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**JOURNAL OF MEDIA LAW & ETHICS**

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# JOURNAL OF MEDIA LAW & ETHICS

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Summer/Fall 2016

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# PRACTICAL TRANSPARENCY: HOW JOURNALISTS SHOULD APPROACH DIGITAL SHAMING AND THE “STREISAND EFFECT”

DAXTON R. “CHIP” STEWART\*  
KRISTIE BUNTON\*\*

*What has become known in Internet culture as the “Streisand Effect” occurs when a person seeks to minimize the harm of something posted online through censorious legal threats, which then backfire, leading to even more scrutiny and attention for the harmful post. Such situations raise legal concerns and ethical obligations for journalists when they encounter people seeking to minimize online embarrassment and exposure, in particular when the people seeking privacy inflame their situation, inadvertently or otherwise, by making legal threats. After examining the narrow legal options available through gag orders and privacy torts, the authors propose the ethical concept of “practical transparency,” on a spectrum of access that spans the chasm of the philosophical extremes of radical transparency to total obscurity, as a balance test, taking into account the value of embarrassing or damaging information to citizens against the harm that disclosure of that information could pose to the embarrassed or shamed person or persons who face the vitriolic naming, blaming, shaming culture of the Internet. As a balance test, practical transparency offers a workable ethical standard for journalists covering cases of censorship backfire that span legal boundaries.*

**Keywords:** Streisand Effect, shaming, transparency, censorship, obscurity

## I. Introduction

Jeff Jarvis, a City University of New York journalism professor regarded as a media thought leader, has been a prolific critic of a wide variety of institutions and people online, and a vocal opponent of censorship. So when Jarvis sought to censor a long-time critic for writing a parody column in *Esquire* using the name @ProfJeffJarvis, he must have expected the backlash typical of the Internet.

“I have put up with this for four years now, knowing that if and when I complain – cue Streisand – I’ll only bring more s\*\*\* upon my head,” Jarvis wrote on his blog.<sup>1</sup> Jarvis was referring to the phenomenon that bears entertainer Barbra Streisand’s name, the “Streisand Effect.” The effect emerged more than a decade earlier, when aerial photos of Streisand’s home that were posted online went viral after she unsuccessfully sued to have them removed. The Streisand Effect is “the notion that the more you try to get something off the Internet, the more you fuel everyone’s interest in it, thus defeating the purpose of your original intervention.”<sup>2</sup>

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<sup>1</sup>Jeff Jarvis, Enough (2016), <https://medium.com/redefining-rude/enough-569bae96773e#.z42qpircj>.

<sup>2</sup>EVGENY MOROZOV, THE NET DELUSION 120 (2011).

The phenomenon has become common when someone attempts to remove items from the Internet, whether through legal threats like Streisand's, through persuasive efforts such as Jarvis's emails to "Hearst executives I happen to know" to demand a takedown of the parody,<sup>3</sup> or through ill-advised payments by the University of California Davis chancellor to a consultant to have infamous photos of a campus police officer pepper-spraying protesting students scrubbed from online searches.<sup>4</sup> The online backlash, often fueled by outraged journalists, can be swift and unrelenting.

In Jarvis's case, the website Gawker re-posted the offending *Esquire* column and derided Jarvis as a person who "built a career by defending the freedom of speech when it costs him nothing to do so, but immediately denigrates the very same freedom when someone else exercises it to his disliking."<sup>5</sup> The dustup between Jarvis and his parodist – Rurik Bradbury, a tech company executive – earned the attention of *The Washington Post*,<sup>6</sup> *New York Magazine*,<sup>7</sup> and Politico,<sup>8</sup> among others, turning Jarvis into a target of free speech and press advocates. As one commentator noted, "this whole thing has been a rather classic iteration of The Streisand Effect: more people have seen the piece in question than otherwise might have because someone behaved like a censorious prat."<sup>9</sup>

When journalists join the backlash against censorship of this kind, they are defending the core professional freedoms of speech and press from intimidation and threats by powerful interests, such as government, big business and prominent people. Consider the well-deserved backlash against Turkish President Recep Tayyip Erdogan, who has prosecuted dozens of critics and banned Twitter and YouTube in Turkey, only to see those critics emboldened and supported when their words and videos arise in other countries.<sup>10</sup> At the same time they join the backlash, journalists may contribute to excessive shaming and punishment of censorship efforts by less public people, or help enable and inflame trolls who harass people in the name of free speech in situations such as non-consensual pornography.<sup>11</sup>

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<sup>3</sup> Jarvis, *supra* note 1.

<sup>4</sup> Sam Stanton & Diana Lambert, *UC Davis spent thousands to scrub pepper-spray references from Internet*, SACRAMENTO BEE, April 13, 2016, <http://www.sacbee.com/news/local/education/article71659992.html>.

<sup>5</sup> J.K. Trotter, *Journalism Professor Will Go to War for Free Speech, as Long as It Doesn't Mock Him*, Gawker, April 29, 2016, <http://gawker.com/i-feel-like-you-re-debating-this-with-someone-else-i-h-1773868312>

<sup>6</sup> Caitlin Dewey, *Is @ProfJeffJarvis Twitter's best parody or its least repentant troll? Possibly a bit of both*, WASH. POST, April 29, 2016, <https://www.washingtonpost.com/news/the-intersect/wp/2016/04/29/is-profjeffjarvis-twiters-best-parody-or-its-least-repentant-troll-possibly-a-bit-of-both>

<sup>7</sup> Brian Feldman, *Why Esquire Took Down That Funny @ProfJeffJarvis Post*, N.Y. MAGAZINE, April 27, 2016, <http://nymag.com/selectall/2016/04/why-esquire-took-down-that-funny-profjeffjarvis-post.html>

<sup>8</sup> Peter Sterne, *Esquire removes satirical article after criticism*, POLITICO MEDIA, April 26, 2016, <http://www.capitalnewyork.com/article/media/2016/04/8597724/esquire-removes-satirical-article-after-criticism>

<sup>9</sup> Sonny Bunch, *Jeff Jarvis, Meet Barbra Streisand and Her Magical Effect*. WASH. FREE BEACON, April 27, 2016, <http://freebeacon.com/blog/jeff-jarvis-meet-barbra-streisand-magical-effect/>

<sup>10</sup> Joe Parkinson, Sam Schechner & Emre Peker, *Turkey's Erdogan: One of the World's Most Determined Internet Censors*, WALL ST. J., May 2, 2014, <http://www.wsj.com/articles/SB10001424052702304626304579505912518706936>; Alison Smale, *Merkel, Accused of Betraying Values, Faces Balancing Act With Turkey*, N.Y. TIMES, April 14, 2016, A12.

<sup>11</sup> Daniell K. Citron & Mary A. Franks, *Criminalizing Revenge Porn*. 49 WAKE FOREST L. REV. 345, 346 (2014).

The purpose of this article is to examine the legal concerns and ethical obligations of journalists when dealing with the Streisand Effect and people who seek to minimize online embarrassment and exposure. The authors examine the phenomenon's history and characteristics, review the few legal remedies available in Streisand Effect situations, and propose the ethical concept of "practical transparency" as a balance test for journalists covering these cases.

## II. Background

The Streisand Effect has been identified for more than a decade, but has not been much studied by either communication or legal scholars. A common understanding of the phenomenon exists in practice, but as a concept, some of the ideas that comprise the Streisand Effect require analysis.

### A. History of the Streisand Effect

In 2003, entertainer Barbra Streisand was upset by aerial photos of her Malibu home that had been posted online as part of a project documenting the California coastline. Streisand sued, seeking \$50 million in damages.<sup>12</sup> News of her lawsuit drew enormous public attention to the photographs; they had only been viewed online six times before the lawsuit, but after Streisand sued, the photos were viewed 420,000 times.<sup>13</sup> Bloggers who saw this as a censorship threat responded by reposting the photos on their blogs. Streisand's effort to protect her privacy backfired, as the lawsuit was dismissed, but she drew continued scorn on the Internet. Streisand's wasn't the first instance of online censorship attempts to backfire, but it soon became the hallmark of the phenomenon. Mike Masnick, writing for the tech blog Techdirt about a resort's attempt to twist trademark law to have its name removed from a site that posted photos of urinals in various locations, only to find that the photos were seen by more people, commented, "let's call it the Streisand Effect."<sup>14</sup>

The effect has emerged in several different contexts, most often involving celebrities. In 2015, the tech news site Gizmodo noted these instances: the Church of Scientology trying to remove videos of actor Tom Cruise; conservative pundit Glenn Beck suing to try to take down a site that attempted to parody his hyperbolic style by asking the question, "Did Glenn Beck Rape and Murder a Young Girl in 1990"; singer Beyonce's attempting to remove unflattering photographs of her Super Bowl performance; and the musician Chubby Checker suing a web app developer for using his name on an app that purported to measure penis size.<sup>15</sup> To further shame censors, the Electronic Frontiers Foundation launched the Takedown Hall of Shame, cataloguing "bogus trademark and copyright takedown threats" by individuals and organizations and inviting the public to submit "honorees."<sup>16</sup>

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<sup>12</sup>MOROZOV, *supra* note 2.

<sup>13</sup>Kraig J. Marton, Nikki Wilk & Laura Rogal, *Protecting One's Reputation – How to Clear a Name in a World Where Name Calling is So Easy*, 4 PHOENIX L. REV. 53, 64 (2010).

<sup>14</sup>Mike Masnick, *Since When is It Illegal To Just Mention a Trademark Online?*, TECHDIRT, January 5, 2005, <https://www.techdirt.com/articles/20050105/0132239.shtml>.

<sup>15</sup>Ashley Feinberg, *The Streisand Effect: Celebrating Ten Years of Internet Pile-Ons*, GIZMODO, January 5, 2015, <http://gizmodo.com/the-streisand-effect-celebrating-10-years-of-internet-1677579192>.

<sup>16</sup>Richard Esguerra, *Hello Streisand Effect: Takedown Hall of Shame Grows by Four*, ELECTRONIC FRONTIERS FOUNDATION, January 19, 2010, <https://www EFF.ORG/deeplinks/2010/01/hello-streisand-effect-takedown-hall-shame-grows-f>; Parker Higgins, *Prince Inducted into Takedown Hall of Shame with New Lifetime Aggrievement Award*, ELECTRONIC FRONTIERS FOUNDATION, May 7, 2013,

Corporations, activist groups and governments have been vexed by the Streisand Effect as well; Morozov credited the rise of the website Wikileaks, which “was built to ensure that all controversial documents that someone wants to get off the Web have a dedicated and well-protected place to stay online,” to efforts by powerful people to stifle criticism online.<sup>17</sup>

### *B. Acts of Perceived Censorship*

A Streisand Effect situation is triggered by an act that someone, either the publisher of an online item or an advocate of the online publication, perceives to be censorious. It is important to distinguish the *perception* of censorship that is common in Streisand Effect situations from more traditional notions of censorship, which in the law classically involve prior restraints, defined by Thomas Emerson as “official restrictions imposed upon speech or other forms of expression in advance of actual publication.”<sup>18</sup> In the digital age, perceived censorship may be more post hoc, where the threat is to take down or otherwise unpublish an online item or else suffer legal consequences, such as a libel or copyright lawsuit.<sup>19</sup> However, this threat of punishment can act as a form of censorship as well. Emerson noted that such subsequent punishments may act as a deterrent of future publication,<sup>20</sup> and as Vernon Bourke outlined in his treatise on ethical issues in censoring media, threats of punishment after publication that chill continued or future publication could be seen as censorship:

I do maintain that, from the point of view of positive freedom of utterance, the practical difference is small. In other words, laws of libel are forms of censorship – though they do not always restrain the dissemination of possibly objectionable matter.<sup>21</sup>

It is in this context that the Streisand Effect creates a sense of censorship for those receiving legal threats. Jansen and Martin conceptualized the Streisand Effect as an example of “censorship backfire,” when efforts to remove potentially damaging or embarrassing information from public circulation, particularly from the Internet, are exposed and produce ridicule or shaming of the censor.<sup>22</sup> The effect is triggered by an act of censorship, although that censorship act can take many forms, typically but not necessarily involving legal action.

For example, Streisand’s act was filing an invasion of privacy lawsuit, which the publishers saw as an attempt at censoring their work. The Church of Scientology used copyright takedown notices to try to remove unflattering videos of Tom Cruise. Glenn Beck filed a claim to the World Intellectual Property Organization, under its domain name policy, seeking to remove the website GlennBeckRapedAndMurdered-AYoungGirlIn1990.com. The Marco Beach Ocean

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<https://www.eff.org/deeplinks/2013/05/prince-inducted-takedown-hall-shame-new-lifetime-aggravement-award>.

<sup>17</sup>Morozov, *supra* note 2, at 121.

<sup>18</sup> Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 L. & Contemporary Problems 648, 648 (1955).

<sup>19</sup> Consider the Electronic Frontier Foundation’s view of abusive takedown notices issued under the Digital Millennium Copyright Act, which it called a “global tool for censorship” because it can have the effect of silencing criticism of government. Maira Sutton, *Copyright Law as a Tool for State Censorship of the Internet*, ELECTRONIC FRONTIERS FOUNDATION, December 3, 2014, <https://www.eff.org/deeplinks/2014/12/copyright-law-tool-state-internet-censorship>.

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

<sup>21</sup> Vernon J. Bourke, *Moral Problems Related to Censoring the Media of Mass Communication*, 40 Marq. L. Rev. 57, 70-71 (1956).

<sup>22</sup>Sue C. Jansen & Brian Martin, *The Streisand Effect and Censorship Backfire*, 9 INT’L J. COMM. 656, 661 (2015).

Resort attempted to remove its name using trademark law. Chubby Checker filed a defamation lawsuit against the app company using his name.<sup>23</sup>

In some cases, people seek injunctions or gag orders under friendly laws to prevent items from being posted or spread online. This is the case in the situation involving what has become known as the “celebrity threesome” in the United Kingdom, as a celebrity convinced a court to order no discussion of the three celebrities’ names by U.K. publications. That, in turn, led publishers to decry the nation’s laws, which restrict publication of the names under threat of contempt while the names can be published legally in the United States without sanction.<sup>24</sup> Indeed, Jansen and Martin noted, it is only when attempts to censor have been sanctioned and successful through gag orders and cover-up efforts such as these that the Streisand Effect has been avoided.<sup>25</sup> These, however, are at most temporary victories, because once information is published in one place, it is difficult to keep it from spreading even to places where it is illegal to publish.

But not all censorship efforts are legal in nature. Beyonce’s effort constituted her publicist’s request that Buzzfeed remove her photos, without an explicit legal threat. Scrubbing materials from the Web to enhance online search results has also triggered the Streisand Effect, as when the University of California Davis paid \$175,000 to consultants to remove images of campus police pepper spraying protesters, only to have that effort backfire when the payments became public, and the university’s chancellor was suspended.<sup>26</sup> Jarvis’s effort that drew scorn involved using his “well-placed connections in the media industry” to persuade Hearst executives to order Esquire to remove the parody about him.<sup>27</sup>

### *C. The Role of Power*

After examining several cases, Jansen and Martin found an “ironic, triumphal, David-versus-Goliath quality” about Streisand Effect situations, where a “powerful force mobilizes great resources to silence a weaker individual or group but misjudges the adversary,” resulting in further embarrassment.<sup>28</sup> One commentator called this the “big bad wolf” approach.<sup>29</sup>

The Streisand Effect often occurs when celebrities try to protect their reputations, and one important reason the phenomenon persists is that it appears to involve a powerful person bullying the less powerful. Streisand was seen by the tech community as a world-famous entertainer “declaring a war on both the Internet and common sense.”<sup>30</sup>

Government officials and agencies also have become victims of the Streisand Effect when they used the power of their offices to try to silence critics. Perhaps most famously, Jim Ardis, the mayor of Peoria, Illinois, sent seven police officers to raid the home of a man who posted

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<sup>23</sup> Feinberg, *supra* note 15.

<sup>24</sup> Joshua Rozenberg, *This celebrity injunction will probably rebound – a case of the “Streisand Effect,”* THE GUARDIAN, April 11, 2016, <https://www.theguardian.com/commentisfree/2016/apr/11/celebrity-injunction-rebound-streisand-effect-sex-scandal-privacy-free-speech>.

<sup>25</sup> Jansen & Martin, *supra* note 18, at 666.

<sup>26</sup> Sarah McLaughlin, *UC Davis Spends \$175,000 to Learn About the ‘Streisand Effect,’* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, April 19, 2016, <https://www.thefire.org/uc-davis-spends-175000-to-learn-about-the-streisand-effect/>

<sup>27</sup> Trotter, *supra* note 5.

<sup>28</sup> Jansen & Martin, *supra* note 18, at 660.

<sup>29</sup> ANDRE M. LOUW, *AMBUSH MARKETING AND THE MEGA-EVENT MONOPOLY: HOW LAWS ARE ABUSED TO PROTECT COMMERCIAL RIGHTS TO MAJOR SPORTING EVENTS* 133 (2012).

<sup>30</sup> Morozov, *supra* note 2, at 120.

from the @Peoriamayor parody account on Twitter, resulting in the man's arrest on drug possession charges.<sup>31</sup> The backlash was almost instant, earning the attention of national media, including Radley Balko of the Washington Post, who commented:

Ardis is well on his way to a permanent place in the annals of First Amendment infamy. Instead of getting mocked by an obscure Twitter account with fewer than 100 followers over things he (presumably) *hasn't* said or done, Ardis is now getting ridiculed all over America for the things he *has*. Instead of one Jim Ardis parody Twitter account, there are now dozens, most with several times as many followers as the original. There are stoner Jim Ardises, Jim Ardises with Hitler mustaches and Jim Ardis "guest posts" at popular blogs.<sup>32</sup>

Corporate entities have been victims of the phenomenon as well. For instance, Honda tried to force the website Jalopnik to remove unfriendly comments from someone who appeared to be a former employee, and to help identify the person. The move backfired when Jalopnik publicized Honda's request, noting that "it's pretty egregious for a corporation to try to bully a news organization into deep-sixing comments from its own readers."<sup>33</sup> Small businesses and professionals, overreacting to negative reviews on sites such as Yelp and Glassdoor, invite Internet shaming when their efforts to censor go viral as well.<sup>34</sup>

Sometimes, however, people involved in Streisand Effect situations are not powerful. A New York watchmaker, for example, triggered online shaming for responding with a legal threat to a bad review on Yelp.<sup>35</sup> Similarly, a pet boarding business in Plano, Texas, earned international attention after filing a lawsuit claiming \$6,766 in damages against a customer for a bad Yelp review.<sup>36</sup>

Because even parties lacking power have become victims of the Streisand Effect, it may be that any person, government, or business using heavy-handed threats to silence speech – even against a more powerful adversary, such as large news media outlets – will earn the

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<sup>31</sup>Matt Buedel, *Fake Peoria mayor Twitter account prompts real raid of West Bluff house*, THE JOURNAL STAR, April 16, 2014, <http://www.pjstar.com/article/20140416/NEWS/140419123?page=1>.

<sup>32</sup>Radley Balko, *The ever-parodiable Jim Ardis*, WASH. POST, April 24, 2014, [https://www.washingtonpost.com/news/the-watch/wp/2014/04/24/the-ever-parodiable-jim-ardis/?tid=hpModule\\_6c539b02-b270-11e2-bbf2-a6f9e9d79e19](https://www.washingtonpost.com/news/the-watch/wp/2014/04/24/the-ever-parodiable-jim-ardis/?tid=hpModule_6c539b02-b270-11e2-bbf2-a6f9e9d79e19).

<sup>33</sup>Patrick George, *Honda's Lawyers Want Us To Dox One Of Our Readers; We Said Hell No*, JALOPNIK, January 27, 2016, <http://jalopnik.com/hondas-lawyers-want-us-to-dox-one-of-our-readers-we-sa-1755277599>.

<sup>34</sup>See Sean D. Lee, "I Hate My Doctor": Reputation, Defamation, and Physician-Review Websites, 23 Health Matrix 573 (2013); Ken White, *Attorney Mike Meier Meets the Streisand Effect, Does Not Enjoy Experience*, POPEHAT, April 27, 2014, <https://popehat.com/2014/08/27/attorney-mike-meier-meets-the-streisand-effect-does-not-enjoy-experience/>; Kathryn Rubino, *'Working Here is Psychological Torture': Law Firm Sues Over Anonymous Comments*, ABOVE THE LAW, May 16, 2016, <http://abovethelaw.com/2016/05/working-here-is-psychological-torture-law-firm-sues-over-anonymous-comments/>.

<sup>35</sup>Timothy Geigner, *Honda Tried to Get Jalopnik to Dox Commenter, Delete Posts, Meets the Streisand Effect*, TECHDIRT, February 20, 2016, <https://www.techdirt.com/articles/20160204/12571933524/honda-tried-to-get-jalopnik-to-dox-commenter-delete-posts-meets-streisand-effect-instead.shtml>.

<sup>36</sup>Leticia Miranda, *A Pet Sitting Business Sued These Customers For Posting A Negative Yelp Review*, BUZZFEED, February 22, 2016, [https://www.buzzfeed.com/leticiamiranda/this-pet-sitting-business-sued-two-customers-for-posting-a-n?utm\\_term=.piobLavnQ#.kpNqrKwn8](https://www.buzzfeed.com/leticiamiranda/this-pet-sitting-business-sued-two-customers-for-posting-a-n?utm_term=.piobLavnQ#.kpNqrKwn8).

antipathy of the Internet community, which is “steeped in West Coast cyber-libertarianism.”<sup>37</sup> and appears to enjoy a good “Internet pile-on.”<sup>38</sup>

#### *D. Backlash and the Media*

The “pile-on” is a critical aspect of the Streisand Effect. The backlash is triggered by censorship attempts and perceived bullying. Zhao, writing about how the Internet has altered management of personal reputation, referred to the effect as, “The more one tries to correct negative information online, the more people will know about it.”<sup>39</sup>

Media exposure also is a critical element of the Streisand Effect, and media values and orientations “generally predispose journalists, bloggers, and technology activists to oppose censorship, making them important potential allies in anticensorship struggles.”<sup>40</sup> Indeed, journalists seem to relish the power to wield the Streisand Effect. After being sued by Honda, Jalopnik responded:

To Honda, or any other automaker: If you would like us to delete the comments of our readers or expose their identities (which again, we can't do anyway) again, please, let me know! I am more than happy to drag your intimidation tactics into the public eye for all your customers and prospective buyers to see. Govern yourselves accordingly.<sup>41</sup>

As a result of backlash, and the often willing participation by journalists, would-be censors may opt for other routes to control information. Morozov urged discussion rather than legal threats, suggesting that it is more effective to “(c)ounter the blog post with effective propaganda rather than a blanket ban.”<sup>42</sup>

### **III. Legal Remedies**

#### *A. Gag orders and Injunctions*

People who trigger the Streisand Effect, unwittingly or otherwise, likely will find little relief from the backlash in United States courts. Decades of jurisprudence have firmly established that censorship is largely incompatible with First Amendment free speech and press protections. As the Supreme Court noted in its foundational *Near v. Minnesota* (1931) ruling, “prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.”<sup>43</sup> The same legal framework that deflected Streisand’s efforts to remove photos of her home from the Internet also prevented her from minimizing the backlash through gag orders or injunctions. In the United States, preventing publication of news stories is permitted only under “exceptional circumstances,” such as “a grave threat to a critical public

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<sup>37</sup>What is the Streisand Effect?, THE ECONOMIST, April 15, 2013, <http://www.economist.com/blogs/economist-explains/2013/04/economist-explains-what-streisand-effect>.

<sup>38</sup> Feinberg, *supra* note 15.

<sup>39</sup> Bo Zhao, *An Analytical Note: How The Internet has Changed Our Personal Reputation*, 19 INT’L REV. INFO. ETHICS 36, 43 (2013).

<sup>40</sup>Jansen & Martin, *supra* note 18, at 663.

<sup>41</sup>George, *supra* note 29.

<sup>42</sup>Morozov, *supra* note 2, at 122.

<sup>43</sup>*Near v. Minnesota*, 427 U.S. 539, 559 (1931).

interest or to a constitutional right.”<sup>44</sup> The hurt feelings of celebrities, government officials and businesses feeling the sting after making censorship threats hardly rise to that level.

As noted above, one trigger for the Streisand Effect is the threat of a lawsuit seeking to censor materials, and the backlash often is exacerbated once the case is filed. U.S. courts are reluctant to interfere with publicity litigants receive as a result of their actions. One U.S. court has cited the Streisand Effect in a decision involving one party’s effort to seal or redact portions of the record in a case of accused breach of a non-disparagement clause, fearing even wider distribution of the disparaging statements. The federal District Court for the District of Columbia refused to hide portions of the case, saying “that is precisely the dilemma faced by all plaintiffs seeking to enforce non-disparagement provisions, and it is similar to the dilemma faced by plaintiffs in defamation cases, who often end up publicizing defamatory statements much more than if they had not filed a lawsuit.”<sup>45</sup>

Similarly, what have become known as “super-injunctions” – that is, court orders that restrain publication of the existence of another injunction – have not been permitted by U.S. courts. Although they are “the seeming antithesis to open processes and procedures” in the justice system, super-injunctions have been issued by other courts around the world, including in the United Kingdom, which has restrained coverage of judicial proceedings about a company accused of killing people through dumping toxic waste, as well as coverage of several famed English football players and other celebrities involved in extramarital affairs.<sup>46</sup> U.K. courts also approved a super-injunction in the “celebrity threesome” case, even though identification of the celebrities was occurring in the United States, prompting the *Daily Mail* to publish a front page headline, “Why the law is an ass! Countless Americans can read about a married celebrity dad having a threesome with another couple. So why are our judges banning YOU from knowing his name?”<sup>47</sup>

These super-injunctions have been justified by U.K. courts under Article 10 of the European Convention on Human Rights, which allows restrictions on free expression “for the protection of the reputation or rights of others,” including “maintaining the authority and impartiality of the judiciary.”<sup>48</sup> Super-injunctions have also been allowed in Australia, where Wikileaks uncovered a super-injunction that prevented both reporting on bribery allegations against public officials and reporting on the existence of a gag order about the case.<sup>49</sup>

In these jurisdictions that are more permissive toward injunctions against coverage of ongoing litigation involving private and embarrassing matters, people suffering backlash under the Streisand Effect may have a resource to mitigate their harm. Of course, in the United States, that is not currently an option.

## *B. Privacy Approaches*

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<sup>44</sup>Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 225 (6th Cir. 1996).

<sup>45</sup>Guttenberg v. Emery, 26 F.Supp.3d 88, 95 (D.D.C. 2014)

<sup>46</sup>Holly K. Hall, *Super-Injunction, What’s Your Function?*, 18 COMM. L. & POL’Y 309, 320 (2013).

<sup>47</sup> Steve Doughty, S, *Why the law is an ass!*, DAILY MAIL, April 6, 2016, <http://www.dailymail.co.uk/news/article-3526916/American-publication-goes-UK-injunction-report-known-celebrity-extra-marital-threesome.html>.

<sup>48</sup>Hall, *supra* note 42, at 320.

<sup>49</sup> Robert Booth, *WikiLeaks reveals Australian gagging order over political bribery allegations*, GUARDIAN, July 29, 2014, <http://www.theguardian.com/world/2014/jul/30/wikileaks-australia-super-injunction-bribery-allegations>.

Privacy law in the United States hampers government officials, celebrities and other famous people in seeking legal remedies. The classic privacy torts identified by Prosser<sup>50</sup> that would be relevant in creating a remedy for widespread distribution of materials people hoped to keep private – intrusion upon seclusion and public disclosure of embarrassing private facts – are typically defeated when publishers offer the defense that the materials were newsworthy.<sup>51</sup> That appears to be the case in most Streisand Effect situations, even when more private individuals or small businesses feel the sting of the backlash because their acts to censor items or punish critics seem to invite publicity. Consider the non-disparagement lawsuit filed by the Texas pet boarding business against customers who posted a negative Yelp review, which attracted attention from BuzzFeed,<sup>52</sup> CBS News,<sup>53</sup> *The New York Daily News*,<sup>54</sup> and *USA Today*.<sup>55</sup> The increased negative attention led the business to ask for additional damages as the lawsuit progressed, increasing from \$6,766 to up to \$1 million on grounds of defamation and business disparagement.<sup>56</sup> The lawsuit itself triggered the news media scrutiny, thus effectively waiving any privacy claims the business owners may have sought as an alternative.

However, the failure of privacy torts to permit a remedy has created challenges in areas where society, and even free speech advocates, may recognize the need to remove items to protect against privacy intrusions. For example, in situations of “revenge porn” or “nonconsensual pornography”<sup>57</sup>– in which intimate photos of a person are posted against that person’s wishes, typically in an effort to “damage reputations and ruin lives” – takedown efforts sometimes embolden internet trolls, inadvertently drawing more attention to the photos while encouraging “users to re-post victims’ images on to other websites.”<sup>58</sup> Thirty-one states have passed laws to criminally punish revenge porn and other forms of what is being called “sextortion,” although these laws may provide little remedy to victims suffering from continual posting of images they want to keep from spreading.<sup>59</sup>

Another possible civil remedy for Streisand Effect victims would be the tort of intentional infliction of emotional distress. After the U.S. Supreme Court’s decision in *Snyder v. Phelps*, the tort is largely unavailable when the speech is about “matters of public interest,”<sup>60</sup> so a key issue for potential plaintiffs seeking remedy for censorship backlash would be overcoming

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<sup>50</sup> William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

<sup>51</sup> See Rodney Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 NOVA L. REV. 289 (2002); Samantha Barbas, *The death of the public disclosure tort: A historical perspective*, 22 YALE J. L. & HUMANITIES 171 (2013).

<sup>52</sup> Miranda, *supra* note 13.

<sup>53</sup> *Pet sitting business bites back after getting bad Yelp review*, CBS NEWS, Feb. 19, 2016, <http://www.cbsnews.com/news/yelp-negative-online-review-texas-couple-sued-jeremy-stoppelman/>.

<sup>54</sup> Christopher Brennan, *Texas couple sued by pet sitter for \$6,700 after leaving negative review on Yelp*, N.Y. DAILY NEWS, February 18, 2016, <http://www.nydailynews.com/news/national/texas-couple-sued-pet-sitter-negative-article-1.2536981>.

<sup>55</sup> Arden Dier, *Petsitter wants \$6,766 for bad Yelp review*, USA TODAY, Feb. 20, 2016, <http://www.usatoday.com/story/money/nation-now/2016/02/20/petsitter-yelp-review-compensation/80657796/>.

<sup>56</sup> Cristin Severance, *Couple Fights off \$1 Million Lawsuit Over Bad Yelp Review*, CBSDFW.COM, May 4, 2016, <http://dfw.cbslocal.com/2016/05/04/yelp-review-could-cost-couple-1-million/>.

<sup>57</sup> Citron & Franks, *supra* note 11.

<sup>58</sup> Amanda M. Levendowski, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422, 444 (2012).

<sup>59</sup> Jada F. Smith, *As ‘Sextortion’ Proliferates, Victims Find Precarious Place in Legal System*, N.Y. TIMES, May 11, 2016, A9; Benjamin Wittes, Cody Poplin, Quinta Jurecic, & Clara Spera, *SEXTORTION: CYBERSECURITY, TEENAGERS, AND REMOTE SEXUAL ASSAULT* (2016).

<sup>60</sup> *Snyder v. Phelps*, 131 S.Ct. 1207, 1215 (2011).

the notion that their disputes became either matters of concern to the community or otherwise had a legitimate news interest. Again, the role of news media in exacerbating the Streisand Effect presents a challenge to plaintiffs because news coverage may bootstrap items into matters of public concern under the pliable test outlined by Chief Justice Roberts in *Snyder v. Phelps*. “Under the test for public concern, the news media now face, not only an ethical dilemma in deciding whether to report on (hate speech) groups, but also a legal one to the extent their coverage shores up public concern claims.”<sup>61</sup> Rather than reporting on hate speech groups, though, in this case, the dilemma would be covering efforts to censor.

Although these torts provide little remedy for people seeking remedies for censorship backlash in the United States, emerging notions of practical obscurity may offer some avenues for minimizing harm, especially when the cases arise in countries following the jurisprudence of the European Union.

### *C. Obscurity and The Right to Be Forgotten*

In the United States, the First Amendment and newsworthiness defenses have largely rendered privacy torts useless against any but the most brazen intrusions upon solitude, creating challenges in preserving one’s reputation online.<sup>62</sup> However, the emerging notion of preserving practical obscurity in one’s online existence – not an absolute right to remove items from the Web, but some remedies to make those things harder to find so as to preserve one’s reputation – offers some potential for people exposed to online backlash. In U.S. law, “practical obscurity” emerged in a Supreme Court ruling that found that a convicted felon maintained a personal privacy interest in his FBI rap sheet, a compilation of a person’s state and federal arrests and convictions.<sup>63</sup> The court ruled that the Department of Justice did not have to release the rap sheet, finding that “the privacy interest maintaining the practical obscurity of rap-sheet information will always be high” because of the personal information contained.<sup>64</sup> The court was satisfied that public interest would be served because the information contained in rap sheets was already a matter of public record. The harm was that the increased accessibility of these records through the spread of the information beyond expected boundaries might allow the information to “readily be exploited for purposes other than those for which it was originally made publicly accessible.”<sup>65</sup>

Although obscurity is a normal expectation for Internet users, as one “should not expect fame or notoriety simply because she or he uses the Internet,” the online world does not mimic the off-line world.<sup>66</sup> Information online spreads rapidly, becomes searchable and remains easily findable. The need for some level of practical obscurity is evident in the “right to be forgotten” established by the European Court of Human Rights in its decision in *Google Spain SL v. Agencia Espanola de Proteccion de Datos*.<sup>67</sup> There, Mario Costeja González asked courts to order Google to remove links to a 36-word article in his local newspaper about foreclosure of his home because a dispute over debts had been resolved. The court recognized the potential for ongoing harm to González under Article 10 of the European Convention on Human Rights and

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<sup>61</sup> Clay Calvert, *Defining “Public Concern” After Snyder v. Phelps: A Pliable Standard Mingles With News Media Complicity*, 19 VILLANOVA SPORTS & ENT. L. J. 39, 70 (2012).

<sup>62</sup>DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* (2007).

<sup>63</sup>Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989).

<sup>64</sup>*Id.* at 770.

<sup>65</sup>DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* 150 (2008).

<sup>66</sup>Woodrow Hartzog & Frederic D. Stutzman, *The Case for Online Obscurity*, 101 CAL. L. REV. 1, 9 (2013).

<sup>67</sup>Google Spain SL v. Agencia Espanola de Proteccion de Datos, C-131/12 (E.C.H.R. 2014).

ordered Google to take down the links. While the right to be forgotten may help private citizens scrub a shaming effort from the web, González became one of the most highly visible Streisand Effect victims, as the world found out exactly what he was trying to bury; on the day the “right to be forgotten” ruling was issued, some 840 articles in major news outlets referred to him. “Costeja González won his fight for a right to be forgotten, or at least to disappear. Unfortunately for him, the fight was pretty damn memorable.”<sup>68</sup>

Journalists worldwide immediately bristled at the court’s decision and responded with a full understanding of the Streisand Effect. Google published the links it was ordered to take down, and the BBC, the *New York Times* and *The Guardian* also reposted links to stories that European courts ordered be removed, thus bringing new publicity to information people were deliberately trying to de-publicize.<sup>69</sup> Subsequently, courts in France fined Google 100,000 euros for refusing to remove links to items on all its platforms, not just those in France, and Google is appealing that ruling to the country’s highest court.<sup>70</sup>

The challenge for people like González – private citizens, not celebrities or public officials – is that the Streisand Effect may harm them more because the censorship backlash is likelier to comprise a majority of their online presence through search engine results. Indeed, Hartzog and Stutzman noted that obscurity protections serve private people better than celebrities or public officials, for whom “online obscurity as a protective measure is hardly suitable” because it would be so likely to be shared and linked widely.<sup>71</sup>

With only limited relief available through the aforementioned avenues, it may be that the law provides inadequate protection for modern norms of privacy and obscurity, particularly regarding people who typically would not have the same level of public scrutiny as government officials, celebrities and corporate entities. But the law is just one way to approach protecting people’s privacy; cultural norms and expectations are also crucial in shaping behavior and policy.<sup>72</sup> These cultural norms, as well as the industry-specific expectations for journalism enshrined in codes of ethics, may provide a more useful framework for understanding the role of journalists in Streisand Effect situations.

#### **IV. The Need for an Ethical Approach**

Emerging through legislation or litigation, law cannot keep pace with the invention and adoption of new digital platforms. In González’s case, for instance, several years elapsed from the time he sought to erase links about his debt history until the “right to be forgotten” ruling was issued. Most legislation and litigation is restricted by national boundaries, while digital information blithely skips worldwide, gaining attention, as typified in the UK’s “celebrity threesome” case. In dire cases, savvy digital users deliberately seek expression-friendly countries for the platforms that broadcast their views. German laws against denying the

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<sup>68</sup>James Ball, *Costeja González and a memorable fight for the 'right to be forgotten'*, THE GUARDIAN, May 14, 2014, <http://www.theguardian.com/world/blog/2014/may/14/mario-costeja-gonzalez-fight-right-forgotten>.

<sup>69</sup> Steven M. LoCascio, *Forcing Europe to Wear the Rose-Colored Google Glass: The Right to Be Forgotten and the Struggle to Manage Compliance Post Google Spain*, 54 COLUMBIA J. TRANSNATIONAL L. 296 (2015).

<sup>70</sup> Sam Schechner, *Google Appeals French 'Right to Be Forgotten' Order*, WALL ST. J., May 19, 2106, <http://www.wsj.com/articles/google-appeals-french-right-to-be-forgotten-order-1463660336>.

<sup>71</sup>Hartzog & Stutzman, *supra* note 62, at 45.

<sup>72</sup>HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* (2010).

Holocaust, for instance, have not kept people from attempting to promulgate their Holocaust denials worldwide from Internet safe havens.<sup>73</sup>

Morally speaking, the sometimes significant harms of the Streisand Effect demand ethical analysis. The fundamental principle of human dignity suggests all people are moral agents possessing the right to help decide how they will be known by the world. Human dignity implies respect for personal autonomy, which can be compromised when the choice of how and when to acknowledge one's behavior or characteristics is ripped from one and made by third parties, including journalists. Dignity requires moral discretion, which Bok importantly defined as "the intuitive ability to discern what is and is not intrusive and injurious, and to use to this discernment in responding to the conflicts everyone experiences as insider and outsider."<sup>74</sup> The harm faced by private citizens caught up in Streisand Effect situations seems particularly egregious because private people are often relatively powerless to advocate for themselves as compared to journalists and news outlets that command audiences of thousands almost any time they declare a topic newsworthy. In light of this power differential, journalists, then, bear a moral responsibility to allow private citizens some discretion when they find themselves named, shamed and blamed in the sometimes vitriolic culture of the internet.

Poynter Institute for Media Studies ethicist Kelly McBride calls public shaming on the Internet "openly humiliating someone as punishment for a certain behavior" that "is inherently a form of intimidation."<sup>75</sup> When journalists engage in shaming "for the purpose of holding the powerful accountable," McBride rightly terms that "noble" or "good" shaming.<sup>76</sup> Journalists who engage in shaming, however, take on the risk of making debate about public matters more toxic, in ways that may be aimed more to publicly humiliate the target of the shaming rather than encouraging accountability and improved outcomes. This moves beyond mere blaming to "blame taken to the extreme," which as Wyatt noted is "far more difficult than blame to justify ethically."<sup>77</sup>

McBride points out that too often online shaming is based on few facts – perhaps a single tweet, as in the infamous thought about AIDS posted by Justine Sacco shortly before she boarded an 11-hour flight to Africa, only to find that because her tweet was rapidly shared worldwide, she had been ridiculed and fired from her job by the time she reached her destination.<sup>78</sup> Raicu noted that Internet shaming can be seen as "inherently unethical because the shamer has no real control over the proportionality of the response."<sup>79</sup> Certainly, this was the case for Sacco, who had just 200 twitter followers but found that after one person picked up her message and found it offensive, it was quickly re-tweeted as many as 20,000 times to hundreds of thousands of people.<sup>80</sup> "In many cases of online shaming, the effects seem to be disproportionate to the offense that set them off" and "marks the person, both online and off,

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<sup>73</sup>Erik Kirschbaum, *Facebook must obey German law even if free speech curtailed: minister*, REUTERS, Aug. 28, 2015, <http://www.reuters.com/article/us-facebook-germany-racism-idUSKCN0QX1XW20150828>.

<sup>74</sup>Sissela Bok, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 41 (1983).

<sup>75</sup> Kelly McBride, *Journalism and Public Shaming: Some Guidelines*, POYNTER.ORG, March 11, 2015, <http://www.poynter.org/2015/journalism-and-public-shaming-some-guidelines/326097/>.

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

<sup>77</sup>Wendy N. Wyatt, *Blame Narratives and the News: An Ethical Analysis*, 14 JOURNALISM & COMM. MONOGRAPHS 153, 159 (2012).

<sup>78</sup> McBride, *supra* note 71.

<sup>79</sup> Irina Raicu, *On the Ethics of Online Shaming*, RECODE.NET, February 15, 2016, <http://www.recode.net/2016/2/15/11587868/on-the-ethics-of-online-shaming>.

<sup>80</sup>Jon Ronson, *SO YOU'VE BEEN PUBLICLY SHAMED* (2015).

potentially forever,” noted Raicu.<sup>81</sup> Furthermore, news coverage of situations that journalists think are newsworthy can have the effect of “exacerbating the shame and humiliation” a person feels for poor behavior at one moment in time.<sup>82</sup>

As explained above, the emerging standard of practical obscurity has, in the law, allowed some protection for more private people online, though it is questionable how far the practical obscurity standard should extend. An ethical standard of *practical transparency* might provide a solution. Practical transparency would accommodate the need of watchdog journalists to provide scrutiny of people of public concern when they seek to disappear from criticism of their actions – be they elected government officials such as the Peoria mayor, corporate leaders such as those at Honda, or even celebrities such as Streisand seeking extreme privacy from activists concerned with environmental matters – while also accommodating the moral need for privacy and dignity of people who do not seek the public spotlight and who do not get to determine what is newsworthy.

The concept of practical transparency can be positioned on a spectrum of access to information that extends from the philosophical extreme of radical and absolute transparency to the extreme of radical and absolute privacy. Practical transparency can be seen as an ethical decision-making principle that balances the public value of embarrassing or damaging information for citizens whom journalists believe need to know it against the private harm that disclosing that information poses to the person who is being shamed or blamed online for trying to remove it.

In effect, McBride uses the concept of practical transparency when she suggests journalists seeking to discern whether news coverage creates or furthers good or bad shaming must ask themselves such questions as whether the target is an individual or organization, whether the target is a powerful individual, what are the motives of others seeking to shame the individual or organization, and whether the incident that triggers the shaming is a one-time occurrence or suggests a pattern of behavior. Balancing the answers to these questions would suggest that more public, powerful people and organizations are subject to more radical transparency when they attempt to scrub the internet in their favor, but that would move down the transparency-privacy spectrum toward practical obscurity in a way that would limit news coverage or perhaps shorten the length of exposure of their poor behavior online.

Thus, practical transparency would suggest that Jeff Jarvis, with his 158,000 twitter followers, has to bear the magazine parody and the ongoing fake Twitter account as long as he continues to seek a high-profile role as a media thought leader. He cannot continually champion free expression and rail against censorship without tolerating free expression directed toward him. But the Texas pet-boarding business that sued to punish a Yelp reviewer for the damage to its reputation may have the moral right to some obscurity, or at least to an online presence that is of the same magnitude as the poor behavior in a Streisand Effect situation deserves. However ill-conceived its lawsuit, perhaps the business should be allowed to fade from the news.

As much as journalists and other free-expression advocates may resist the idea that people deserve the right to be forgotten online, Raicu suggests an ethical obligation to ask whether the benefits of online shaming outweigh the “corrosive” harm shaming poses to our common good: “The need for some kind of Internet forgetting is clear.”<sup>83</sup> Perhaps an application of practical transparency would help.

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<sup>81</sup>Raicu, *supra* note 75.

<sup>82</sup>McBride, *supra* note 71.

<sup>83</sup>Raicu, *supra* note 75.

## V. Conclusion

The Streisand Effect presents a dilemma for journalists when covering situations involving censorship because the news media immediately become an important factor in the backlash, with the ability to hasten the spread of shaming. On the one hand, journalists play an extremely important role in covering censorship; as Jansen and Martin found, the only effective means to thwart the Streisand Effect by powerful interests is “(c)overing up the action, namely censoring the censorship.”<sup>84</sup> Standing up to powerful censors is an important calling journalists serve in their roles as “independent monitors of power.”<sup>85</sup>

On the other hand, as Kovach and Rosenstiel noted, it is also journalists’ duty to provide comprehensive and proportional coverage.<sup>86</sup> Journalists are ethically obliged to wield the power of shaming and blaming carefully, knowing that publicity can foment significant harm on the lives of relatively powerless private people. Journalists must be aware of the power of the internet to engage in endless “feedback loops” leading to a spiral of shaming that can destroy reputations and that is disproportionate to the bad acts journalists call attention to as part of their jobs. Thus, journalists must be aware when they are, as Ronson put it, “defining the boundaries of normality by tearing apart the people outside it.”<sup>87</sup>

The Streisand Effect puts journalists in the difficult position of determining what kinds of censorship are bad and deserve attention and shaming, and what kinds of censorship are more morally acceptable. This may be clearer in the practical transparency framework devised in this paper, ranging on a spectrum from people who are more private and less powerful to those who are more public and have more power. But how should journalists treat the famous wrestler Hulk Hogan, a very public and wealthy person who claimed grievous privacy harm? Hogan, whose real name is Terry Bollea, successfully sought relief from courts to take down a video depicting him having sex with a friend’s spouse. He obtained an injunction against the video<sup>88</sup> and ultimately won a \$140 million jury verdict against Gawker Media.<sup>89</sup> Journalists have both criticized Gawker in publishing a sex tape as unethical and criticized the courts and Gawker’s opponents as censors creating a hostile environment for online publishers.<sup>90</sup>

As journalists’ awareness of the Streisand Effect and their role in it continues to develop, it is also important for journalists to understand how people in power are responding. Morozov noted that as an alternative to attempting censorship that is almost certain to backfire, savvy opponents counter with effective propaganda, cultivating “extremely agile rapid-response blogging teams to fight fire with fire.”<sup>91</sup> Pro-Putin forces in Russia, for example, respond to critics online with a “vicious retaliatory campaign of harassment and insults,” through what have become known as “troll factories.”<sup>92</sup>

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<sup>84</sup> Jansen & Martin, *supra* note 18, at 666.

<sup>85</sup> BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM*, 3RD ED., 171 (2015).

<sup>86</sup> *Id.*

<sup>87</sup> Ronson, *supra* note 76, at 282.

<sup>88</sup> John Cook, *A Judge Told Us to Take Down Our Hulk Hogan Sex Tape Post. We Won’t.*, GAWKER, April 25, 2013, <http://gawker.com/a-judge-told-us-to-take-down-our-hulk-hogan-sex-tape-po-481328088>.

<sup>89</sup> Jim Rutenberg, *Drawing the Line on Gossip After the Gawker Trial*, N.Y. TIMES, April 4, 2016, B1.

<sup>90</sup> Jane Kirtley, *The Gawker-Hulk Hogan Case Is a Threat to Editorial Independence*, N.Y. TIMES, March 18, 2016, <http://www.nytimes.com/roomfordebate/2016/03/18/should-the-gawker-hulk-hogan-jurors-decide-whats-newsworthy/the-gawker-hulk-hogan-case-is-a-threat-to-editorial-independence>.

<sup>91</sup> Morozov, *supra* note 2, at 122.

<sup>92</sup> Andrew Higgins, *Russia’s ‘Troll Army’ Retaliates Against an Effort to Expose It*, N.Y. TIMES, May 31, 2016, A1.

The Streisand Effect, and the responses to it, requires journalists to make difficult ethical choices to hold people and institutions in power accountable while minimizing undue harm against those with less power. The practical transparency approach offered in this article is one way for journalists to cover efforts to censor responsibly.

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# FACEBOOK'S FREE SPEECH BALANCING ACT

## Corporate Social Responsibility and Norms of Online Discourse

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*This article examines how Facebook communicates corporate social responsibility (CSR) when governing the content that users publish on its platform. In particular, the article looks at how Facebook communicates CSR in the most recent version of its Community Standards (March 2015). This analysis will highlight Facebook's tenuous attempts at defining itself as a platform that both promotes speech and offers a "safe" community for its users. The article argues that Facebook is furthering an "aggregational" theory of freedom of expression, whereby primacy is given to the sheer capacity or potential for individuals to communicate using platforms such as Facebook, rather than the quality or importance of that speech. Under this free speech paradigm, Facebook projects itself as benevolent compared to repressive state actors that wield the legal authority to censor speech, while failing to address its own power as an arbiter of global freedom of expression. Such an approach is problematic for two reasons. First, the quantity of online voices does not automatically translate into quality of online discourse—strict norms would cramp the range of discourse on Facebook regardless of the number of active daily users. Second, valuing quantity over quality could lead individuals to be more forgiving of Facebook's arbitrary and capricious methods of governing user content. To avoid these problems, Facebook should follow a policy that is more tolerant toward extreme speech and is transparent about the operations of its entire system of governing users' speech.*

**Keywords:** Facebook, freedom of speech, private governance, ethics, community standards

### I. Introduction

In late April 2013, two videos depicting the beheading of three individuals, purportedly in Mexico, appeared on Facebook.<sup>1</sup> The social networking site initially refused to remove the videos in spite of formal requests made by individual members and humanitarian organizations. However, after pressure from members and interest groups increased, Facebook decided to remove the videos, saying it would "evaluate [its]

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<sup>1</sup> Leo Kelion, *Facebook U-turn after Charities Criticizes Decapitation Videos*, BBC NEWS: TECHNOLOGY (May 1, 2013), <http://www.bbc.co.uk/news/technology-22368287>.

policy and approach to this type of content.”<sup>2</sup> At the time, Facebook’s “Community Standards” page stated, “We understand that graphic imagery is a regular component of current events, but must balance the needs of a diverse community. Sharing any graphic content for sadistic pleasure is prohibited.”<sup>3</sup> Facebook issued a statement in May 2013 saying that the videos did not meet its standards for graphic or gratuitous violence.<sup>4</sup> In mid-October 2013, it allowed the videos to be viewed on its site, again saying that people should be able to watch the videos to condemn them, and adding that it was considering a policy of including a warning alongside the link to the video.<sup>5</sup> Facebook’s flip-flopping with its policy toward such a video highlights the arbitrary and capricious way in which the social networking site deals with extreme content in spite of (or perhaps because of) the content’s political message.

Managing extreme user-generated content (UGC) is a common problem for Facebook, which has dealt with racist speech,<sup>6</sup> sexist and misogynist speech,<sup>7</sup> nudity in various forms,<sup>8</sup> photos of a seriously ill child,<sup>9</sup> anti-Muslim speech,<sup>10</sup> and the limits of its “real name” policy.<sup>11</sup> Facebook is not the only digital intermediary forced to set boundaries on the extreme speech that individuals may wish to publish: sites such as Twitter,<sup>12</sup> YouTube<sup>13</sup> and Reddit<sup>14</sup> have faced similar challenges of balancing the interests

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<sup>2</sup> *Id.*

<sup>3</sup> *Facebook Community Standards*, INTERNET ARCHIVE (Dec. 15, 2012), <http://web.archive.org/web/20121215024155/http://www.facebook.com/communitystandards>.

<sup>4</sup> Kelion, *supra* note 1.

<sup>5</sup> Leo Kelion, *Facebook lets beheading clips return to social network*, BBC NEWS (Oct. 21, 2013), <http://www.bbc.co.uk/news/technology-24608499>.

<sup>6</sup> *See Facebook removes racist Spongebob Trayvon Martin GIF*, BBC News (July 29, 2016), <http://www.bbc.com/news/world-us-canada-36910335>.

<sup>7</sup> *See Open Letter to Facebook*, WOMEN, ACTION, & THE MEDIA (May 21, 2013), *available at* <http://www.womenactionmedia.org/facebookaction/open-letter-to-facebook/>.

<sup>8</sup> *See Miguel Helft, Art School Runs Afoul of Facebook’s Nudity Police*, N.Y. TIMES: BITS BLOG (Feb. 18, 2011), <http://bits.blogs.nytimes.com/2011/02/18/art-school-runs-afoul-of-facebooks-nudity-police/>; Caitlin Dewey, *Facebook Censored a Nude Painting, and it Could Change the Site Forever*, WASH. POST: THE INTERSECT BLOG (Mar. 9, 2015), <http://www.washingtonpost.com/news/the-intersect/wp/2015/03/09/facebook-censored-a-nude-painting-and-it-could-change-the-site-forever/>; Kristy Kemp, *Breastfeeding Advocate, Outraged When Nursing Photos Were Removed from Facebook*, HUFFINGTON POST (Apr. 5, 2013), [http://www.huffingtonpost.com/2013/04/05/kristy-kemp-breastfeeding-photos\\_n\\_3021288.html](http://www.huffingtonpost.com/2013/04/05/kristy-kemp-breastfeeding-photos_n_3021288.html); Sara Gates, *Facebook Removes Photo of Breast Cancer Survivor’s Tattoo, Users Fight Back*, HUFFINGTON POST (Feb. 20, 2013), [http://www.huffingtonpost.com/2013/02/20/facebook-breast-cancer-tattoo-photo-double-mastectomy\\_n\\_2726118.html](http://www.huffingtonpost.com/2013/02/20/facebook-breast-cancer-tattoo-photo-double-mastectomy_n_2726118.html).

<sup>9</sup> *See Facebook Rejects Photo of Baby Boy in Hospital, Calls It Too Graphic*, FOX 13 (Sept. 11, 2014), *available at* <http://www.myfoxchicago.com/story/26505303/facebook-rejects-photo-of-baby-boy-in-hospital-calls-it-too-graphic>.

<sup>10</sup> *See Caitlin Fitzsimmons, Anti-Muslim Facebook Page Now Removed*, ADWEEK: SOCIAL TIMES (Nov. 12, 2010), *available at* <http://www.adweek.com/socialtimes/poppy-page-removed/326272>; *Deport the Muslims Who Ruined 2010 Remembrance Day*, FACEBOOK, <https://www.facebook.com/pages/Deport-the-muslims-who-ruined-2010-remembrance-day/144232922290674>.

<sup>11</sup> *See Micah Luxen, Facebook Challenges Legitimacy of Some Native Names*, BBC TRENDING (Mar. 3, 2015), <http://www.bbc.com/news/blogs-trending-31699618>; Lil Miss Hot Mess, *Say My Name: Facebook’s Unfair “Real Names” Policy Continues to Harm Vulnerable Users*, SALON (Mar. 30, 2015), [http://www.salon.com/2015/03/30/say\\_my\\_name\\_facebooks\\_unfair\\_real\\_names\\_policy\\_continues\\_to\\_harm\\_vulnerable\\_users/](http://www.salon.com/2015/03/30/say_my_name_facebooks_unfair_real_names_policy_continues_to_harm_vulnerable_users/).

<sup>12</sup> *See Jillian C. York, Terrorists on Twitter*, SLATE (June 25, 2014), <http://www.slate.com/articles/>

of preventing harm, promoting free speech, and adhering to the provisions of their respective community standards. News media have tended to view these instances as vexingly controversial: efforts to protect individuals from harmful speech are welcomed,<sup>15</sup> yet at the same time the appearance of arbitrary and capricious (and sometimes politically biased) control over individuals' speech is criticized.<sup>16</sup> This concern for individual liberties persists despite the fact that digital intermediaries are not state actors, and thus individuals have no legal authority to claim that the removal of their content violated their right to freedom of expression.<sup>17</sup>

This article asks the following question: How do the speech codes of social networking sites balance the competing interests of promoting freedom of speech and preventing harm to users? To answer this question, Facebook's experience with this balancing act will be used as a case study. The analysis will focus on how Facebook frames this balancing act through its Community Standards, as well as through the company's blog posts, responding to incidents of governing controversial UGC. The concept of corporate social responsibility (CSR) — the notion that a company will justify its actions by communicating how those actions maximize possible benefits to society and minimize likely harms — will guide this analysis. Facebook's use of CSR in justifying its decisions on governing controversial speech has important implications for online public discourse. It fosters what this article calls an "aggregational" philosophy of freedom of expression, whereby the sheer ability of individuals to speak on platforms is deemed more important than the ability of speakers to say whatever they want. Such a theory of freedom of expression is problematic for two reasons. First, the quantity of online voices does not automatically translate into quality of online discourse — strict norms would cramp the range of discourse on Facebook regardless of the number of active daily users. Second, valuing quantity over quality could lead individuals to be

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technology/future\_tense/2014/06/isis\_twitter\_suspended\_how\_attempts\_to\_silence\_terrorists\_online\_could\_backfire.html.

<sup>13</sup> See Eva Galperin, *YouTube Blocks Access to Controversial Video in Egypt and Libya*, ELECTRONIC FRONTIER FOUNDATION (Sept. 12, 2013), <https://www.eff.org/deeplinks/2012/09/youtube-blocks-access-controversial-video-egypt-and-libya>; Peter Whoriskey, *YouTube Bans Videos That Incite Violence*, WASH. POST (Sept. 12, 2008), available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/11/AR2008091103447.html>.

<sup>14</sup> *Content Policy Update. AMA Thursday, July 16<sup>th</sup>, 1pm PST*, REDDIT, [https://www.reddit.com/r/announcements/comments/3dautm/content\\_policy\\_update\\_ama\\_thursday\\_july\\_16th\\_1pm/](https://www.reddit.com/r/announcements/comments/3dautm/content_policy_update_ama_thursday_july_16th_1pm/).

<sup>15</sup> See NitashaTiku and Casey Newton, *Twitter CEO: "We suck at dealing with abuse,"* THE VERGE (Feb. 4, 2015), <http://www.theverge.com/2015/2/4/7982099/twitter-ceo-sent-memo-taking-personal-responsibility-for-the>.

<sup>16</sup> See Yoree Koh, *Twitter, in Punishing a Controversial User, Stokes Freedom of Speech Debate*, WALL STREET JOURNAL DIGITS BLOG (Jan. 11, 2016), <http://blogs.wsj.com/digits/2016/01/11/twitter-in-punishing-a-controversial-user-stokes-freedom-of-speech-debate/>.

<sup>17</sup> See, e.g., *Cyber Promotions v. AOL*, 948 F. Supp. 436 (E.D. Pa. 1996) (holding that AOL's email service did not provide the "functional equivalent" to a public forum, nor did it amount to a "critical pathway" of communication, and thus the government could not require AOL to allow all companies to use its email service). However, legal scholars Rebecca Tushnet and Dawn Nunziato argue that Section 230 of the 1996 Communications Decency Act, 47 U.S.C. § 230, gives digital intermediaries *too much* of an incentive to control speech. They contend that if intermediaries are able, under Section 230, to remove objectionable content without fear of liability, they will do so, to the detriment of individuals' ability to speak freely on these platforms. Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 G.W. L. REV. 986, 1011 (2008); DAWN C. NUNZIATO, *VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE* 36 (2009).

more forgiving of Facebook's arbitrary and capricious methods of governing user content.

This article will proceed as follows. First, the case will be made for why Facebook is the ideal digital intermediary for this study. Next, the article reviews literature on the concept of CSR in relation to how media companies communicate their purportedly socially responsible practices to their audiences. This literature will be used to build a set of criteria for understanding Facebook's examples of CSR. The article then conducts a close reading of Facebook's most recent update of its community standards (March 2015) and company blog posts addressing Facebook's decisions on handling controversial speech. The analysis will pay closest attention to the ways in which Facebook communicates its dual mission of promoting speech and preventing harm. The article concludes with a discussion of the potential implications of Facebook's aggregational "free speech as CSR" approach for a public discourse that is found more and more in the non-public forums that powerful digital intermediaries afford to individuals.

## II. Why Facebook?

Facebook was chosen as the focus of this analysis because of its dominant position among social networking sites. As of this writing, Facebook is the third most popular site on the World Wide Web,<sup>18</sup> with reportedly more than 1.13 billion global active daily users.<sup>19</sup> Women (58% of users) use Facebook only slightly more than men (42%), thus highlighting the relative gender parity of the social network.<sup>20</sup> In the United States, 71% of all adult Internet users were using Facebook in September 2014,<sup>21</sup> and this proportion was virtually identical across African- Americans, Latinos and whites.<sup>22</sup> The U.S. Facebook population also has a vast and relatively evenly distributed age range: in January 2014, 9.8 million users (5.4% of all users) were 13-17 years old, 42 million (23.3%) were 18-24, 44 million (24.4%) were 25-34, 56 million (31.1%) were 35-54, and 28 million (15.6%) were over the age of 55.<sup>23</sup> U.S. Facebook users tend to vary considerably in terms of political ideology.<sup>24</sup> Facebook's diversity extends well beyond the United States: as of March 2015, the company reports that 82.4% of its active users are outside the United States and Canada.<sup>25</sup> The platform is also diverse in terms of its

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<sup>18</sup> *The Top 500 Sites on the Web*, ALEXA (Aug. 1, 2016), <http://www.alexa.com/topsites> (Google.com is the Web's most popular site and Google-owned YouTube.com is the second most popular site, according to Alexa).

<sup>19</sup> *Company Info*, FACEBOOK (Aug. 1, 2016), <http://newsroom.fb.com/company-info/>.

<sup>20</sup> Albert Costill, *25 Amazing Facts about Facebook*, SEARCH ENGINE J. (Feb. 12, 2014), <http://www.searchenginejournal.com/25-amazing-facts-facebook/88733/>.

<sup>21</sup> *Social Networking Fact Sheet*, PEW RESEARCH CTR. (Sept. 2014), <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/>.

<sup>22</sup> Maeve Duggan, Nicole B. Ellison, Cliff Lampe, Amanda Lenhart and Mary Madden, *Demographics of Key Social Networking Platforms*, PEW RESEARCH CTR. (Jan. 9, 2015), <http://www.pewinternet.org/2015/01/09/demographics-of-key-social-networking-platforms-2/>.

<sup>23</sup> Ryan W. Neal, *Facebook Gets Older: Demographic Report Shows 3 Million Teens Left Social Network in 3 Years*, INT'L BUS. TIMES (Jan. 16, 2014), available at <http://www.ibtimes.com/facebook-gets-older-demographic-report-shows-3-million-teens-left-social-network-3-years-1543092>.

<sup>24</sup> See Timothy Macafee, *Some of These Things Are Not Like the Others: Examining Motivations and Political Predispositions Among Political Facebook Activity*, 29 COMPUTERS IN HUMAN BEHAVIOR 2766 (2013).

<sup>25</sup> *Company Info*, *supra* note 19.

function and the types of content that can be published on the site. Individuals use Facebook for a variety of reasons, such as entertainment, keeping up-to-date on the lives of friends and family, keeping up-to-date with news and current events, becoming civically engaged, and receiving support from people in their network.<sup>26</sup> Facebook has become a serious challenger to YouTube as the preferential site where users both upload and view videos.<sup>27</sup> The unveiling in the summer of 2016 of Facebook Live, a feature that allows users to stream live video shot on smartphones via their accounts, augments individuals' power as "citizen journalists" to broadcast to the world everything from the mundane to the socially groundbreaking.<sup>28</sup> Finally, Facebook's users vary widely in terms of the social norms of freedom of expression wherethey come from, meaning that the social network faces the difficult task of seeking consensus among serious and potentially intractable differences in how users interpret the values and harms of certain types of speech.<sup>29</sup>

These characteristics lead one to draw the following conclusions about Facebook. First, Facebook is not a niche platform that only caters to one target audience or to facilitating the publication of one type of UGC; rather, it is "the closest thing we have to a universal communication platform."<sup>30</sup> Second, because of the size and diversity of Facebook's body of users, Facebook has an incentive to both promote freedom of expression and minimize the harmful effects of UGC on other users. For Facebook, UGC is directly tied to advertising revenue: such content can determine which ads to put in front of which users.<sup>31</sup> Meanwhile, Facebook benefits from the positive publicity associated with being a catalyst for free speech and political foment in revolts against repressive regimes, such as with the 2011 "Arab Spring."<sup>32</sup> However, the lines separating abusive speech, political speech, hate speech and speech promoting terrorism have the potential to get blurred among this diverse group of users, which means that Facebook "walks a delicate line when it tries to ban violent or offensive content without suppressing the free sharing of information that it says it wants to encourage."<sup>33</sup> Facebook risks attrition of users if it tips the balance too much in either the pro-speech or pro-safety direction.<sup>34</sup> Third, Facebook's popularity and ubiquity mean that any changes it makes to its community standards will have a far-reaching effect on the norms of online freedom of expression. The direction in which Facebook is taking these norms is best understood through the analytical lens of corporate social responsibility.

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<sup>26</sup> Aaron Smith, *6 New Facts about Facebook*, PEW RES. CTR. (Feb. 3, 2014), <http://www.pewresearch.org/fact-tank/2014/02/03/6-new-facts-about-facebook/>; Macafee, *supra*, note 24.

<sup>27</sup> Dan Kedmey, *Facebook Video Uploads Reportedly Overtake YouTube*, TIME (Dec. 9, 2014).

<sup>28</sup> See Mike Isaac and Sydney Ember, *Live Footage of Shootings Forces Facebook to Confront New Role*, N.Y. TIMES (July 9, 2016), A14.

<sup>29</sup> See Michael Zimmer, *Facebook's Censorship Problem*, HUFFINGTON POST (June 22, 2011), [http://www.huffingtonpost.com/michael-zimmer/facebooks-censorship-prob\\_b\\_852001.html](http://www.huffingtonpost.com/michael-zimmer/facebooks-censorship-prob_b_852001.html).

<sup>30</sup> Vindu Goel, *Facebook Clarifies Rules on What It Bans and Why*, N.Y. TIMES (Mar. 16, 2015).

<sup>31</sup> *How Does Facebook Decide Which Ads to Show Me and How Can I Control The Ads I See*, FACEBOOK: HELP CENTER (n.d.), <https://www.facebook.com/help/562973647153813>.

<sup>32</sup> See Adrian Blomfield, *Nobel Peace Prize: Could Facebook or Twitter Win?* THE TELEGRAPH (UK) (Oct. 7, 2011), available at <http://www.telegraph.co.uk/news/worldnews/8812521/Nobel-Peace-Prize-Could-Facebook-or-Twitter-win.html>.

<sup>33</sup> Goel, *supra* note 30.

<sup>34</sup> *Id.*; see also DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 2 (2015)

### III. Corporate Social Responsibility

The concept of corporate social responsibility (CSR) has no agreed upon definition, but generally scholars use the term to debate whether businesses have a special duty to benefit society outside of their daily operations (and, if so, how they should fulfill that duty).<sup>35</sup> The origins of the term date back to the 1950s,<sup>36</sup> though certainly the debate behind the term is much older. To explain CSR in the context of Facebook's community standards, this article adopts a dualistic definition of CSR based on research by business professor Geoffrey Lantos<sup>37</sup> that focuses on how a firm creates CSR narratives based on the potential social harms and benefits resulting from the firm's activities. Thus, CSR is a concerted effort by a firm's public relations team to at least give the appearance that (1) the firm is concerned with the social consequences of its business practices, and (2) the firm is taking active steps both minimize the negative consequences and maximize the positive consequences of its practices. Whether the firms actually care about these externalities is an open question.<sup>38</sup>

A firm's potential social harms and benefits vary depending on the firm's product or service. In defining the potential harms and benefits of media corporations, scholars analyzing the CSR of these corporations have tended to borrow concepts from the fields of media ethics and political economy of media. For example, communication professors Diana Ingenhoff and Martina Koelling argue that media corporations' primary social responsibility rests in the content they create — specifically, that they should promote media products that will benefit society and refrain from producing media products that will harm society.<sup>39</sup> In the context of newsmedia corporations, professor Eun-Kyoung Han and colleagues noted that newspapers have a special sense of CSR that derives from their production of the “spiritual good” of knowledge.<sup>40</sup> Therefore, newspapers use CSR to promote their essential social externality and thereby justify their very nature as

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<sup>35</sup> See, e.g., Ina Freeman and Amir Hasnaoui, *The Meaning of Corporate Social Responsibility: The Vision of Four Nations*, 100 J. BUS. ETHICS 419, 439 (2011) (arguing that the “practice of CSR ... is dependant [sic] on how the term is understood”); ItziarCastelló, MetteMorsing and Friederike Schultz, *Communicative Dynamics and the Polyphony of Corporate Social Responsibility in the Network Society*, 118, J. BUS. ETHICS 683, 684 (2013) (“CSR can hardly be reduced to being a corporate function or instrument, but ... needs to be understood as a construct that continuously emerges and changes in the dynamic, media-based interplay between several actors”); Wan Saiful Wan-Jan, *Defining Corporate Social Responsibility*, 6 J. PUB.AFF. 176, 177 (2006) (“even if the same term—CSR—is used, it does not necessarily mean that the discussion is about the same concept”).

<sup>36</sup> Marisol Sandoval, *Corporate Social (Ir)Responsibility in Media and Communication Industries*, 20 JAVNOST-THE PUBLIC 39, 40 (2013)

<sup>37</sup> See, e.g., Geoffrey P. Lantos, *The Boundaries of Strategic Corporate Social Responsibility*, 18 J. CONSUMER MARKETING 595 (2001); Lantos, *The Ethicality of Altruistic Corporate Social Responsibility*, 19 J. CONSUMER MARKETING 205 (2002); Lantos, *Corporate Socialism Masquerades as “CSR”: The Difference Between Being Ethical, Altruistic and Strategic in Business*, 19 STRATEGIC DIRECTION 31 (2003).

<sup>38</sup> See Sandoval, *supra* note 36, at 51 (“CSR often serves as an argument for legitimising [sic] neoliberal deregulation and privatisation [sic]: corporations are supposed to voluntarily adopt responsible behaviour [sic] rather than being obliged to it by law”).

<sup>39</sup> Diana Ingenhoff and A. Martina Koelling, *Media Governance and Corporate Social Responsibility of Media Organizations: An International Comparison*, 21 BUS. ETHICS: A EUROPEAN REV. 154, 157 (2012).

<sup>40</sup> Eun-Kyoung Han, Dong-Han Lee and Hyoungkoo Khang, *Influential Factors of the Social Responsibility of Newspaper Corporations in South Korea*, 82 J. BUS. ETHICS 667, 668 (2008).

businesses.<sup>41</sup> Ethicists Walter Jaehnig and Uche Onyebadi identify the promotion of truth telling, diversity, societal betterment and the admission of wrongdoing as additional key areas that media corporations must address through their CSR.<sup>42</sup> These findings are consistent with ethicist Stephanie Craft's argument that media corporations require a moral compass due to the fact that they "straddle two realms, business and public service, in ways that other corporations do not."<sup>43</sup> Craft sees the Press Clause of the First Amendment as evidence that the Framers "thought of the press as an entity whose purpose was not solely or even predominantly profit generation, but public service."<sup>44</sup>

However, media corporations do not always communicate CSR as being a high priority when they produce content. Communication professor Ágnes Gulyás found that 16 major global media conglomerates did not discuss CSR in relation to their products in their official CSR reports from 2000, and only six of these companies mentioned their products in their official CSR reports in 2009.<sup>45</sup> Instead, these conglomerates (which include major players such as Disney, News Corp and Vivendi) focused more on activities not directly related to their products, such as environmental stewardship and humane labor practices.<sup>46</sup> This gap parallels the criticism media corporations face from ethicists and political economists that their products reflect greater concern for the bottom line than for the public interest.<sup>47</sup>

As digital intermediaries such as Facebook assert themselves as major players in today's media landscape, scholars are beginning to study the positive and negative social consequences of these companies' business practices.<sup>48</sup> In particular, there is a growing trend toward studying the positive and negative consequences surrounding these sites' core function of facilitating users' ability to create content and contribute to the

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<sup>41</sup> *Id.* at 667.

<sup>42</sup> Walter B. Jaehnig and Uche Onyebadi, *Social Audits as Media Watchdogging*, 26 J. MASS MEDIA ETHICS 2 (2011). See also Mary Lyn Stoll, *Infotainment and the Moral Obligations of the Multimedia Conglomerate*, 66 J. BUS. ETHICS 253, 258-9 (2006) ("At a minimum, media institutions should view the duty to promote the representation of diverse views in a democracy as an imperfect moral and civic duty rather than making programming decisions solely by reference to profit").

<sup>43</sup> *Id.* at 262.

<sup>44</sup> *Id.* at 265.

<sup>45</sup> Ágnes Gulyás, *Demons into Angles? Corporate Social Responsibility and Media Organisations*, 23 CRITICAL SURVEY 56, 66 (2011).

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

<sup>47</sup> See generally ROBERT M. ENTMAN, *DEMOCRACY WITHOUT CITIZENS: MEDIA AND THE DECAY OF AMERICAN POLITICS* (1989); BEN BAGDIKIAN, *THE NEW MEDIA MONOPOLY* (2004); Daniel C. Hallin, *Hegemony: The American News Media from Vietnam to El Salvador, A Study of Ideological Change and its Limits*, in *POLITICAL COMMUNICATION: APPROACHES, STUDIES, ASSESSMENTS*, (David L. Paletz ed., 1986); ROBERT MCCHESENEY, *DIGITAL DISCONNECT: HOW CAPITALISM IS TURNING THE INTERNET AGAINST DEMOCRACY* (2013).

<sup>48</sup> Examples include studies on how and why these intermediaries use users' personal data to run their services, see, e.g., Benhard Debatin, Jennette P. Lovejoy, Ann-Kathrin Horn & Brittany N. Hughes, *Facebook and Online Privacy: Attitudes, Behaviors, and Unintended Consequences*, 15 J. COMPUTER-MEDIATED COMM. 83 (2009); danah boyd & Eszter Hargittai, *Facebook Privacy Settings: Who Cares?* 8 FIRST MONDAY n.p. (2010); Christian Fuchs, *The Political Economy of Privacy on Facebook*, 13 TELEVISION & NEW MEDIA 139 (2012); and studies on the extent to which these sites comply with government requests for users' information, see Junichi P. Semitsu, *From Facebook to Mug Shot: How the Dearth of Social Networking Privacy Rights Revolutionized Online Government Surveillance*, 31 PACE L. REV. 291 (2011).

marketplace of ideas.<sup>49</sup> The primary positive consequence of facilitating UGC is rather obvious: digital intermediaries give individuals enormous potential to reach a variety of audiences, ranging from dozens to perhaps tens of millions of people, by affording them platforms for publishing various kinds of content.<sup>50</sup> Indeed, the primary commodity that digital intermediaries sell to their users is potential: the potential to contribute to democratic discourse, to have their content go viral, to become famous overnight, or simply to have an audience of even a handful of family and friends who will see or hear their content.<sup>51</sup> These positive consequences represent core functions of freedom of expression: individual self-fulfillment<sup>52</sup> and participation in public discourse.<sup>53</sup> Therefore, digital intermediaries have an incentive not only to sell potential, but also to cast that potential as the product of individuals exercising their freedom of expression.

The primary negative consequence of facilitating UGC is the same as the primary negative consequence that First Amendment absolutists must answer for: speech can cause harm. Of particular concern is extreme, offensive or hateful UGC, which may enjoy First Amendment protection yet can still cause harm to others' emotional wellbeing.<sup>54</sup> First Amendment scholars have put forth several reasons why such speech should enjoy exceptional legal protection. For example, one can invoke the marketplace of ideas metaphor and argue that truth is best realized when rational individuals identify bad speech,<sup>55</sup> or one can claim that tolerating extreme speech strengthens the collective

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<sup>49</sup> See Kate Crawford and Tarleton Gillespie, *What is a flag for? Social media reporting tools and the vocabulary of complaint*, NEW MEDIA & SOC'Y 1, 7 (2014), available at <http://papers.ssrn.com/sol3/papers.cfm?abstractid=2476464> (discussing the policies of various digital intermediaries of allowing users to "flag" undesirable content, as well as the reasons why individuals flag content); Tarleton Gillespie, *The Politics of Platforms*, 12 NEW MEDIA & SOC'Y 347 (2010) (discussing how digital intermediaries such as YouTube define themselves through strategic public relations); Josh Braun and Tarleton Gillespie, *Hosting the Public Discourse, Hosting the Public*, 5 JOURNALISM PRACTICE 383 (2011) (discussing how news outlets manage and curate user-generated content and the user comments).

<sup>50</sup> See generally YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006); AXEL BRUNS, *BLOGS, WIKIPEDIA, SECOND LIFE, AND BEYOND* 19 (2008); Manuel Castells, *Communication, Power and Counter-Power in the Network Society*, 1 INT'L J. OF COMM. 238 (2007).

<sup>51</sup> See Ute Schaedel and Michel Clement, *Managing the Online Crowd: Motivations for Engagement in User-Generated Content*, 7 J. MED. BUS. STUD. 17 (2010); José van Dijck, *Users like you? Theorizing agency in user-generated content*, 31 MED. CULT. & SOC'Y 41 (2009).

<sup>52</sup> Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, 879 (1963) ("expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self").

<sup>53</sup> Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Speech for the Information Society*, 79 N.Y.U. L. REV. 1, 3 (2004) (arguing that the purpose of freedom of expression is to build "a culture in which individuals have a fair opportunity to participate in the forms of meaning-making that constitute them as individuals").

<sup>54</sup> RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 48 (1992) (labeling the harm of such speech "reactive harm" and arguing that because it such harms are subjectively defined and difficult to measure, legally proscribing the speech that causes them could lead to a chilling effect on speech that is potentially harmful yet also potentially significant to social and political discourse).

<sup>55</sup> See Jeremy Ofseyer, *Taking Liberties with John Stuart Mill*, 1999 ANN. SURV. AM. L. 395 (1999).

character of society and gives us the courage to confront contentious issues.<sup>56</sup> However, because digital intermediaries are free to include or exclude whatever speech they want, they do not have to follow these same theoretical justifications for protecting harmful speech.

To better understand these issues, social networking sites' facilitation of UGC must be conceptualized within the context of CSR. As digital intermediaries such as Facebook govern the content that users publish on their platforms, they must be able to point to codified policies to justify their decisions. They must identify the line separating allowable from unallowable speech, and they must justify why that line exists where it does. Digital intermediaries communicate this governing process using CSR, highlighting how their decisions enhance positive attributes (promoting speech) and remove negative ones (causing harm). This communication is found primarily in these platforms' "community standards" pages, where the companies set the boundaries for which types of UGC they will allow and which they will not.<sup>57</sup> Communicating speech policies in terms of CSR represents a shift in the primary theoretical rationales for the role of freedom of expression in society: from philosophical justifications grounded in notions of human reason and democratic theory to commercial justifications couched in the rhetoric of social responsibility. This shift is troubling because sites such as Facebook appear to have tremendous power to shape the norms of online communication to its liking. An analysis of Facebook's community standards can reveal the nature of this shift.

#### **IV. Facebook's Community Standards; March 2015 Update**

A close reading<sup>58</sup> of Facebook's community standards reveals how Facebook frames freedom of expression in terms of CSR. Several benchmarks will be used to assess how Facebook's community standards balance protection of individuals' speech with prevention of harm. These benchmarks include established legal tests for distinguishing protected from unprotected speech, as well as Facebook's interests within a networked economy. Obviously, Facebook's community standards need not be as protective of speech as First Amendment jurisprudence, and the purpose of the analysis is not to make such an obvious argument. Rather, the goal of assessing Facebook's standards vis-à-vis legal standards is to identify the arbitrary and capricious ways in which Facebook governs problematic UGC.

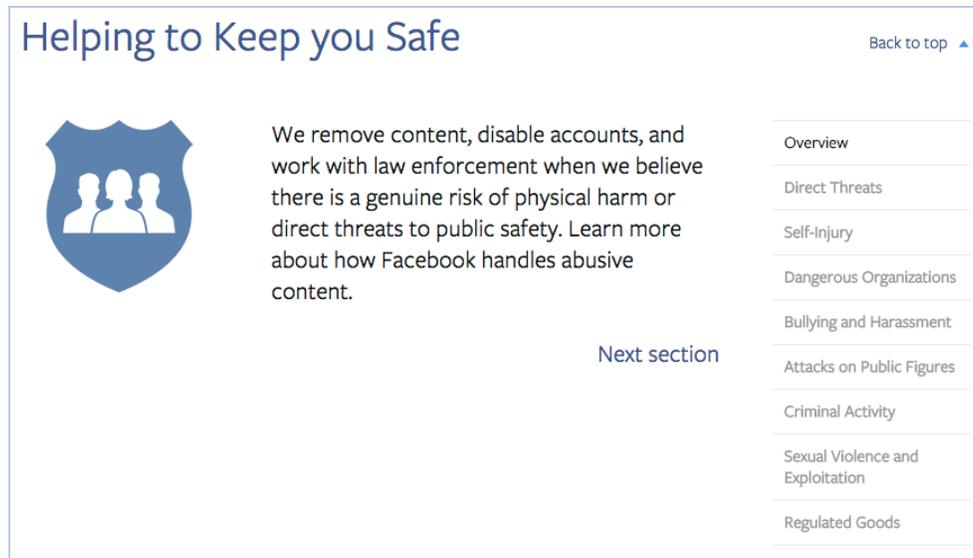
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<sup>56</sup> LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 9 (1986) (writing, "society adds something important to its identity, [and] is significantly strengthened, by ... acts of extraordinary tolerance").

<sup>57</sup> See Crawford and Gillespie, *supra* note 49.

<sup>58</sup> The term "close reading" is widely used in legal research to refer to a critical, qualitative textual analysis of legal language (e.g. from a case or statute) whose goal is to uncover broader contextual meaning beyond the plain language. In the field of mass communication, this method of analysis and its ultimate goal is no different than a qualitative analysis of texts such as images or news reporting. See, e.g., NORMAN FAIRCLOUGH, *DISCOURSE AND SOCIAL CHANGE* (1992); Elfriede Fürsich, *In Defense of Textual Analysis*, 10 *JOURNALISM STUDIES* 238 (2009); GIOVANNA DELL'ORTO, *THE HIDDEN POWER OF THE AMERICAN DREAM: WHY EUROPE'S SHAKEN CONFIDENCE IN THE UNITED STATES THREATENS THE FUTURE OF U.S. INFLUENCE* (2008); THOMAS R. LINDLOF AND BRYAN C. TAYLOR, *QUALITATIVE COMMUNICATION RESEARCH METHODS* 246 (2011); William A. Gamson and Andre Modigliani, *Media Discourse and Public Opinion on Nuclear Power: A Constructionist Approach*, 95 *AM. J. OF SOCIOLOGY* 1 (1989).

On March 15, 2015, Facebook launched a completely redesigned version of its community standards.<sup>59</sup> The site contains broad categories of goals (“Keeping You Safe,” “Encouraging Respectful Behavior,” “Keeping Your Account and Personal Information Secure,” and “Reporting Abuse”), each with its own set of subcategories that are accessed by clicking links in a sidebar next to the broad categories. For example, “Direct Threats,” “Self-Injury,” and “Bullying and Harassment” are under “Keeping You Safe,” while “Nudity,” “Hate Speech,” and “Violence and Graphic Content” are under “Encouraging Respectful Behavior”<sup>60</sup> (see Figure 1 and Figure 2).



**Figure 1: “Helping to Keep you Safe”**

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<sup>59</sup> *Facebook Community Standards*, FACEBOOK (Mar. 15, 2015), <https://www.facebook.com/communitystandards>. A cursory analysis of the history of various versions of Facebook’s Community Standards page using the online tool called “The Wayback Machine,” which periodically takes cached snapshots of webpages to document their evolutions, reveals that it has been updated approximately 14 times since the company was founded in 2004.

<sup>60</sup> *Id.*

## Encouraging respectful behavior

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People use Facebook to share their experiences and to raise awareness about issues that are important to them. This means that you may encounter opinions that are different from yours, which we believe can lead to important conversations about difficult topics. To help balance the needs, safety, and interests of a diverse community, however, we may remove certain kinds of sensitive content or limit the audience that sees it. Learn more about how we do that here.

[Overview](#)

[Nudity](#)

[Hate Speech](#)

[Violence and Graphic Content](#)

[Next section](#)

**Figure 2: “Encouraging respectful behavior”**

**f** Community Standards

Our mission is to give people the power to share and make the world more open and connected. Every day, people come to Facebook to share their stories, see the world through the eyes of others and connect with friends and causes. The conversations that happen on Facebook reflect the diversity of a community of more than one billion people.

We want people to feel safe when using Facebook. For that reason, we've developed a set of Community Standards, outlined below. These policies will help you understand what type of sharing is allowed on Facebook, and what type of content may be reported to us and removed. Because of the diversity of our global community, please keep in mind that something that may be disagreeable or disturbing to you may not violate our Community Standards.

[Read a letter from our ...](#)

**Figure 3: Opening to March 15, 2015 Update of Facebook's Community Standards**

The new standards open by stating that Facebook is on a “mission ... to give people the power to share and make the world more open and connected.”<sup>61</sup> (See Figure 3.) At the

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

same time, Facebook “want[s] people to feel safe when using” the service.<sup>62</sup> These two goals frame each of the categories in the 2015 update. Each category is defined in terms of its importance and its detriments without a bright line distinguishing the two sides, thereby appealing to each of Facebook’s two competing goals. Each category of content includes contextual caveats to trace the boundary between the speech that Facebook hopes to champion and that which it hopes to quash. For example, the section on “Direct Threats” includes the provision that Facebook “may consider things like a person’s physical location or public visibility in determining whether a threat is credible.”<sup>63</sup> This provision shows that Facebook may assume some responsibility for determining the intent behind extreme speech by using tools (either algorithmic or human) that it has at its disposal. The category of “Dangerous Organizations” forbids groups that engage in terrorist activity or organized criminal activity from using Facebook to spread their messages. However, even here the line is not so bright. Under this category, “supporting” or “condoning” such activities is forbidden, though Facebook “welcome[s] broad discussion and social commentary on these general subjects.”<sup>64</sup> The standards do not go into any greater detail on this category, casting the category in many shades of gray. For example, suppose a user went on Facebook to express the following hypothetical message: “Sadly, I say thank goodness for ISIS for showing the West the error of its colonial past.” The message is inherently political, expressing an anti-colonialist viewpoint. The author also does not necessarily “support” or “condone” the Islamist terrorist organization ISIS, as denoted by the modifier “sadly” that begins the sentence. However, another user could easily find this post offensive and request that Facebook take it down, and Facebook could just as easily agree that the message does, indeed, violate its community standards and remove the post. Online public discourse would be scrubbed of this message, robbing individuals of the opportunity to debate the validity of its claim.

The 2015 guidelines also state that sometimes it is a user’s responsibility to make clear to Facebook and the Facebook community that its speech should be considered valuable. For example, under the category of “Hate Speech,” Facebook includes an exception for sharing “someone else’s hate speech for the purpose of raising awareness or educating others about that hate speech. When this is the case, we expect people to clearly indicate their purpose, which helps us better understand why they shared that content.”<sup>65</sup> This statement clearly highlights Facebook’s focus on users’ intent. Users must not simply state a message, but rather they must provide any relevant context behind that message to ensure that it remains protected on Facebook’s platform. This policy opens up a debate over whether supplying such context would impinge upon an individual’s ability to speak his or her message as he or she intended. The policy also feeds into Facebook’s CSR approach to governing users’ speech. The social network can claim to be as much of an advocate for freedom of expression as it wants to be, and when it does remove users’ speech it is the user’s fault for failing to communicate the speech’s importance rather than Facebook’s fault for acquiescing easily to users’ complaints. This policy certainly seems noble in its desire to calm caustic discourse by requiring speakers to be more thoughtful with their commenting. However, the problem with this policy is that it alienates a range of opinion that “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”<sup>66</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

Categories dealing with speech that can inflict harm directly against a specific individual have clearer and stricter standards. “Bullying and Harassment” contains several examples of what may constitute such an infraction, such as shaming, degrading or blackmailing private individuals.<sup>67</sup> A prohibition specifically against the phenomenon of “revenge porn” is included.<sup>68</sup> A section titled “Attacks on Public Figures” stipulates that credible threats and hate speech directed at specific public figures will be removed just as they would be if directed at private individuals.<sup>69</sup> These rules attempt to distinguish the potentially high value of speech that deals with broad social or political issues from the nearly certain low value of speech directed at a specific individual. Such a distinction follows the guidance of legal scholars who have argued that legal measures to proscribe speech intended to harm specific individuals would not amount to a threat to constitutionally protected speech.<sup>70</sup> However, the social network also avers that it does “permit open and critical discussion” of public figures.<sup>71</sup> Facebook appears to be borrowing from U.S. defamation law here, setting apart speech on public figures as more socially valuable than speech about private individuals.<sup>72</sup> Yet this standard is little more than a false contrast between two categories of speech that, legally speaking, are not perfect opposites of one another, thus revealing that Facebook is yet again staking claim to a middle ground where the goals of promoting freedom of speech and creating a safe space can coexist.

The category of “Nudity” offers perhaps the most absolute rules of all: “We restrict the display of nudity because some audiences within our global community may be sensitive to this type of content – particularly because of their cultural background or age.”<sup>73</sup> However, even these standards come with a caveat due to recent incidents involving the removal of women’s photos of breastfeeding or double mastectomies.<sup>74</sup> The standards state, “[W]e always allow photos of women actively engaged in breastfeeding or showing breasts with post-mastectomy scarring. We also allow photographs of paintings, sculptures, and

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

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See CITRON, *supra* note 34, at 69 (arguing that stopping online abuse “would secure the necessary preconditions for free expression for targeted individuals”); CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 174 (1993) (distinguishing a misogynist tract from pornographic movies, a racist speech to a crowd from face-to-face racial harassment, and a tract in favor of white supremacy from a racial epithet – the former examples having some social value, with the latter ones having none); Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 246 (2011) (writing that “a world in which only certain individuals enjoy the mythic degree of liberty ... touted by cyberspace idealists, while others experience a loss of liberty and a re-entrenchment of physical restraints already unequally imposed upon them in the offline world”). Yet *cf.* SMOLLA, *supra* note 54, at 46 (arguing that speech cannot be banned due to its emotional component alone; its intellectual component must be factored in, and even the slightest intellectual value will tip the scale in favor of protecting the speech).

<sup>71</sup> *Facebook Community Standards*, *supra* note 59.

<sup>72</sup> *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (Warren, C. J., concurring) (contending that public figures, though not elected officials, “are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large”); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (holding that “[p]rivate individuals are ... more vulnerable to injury, and the state interest in protecting them is correspondingly greater” than for public figures).

<sup>73</sup> *Facebook Community Standards*, *supra* note 59.

<sup>74</sup> See *Kristy Kemp, Breastfeeding Advocate*, and *Gates, Facebook Removes Photo of Breast Cancer Survivor’s Tattoo*, *supra* note 8.

other art that depicts nude figures.”<sup>75</sup> However, an earlier part of the same section reads, “our policies can sometimes be more blunt than we would like and restrict content shared for legitimate purposes. We are always working to get better at evaluating this content and enforcing our standards.”<sup>76</sup> In other words, Facebook is urging its users to realize that its system of speech governance is not perfect. The ideal outcome for Facebook is that users will be forgiving and not take the rejection of their content personally as Facebook continues to find the ideal balance between protecting speech and preventing harm to users. However, this rationale also excuses Facebook from moving past opaque, arbitrary and capricious methods for managing user content.

This policy creates the same headaches of subjectivity as do obscenity standards in First Amendment jurisprudence.<sup>77</sup> However, in the case of Facebook, the gap between unallowable nudity and speech with elements of nudity that nonetheless has literary, artistic, political or scientific value is much narrower than that between obscenity and valuable speech. Although the penalty for crossing the line with Facebook is not criminal obscenity charges for the individual user, the potential damage to the public discourse that Facebook hosts is high, as it easily could become bereft of high-value speech. For example, in September 2016, Facebook removed a post made by the editor of the Norwegian newspaper *Aftenposten* containing Nick Ut’s Pulitzer Prize-winning photograph from the Vietnam war showing a naked young girl crying as she fled a napalm attack that left her severely burned.<sup>78</sup> After public outcry, Facebook restored the photo to *Aftenposten*’s page.<sup>79</sup> Although an individual can find this image through other online channels, a chief concern with Facebook removing this photo from its own platform is that the social network could so easily rely on a flawed system of governing user content to rob the public discourse that occurs on its platform of such an evocative image that is emblematic of one of humanity’s darker moments in history.

One key strategy that Facebook uses in its 2015 Community Standards is to portray state actors as the main enemies of freedom of expression. The standards read, “[W]e may have to remove or restrict access to content because it violates a law in a particular country, even though it doesn’t violate our Community Standards.”<sup>80</sup> The standards then place Facebook on the side of individual users and against state actors by stating, “We challenge requests that appear to be unreasonable or overbroad. And if a country requests that we remove content because it is illegal in that country, we will not necessarily remove it from Facebook entirely, but may restrict access to it in the country where it is illegal.”<sup>81</sup> Thus, Facebook occupies a relatively liberal position as a champion of protecting freedom of expression. Even if Facebook does remove users’ content in certain situations, it still is not as bad as government censors. But if government censors do put pressure on Facebook, the company must abide by their demands when legally required. Therefore, Facebook is

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<sup>75</sup> *Facebook Community Standards*, *supra* note 59.

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

<sup>77</sup> *Miller v. California*, 413 U.S. 15, 24 (1973) (holding that content is unconstitutionally obscene if it appeals to prurient interests, depicts sexual or scatological functions in a patently offensive manner, and lacks serious literary, artistic, political, or scientific value).

<sup>78</sup> Zoe Kleinman, *Fury over Facebook “Napalm Girl” Censorship*, BBC NEWS (Sept. 9, 2016), available at <http://www.bbc.com/news/technology-37318031>.

<sup>79</sup> *Facebook U-turn over “Napalm Girl” Photograph*, BBC NEWS (Sept. 9, 2016), available at <http://www.bbc.com/news/technology-37318040>.

<sup>80</sup> *Facebook Community Standards*, *supra* note 59.

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

portraying itself as just as much a victim of government censorship as the individuals whose content gets legally removed.<sup>82</sup>

The updated standards make clear that they only “outline Facebook’s expectations when it comes to what content is or is not acceptable in our community,” while “countries have local laws that prohibit some forms of content.”<sup>83</sup> On its face, this statement conveys a rather obvious fact. However, it is important to point out the distinction made in this statement between “our community” and “countries.” In making this distinction, Facebook is placing itself in an advantageous position when it comes to supporting freedom of expression online. On the one hand, Facebook is claiming to set itself apart from the world of “flesh and steel” that philosopher John Perry Barlow vilified in 1996.<sup>84</sup> However, it is also acceding to reluctant participation in the legal regimes that inevitably do have control over online activity and speech, as legal scholars David Johnson and David Post averred.<sup>85</sup>

Facebook’s position is that complying with legitimate government demands is better for speech in the long run. Mark Zuckerberg wrote in a March 15, 2015, post on Facebook’s company blog, “If we ignored a lawful government order and then we were blocked, ... people’s voices would be muted, and whatever content the government believed was illegal would be blocked anyway.”<sup>86</sup> Freedom of expression should not be considered a black-and-white issue, Zuckerberg argued; rather, “giving people a voice ... is something that we must make incremental progress towards.”<sup>87</sup> This philosophy highlights the fact that Facebook’s rules governing UGC are a constant work in progress. It is an experiment that combines elements of First Amendment theory and jurisprudence (e.g. for threats and incitement), media ethics, corporate social responsibility, and harnessing user agency to both encourage good speech and discourage the bad. It is dependent on users’ intent and the context behind the speech. It will probably never be perfect, but that is ideal for Facebook. It can keep adjusting its social norms in an *ad hoc* process, always claiming to be serving the goals of both promoting speech and preventing harm.

## V. Discussion

Through its community standards, Facebook is creating a new “aggregational” theory of freedom of speech. Under this theory, emphasis is placed on the sheer capacity or potential for individuals to communicate using a platform such as Facebook, rather than the quality or importance of that speech. Facebook is concerned about the aggregate of voices on its platform, and the only way to maintain a high aggregate of voices is to

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<sup>82</sup> For more on this strategy, see MONROE E. PRICE AND STEFAAN G. VERHULST, *SELF-REGULATION AND THE INTERNET* (2005). These scholars argue that self-regulation generally has had “the apparent benefit of avoiding state intervention in sensitive areas of basic rights, such as freedom of speech and information, while offering standards for social responsibility, accountability, and user protection from offensive material,” at 9.

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

<sup>84</sup> John Perry Barlow, *A Declaration of the Independence of Cyberspace* (1996), available at <https://projects.eff.org/~barlow/Declaration-Final.html>.

<sup>85</sup> David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

<sup>86</sup> Mark Zuckerberg, *Today we released our latest Global Government Requests Report and updated our Community Standards*, FACEBOOK (Mar. 15, 2015), [https://www.facebook.com/zuck/posts/10101974380267911?reply\\_comment\\_id=10101974442079041&total\\_comments=36&\\_\\_fns&has\\_h=Ac2U13\\_rwzPmNUEQ](https://www.facebook.com/zuck/posts/10101974380267911?reply_comment_id=10101974442079041&total_comments=36&__fns&has_h=Ac2U13_rwzPmNUEQ).

<sup>87</sup> *Id.*

appeal simultaneously to the values of promoting speech and preventing harm to users. Market forces dictate such a policy. If Facebook were to allow more speech that comes close to violating its community guidelines, it would the risk of alienating users who are offended by that speech. These users might choose to leave Facebook. If a critical mass of users left Facebook, the company subsequently would lose advertising revenue, and might eventually be forced out of business. Thus, although some individuals may become upset because their content was removed from Facebook (whether that content in fact violated Facebook's community guidelines or not), those removals are defensible out of a desire to preserve the social network's broader function of increasing individuals' communicative agency in the global public discourse.

Mark Zuckerberg said in a March 15, 2015, post on Facebook's company blog that "threats of violence and bullying will be taken down" because they "are examples where one person exercising their voice may unfairly limit the voices of many others. Therefore, in the spirit of giving the most voice to the most people, we choose not to permit this content."<sup>88</sup> This aggregational approach appears to have an affinity with affirmative First Amendment theory, which generally holds that the most important value of freedom of expression is mass participation by individuals in a self-governing democracy.<sup>89</sup> Of course, Zuckerberg's position specifically refers to Facebook's mission of encouraging more speech through preventing the types of abuse and harassment of users that would scare them away from using the social network as a platform for speaking. However, in such a policy, viewed through the lens of Facebook's aggregational approach to freedom of expression, it is impossible to fully separate Facebook's self-interest in preserving the viability of the platform from concern for respecting individual dignity. At best, the commercial rationale for the speech policy is coextensive with the philosophical rationale; at worst the former is parading as the latter. Either way, Facebook's policy cheapens the values of promoting speech and protecting users from harm since the boundary separating these goals is hazy.

An alternative to an aggregational approach to governing content is tolerance. According to law professor Lee Bollinger, tolerance involves an acknowledgement that the "real threat to liberty of speech ... rests within the general population of citizens instead of officialdom alone."<sup>90</sup> The goal of tolerance is not for extreme speech to be *accepted* in society, but rather that society simply *allows* extreme speech into the public discourse. Such speech should be allowed so that individuals have the opportunity to critically engage with ideas, even those that may be considered outrageous or that may threaten the very fabric of our democracy.<sup>91</sup> Facebook already does enough through its algorithm to cloister users in "filter bubbles" or "echo chambers" where the vast majority of ideas they interact with are those with which they agree.<sup>92</sup> Allowing users to be challenged by extreme ideas could lead users to become more engaged citizens, more critically aware of the range of ideas found in society, and perhaps more likely to come

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<sup>88</sup> Zuckerberg, *supra* note 86.

<sup>89</sup> See, e.g., ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Speech for the Information Society*, 79 N.Y.U. L. REV. 1 (2004); SUNSTEIN, *supra* note 70.

<sup>90</sup> Bollinger, *supra* note 56, at 80.

<sup>91</sup> ROBERT POST, CONSTITUTIONAL DOMAINS 143 (1995).

<sup>92</sup> See, e.g., ELI PARISER, THE FILTER BUBBLE: HOW THE NEW PERSONALIZED WEB IS CHANGING WHAT WE READ AND HOW WE THINK (2011); Zeynep Tufekci, *Facebook Said Its Algorithms Do Help Form Echo Chambers, and the Tech Press Missed It*, 32 NEW PERSPECTIVES Q. 9 (2015).

up with solutions for the real ills associated with those ideas. Consider the following hypothetical examples:

- A person posts a message on Facebook that the 2016 remake of *Ghostbusters*, which features an all-female lead cast, is not as good as the original.
- A person posts a message on Facebook calling the actresses “dumb bimbos” and arguing that female actors are not as funny as male actors.
- A person posts degrading messages about individual members of the *Ghostbusters* cast because of their gender or their race.

The first post expresses a matter of taste that may or may not be related to the fact that the lead cast is all female, though without context the message easily could be taken as sexist. The second post expresses a clearly sexist message, though it also offers users the opportunity to start a critical discussion about the gender norms and stereotypes that Hollywood perpetuates. Removing that message due to its offensive language would prevent such critical engagement with this extreme idea. The final post — which Leslie Jones, an African-American actress who starred in the movie, actually suffered — is not only personally abusive, but it lacks the ideational value of the first two messages. Law professor Cass Sunstein offers some criteria to draw a line separating the first two examples of allowable speech from the last, unallowable example. Sunstein distinguishes a misogynist tract from demeaning depictions of women, a racist speech to a crowd from face-to-face racial harassment, and an essay in favor of white supremacy from a racial epithet.<sup>93</sup> The former of each of these pairs contains ideas that society should be prepared to critically engage with, no matter how extreme, unpopular or potentially harmful. The latter examples are not neatly bound into one category of speech — admittedly, “demeaning depictions” is subjective, and neither these depictions nor the racial epithet may be directed at a specific individual, as with the face-to-face racial harassment. However, what these three examples do have in common is a lack (or at least a dearth) of “a contribution to social deliberation,”<sup>94</sup> while the other three do make such a contribution, even if from an extreme starting point. Facebook could adopt a similar policy.

Tolerance requires two things of Facebook. First, it requires Facebook to firmly embrace its role as “the closest thing we have to a universal communication platform.”<sup>95</sup> This commitment goes beyond good public relations and Community Standards that say Facebook encourages free speech until that speech violates vague rules. Such a commitment means Facebook must state that promoting freedom of expression is its primary duty, and all harms that it seeks to avoid from extreme speech will be judged by specific, unambiguous standards. Second, tolerance requires transparency. Facebook must go beyond caveats and disclaimers and pleas for patience and forgiveness if speech is wrongly removed. Users deserve standards that as clearly as possible set up boundaries between allowable and unallowable discourse. A policy that allows users push those boundaries (with the likelihood that they will have their speech removed) is healthier for public discourse than a policy in which users have important speech removed arbitrarily and capriciously because it falls in a gray area of Facebook’s community standards. Transparency also requires Facebook to pull back of the curtain a bit. The March 2015 Community Standards talk of “dedicated teams working around the world to review things,” and of some of these people being “the right person for

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<sup>93</sup> Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 309 (1992).

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

<sup>95</sup> Goel, *supra* note 30.

review[ing]” certain categories of content.<sup>96</sup> Yet users are in the dark about what exactly happens between when content is flagged and when a decision is made on whether or not the content should be removed. Who are the people who review the flagged content? How are they trained? How do some people become experts in one category over another? Is the fate of content in the hands of one person, several or many?<sup>97</sup> In its “Facebook Principles,” Facebook lists “Transparent Process” as principle 9 out of 10, averring that “Facebook should publicly make available information about its purpose, plans, policies, and operations.”<sup>98</sup> Governance of user-generated content seems like an excellent place to make good on that principle.<sup>99</sup>

## VI. Conclusion

Facebook faces an unending struggle to find the balance between creating a communicative service where people feel “safe”<sup>100</sup> and promoting an arena of public discourse where people “make the world more open and connected” as they “share their stories, see the world through the eyes of others and connect with friends and causes.”<sup>101</sup> The line separating these two goals is constantly shifting. No matter how specific Facebook gets in trying to define that line as it continues to revise its community standards, advocates for either goal will continue to put pressure on either side of the line.

The purpose of this analysis is not to argue that Facebook should become more protective of freedom of expression than it currently is. Nor, for that matter, does this study contend that Facebook should follow the standards of First Amendment jurisprudence in crafting its community guidelines. Rather, the ultimate conclusion reached from this analysis is that Facebook’s current aggregational approach to governing UGC is problematic. The quantity of online voices does not automatically translate into quality of online discourse. Asking individuals to be more forgiving of Facebook’s arbitrary and capricious methods of governing user content in the name of valuing quantity over quality could lead to a narrowing of the range of acceptable discourse on Facebook. For the sake of the health and robustness of online public

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<sup>96</sup> *Facebook Community Standards*, FACEBOOK (Mar. 15, 2015).

<sup>97</sup> Journalist Adrian Chen has reported on the work of laborers responsible for reviewing flagged content for several unnamed digital intermediaries. Many of these laborers are based in the Philippines, due to a widespread knowledge of both English and U.S. cultural norms among Filipinos. The vast majority of their decisions involve more than just whether a photo of a breastfeeding mom shows too much nipple or whether a racist diatribe has a salvageable political message. Rather, these workers spend their days judging hardcore pornography, beheadings or other images of gore. The sheer volume and nature of flagged content may in fact necessitate that digital intermediaries employ hoards of day laborers that can stomach (even if barely) the job of reviewing that content. Adrian Chen, *The Laborers Who Keep Dick Pics and Beheadings Out of Your Facebook Feed*, WIRED (Oct. 21, 2014), <http://www.wired.com/2014/10/content-moderation/>.

<sup>98</sup> *Facebook Principles*, Facebook (Aug. 25, 2010), <https://www.facebook.com/principles.php>.

<sup>99</sup> To its credit, in early 2015 Facebook began releasing a so-called “Transparency Report,” which consists of data on requests by governments around the world for information on certain users and for allegedly illegal UGC to be removed. See *Global Requests Report*, FACEBOOK (2015), <https://govtrequests.facebook.com/>. However, this report does not contain information on users flagging other users over extreme content, and it does not contain information on the process of how Facebook makes decisions on content governance.

<sup>100</sup> *Facebook Community Standards*, FACEBOOK (Mar. 15, 2015).

<sup>101</sup> *Id.*

discourse, Facebook would be wise to embrace its role as a universal platform for public discourse and shift from an aggregational approach to content governance to one based on tolerance.

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# LEGAL REGULATION OF CSR? THE CASE OF SOCIAL MEDIA AND GENDER-BASED HARASSMENT

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*Online harassment targeted at women is often sexual and violent. Social media organizations have recently responded to doxxing,<sup>1</sup> harassment and revenge porn on their sites by enhancing their rules of participation. This paper argues that this is a form of Corporate Social Responsibility (CSR) response. CSR actions involve voluntary codes of conduct with lax implementation systems and are known to be self-serving and non-binding. A different form of CSR that is enhanced by law and government regulation may be necessary to curb the fear and threat faced by all, and women in particular, on social media platforms. Using a reexamination of the concept of CSR both historically and contemporaneously, the study advocates a regulatory-based form of CSR by tweaking Sec. 230 of the Communications Decency Act (CDA) as a possible solution to the virulent forms of threats and violence that women encounter on social media platforms. These legal/regulatory-based forms of CSR have been advocated, and used, in other contexts to enhance the provisions of self-regulating CSR policies to encourage compliance. This is a response that seems specially suited for social media platforms because of the interactions of speech protection and the need for openness and participation on social media platforms. This paper is premised on the fact that threats, harassment, and revenge porn are not constitutionally protected forms of expression.*

**Keywords:** Gender and Social Media, CSR, Digital Media Law

## I. LIVING AN INCREASINGLY DIGITAL LIFESTYLE

The importance of the digital communication in modern lives cannot be overstated. To put this in context, consider the recent data on the convergence of social media and traditional media in our lives:

Sixty-three percent of Facebook and Twitter users rely on those social networks

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<sup>1</sup> Posting of private information—address, phone number, and more—online.

for news and information.<sup>2</sup> Keeping in mind that Twitter has over 300 million users and Facebook has 1.6 billion active monthly users worldwide as of the fourth quarter in 2015,<sup>3</sup> 59 percent of Twitter users keep up with breaking events as they are happening,<sup>4</sup> Snapchat and Instagram have increasingly asserted themselves as strong social and information networks. Instagram reportedly has over 300 million users and over 70 million photos shared each day; it is also trying to become a source of real time news for its users with a new feature called “Explore” unveiled in June 2015.<sup>5</sup> Not to be left behind in the attempt to become both a strong social platform and a strong news platform for its users, Snapchat launched “Snapchat Stories” and a “Live Story” for the first Republican debate in which videos posted by users and candidates on the night of the debate were made into a live story.<sup>6</sup>

With just the social media part of our online lives having such a pervasive reach and increasing their scope by going beyond the social to become news and information sources, online harassment and revenge porn are more likely to have further devastating effects and keep several people away from participating in the biggest and most widespread way of communication in the modern world.

## II. PERVASIVENESS OF ONLINE HARASSMENT

A 2014 study by Pew Research shows that both young men and women experience online harassment. Four in ten Internet users have experienced some form of online harassment. Young men tend to experience the less severe forms of harassment defined as name-calling and embarrassment while young women tend to suffer from the more severe form of online harassment such as stalking, sexual threats, physical threats, and sustained harassment. Twenty-six percent of young women between the ages of 18-24 have experienced the severe form of online harassment. Women and young adults are more likely to experience harassment on social media or an app.<sup>7</sup> People who are harassed online also suffer offline consequences as a result of the harassment. Consider the documented cases of the following high-profile people:

Caroline Criado-Perez, blogger, cofounder of the Women’s Room website who was running a campaign to put a woman on the back of a British bank note, received

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<sup>2</sup> Michael Barthel, Elisa Shearer, Jeffrey Gottfried, Amy Mitchell, *The Evolving Role of News on Twitter and Facebook*, Pew Research Center (July 14, 2015), <http://www.journalism.org/2015/07/14/the-evolving-role-of-news-on-twitter-and-facebook/>.

<sup>3</sup> Number of monthly active Facebook users worldwide as of 4th quarter 2015 (in millions), Statista (2015), <http://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/>.

<sup>4</sup> Number of monthly active Twitter users worldwide from 1<sup>st</sup> quarter 2010 to 2<sup>nd</sup> quarter 2015 (in millions), Statista (2015), <http://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/>.

<sup>5</sup> Lauren Leatherby, *What’s Trending On Instagram? A Battle With Twitter*, NPR (June 23, 2015), <http://www.npr.org/sections/alltechconsidered/2015/06/23/416928369/whats-trending-on-instagram-a-battle-with-twitter>.

<sup>6</sup> Kerry Flynn, *Snapchat To Launch ‘Live Story’ For Thursday’s Republican Primary Debate On Fox News, Facebook*, International Business Times (Aug. 4, 2015), <http://www.ibtimes.com/snapchat-launch-live-story-thursdays-republican-primary-debate-fox-news-facebook-2038288>.

<sup>7</sup> Maeve Dungan, *Online Harassment*, (October 22, 2014). Pew Center, <http://www.pewinternet.org/2014/10/22/online-harassment/>.

death and rape threats.<sup>8</sup> Two reporters for the *New York Times* had to leave their homes after their addresses were posted online as retaliation for including the name of a street where the police officer in the Ferguson shooting once lived in their stories about the Ferguson shooting.<sup>9</sup> Anita Sarkeesian, a media critic, saw her online harassment spill into offline when a speaking event at Utah State University was canceled because the school received a threat of the “deadliest school shooting in American history” if she spoke. The online harassment was as a result of her launching a campaign to fund videos that explore the representation of women in pop culture narratives.<sup>10</sup> And Zelda Williams, Robin Williams’s daughter, publicly left Twitter after being harassed following the death of her father.<sup>11</sup>

While online arguments and name-calling that may be caustic and vehement are legal, harassment, stalking, and threats that make people fear for their lives are not. According to Sarah Kessler of *Fast Company*, one of the problems with policing online harassment through the use of law enforcement is that “in some cases, crimes are difficult to litigate online. Some states’ harassment laws, for instance, only cover threats sent directly to the target. Tweeting someone’s nude photo to her boss is harassment, but because it is not directed to the target specifically, it doesn’t often fall under the legal definition.”<sup>12</sup> Quoting Danielle Citron, law professor at University of Maryland, Kessler argues that there are already “tons” of law on the illegality of harassment; however, those laws are not being frequently enforced because the police at the local level are not adept yet at investigating online harassment. Additionally, Citron (as reported by Kessler) said that startups are not required to address online harassment in the same way they are required to address copyright infringement.

Sarah Kessler, in her long form reporting on the issue for *Fast Company*, noted the research on the impact of harassment on social media use is hard to come by. However, she provided anecdotal comments from women who expressed a much lower level of participation on platforms like Twitter due to fear of harassment. She quoted Imani Gandy, a senior legal analyst at RH *Reality Check*, a publication that reports on sexual and reproductive health and justice issues, who said (as quoted by Kessler), “if there’s something crazy happening in the news, I won’t comment on it. Because I know if I do comment on it, I’m just going to end up being inundated with nutjobs. I definitely self-censor a lot more than I used to because of the harassment.”<sup>13</sup> She also cited Adria Richards who used to regularly make tech “how-to” YouTube videos. She made about 400 in three years. After receiving a death threat, she posted one video in the two years following the threat. The death threat

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<sup>8</sup> <http://www.theguardian.com/lifeandstyle/2013/aug/04/caroline-criado-perez-twitter-rape-threats>.

<sup>9</sup> Kristin Taylor, *NY Times Reporter Julie Bosman Has Not Reported Since Darren Wilson Address Controversy* (Dec. 17, 2014), <http://www.thegatewaypundit.com/2014/12/ny-times-reporter-julie-bosman-has-not-reported-since-darren-wilson-address-controversy/>.

<sup>10</sup> Feminist Frequency.com <http://femfreq.tumblr.com/post/109319269825/one-week-of-harassment-on-twitter>. (Warning: This site is full of sexual violence, death and rape threats, and suicide incitement).

<sup>11</sup> *Zelda Williams Quits Twitter, Instagram After 'Cruel and Unnecessary' Comments*, <http://mashable.com/2014/08/13/zelda-williams-quits-twitter/>.

<sup>12</sup> Sarah Kessler, *Why Online Harassment Is Still Ruining Lives – And How We Can Stop it* (June 03, 2015), <http://www.fastcompany.com/3046772/tech-forecast/why-online-harassment-is-still-ruining-lives-and-how-we-can-stop-it>.

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

came when she tweeted in 2013 about two men who made an inappropriate joke at a technology conference. One of them, after losing his job, posted the threat on *Hacker News*.

One may argue that one of the functions of the First Amendment is to enable a marketplace of ideas in which discussions may be vehement, caustic, and full of diatribes. However, the marketplace stops functioning as a marketplace of different ideas and becomes a monopoly if certain people are driven off from the center to the periphery, or chased completely off by intimidation and threats, not because their ideas and contributions are bad, but because their ideas contradict and challenge the status quo or are contrary to the presumed mainstream ideas. The role of the government in the capitalist idea of free market is to prevent a monopoly.

### III. REVENGE PORN

The phenomenon known as “revenge porn” typically arises when a person takes a naked selfie or a selfie of parts of their anatomy and sends it to a lover when things are good. When things sour between the lovers, one lover posts the private pictures of the other person in her/his collection on a website available to a lot of people, sometimes with names, addresses and other identifying information. Because, in most revenge porn cases, the pictures were openly and legally obtained, with consent, and the publication of the pictures was often not for commercial purposes (just the humiliation factor), state civil privacy laws are often inapplicable in prosecuting the publication of the pictures. Additionally, most of the pictures are posted anonymously or pseudonymously, which makes it difficult to find a perpetrator to prosecute for sex trafficking and other federal criminal violations.

Olivia Wilson of *Huffington Post* argues that “revenge Porn is a digital sexual assault and should be approached with more accurate language.” The issues are of consent and criminality, “sending a naked picture to a lover who then posts that picture to a public forum is like consenting to sex with one person once and getting a gang bang, over and over again,” she says.<sup>14</sup> As noted by Wilson, unlike other forms of online harassment, “Revenge porn sites almost exclusively feature women. Because it works... Men are rarely shamed as a result of a consensual sex act. Women and their sexuality are shamed on a regular basis. We are all just as able to post revenge porn. The reason men have more power in this situation is because they have less to lose. Male consent is more respected and male sexuality is less examined.”<sup>15</sup>

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<sup>14</sup> Olivia Wilson, *Revenge Porn Is More Than a Violation of Privacy It Is Digital Sexual Assault* (June 23, 2015), [http://www.huffingtonpost.com/olivia-wilson/revenge-porn-is-more-than\\_b\\_7641876.html](http://www.huffingtonpost.com/olivia-wilson/revenge-porn-is-more-than_b_7641876.html). For a colorful description of how dangerous it is for many women writers and public figures to participate in online conversation, see John Oliver’s episode on the issue on his show *Last Week Tonight* in June 2015 [http://www.huffingtonpost.com/2015/06/22/john-oliver-online-harassment-last-week-tonight\\_n\\_7635518.html?utm\\_hp\\_ref=women&ir=Women](http://www.huffingtonpost.com/2015/06/22/john-oliver-online-harassment-last-week-tonight_n_7635518.html?utm_hp_ref=women&ir=Women). This episode of John Oliver’s show captures the level of harassment women face daily in their attempts to participate effectively in an online dialogue or offer criticism online. The episode addresses revenge porn and the victim blaming that often accompanies it.

<sup>15</sup> Wilson, *supra* note 14.

While online harassment and revenge porn seem to be climbing rapidly in the last few years, 2015 appeared to be the year in which the major players online decided that there was enough to require some action from the industry. The reasons that precipitated a response from the industry are merely speculative at best. However, the potential impact on business might be a major consideration.

#### IV. THREATS

In its first Facebook case, the Supreme Court of the United States refused to make a distinction between threats made online and elsewhere.<sup>16</sup> The case involved Anthony Elonis who posted alleged threats against his ex-wife, his co-worker, a kindergarten class, and a female federal agent on his Facebook page. Elonis was convicted on four of five counts of violating a federal anti-threat statute, 18 U.S.C. § 875(c), at the District Court and the Third Circuit upheld his conviction. The Supreme Court of the United States reversed and remanded the case on the ground that there was no proof that Elonis had the requisite state of mind and intent required by the law under which he was prosecuted.

Here are excerpts from the Elonis rap posted on his Facebook page in 2010:

“[T]here’s only one way to love you but a thousand ways to kill you. I’m not going to rest until your body is a mess, soaked in blood and dying from all the little cuts. Hurry up and die, bitch, so I can bust this nut all over your corpse from atop your shallow grave. I used to be a nice guy but then you became a slut. Guess it’s not your fault you liked your daddy raped you. So hurry up and die, bitch, so I can forgive you.”<sup>17</sup>

Written in a lyrical rap-style, Elonis’s Facebook statements were peppered with disclaimers that his rap lyrics were not against real people. Elonis’s employer at an amusement park fired him as a result of his rap, and his wife sought and obtained a protective order against him. With the reversal and remand of the case by the U.S. Supreme Court, Sarah Kessler, a technology reporter at *Fast Company*, argues that this ruling “will make it more difficult than ever to prosecute the authors of online death and rape threats.”<sup>18</sup>

#### V. LEGAL CHALLENGES FOR VICTIMS

In the United States, the third party publishers of revenge porn are immunized from lawsuit by federal law. The 1996 Communications Decency Act (CDA), 47 U.S.C § 230, makes it difficult for victims to seek legal remedies for revenge porn. CDA § 230(c)(1) states that an “interactive computer service provider” (essentially any online service provider) cannot be treated as a publisher or speaker of content provided by a separate “information content provider” (often a user). The statute bars a claim if: (1)

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<sup>16</sup> *Elonis v. United States*, 135 S.Ct. 2001(2015).

<sup>17</sup> *United States v. Elonis*, 730 F.3d 321, 324 (3d Cir. 2013).

<sup>18</sup> <http://www.fastcompany.com/3046772/tech-forecast/why-online-harassment-is-still-ruining-lives-and-how-we-can-stop-it> (Last visited Feb. 23, 2016).

the defendant claiming immunity is an “interactive computer service provider,” (2) the content at issue was provided by a separate “information content provider,” and (3) the claim purports to treat the defendant as a publisher of that content. Most CDA § 230 litigation concern § 230(c)(1). Courts have generally read CDA § 230(c)(1) immunity

broadly in order to promote Internet growth and technological development, even when doing so allows for the publication of content some find objectionable.<sup>19</sup>

CDA has provided immunity to website operators, online service providers (OSPs) and Internet service providers (ISPs) in cases of defamation based on publication of user-generated content. Immunity has been denied in cases where the website operator/ISP/OSP has “materially contributed to the creation or development of the allegedly illegal content, ... may have become information content provider.” Additionally, performing classic editorial functions regarding user-generated content

does not lead to a loss of the CDA immunity. Aaron P. Rubin, social media expert and partner at Morrison & Foerster LLP, says:

Websites may edit third-party content through traditional editorial functions, such as deciding whether to publish or alter content, and retain their CDA § 230 immunity, provided that the changes are unrelated to the alleged illegality. Recent cases have established that manipulating search results and filtering reviews qualify as traditional editorial functions. As a result, websites that use these functions, such as Google and Yelp, retain CDA § 230 protection.<sup>20</sup>

However, CDA § 230 does not provide immunity from liability for violations of federal criminal law, federal intellectual property law, state laws consistent with CDA § 230, or communications privacy law.<sup>21</sup> Furthermore, CDA § 230(c)(2) offers immunity for ISPs/OSPs for (A) “in good faith,” restricting access to material that the provider or user considers “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.” These OSPs/ISPs may also use content filtering on their sites in good faith.<sup>22</sup> They may, however, lose their immunity if they make content filtering decisions that are not ‘in good faith’ or without first determining whether content is offensive.<sup>23</sup>

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<sup>19</sup> Aaron P. Lubin, *Recent developments in Social Media Law* in COMMUNICATIONS LAW IN THE DIGITAL AGE 2015, at 3.

<sup>20</sup> *Id.* at 5.

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

<sup>22</sup> See *Obado v. Magedson*, No. CIV. 13-2382 JAP, 2014 WL 3778261 (D. N.J. July 31, 2014) *aff'd*, No. 14-3584, 2015 WL 2167683 (3d Cir. May 11, 2015) (holding that CDA § 230 immunized websites from liability for failing to remove allegedly defamatory blogs or failing to make plaintiff’s rebuttal statements widely available, as these were decisions “relating to the monitoring, screening, and deletion of content from its network – actions quintessentially related to a publisher’s role”).

<sup>23</sup> See *Song Fi, Inc. v. Google, Inc.*, 2015 WL 3624335 (N.D. Cal. June 10, 2015) (holding that online service provider was not immune from liability under CDA § 230(c)(2) for removing a music video with an allegedly inflated view count because an inflated view count did not constitute “otherwise objectionable” content within the meaning and purpose of the statute). See also *Sherman v. Yahoo! Inc.*, 997 F. Supp. 2d 1129 (S.D. Cal. 2014) (holding that online

Interestingly, the legislative history of the CDA and § 230 is encased within the boundaries of the need to restrict the distribution of pornographic content to children over the Internet. There was also the need to make the internet free, open and robust in such a way that online service providers may perform editorial duties regarding content without acquiring legal liabilities for content in the process.<sup>24</sup> After the bill was signed into law on February 8, 1996, the ACLU filed suit to declare the anti-indecency part of the law unconstitutional. The Court struck down the anti-indecency section of the Act. Section 230, which promotes free speech and immunizes website operators from liability for third party content, survived. “Section 230 had two purposes: the first was to encourage the unfettered and unregulated development of free speech on the Internet the other was to allow online services to implement their own standards for policing content and provide for child safety.”<sup>25</sup>

This immunity from liability provided by CDA § 230 made it rather difficult for victims of online harassment, threats, defamatory content, doxxing, and revenge porn to successfully sue the perpetrators, especially when the harmful content is posted anonymously or pseudonymously. The online publishers are immunized from lawsuit and they have no legal responsibility to take down the offending content. As noted by Kessler, “Business owners can be sued for injury that occurs on their physical, offline properties if conditions likely to cause harm were present—for instance, if the business built a parking lot with no lighting. But website owners cannot be sued for creating conditions under which harm is likely to occur.”<sup>26</sup> Of course, harm caused by speech is somewhat different from physical harm. Nevertheless, it is disheartening that, “[A platform] is more liable for copyright violation, than if someone makes a death threat on [its] website.”<sup>27</sup>

Talks about reducing the level of immunity granted by Section 230 have been ongoing for a few years. The intensity of online harassment and threats, continuing humiliation posed by revenge porn, and online sex trafficking has led to a new level of activism in the last year to curb the reach of Section 230. “Congress and several states legislatures have considered legislation that would curtail CDA § 230 immunity for online service providers in order to combat online sex trafficking and revenge porn,” says Rubin.<sup>28</sup> Four states – Connecticut, New Jersey, Tennessee, and Washington – have statutes that criminalize the knowing publication of online sex trafficking ads.<sup>29</sup>

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service provider was not immune from liability under CDA § 230(c)(2) for sending an automated notification text message to users with a link to instructions on blocking future messages because the provider did not have the opportunity to determine whether the third-party message was offensive material).

<sup>24</sup> See Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway* (November 1996), <http://www.cybertelecom.org/cda/cannon2.htm>. See also <https://www.eff.org/issues/cda230/legislative-history>.

<sup>25</sup> <https://www.eff.org/issues/cda230/legislative-history> (last visited Feb. 26, 2016).

<sup>26</sup> Sarah Kessler, *Why Online Harassment Is Still Ruining Lives-And How We Can Stop it* (June 03, 2015), <http://www.fastcompany.com/3046772/tech-forecast/why-online-harassment-is-still-ruining-lives-and-how-we-can-stop-it>.

<sup>27</sup> *Id.* (quoting Nancy Kim, California Western School of Law).

<sup>28</sup> Aaron P. Rubin, *Recent developments in Social Media Law*, COMMUNICATIONS LAW IN THE DIGITAL AGE 2015, at 8.

<sup>29</sup> *Id.*

Courts in New Jersey, Tennessee and Washington have held that these laws are likely preempted by CDA § 230 and issued injunctions blocking their enforcement.<sup>30</sup> Sixteen states currently have laws criminalizing revenge porn, and twelve have bills pending.<sup>31</sup>

The U.S. House of Representatives passed the Stop Advertising Victims of Sexual Exploitation Act (“SAVE Act”) in 2015. This would create federal criminal liability for online service providers who host third-party ads for commercial sexual exploitation.<sup>32</sup> The bill was referred to the Senate Judiciary Committee. Additionally, Congresswoman Jackie Speier (D-Calif.) announced plans to introduce a bill that would make revenge porn a federal crime.<sup>33</sup> Despite these efforts, under CDA § 230, it looked like online service providers might still be immune from liability for prosecutions stemming from violations of state laws criminalizing online sex trafficking ads and revenge porn.<sup>34</sup> Given this possibility, in 2013, 49 state attorneys general requested an amendment to the CDA § 230 to remove immunity for online service providers in cases of violations of state criminal law.<sup>35</sup> These developments seem to have engendered a response from the industry.

## VI. RESPONSES FROM THE INDUSTRY

### A. Twitter

The first inkling that the issue of harassment may be concerning to Twitter in terms of decreased number of users came from the CEO in February 2015 in a leaked memo about harassment on the platform. Released by *The Guardian* in a story by Nitasha Tiku and Casey Newton, then Twitter CEO, Dick Costollo, was quoted as saying “We suck at dealing with abuse and trolls on the platform, and we’ve sucked at it for years, ... it’s no secret, and the rest of the world talks about it every day. We lose core user after core user by not addressing simple trolling issues that they face.”<sup>36</sup>

Costollo’s leaked comments ostensibly came in response to an internal forum concerning a story by Lindy West, a writer and performer, who was a frequent target of harassment on Twitter because of her stances on being fat and happy, rape culture, and feminism. West is a Seattle-based writer, current *Guardian* columnist and former writer for *Jezebel*. On Twitter, she came under attack by the site’s commenters. She

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

<sup>31</sup> Rebecca Leber, *Is Revenge Porn Legal in Your State?*, New Republic (September 3, 2014), <http://www.newrepublic.com/article/119295/revenge-porn-laws-state-map-shows-theyre-rare-us>.

<sup>32</sup> U.S. House, 114<sup>th</sup> Congress. “H.R. 285: SAVE Act of 2015.” (Version: 2; Version Date: January 27, 2015) <https://www.govtrack.us/congress/bills/114/hr285>.

<sup>33</sup> Mary Emily O’Hara, *A federal revenge-porn bill is expected next month*, THE DAILY DOT (June 21, 2015), <http://www.dailydot.com/politics/federal-revenge-porn-bill/>.

<sup>34</sup> *See, e.g.*, Doe v. Backpage.com LLC, 817 F.3d 12 (1<sup>st</sup> Cir. 2016), in which the U.S. Court of Appeals for the First Circuit held that online classified ad site Backpage.com LLC was protected under Section 230 of the Communications Decency Act against a claim that it enabled sex traffickers to advertise their victims online.

<sup>35</sup> National Association of Attorneys General, Letter to Congress (July 23, 2013), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1465&context=historical>.

<sup>36</sup> Nitasha Tiku and Casey Newton, *Twitter CEO: ‘We Suck At Dealing With Abuse’* (Feb. 4, 2015), <http://www.theverge.com/2015/2/4/7982099/>.

was frequently threatened with rape and sexual violence on Twitter. She documented her abuse on Twitter in a book titled *Shrill* published in 2016. In the book, West expressed hope that it was possible to engage meaningfully with Internet trolls, but on Jan. 3, 2017, she finally gave up the fight and quit Twitter. West wrote about her decision to quit the platform:

I hate to disappoint anyone, but the breaking point for me wasn't the trolls themselves (if I have learned anything from the dark side of Twitter, it is how to feel nothing when a frog calls you a cunt) – it was the global repercussions of Twitter's refusal to stop them.<sup>37</sup>

Twitter embarked on some reforms on the platform to improve the previously arduous process of reporting abuse in December 2014. The company also reportedly partnered with an advocacy group called WAM! to investigate harassment against women.<sup>38</sup> Some of the measures taken by Twitter to reform its abuse-reporting process include the introduction of new tools available to users to deal with harassment and unwanted messages. These tools made it a bit easier to flag abuse and describe reasons for blocking a Twitter account.<sup>39</sup> In the past, Twitter had only allowed the report of spam messages; the new tool allows the reporting of harassment, impersonations, suicide, self-harm, and harassment on behalf of others.<sup>40</sup> Within harassment, a user may also report categories as “disrespectful or offensive” or “threatening violence or physical harm.”<sup>41</sup> Twitter also addressed blocking on the site even with mobile devices. Previously, a person could still receive tweets from blocked accounts and respond but just could not follow the blocker. With the new tool, blocked accounts are not allowed to see the profile of the blocker.<sup>42</sup>

Following Costolo's acknowledgment of the problem, in April 2015, Twitter installed a new filter that would automatically prevent users from seeing messages of violence and harassment.<sup>43</sup> The filter is on for all users and cannot be turned off.<sup>44</sup> After Costolo's statement, Twitter also tripled the number of employees dealing with reports of abuse and included rules to address revenge porn.<sup>45</sup> The platform now has a scheme of temporary suspension for users who break the rules but whose offense does

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<sup>37</sup> <http://www.seattlereviewofbooks.com/notes/2017/01/03/sherman-alexie-liney-west-and-ta-nehisi-coates-all-quit-twitter-this-week/>. (Last visited Jan. 12, 2016).

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

<sup>39</sup> Bill Chappell, *Twitter Targets Trolls with New Rules on Abuse* (Dec. 2, 2014), NPR, <http://www.npr.org/sections/thetwo-way/2014/12/02/368056945/twitter-targets-trolls-with-new-rules-on-abuse>.

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

<sup>41</sup> Sarah Perez, *Twitter Releases New Suite of Anti-Harassment Tools, Promises Faster Response Times for Dealing with Abuse*, Tech Crunch (Dec. 2, 2014), <http://techcrunch.com/2014/12/02/twitter-releases-new-suite-of-anti-harassment-tools-promises-faster-response-times/>.

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

<sup>43</sup> Pete Pachal, *Twitter takes the fight to abusers with new quality filter* (March 24, 2015), Mashable, <http://mashable.com/2015/03/24/twitter-content-filter/>.

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

<sup>45</sup> Chris Ridder, *Free Speech v. Harassment*, California Lawyer (Aug. 2015 edition), [http://www.nxtbook.com/nxtbooks/dailyjournal/calilawyer\\_201508/index.php#/14](http://www.nxtbook.com/nxtbooks/dailyjournal/calilawyer_201508/index.php#/14).

not merit a full suspension.<sup>46</sup> However, nothing stops them from signing up for a new account under a new identity. As of Jan. 9, 2017, *Columbia Journalism Review* editors commented that “...for too many journalists, especially women, people of color, and those who are Jewish, Twitter is also a place where they must deal with hateful and often violent threats.”<sup>47</sup>

### *B. Instagram*

After a series of censorship debates, Instagram followed the footsteps of Twitter in April 2015 and updated its terms of use and guidelines page.<sup>48</sup> The new standards address pornography, harassment, and nudity on the site. According to Jackson Colaco, Director of Public Policy, following numerous user complaints, Instagram moved from previous “dos” and “don’ts” kind of policy to a more actively stated prohibited materials.<sup>49</sup> Explicit rules forbidding nudity, except for post-mastectomy scarring, and women actively breastfeeding, are now prohibited. Offering sexual services, buying/selling drugs, or promoting recreational use of drugs are now actively prohibited. Sexual images of minors, revenge porn, or the threat of revenge porn are also now prohibited on the platform.<sup>50</sup> The new explicit language also makes clear that credible threats, hate speech, and personal information meant to blackmail or harass someone are removed from the site.<sup>51</sup> There was little information on what happens to the poster of the information.

### *C. Facebook*

While Facebook has maintained consistency in its anti-harassment policy and community standards, the platform released another design of the standards in March 2015. Monica Bickert, head of global policy management for Facebook, argued that this was to explain the policies more clearly and make them easier to navigate.<sup>52</sup> According to the Facebook community page, the policies are now grouped into four sections:

“Helping to keep you safe”- Prohibition of bullying and harassment, direct threats, criminal activity, etc.

“Encouraging respectful behavior”- Prohibition of nudity, hate speech,

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

<sup>47</sup> See <http://us3.campaign-archive1.com/?u=a23440a018c7ba0619c6f01e6&id=3f990a5170&e=c9731c35f8> (last visited on Jan. 12, 2017).

<sup>48</sup> Deepa Seetharaman, *Instagram Tightens Guidelines to Curb Pornography and Harassment*, Wall Street Journal (April 16, 2015), <http://blogs.wsj.com/digits/2015/04/16/instagram-tightens-rules-to-curb-pornography-and-harassment/>.

<sup>49</sup> Haley Tsukayama, *Instagram updates its rules to explain how it deals with nudity and abuse*, (April 16, 2015), WASH. POST, <https://www.washingtonpost.com/news/the-switch/wp/2015/04/16/instagram-updates-its-rules-to-explain-how-it-deals-with-nudity-and-abuse/>.

<sup>50</sup> See Instagram Community Guidelines, <https://help.instagram.com/477434105621119/> (accessed Feb. 23, 2016); Facebook Community Standards page, <https://www.facebook.com/communitystandards/> (accessed Feb. 23, 2016).

<sup>51</sup> *Id.*

<sup>52</sup> Hayley Tsukayama, *Facebook rolls out more readable rules for its network* (March 2015), WASH. POST, <https://www.washingtonpost.com/news/the-switch/wp/2015/03/16/facebook-rolls-out-more-readable-rules-for-its-network/>.

and graphic content.

“Keeping your account and personal information secure”- Policy of spam and fraud.

“Protecting your intellectual property”- Users may only post content to which they own the right.<sup>53</sup>

#### *D. Reddit*

Reddit, the wild, wild west of online media platforms decided in March 2015 to prohibit the posting of copyrighted materials, confidential materials, unauthorized photos and videos of nude or sexually excited subjects, and violent personal images.<sup>54</sup> In May 2015, Reddit came up with an anti-harassment policy that some people found controversial. Reddit announced an updated policy that bans harassment against users. Using a blog post with the title “Promote ideas, Protect people,” Reddit said it would ban “attacks and harassment of individuals through the platform.”<sup>55</sup>

Alexis Ohannian, co-founder of Reddit before it was sold to Conde Nast, and tech entrepreneur, addressed the changes when he said, “Revenge porn didn’t exist in 2005. Smartphones didn’t really exist in 2005... we are taking the standards we had 10 years ago and bringing them up to speed for 2015.”<sup>56</sup> According to Lucy England, a technology reporter at *Business Insider*, “this latest change was prompted by a survey of 15,000 “redditors” that found that negative responses to comments prevented others from sharing their opinions. In the blog post announcing the changes, Reddit said the biggest reason users do not recommend the site to friends “is because they want to avoid exposing friends to hate and offensive content.”<sup>57</sup> Reddit, however, will not be policing the site for harassment but rely on users to report it.<sup>58</sup> As a result of the new policy changes, Reddit permanently removed five forums from the site. One was about racism, one about transphobia, another one was about harassing members of a progressive website, and two were dedicated to fat shaming.<sup>59</sup> Despite the removal of these five sub-Reddits, several still exists on the website that are dedicated to racism and another to suggestive pictures of minors.<sup>60</sup>

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<sup>53</sup> Facebook Community Standards page, <https://www.facebook.com/communitystandards/> (accessed February 23, 2016).

<sup>54</sup> Chris Ridder, *Free Speech v. Harassment*, California Lawyer (August 2015 edition), [http://www.nxtbook.com/nxtbooks/dailyjournal/calilawyer\\_201508/index.php#/14](http://www.nxtbook.com/nxtbooks/dailyjournal/calilawyer_201508/index.php#/14).

<sup>55</sup> *Promote ideas, protect people* (May 14, 2015), Reddit Blog, <http://www.redditblog.com/2015/05/promote-ideas-protect-people.html>.

<sup>56</sup> Lucy England, *Reddit is Finally Mounting A war against trolls*, (May 15, 2015), <http://www.businessinsider.com/reddit-introducing-anti-harassment-policy-trolls-2015-5?r=UK&IR=T>. See also Mike Issac, *Reddit Introduces Anti-Harassment Policy* (May 14, 2015), N.Y.TIMES BLOG, [http://bits.blogs.nytimes.com/2015/05/14/reddit-introduces-anti-harassment-policy/?\\_r=0](http://bits.blogs.nytimes.com/2015/05/14/reddit-introduces-anti-harassment-policy/?_r=0).

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

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

<sup>59</sup> Caitlin Dewey, *These are the 5 subreddits Reddit banned under its game-changing anti-harassment policy – and why it banned them*, The Washington Post (June 10, 2015), <https://www.washingtonpost.com/news/the-intersect/wp/2015/06/10/these-are-the-5-subreddits-reddit-banned-under-its-game-changing-anti-harassment-policy-and-why-it-banned-them/>.

<sup>60</sup> *Id.*

## E. Others

In addition to the platforms listed above, Bing also announced that it is committed to removing revenge porn from its search results in OneDrive and from Xbox Live.<sup>61</sup> Google also announced the change in its policy and will now accept requests from people to remove nude or sexually explicit pictures that are posted without consent from Google Search results.<sup>62</sup>

## VII. WHY INDUSTRY SOCIAL RESPONSIVENESS IS NOT ENOUGH

This study argues that these responses from the industry are evidence of their corporate social responsibility (CSR), but these are not enough. CSR efforts, whether tied to a moral/ethical sense of social responsibility, or merely reactive to public opinion or perception, are partly motivated by isomorphic pressures felt by organizations to deal with uncertainty<sup>63</sup> and to increase their legitimacy and survival prospects.<sup>64</sup> A particular prevailing public opinion can move an organization to a responsiveness that takes the prevailing social norms into account and either align – sometimes merely ceremoniously – corporate policy with these social norms, or keep a low profile about the corporate non-commitment to the prevailing social norms. Additionally, self-interest and avoidance of regulatory measures are always a consideration in many corporate social responsibility and responsiveness measures. While these motivations may sometimes be enough to trust CSR efforts in combating serious issues such as online harassment and threat of violence and rape, they are also self-regulating codes of conduct with no legal effects or consequences for lack of compliance. As stated by Carola Glinski, there is a “long standing opinion of authors [that] such codes of conduct merely create moral obligations but have no legal effect whatsoever.”

## VIII. CORPORATE SOCIAL RESPONSIBILITY (CSR)

Concerns about what social and moral responsibilities business and corporations may or may not have to the public have been a subject of debate for several decades. A portion of the debate has been focused on what the term “CSR” means. Andrews<sup>65</sup> and Davis and Bloomstron<sup>66</sup> have provided some definitions.

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<sup>61</sup>Natasha Lomas, *Microsoft Targets Revenge Porn with Link Removal Form*, TechCrunch (July 23, 2015), <http://techcrunch.com/2015/07/23/microsoft-targets-revenge-porn-with-link-removal-form/>.

<sup>62</sup>Jessica Guynn, *Google to remove ‘revenge porn’ from search results*, USA TODAY (June 19, 2015), <http://www.usatoday.com/story/tech/2015/06/19/google-revenge-porn-search-results/28983363/> (Last visited March 30, 2016).

<sup>63</sup>See THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (DiMaggio, P. J., and Powell, W. W., eds. 1991).

<sup>64</sup>John W. Meyer, B. Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, in THE NEW INSTITUTIONALISM, *supra* note 64, at 143-164.

<sup>65</sup>ANDREWS, K. R., THE CONCEPT OF CORPORATE STRATEGY (1971).

<sup>66</sup>K. DAVIS, W. C. FREDERICK, & R. L. BLOMSTROM, R. L., BUSINESS AND SOCIETY: CONCEPTS AND POLICY ISSUES (1980).

Carroll<sup>67</sup> provided both a definition and a framework for corporate social responsibility. The history of CSR in business includes a tired debate about whether business should have any moral responsibility in society other than to provide the highest returns to their shareholders. In 2005, in a survey conducted by *McKinsey Quarterly*, a publication for management consultants, only-six percent of the over four-thousand executives surveyed worldwide agreed with the old Milton Friedman position that businesses' reason for existence was to make high profits for their shareholders. About 84% of the respondents said high returns had to be balanced with contributions to the broader public good.<sup>68</sup>

Frederick<sup>69</sup> describes corporate social responsibility as the idea that “business corporations have an obligation to work for social betterment.”<sup>70</sup> He further argues that corporate social responsibility tends to be moralistic and based on “speculative generalities” about the reasons corporations should be socially responsible. In a 1986 piece, Frederick argues that an effective corporate social response could be about “fending off, neutralizing or defeating”<sup>71</sup> social or legal forces that aim to lead the corporation in a direction considered necessary for society in general. More recently, the notions of the relationship between CSR and the law expressed by Doreen McBarnet have resonated with the author of this paper. McBarnet noted:

The adoption of Corporate Social Responsibility (CSR) policies is no longer a matter of voluntary practice on the part of business. In one sense it was never really voluntary, being in most cases a response to market pressures and reputational risk. But increasingly CSR is also subject to legal pressure and legal enforcement, not necessarily in the form of conventional state regulation but rather through indirect state pressure and through the use of private law by private actors, sometimes through highly innovative uses of law.<sup>72</sup>

Considering the increasing incursion of digital information into our individual and professional lives and the increasing public dependency on digital sources and resources for information we need to live our lives, social media corporations need to have more responsibility for what happens on their sites and the rules for participating need to be more nuanced by principles and ideals rather than voluntary self-regulating rules.

Additionally, research has shown that as a response to public opinion, corporate social responsibility can be a token, and indeed, politically correct part of the

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<sup>67</sup> A. B. Carroll, A.B., *A Three-Dimensional Conceptual Model of Corporate Performance*, 4 ACADEMY OF MANAGEMENT REVIEW 497 (1979).

<sup>68</sup> *Global Survey of Business Executives: Business and Society*, 2006 MCKINSEY QUARTERLY 33.

<sup>69</sup> W. C. Frederick, *From CSR1 to CSR2—The Maturing of Business-and-Society Thought*, 33 BUS. & SOC'Y 150 (1994).

<sup>70</sup> *Id.* at 151.

<sup>71</sup> W.C. Frederick, *Toward CSR3: Why Ethical Analysis is Indispensable and Unavoidable in Corporate Affairs*, 28 CAL. MGMT. REV. 132 (1986).

<sup>72</sup> Doreen McBarnet, *Corporate Social Responsibility beyond the Law, through Law, for Law*, U. Edinburgh Sch. of L., Working Paper No. 3, 2009).

corporate makeup,<sup>73</sup> rather than a principled response to a social issue or concern. Even when well-intentioned and useful, several recently published scientific studies demonstrate the fundamental inadequacy of corporate social responsibility.<sup>74</sup> When it comes to public policy, “voluntary approaches are rarely if ever an effective substitute for regulatory or fiscal measures in seeking to achieve public policy objectives.”<sup>75</sup> CSR efforts usually generate internal policies that are inadequate for many and varied reasons. Often, even when corporations are serious about them and they are well laid down, these internal policies are not necessarily binding on the corporations. The internal policies may have been instituted mainly for the purposes of meeting what constitutes the predominant, and therefore, politically correct, opinion about a certain issue in a particular setting at a particular time.<sup>76</sup> As a result of the fact that the internal policies are not binding on the corporation, there are usually minimal or no consequences for violating them.

## IX. CSR AND THE LAW

There is a conventional notion of CSR efforts as supererogatory. This implies that corporations adopt CSR rules with the goals of going beyond the requirements of the law. As noted by McBarnet, some have seen CSR efforts as inadequate without the development of further legal accountability too.<sup>77</sup> In the McKinsey report mentioned earlier, only eight-percent of the executives surveyed thought genuine concern was the motivation for companies to adopt social and environmental causes. Market forces engendered through activist investors and concerned consumers, as well as civil societies, and the threat of government regulation have been key drivers in the implementation of CSR policies. This defeats the romantic notion of CSR policies as voluntary and going beyond the stipulations of the law efforts. In addition to the fact that CSR is not always voluntary, there have been some questions of legitimacy when the CSR efforts of businesses seem to overreach their role by making public-interest decisions.<sup>78</sup>

As noted by the *Economist*, in a critique of CSR, “the proper guardians of the public interest are governments, which are accountable to all citizens.”<sup>79</sup> Scholars, policymakers, and government representatives have all lamented the inadequacy of CSR efforts in combating social ills and have called for the need for good public policy and legislation. John Ruggle, UN Special Representative for Business and Human Rights, noted that “compliance efforts [in supply chain issues] cannot fully succeed unless we bring government back into the equation.”<sup>80</sup> Sir Geoffrey Chandler, former director of Shell Oil, and after retirement from Shell, the chair of Amnesty International’s UK Business Group, described CSR as a ‘curse’ that distracts from the

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<sup>73</sup> S. Vallentin, *Private Management and Public Opinion – Corporate Social Responsiveness Revisited*, 48 BUS. AND SOC’Y 82 (2009).

<sup>74</sup> See <http://www.alliancesud.ch/en/policy/multinationals/corporate-social-responsibility-under-close-scrutiny#sthash.qnMSiIT.dpuf>.

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

<sup>76</sup> E. Noelle-Neumann, *Public Opinion and the Classical Tradition: A Re-evaluation*, 43 PUB. OPINION Q. 143 (1979).

<sup>77</sup> McBarnet, *supra* note 72.

<sup>78</sup> *Id.* at 25.

<sup>79</sup> *The Economist*, Jan. 22, 2005.

<sup>80</sup> Remarks at the forum on CSR, Bamberg, Germany, June 14, 2006.

need for effective external control.<sup>81</sup>

In 2001, Friends of the Earth, responding to the European Union's Green Paper stated:

While CSR may be valuable in terms of promoting corporate behavior it can never be seen as an alternative to good public policy and legislation...Voluntary commitments are hardly the basis for ensuring responsible corporate behavior.<sup>82</sup>

Vogel noted that there is a limit to what non-governmental organizations (NGOs) and the market can achieve voluntarily and called for effective government regulation. He argued that while market-driven CSR should be valued, it should not be regarded as a long-term substitute for the rule of law.<sup>83</sup>

## X. CSR THROUGH LAW

While CSR efforts by companies are laudable and encouraging, the lack of enforcement power makes their effectiveness doubtful. This paper acknowledges the fact that some CSR efforts can move some organizations to performances that are beyond the letter of the law, but such performances are dependent on the will and tenacity of the organization involved and require no compulsion. This is not to say that there is no room for good CSR policies in the social media industry. This paper calls for CSR efforts that are required by law and regulation as a solution to the problem of gender-based harassment that women in particular encounter on social media sites.

This is not a novel suggestion by any means. According to McBarnet, "governments are [already] fostering CSR through indirect regulation, old legal rights are being put into new uses, and private law – tort law and contract law – are being used: tort law to extend the legal enforceability of CSR issues, contract law to give CSR standards the weight of legal obligation.<sup>84</sup> As McBarnet remarked, non-governmental organizations (NGOs) and civil society have had roles in bringing law into play in innovative and surprising ways to enforce CSR and increasingly to make it a legal obligation.<sup>85</sup>

An example of creative engagement is the use of The Alien Tort Claims Act (ACTA), by NGOs to pursue multinational corporations for human rights abuses committed abroad by foreign governments with which U.S. corporations have been operating in joint ventures. ACTA, a U.S. statute from 1789 to address piracy on the high seas was used by the Center for Constitutional Rights (CCR) in the case of

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<sup>81</sup> G. Chandler, *The Curse of "Corporate Social Responsibility,"* 2 NEW ACADEMY REV. (2003).

<sup>82</sup> Friends of the Earth, December 2001.

<sup>83</sup> D. Vogel, *The Limits of the Market for Virtue,* 2005 ETHICAL CORPORATION 46.

<sup>84</sup> McBarnet, *supra* note 72, at 31.

<sup>85</sup> *Id.* at 23.

*Filartiga v. Pena-Irala*<sup>86</sup> in 1980. While this case dealt with human rights and not business, similar tactics were employed by CCR and other NGOs in the *Unocal* case that settled out of court in 2005. *Unocal* had since merged with *Chevron* but the case put pressure on *Chevron* and other multinationals to implement their human rights policy.<sup>87</sup>

Another example of creative legal challenge to established and published voluntary CSR policy is the case of *Kasky v. Nike*.<sup>88</sup> Similar to the *Unocal* case, the *Kasky* case was settled out of court with *Nike* paying \$1.5 million to the Fair Labor Association,<sup>89</sup> but the case became a warning about the use of CSR in public relations practices. In late 1990s, Marc Kasky, an environmental activist, brought a lawsuit against *Nike* alleging that it had made false statements in response to criticisms that *Nike* was using sweat shops abroad to produce its goods. *Nike* had stated in its CSR reports that it used suppliers who complied with *Nike's* code of conduct and did not use sweat labor. Kasky successfully argued that this was false and misleading and, in violation of California's legislation on unfair competition and false advertising.

Given that regulation is not always as effective as one might hope in controlling business, there is still a lot of room for the existence of CSR policies that are well intentioned and actively enforced. However, this article argues that the ability of women to safely participate in social media conversations and debates – a platform that is perhaps, the most global forum for debates, conversation, news and socialization – is important enough to require additional legal pressures on social media corporations to enforce their own policies. Government also needs to strengthen existing laws in the analog world for the protection of dignity and privacy in the digital world by rolling back some of the immunity afforded to internet service providers through Section 230 of the CDA. Just as in other laws, such as the Digital Millennium Copyright Act (DMCA), where an interactive Internet operator may lose his/her immunity if notice of copyright infringement is ignored, a social media platform that does not expeditiously remove threats, persistent harassment, and doxxing information from its site should lose the protection of the Section 230 of the CDA.

This proposed amendment to Section 230 of the CDA would be a perfect companion to CSR policies already voluntarily enacted by the social media organizations. It would act as an incentive for corporations to abide by their own voluntary policies. This concept would also be effective because it would have limited impact on protected speech rights of individual users of social media platforms. Social media platforms, as noted above, have already devised policies to address unprotected abusive speech on their sites. The threat of losing Section 230 protections would be an additional incentive to follow through on their existing policies.

## XI. CONCLUSION

While men and women both experience online harassment, women are more

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<sup>86</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>87</sup> [www.socialfunds.com/news](http://www.socialfunds.com/news), Aug. 17, 2005.

<sup>88</sup> *Kasky v. Nike, Inc.*, 45 P. 3d 243 (Cal. 2002).

<sup>89</sup> P. Rudolph, *Ethical Reporting and the Law*, ETHICAL CORPORATION, Feb. 3, 2005.

likely to experience gender-based online harassment. The majority of revenge porn victims are women, and women and girls are often the victims of rape videos posted on several online platforms.<sup>90</sup> The particular forms of virulent sexism and harassment women face online have been documented in books such as Danielle Citron's *Hate Crimes in Cyberspace* and articles such as Amanda Hess's "Why Women Aren't Welcome on the Internet"<sup>91</sup> as well as the research results on online harassment published by the Pew Research Center.<sup>92</sup>

In response to online harassment of women, several regulatory measures have been implemented or being advocated. These measure include the SAVE ACT of 2015 (H.R. 285), which passed the House in January 2015 and provided a penalty for knowingly selling advertising that offers certain commercial sex acts.<sup>93</sup> The Senate version of the SAVE Act became law in May 2015. It was added as an amendment (Section 118) to the Justice for Victims of Trafficking Act of 2015 (S. 178), which became Public Law No. 114-22.<sup>94</sup> The Cyber Civil Rights Initiative (CCRI) in just a couple of years managed to get 21 U.S. states to outlaw revenge porn and 17 states about to institute a similar ban.

CCRI, through the office of U.S. Representative Jackie Speier (D-Calif.), was also planning to sponsor a bill in fall 2015 that would outlaw revenge porn nationally.<sup>95</sup> Major online platforms like Twitter, Reddit and Facebook took notice of the changing regulatory environment, and responded by modifying their rules and placing a ban on revenge porn on their sites beginning in 2015.<sup>96</sup> The regulatory environment for the social media platforms was made even more uncertain when the National Association of Attorneys General wrote a letter to Congress in July 2013 asking that 47 U.S.C. § 230(e)(1) (Communications Decency Act, Sec. 230), be amended to allow states and local authorities, and not just the federal government, to investigate and prosecute websites that promote prostitution and child sex trade.<sup>97</sup>

These recent agitations for regulatory changes in the industry to curb online harassment and threats of sexual violence may have prompted social media platforms to come up with new codes of conduct discussed above. However, while the recent publication of new internal policies to curb bad behaviors is admirable, like most codes of conduct and CSR measures, these efforts lack any legal enforcement capabilities. While admirable and sometimes thoughtful, the lack of enforcement mechanisms for CSR policies is problematic. Regulatory effort should come in the form of a modification to Section 230 of the CDA that compels the social media companies to have the code of conduct, enforce the codes of conduct for their members or lose their immunity. This is not a novel concept by any means. It is already in use online for copyright infringement online.

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<sup>90</sup> <http://time.com/3305466/male-female-harassment-online/> (Last visited March 30, 2016).

<sup>91</sup> <https://psmag.com/why-women-aren-t-welcome-on-the-internet-aa21fdb8d6#.9j3t2f223> (Last visited January 16, 2017).

<sup>92</sup> <http://www.pewinternet.org/2014/10/22/online-harassment/> (Last visited March 30, 2016).

<sup>93</sup> <https://www.govtrack.us/congress/bills/114/hr285> (Last visited March 30, 2016).

<sup>94</sup> <https://www.eff.org/deeplinks/2015/01/save-act-passes-house-coming-one-step-closer-chilling-online-speech> (Last visited January 16, 2017).

<sup>95</sup> <http://www.dailydot.com/politics/federal-revenge-porn-bill/> (Last visited March 30, 2016).

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

<sup>97</sup> <https://assets.documentcloud.org/documents/739520/ags-anti-230-letter.pdf> (Last visited March 30, 2016).

Several government agencies in the United States consider internal codes of conduct and an active program of enforcement as mitigating factors in meting out punishments for organizational wrongdoings. Examples of situation where government did not mandate codes but fostered their adoption can be seen in the Foreign Corrupt Practices Act, which introduced tougher penalties for corruption, but the U.S. Sentencing Commission also has scope to mitigate the penalties if a corporation could demonstrate it has a code of conduct in place and an active program of enforcement.<sup>98</sup> Similarly, other agencies, such as the Environmental Protection Agency, take account of internal policies in deciding on penalties. The Securities Exchange Commission (SEC) requires a code of ethics and evidence of effective implementation process. Since 2004, the New York Stock Exchange and NASDAQ have required evidence of a code of conduct and effective implementation among its members. These codes and effective implementation are considered when imposing sentence on an errant member.<sup>99</sup> All of these examples support the notion that that there is still room and a good opportunity for establishing good CSR codes of conduct and having evidence of enforcement within corporations. The threat of losing immunity serves as a regulatory measure to ensure enforcement in the case of social media corporations.

In conclusion, given the importance and pervasiveness of social media platforms to our business and social lives in the U.S., it is imperative to ensure that social media corporations make the platforms safe for participants, and discourage harmful and illegal speech and acts. However, just adopting new codes will not be sufficient to make this happen. It is important that there is the legal enforcement threat of losing immunity to ensure that social media companies are abiding by their own established CSR codes of conduct. Amendment to section 230 of the CDA provides this measure without imposing any extra burden on users of the platforms or owners of the platform. Additionally, concerted advocacy efforts, such as the one by the Cyber Civil Rights Initiative (CCRI), should continue as a check on the social media industry giants to ensure that they are complying with their own internal rules and policies to make the online world a true marketplace where misogyny and trolls do not have a monopoly on speech.

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<sup>98</sup> US Sentencing Commission, *Federal Sentencing Guidelines Manual* (2004). See also L. Paine, R. Deshpande, J. Margolis and K. Bettcher, *Up to Code: Does Your Company's Conduct meet World Class Standards?*, 2005 HARV. BUS. REV. 122.

<sup>99</sup> Simon Webley, *The Nature and Value of Internal Codes of Ethics*, presented at the conference on The Importance of Human Rights in International Business, University of Exeter, Sept. 15-17, 1998.

# UNDERSTANDING THE AGE OF *CITIZENS UNITED* THROUGH BECKER'S THEORY OF 'HISTORY THAT DOES WORK IN THE WORLD'

ROBERT L. KERR\*

*Midway through the first decade of the Citizens United age of campaign-finance regulation and its role in altering any number of legal, political, economic, and social realities over time, this article considers the historical roots of those dramatic changes through historian Carl Becker's theory of the past that tries to identify "history that does work in the world, the history that influences the course of history." That analytic approach is utilized to assess the interplay among critical elements involved in the way a late twentieth-century justice on the United States Supreme Court may have come to apprehend the societal role of corporate political media spending and effect that understanding so as to transform such spending into protected First Amendment speech, "imaginatively" recreating history "as an artificial extension of his personal experience."*

**Keywords:** Citizens United, campaign finance regulation, corporate speech, Carl Becker, Justice Lewis Powell

## I. Introduction

Moving into the second half of the first decade of the *Citizens United* age of campaign-finance regulation, the deluge of almost limitless spending on elections that it unleashed continues to surge far beyond the particulars of its holding.<sup>1</sup> Amid estimates that more than \$10 billion would be spent on the 2016 presidential campaign, the head of the Federal Election Commission declared that her agency was so overwhelmed it was "worse than dysfunctional" and that it was unlikely any federal campaign-finance laws could be enforced.<sup>2</sup>

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<sup>1</sup> 558 U.S. 310 (2010). In that case, a five-to-four majority swept away a century-old body of law restricting corporate political media spending in candidate elections by holding for the first time that corporations may make unlimited political expenditures directly from their treasuries. Campaign-finance regulatory efforts have since been further weakened by other rulings, including *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), and *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014).

<sup>2</sup> Eric Lichtblau, *F.E.C. Can't Curb 2016 Election Abuse, Commission Chief Says*, N.Y. TIMES, May 2, 2015, at A1.

Empowered by looser fund-raising rules since *Citizens United* and freedom to spend more than ever on elections, a handful of donors of unprecedented concentration was dominating funding for presidential candidates, an analysis five years after the ruling found.<sup>3</sup> The biggest donors have begun holding what amounts to auditions for their largesse.<sup>4</sup>

Such developments have spawned the rise of organizations such as Free Speech for People, Move to Amend, and People for the American Way, devoted to rolling back *Citizens United* with a variety of campaign-finance-reform efforts aimed at establishing “that inalienable rights belong to human beings only, and that money is not a form of protected free speech under the First Amendment and can be regulated in political campaigns.”<sup>5</sup> That movement has focused in particular on proposed constitutional amendments that seek to declare that the First Amendment does not bar Congress and state legislatures from enacting campaign-finance restrictions that “distinguish between corporations and real people.”<sup>6</sup> By mid 2016, legislatures in seventeen states had committed to support such an amendment.<sup>7</sup> Amendments and related campaign-finance legislation remain pending in Congress, such as the We the People Act.<sup>8</sup> In surveys, Americans have expressed broad support for such efforts.<sup>9</sup>

Whatever course the many surging currents set in motion by *Citizens United* may ultimately take, their collective prominence confirms the validity of conceptualizing the years since the ruling as an historical era, useful in helping to assess the altered nature of any number of legal, political, economic, and social realities over time. So this article seeks to contribute to efforts to understand the historical roots of those dramatic changes across the American landscape in the latter twentieth and early twenty-first centuries. It does so by proposing that those beginnings be considered through the explanatory view of a lens provided by a theory of the past that tries to identify “history that does work in the world, the history that influences the course of history,” in contrast

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<sup>3</sup> Nicholas Confessore, Sarah Cohen & Karen Yourish, *Small Pool of Rich Donors Dominates Election Giving*, N.Y. TIMES, August 1, 2015, at A1.

<sup>4</sup> *Republicans Audition for Big Money*, N.Y. TIMES, July 31, 2015, at A20.

<sup>5</sup> MTA Coalition, MOVE TO AMEND, accessed at: <http://movetoamend.org/about-us> (Last visited July 1, 2016).

<sup>6</sup> *Amending the Constitution to Overturn Citizens United*, PEOPLE FOR THE AMERICAN WAY, accessed at: <http://www.pfaw.org/issues/government-people/amending-constitution-overturn-citizens-united-why-amendment-necessary> (Last visited July 1, 2016).

<sup>7</sup> Bri Holmes, *New York Becomes the 17<sup>th</sup> State to Call for a Constitutional Amendment to Reclaim Our Democracy*, FREE SPEECH FOR PEOPLE, June 15, 2016, accessed at: <http://freespeechforpeople.org/new-york-becomes-17th-state/> (Last visited July 1, 2016).

<sup>8</sup> *The “We the People Act,”* DEMOCRATIC POLICY & COMMUNICATIONS CENTER, accessed at: <http://www.politico.com/f/?id=00000155-3532-d270-ab57-f772692c0001> (Last visited July 1, 2016).

<sup>9</sup> Nicholas Confessore & Megan Thee-Brenan, *Poll Shows Americans Favor an Overhaul of Campaign Financing*, N.Y. TIMES, June 2, 2015, at A18.

to the “history that lies inert in unread books [and] does no work in the world.”<sup>10</sup>

This study utilizes an analytic approach sometimes referenced as the “Mr. Everyman” theory of history in order to consider the interplay among critical elements involved in the way a late twentieth-century justice on the United States Supreme Court may have come to apprehend the societal role of corporate political media spending and effectuate that understanding so as to transform such spending into protected First Amendment speech. Through that approach, this analysis asserts the continued relevance of a near century-old thesis in illuminating the role that an individual’s “imaginatively recreat[ing history] as an artificial extension of his personal experience”<sup>11</sup> can have significant impact far beyond the personal. That process, which historian Carl Becker articulated as “living history, that pattern of remembered events, whether true or false, that enlarges and enriches the collective specious present,”<sup>12</sup> is examined here as a pivotal dynamic in shaping our present age of *Citizens United*.

## II. The Everyman Philosopher and the Practical Justice

The work for which Carl Lotus Becker is best remembered today was built upon a critique he had been developing for some time when he delivered his “Everyman His Own Historian” address to the American Historical Association, “the profession’s most prestigious rostrum,”<sup>13</sup> in Minneapolis, Dec. 29, 1931. *The New York Times* devoted most of a full column to Becker’s speech on its editorial page, breaking down his thesis and calling it an address that was “meat and drink” to laymen.<sup>14</sup> Published and republished widely since then, it is remembered as “a richer, more refined, and more elegant restatement of the ideas he had been professing for the past twenty years.”<sup>15</sup> Peter Novick, whose work has focused on the history of historiographic approaches, has declared, “No presidential addresses to the American Historical Association ever occasioned as much discussion as Becker’s ‘Everyman’ and [Charles] Beard’s ‘Act of Faith’ ” two years later, and it would be “impossible to find two more influential critics of the doctrine of historical objectivity.”<sup>16</sup>

Called “the fullest expression of the philosophy of historical relativism” — although Becker did not embrace that label — his presidential address sparked such an “electrifying response” due in part, historian Milton Klein wrote, to “its contrast with the dominant theory of historical writing that had controlled the profession from its beginnings in the 1880s as a scholarly discipline,” referred to variously as “scientific history,” “scientific determinism,”

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<sup>10</sup> CARL BECKER, *EVERYMAN HIS OWN HISTORIAN: ESSAYS ON HISTORY AND POLITICS* 252 (1935).

<sup>11</sup> *Id.* at 245.

<sup>12</sup> *Id.* at 252-3.

<sup>13</sup> PETER NOVICK, *THAT NOBLE DREAM: THE ‘OBJECTIVITY QUESTION’ AND THE AMERICAN HISTORICAL PROFESSION* 253 (1988).

<sup>14</sup> *History as Low-Brow*, N.Y. TIMES, Jan. 10, 1932, at E1.

<sup>15</sup> Milton M. Klein, *Everyman His Own Historian: Carl Becker as Historiographer*, 19 HIST. TCHR. 1 (1985), at 105.

<sup>16</sup> NOVICK, *supra* note 13, at 253, 258.

and “objectivism.”<sup>17</sup> The principal argument put forth by Becker and other historians of the era such as Beard and Frederick Jackson Turner, “was that so far as they could see historical interpretations always had been, and for various technical reasons always would be, ‘relative’ to the historian’s time, place, values, and purposes.”<sup>18</sup> The “Everyman” element derived from Becker’s thesis that all people, in effect, have their own history, “informal and unrefined though it be,” with professional historians seeking at best “merely to correct the cruder image of the past held by laymen.”<sup>19</sup>

Becker made the case for what he called “the specious present” as “an unstable pattern of thought, incessantly changing in response to our immediate perceptions and the purposes that arise therefrom.” Ultimately, “each one of us (professional historian no less than Mr. Everyman) weaves into this unstable pattern such actual or artificial memories as may be necessary to orient us in our little world of endeavor.”<sup>20</sup> Whenever in the process of “constructing this more remote and far-flung pattern of remembered things,” Mr. Everyman “works with something of the freedom of a creative artist; the history which he imaginatively recreates as an artificial extension of his personal experience will inevitably be an engaging blend of fact and fancy, a mythical adaptation of that which actually happened.”<sup>21</sup>

Not quite half a century after Becker’s presidential address set off that still reverberating call for change in the practice of writing and understanding history, Lewis Franklin Powell, Jr., essayed forth in another prominent venue with an effort at changing something that had also been on his mind for some time. He had been an associate justice on the United States Supreme Court for six years, and a corporate attorney for decades before that, when the landmark *First National Bank of Boston v. Bellotti* came before the Court. When circumstances ultimately positioned him to be the author of the April 26, 1978, opinion that would come to be characterized as the “Magna Carta” of corporate First Amendment jurisprudence,<sup>22</sup> Justice Powell managed to pull together the five-to-four majority that first brought corporate political media spending within the constitutional protections theretofore extended only to the freedom of speech of human beings.<sup>23</sup>

Without the holding that *Bellotti* institutionalized in First Amendment case law, corporate managers would only be able to spend their own money for

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<sup>17</sup> KLEIN, *supra* note 15, at 103.

<sup>18</sup> NOVICK, *supra* note 13, at 166.

<sup>19</sup> KLEIN, *supra* note 15, at 105.

<sup>20</sup> BECKER, *supra* note 10, at 241.

<sup>21</sup> *Id.* at 245.

<sup>22</sup> Norman Dorson and Joel Gora, *Free Speech, Property, and the Burger Court: Old Values, New Balances*, 1982 SUP. CT. REV. 195, 212 (1982).

<sup>23</sup> 435 U.S. 765 (1978). Corporate political media spending (often referred to as “corporate speech”) is the more precise term for the First Amendment category of corporate expression that seeks to influence political outcomes or social climate. It is distinguished from “commercial speech”—media efforts that promote products or services. Each has generated a distinct body of First Amendment law, and in that context, not all corporate speech is *commercial*, and neither is all commercial speech *corporate*.

political media purposes, rather than that of their shareholders. And without *Bellotti*, the Supreme Court's 2010 ruling in *Citizens United*, which more sweepingly than ever protected that sort of corporate spending from regulation aimed at preventing corruption of political campaigns, almost certainly could not have been possible.<sup>24</sup> When the Court in *Citizens United* declared unconstitutional virtually all limits on expenditures by corporations to influence political campaigns, the majority opinion by Justice Anthony M. Kennedy referenced *Bellotti* twenty-four times – rather remarkable in light of the fact that the Court had issued many other rulings on corporate political media spending in the thirty-two years between those two cases.

As the “first justice since Louis D. Brandeis to come straight from private practice,” more than half a century before, Justice Powell “brought with him the careful reasoning, the practical judgment, and the tact of the successful business lawyer who concentrates on solutions rather than theory.”<sup>25</sup> Shortly before joining the Court, corporate attorney Powell had authored something of his own historical assessment of what social and political trends of the sixties meant for the American business community. As *The New York Times* reported it in 1972, “Lewis F. Powell, Jr., in a confidential memorandum written two months before his nomination to the Supreme Court, urged the United States Chamber of Commerce to mount a campaign to counter criticism of the free enterprise system in the schools and the news media.”<sup>26</sup> In the memorandum, distributed originally to the Chamber's membership in 1971 under the headline “Attack on American Free Enterprise System,” Powell also recommended aggressive efforts in the courts – particularly the Supreme Court – to advance business interests through litigation and the filing of *amici* (friend-of-the-court) briefs.<sup>27</sup>

In the years that followed, the thirty-four page “Attack” memorandum would prove to be highly influential, providing “the very blueprint for Supreme Court litigation that the Chamber has since followed,” research such as legal scholar Richard Lazarus's has documented.<sup>28</sup> The Chamber began filing ever larger numbers of friend-of-the-court briefs in cases beginning in 1977 – including one in *Bellotti* that declared the messages disseminated by “incorporated enterprise” were as equally vital to “the free, frank, and robust expression of public opinion” fostered by the First Amendment as any other source of such speech.<sup>29</sup> It also launched an era in which corporate interests would win ever greater Bill of Rights guarantees once held only by human

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<sup>24</sup> 558 U.S. 310 (2010).

<sup>25</sup> ANNE HOBSON FREEMAN, *THE STYLE OF A LAW FIRM: EIGHT GENTLEMEN FROM VIRGINIA* 192 (1988).

<sup>26</sup> Fred P. Graham, *Powell Proposed Business Defense*, N.Y. TIMES, Sept. 29, 1972, at 31.

<sup>27</sup> Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., “Attack on American Free Enterprise System,” [hereinafter “Attack Memorandum”] in U.S. Chamber of Commerce, WASH. REP., Aug. 23, 1971, at 6, on file in Lewis F. Powell, Jr. Papers, Powell Archives, Washington and Lee University School of Law [hereinafter LFP Papers].

<sup>28</sup> Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L. J. 1487, 1505 (2008).

<sup>29</sup> Brief for Chamber of Commerce of the United States of America at 3-5, *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (No. 76-1172).

beings,<sup>30</sup> as well as laying the ground for a legacy in which Justice Powell continues to be frequently characterized in terms such as “the man to blame for corporations having more rights than you.”<sup>31</sup>

### III. Everyman His Own Imperfect Historian

Becker and the others who came to be referenced commonly as historical relativists supported their central thesis first “with countless examples . . . that all historians, including professional historians, right down to the present day, could be shown to have been massively influenced in constructing their accounts by their differing and changing ideological commitments,” and second, with assertions that “the problem of selection, and the valuations implicitly embedded within frames of reference, made the ideological nature of historical work inescapable.” Thus, they concluded, the objective of “a value-free and objective historiography . . . was chimerical.”<sup>32</sup> Establishing “the facts is always . . . the first duty of the historian,” Becker wrote, but to assume that “the facts, once established in all their fullness, will ‘speak for themselves’” was, he declared, “perhaps peculiarly the illusion of those historians of the last century who found some special magic in the word ‘scientific.’”<sup>33</sup> Becker “awoke historians to the realization that science and history have different objectives and values,” articulating “the central role of the historian as an active present participant in human experience, trying to enlarge and enrich his perspective by linking himself to the thought and action of life in the past,” wrote intellectual historian Cushing Strout.<sup>34</sup>

The work of Becker and others in his school of historiographical thought “reminded historians of their fallibility, [and] . . . asked historians to study the relationship between the rational and irrational, the conscious and subconscious, impersonal forces and human motivations, the social sciences and intellectual thought,” and “helped to free history from the shackles of scientific determinism,” Klein observed. “If historians today are neither quite relativist nor determinist or partly both, it may be because they have become sensitive to Becker’s warning not to be too certain of anything in the business of historical writing.”<sup>35</sup> In his exhaustive history of “the fortunes of the idea of objectivity among American professional historians over the last century,” Novick concluded that “what is striking about the debate” incited particularly by Becker in the 1930s “is that almost none of the many historians who rejected their conclusions, who expressed dismay at the implications of those

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<sup>30</sup> Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L. J. 577 (1990).

<sup>31</sup> Jeffrey Clements, *The Real History of ‘Corporate Personhood*, ROOTSACTION, December 8, 2011, accessed at: <http://rootsaction.org/news-a-views/324-the-real-history-of-corporate-personhood-meet-the-man-to-blame-for-corporations-having-more-rights-than-you-> (Last visited June 30, 2016). Clements is the author of CORPORATIONS ARE NOT PEOPLE: WHY THEY HAVE MORE RIGHTS THAN YOU DO AND WHAT YOU CAN DO ABOUT IT (2011).

<sup>32</sup> *Id.* at 259-60.

<sup>33</sup> BECKER, *supra* note 10, at 249.

<sup>34</sup> CUSHING STROUT, THE PRAGMATIC REVOLT IN AMERICAN HISTORY: CARL BECKER AND CHARLES BEARD 41 (1958).

<sup>35</sup> KLEIN, *supra* note 15, at 107.

conclusions, or were appalled by their alternative conceptualizations, ever challenged their arguments.”<sup>36</sup> And to this day, there is “among even the firmest supporters of the idea of objectivity, a bit less confidence in the capacity of historians, no matter how rigorously trained, to completely purge themselves of all values.” Although conceptualizations of objectivity and relativism have been “reworked and reinterpreted over the last hundred years,” for historians today, “contributions to knowledge’ are somewhat more often seen as dialectical, rather than as permanent bricks.”<sup>37</sup>

Early in “Everyman,” Becker worked through two understandings of history — “the actual series of events that once occurred; and the ideal series that we affirm and hold in memory.”<sup>38</sup> Seeking, he said, to “perform on the subject of history” the basic mathematical function of reducing a fraction to its lowest terms, he arrived at his working definition of history as “the memory of things said and done.” He asserted that as “a definition that reduces history to its lowest terms, and yet includes everything that is essential to understanding what it really is.”<sup>39</sup> He argued the accuracy of that conceptualization of “history” in light of the inconvenient reality that “no doubt throughout all past time there actually occurred a series of events which ... constitutes history in some ultimate sense,” we can know nothing about most, “not even that they occurred; many of them we can know only imperfectly; and even the few events that we think we know for sure we can never ... observe or test them directly.” Thus, once the actual event “has disappeared ... the only objective reality we can observe or test is some material trace which the event has left — usually a written document.”<sup>40</sup> From there, he introduced his “Mr. Everyman.” If history, reduced to its most essential understanding, he wrote, “is the memory of things said and done, then it is obvious that every normal person, Mr. Everyman, knows some history.” He explained how his Mr. Everyman “reaches out into the country of the past” every day, in an ongoing process, and recreates his “world of endeavor, pulls together as it were things said and done in his yesterdays, and coordinates them with his present perceptions and with things to be said and done.”<sup>41</sup>

Becker pointed out that even though we tend to think of “the present alone as real,” with the past over and the future nonexistent, “strictly speaking, the present doesn’t exist, or is at best no more than an infinitesimal point in time, gone before we can note it as the present.” What we think of as the present is instead something that we create “by robbing the past, by holding on to the most recent events and pretending that they all belong to our immediate perceptions.”<sup>42</sup>

It is in that sense that this study considers the way that Lewis Powell could have assessed what he understood as that sort of present, for example, during the time when he was talking with his neighbor, Eugene B. Sydnor, Jr.,

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<sup>36</sup> NOVICK, *supra* note 13, at 260.

<sup>37</sup> *Id.* at 2.

<sup>38</sup> BECKER, *supra* note 10, at 234.

<sup>39</sup> *Id.* at 235.

<sup>40</sup> *Id.* at 233.

<sup>41</sup> *Id.* at 236.

<sup>42</sup> *Id.* at 240.

before joining the Supreme Court about what was going on in the world and what could be done to right matters for the business community. He authored his memorandum for the United States Chamber of Commerce in October of 1971, in response to conversations he had with Sydnor, who was chair of the Education Committee of the Chamber.<sup>43</sup> Whatever may have factored into Powell's assessment as he authored his "Attack" memorandum for his neighbor's employer — and later his *Bellotti* opinion — it almost certainly was grounded not just strictly in that moment but in some level of historical understanding. Central to that understanding was an idealistic faith in the business community through which he interpreted the social and cultural evolution of the era as a threat to the influence of business.

All such historical understandings, however, have an inherent fallibility, which Becker characterized as "an unstable pattern of thought, incessantly changing in response to our immediate perceptions and the purposes that arise therefrom."<sup>44</sup> In order to prepare for what lies ahead, as we draw upon our sense "more or less of the past, the future refuses to be excluded; and the more of the past we drag into the specious present, the more an hypothetical, patterned future is likely to crowd into it also." For Becker, the result was an elusive process through which either "our memories construct a pattern of past events at the behest of our desires and hopes, or ... our desires and hopes spring from a pattern of past events imposed upon us by experience and knowledge."<sup>45</sup>

This study considers the manner in which the events and circumstances that lay ahead for citizen Lewis Powell later in the 1970s may have shaped the understandings that he articulated in his "Attack" memorandum and later his *Bellotti* opinion that proved so consequential for American political and media culture. The evidence indicates that he authored the memorandum sometime around August of 1971, shortly before the Nixon White House would talk to him formally about filling a Supreme Court vacancy in late October of that year.<sup>46</sup> It was the second time President Richard Nixon had sought to appoint Powell to the Court, the senior partner in a prestigious Richmond, Virginia, law firm having declined the offer in 1971.<sup>47</sup> Soon, his time at the Court would provide Justice Powell with opportunities to adjudicate what can be thought of as his own Mr. Everyman understanding into constitutional law.

In Becker's analysis of Mr. Everyman's motivation to be his own historian, he "wishes to adjust himself to a practical situation, and on that low

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<sup>43</sup> POWELL, *supra* note 27, at 6.

<sup>44</sup> BECKER, *supra* note 10, at 241.

<sup>45</sup> *Id.* at 241-2.

<sup>46</sup> Nixon's Attorney General John Mitchell discussed filling the vacancy with Powell on October 19, 1971, two years after serious discussions regarding an earlier vacancy at the Court. See JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT 200-201, 230-31* (2002).

<sup>47</sup> In 1969, when he had been Nixon's first choice for a previous vacancy on the Court, Powell told the President that at sixty-two he was too old to begin an appointment to the Court. He also had concerns about his health, and his wife was very reluctant to leave their home in Richmond, the city where she had always lived. Harry A. Blackmun eventually filled that seat. See JOHN C. JEFFRIES, *JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 2, 3-8* (1994).

pragmatic level he is a good historian precisely because he is not disinterested: he will solve his problems, if he does solve them, by virtue of his intelligence and not by virtue of his indifference.”<sup>48</sup> Indisputably, citizen Powell was not indifferent to solving the problem before him — as he understood it — of how to save the free enterprise system from being crushed by the social and political developments of the era. In his memorandum for the Chamber he called for coordinated activism by business because “few elements of American society today have as little influence in government as the American businessman, the corporation, or even the millions of corporate stockholders,” he wrote. “Current examples of the impotency of business, and of the near-contempt with which businessmen’s views are held, are the stampedes by politicians to support almost any legislation related to ‘consumerism’ or to the ‘environment.’”<sup>49</sup> He called for corporations to counter the “disquieting voices ... of criticism” by waging through advertising and other media efforts “a sustained, major effort to inform and enlighten the American people,” not only separately but with a level of coordination beyond any ever mounted at that time.<sup>50</sup> He drew upon research after a fashion, invoking as support for his assessment of the problem sources such as *The Wall Street Journal*, commentator William F. Buckley, Jr., and economist Milton Friedman.

His concerns also led citizen Powell to draw upon what Becker characterized as Mr. Everyman’s impulse to fashion for himself “a more spacious world than that of the immediately practical.”<sup>51</sup> To that end, Mr. Everyman will variously “recall the days of his youth, the places he has lived in, the ventures he has made, the adventures he has had — all the crowded events of a lifetime; and beyond and around this central pattern of personally experienced events, there will be embroidered a more dimly seen pattern of artificial memories, memories of things reputed to have been said and done in past times which he has not known.” Through a process of this sort, Mr. Everyman “completes the central pattern of his personal experience” and understanding, “woven, he could not tell you how, out of the most diverse threads of information, ... from the most unrelated sources — from things learned at home and in school, from knowledge gained in business or profession, from newspapers glanced at, from books ... read or heard of, from remembered scraps of newsreels, ... from a thousand unnoted sources.”<sup>52</sup>

Becker also sought to characterize the essential implications of the way he believed Mr. Everyman assimilated historical understandings, drawing upon his own particular “mass of unrelated and related information and misinformation, of impressions and images, out of which he somehow manages, undeliberately for the most part, to fashion a history, a patterned picture of remembered things said and done in past times and distant places.” For Becker it was neither possible nor essential “that this picture should be complete or completely true: it is essential that it should be useful to Mr. Everyman; and that it may be useful to him he will hold in memory, of all the things he might hold in memory, those things only which can be related with

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<sup>48</sup> BECKER, *supra* note 10, at 234.

<sup>49</sup> POWELL, *supra* note 27, at 6.

<sup>50</sup> *Id.* at 1, 5.

<sup>51</sup> BECKER, *supra* note 10, at 244.

<sup>52</sup> *Id.* at 244-5.

some reasonable degree of relevance and harmony to his idea of himself and of what he is doing in the world and what he hopes to do.”<sup>53</sup> In that vein, this study proposes that what citizen Powell ultimately drew upon as most useful to him and what he was doing in the world proved over time highly significant in shaping a consequential body of First Amendment law and broader political culture in the latter twentieth and early twenty-first centuries.

Ultimately, Becker wrote, Mr. Everyman’s historical recreations prove to be “as a whole perhaps neither true nor false, but only the most convenient form of error.” Discussing his “Everyman” address in a letter to a colleague in 1932, Becker spoke of how historical “facts may be determined with accuracy; but the ‘interpretation’ will always be shaped by the prejudices, biases, needs, of the individual and these in turn will depend on the age in which he lives.” Thus, he had aimed in his essay “to show that Mr. Everyman has and will have his history, true or false, and that one function of the historian is to keep Mr. Everyman’s history, so far as possible, in reasonable harmony with what actually happened.”<sup>54</sup> In Becker’s historical writing on the American revolution, his biographer wrote that he “inquired not whether the particulars in the Declaration of Independence were true, not whether George III was guilty as charged, but how honest men like Jefferson could think that he was.”<sup>55</sup> This study proposes Becker’s “Mr. Everyman” theory of history as a lens through which to consider how an individual like Justice Powell may have thought as he did of establishing First Amendment protection for political media spending by corporations.

To the extent that Lewis Powell succeeded in effecting his historical understanding into American jurisprudence and democratic governance, it can be seen as what Becker called part of the “unconscious and necessary effort on the part of ‘society’ to understand what it is doing in the light of what it has done and what it hopes to do.”<sup>56</sup> And for historians considering the implications of such contributions, Becker maintained the “proper function is not to repeat the past but to make use of it, to correct and rationalize for common use Mr. Everyman’s mythological adaptation of what actually happened, ... surely under bond to be as honest and as intelligent as human frailty permits.”<sup>57</sup> Although we can never know all that would have been part of citizen or Justice Powell’s “patterned picture of remembered things,” we can sketch a good-faith rendition, recognizing, as Becker did, that “to study history is always to attempt a self-transcendence that makes possible an imaginative grasp of men whose purposes are not our own and whose world seems at first alien and unintelligible.”<sup>58</sup>

#### **IV. A Justice Everyman’s Remembered Things**

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<sup>53</sup> *Id.* at 245.

<sup>54</sup> Letter from Carl L. Becker to William E. Dodd (Jan. 27, 1932), in MICHAEL KAMMEN, ED., *WHAT IS THE GOOD OF HISTORY?: SELECTED LETTERS OF CARL L. BECKER, 1900-1945* 157 (1973).

<sup>55</sup> BURLEIGH TAYLOR WATKINS, *CARL BECKER: A BIOGRAPHICAL STUDY IN AMERICAN INTELLECTUAL HISTORY* 120 (1961).

<sup>56</sup> BECKER, *supra* note 10, at 247-8.

<sup>57</sup> *Id.* at 253.

<sup>58</sup> STROUT, *supra* note 34, at 43.

Powell grew up in an area of Richmond, Virginia, where his parents moved shortly after he was born in 1907 in Suffolk, Virginia, that during his middle-class youth was isolated enough that his father kept fifteen foxhounds and a few horses.<sup>59</sup> While attending the private McGuire's University School, he won "the school's highest honor, the Jack Gordon Medal ... bestowed in recognition of the highest traits of manly character: dauntless courage and stainless integrity."<sup>60</sup> He completed college and law school at Washington and Lee University, and at his father's urging, a Master of Laws degree at Harvard. Not long after returning to Richmond, he joined the Hunton, Williams firm in 1934. By his own account, he "read an enormous amount of history.... It was clear to me from reading history that the people who *made* history were military people and lawyers. I decided I didn't want to be a military person. So I was a lawyer."<sup>61</sup>

After early tort work for Southern Railway, he got his first "sampling of modern corporate practice" when he filed "the first registration statement in Virginia under the new Securities Exchange Act." The Act was so recently passed that "neither his law school training nor his senior partners could help him." So he traveled to Washington to research other registration statements at the SEC before writing the one for his client.<sup>62</sup> It led to more work on securities, and he also engaged in a good deal of local litigation, while planning for bigger things. He lunched weekly with boyhood friend and Richmond banker Harvie Wilkinson. They were young men who "were clearly driving for the top," Wilkinson recalled in 1985. "To each other we never pretended anything else."<sup>63</sup> In the 1930s, both served on the boards of many local businesses, which Wilkinson said, "gave them invaluable training for the larger corporate boards that lay ahead."<sup>64</sup> Powell put in "legendary hours," working most weekends until joining the Army after the bombing of Pearl Harbor and serving through World War II in combat in North Africa and helping break German code.<sup>65</sup> He returned home to "work even harder than he had worked before, extending his influence in the community to the point that he was well known to its business leaders, trusted by them all and eventually given a lion's share of their business.... Powell became a great 'rainmaker' for the firm and, finally, the dominant partner."<sup>66</sup>

He went on to serve on the boards of eleven corporations and to hold the presidencies of the American Bar Association and American College of Trial Lawyers.<sup>67</sup> Spending "nearly forty years ... in corporate boardrooms led him to trust the character of the average American businessman," legal scholar A.C. Pritchard concluded, because "[i]n Powell's world, free enterprise and the

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<sup>59</sup> FREEMAN, *supra* note 25, at 144.

<sup>60</sup> *Id.* at 146.

<sup>61</sup> *Id.* at 144.

<sup>62</sup> *Id.* at 150.

<sup>63</sup> *Id.* at 151.

<sup>64</sup> *Id.* at 152.

<sup>65</sup> *Id.* at 153, 154-6.

<sup>66</sup> *Id.* at 153-158.

<sup>67</sup> JEFFRIES, *supra* note 47, at 1.

businessmen who made it work were the foundation of strong communities.”<sup>68</sup> Powell’s connections in big business were so deep that he doubted he could be confirmed to the Supreme Court, worrying that he would suffer the same fate of recent failed Nixon nominee Clement Haynsworth because it seemed nominating “another southern lawyer with a business-oriented background would invite — if not assure — organized and perhaps prolonged opposition.”<sup>69</sup> That scenario did not come to pass, quite possibly most of all because Powell’s confidential memorandum to the Chamber of Commerce calling for more aggressive action by business interests in media and the courts was not made public until a few months later.<sup>70</sup>

The impact of that memorandum on American business was speedy and dramatic. While “not all businessmen shared Powell’s passions,” historian Kim Phillips-Fein has concluded, “those who did began to act as a vanguard organizing the giants of American industry.”<sup>71</sup> One of the earliest of those leaders, beer magnate Joseph Coors, Sr., said it was the Powell memorandum that led him in 1971 to invest the first \$250,000 in funding for what later became the Heritage Foundation.<sup>72</sup> Such synergy between business interests and the political movement that has come to be known as modern conservatism began to reach critical mass in the 1970s.<sup>73</sup> Many of the nation’s wealthiest business executives began to generously subsidize think tanks, journals, and other media activities that served to more widely promote the work of economists who favored a diminished role for government regulation, according to political scientist Patrick Allitt in his history of conservatism.<sup>74</sup> The centrality of financial support from business leaders such as Coors to the modern conservative movement is also documented in research by Nicole Hoplin and Ron Robinson.<sup>75</sup> Political scientist Steven Teles has characterized the memorandum as “the most notorious indication of business’s early strategic response to legal liberalism.”<sup>76</sup>

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<sup>68</sup> A.C. Pritchard, *Justice Lewis F. Powell, Jr., and the Counterrevolution in the Federal Securities Laws*, 52 DUKE. L. J. 841, 947 (2003).

<sup>69</sup> Letter from Powell, to John N. Mitchell, Attorney General, U.S. Department of Justice 1 (Dec. 12, 1969), cited in JEFFRIES, *supra* note 47, at 2.

<sup>70</sup> Jack Anderson, *Powell’s Lesson to Business Aired*, WASH. POST, Sept. 28, 1972, at F2; Jack Anderson, *FBI Missed Blueprint by Powell*, WASH. POST, Sept. 29, 1972, at C27. Even the Nixon Administration was not aware of the memorandum until after Justice Powell’s confirmation, according to former White House Counsel John Dean, who said it likely would have made the President view his nominee even more favorably. John W. Dean, e-mail message to author, Feb. 27, 2010. See detailed White House discussions on the Powell nomination, DEAN, *supra* note 46, at 200-33, 253-60.

<sup>71</sup> KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN* 165 (2009).

<sup>72</sup> LEE EDWARDS, *THE POWER OF IDEAS: THE HERITAGE FOUNDATION AT 25 YEARS* 125-6 (1997).

<sup>73</sup> PATRICK ALLITT, *THE CONSERVATIVES: IDEAS AND PERSONALITIES THROUGHOUT AMERICAN HISTORY* 2 (2009).

<sup>74</sup> *Id.* at 225, 228-34.

<sup>75</sup> NICOLE HOPLIN & RON ROBINSON, *FUNDING FATHERS: THE UNSUNG HEROES OF THE CONSERVATIVE MOVEMENT* (2008).

<sup>76</sup> STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 61 (2008).

Legal scholar Ann Southworth also has detailed at length how the “counterattack” began “soon after the release of the Powell memorandum,” quickly fulfilling not only his contemplation that “the U.S. Chamber of Commerce would become the primary representative of American business in the courts and agencies” but also the even more rapid creation of a number of “conservative public interest law organizations” supported by foundations and business.<sup>77</sup> Justice Ruth Bader Ginsburg often has commented publicly on the striking influence the memorandum had on legal activism by business interests, declaring, for example that the “briefs that currently troop before the Supreme Court, from all manner of organizations, suggest that Powell’s message has been heard.”<sup>78</sup> Recent analysis by legal scholar Jeffrey Rosen has detailed the success of the memorandum’s call for “creating a network of activist conservative litigation groups.”<sup>79</sup>

Yet it is also almost certainly overreaching to suggest that Powell went to the Supreme Court in order to actively participate in that movement from the bench. Indeed, he seems to have tried his best to avoid ever joining the Court, declining to accept Nixon’s first offer to be nominated and then accepting reluctantly two years later only under considerable pressure from the President.<sup>80</sup> Even then, he attempted to withdraw just hours before his nomination was announced and went on to tell his sister on the day he was sworn in as a justice in January of 1972 that if he had had another twenty-four hours to consider the appointment, he would not have accepted it.<sup>81</sup> Powell agreed to fill one of the empty seats following the retirements of justices Hugo Black and John Marshall Harlan only at the President’s insistence that it was Powell’s duty to his country.<sup>82</sup>

Further, Powell’s personal politics, though avowedly pro-business as a member of so many corporate boards and counsel to countless corporate clients, were more nuanced and diverse. As a member of the school board in Richmond in the late 1950s, he worked to moderate efforts of Virginia legislators and school board members to resist the Supreme Court’s order to desegregate schools and was influential in keeping Richmond schools open when many others in Virginia closed rather than desegregate.<sup>83</sup> His closest friend at his Richmond firm, George Gibson was also a top corporate lawyer, having rewritten the Virginia general corporation laws himself, but he was also a legal scholar who once was “violently” opposed to the New Deal policies of President Franklin Roosevelt yet ultimately “greatly changed his attitude and decided that Roosevelt had prevented revolution or at least greater disorder,” Powell told a biographer of the firm.<sup>84</sup>

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<sup>77</sup> ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* 15 (2008).

<sup>78</sup> Ruth Bader Ginsburg, *Supreme Court Pronouncements on the Conduct of Lawyers*, 1 J. INST. STUD. LEGAL ETHICS 1 9-10 (1996).

<sup>79</sup> Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES MAG., April 17, 2005, at 44-47.

<sup>80</sup> JEFFRIES, *supra* note 47, at 3-8.

<sup>81</sup> *Id.* at 1.

<sup>82</sup> *Id.* at 1.

<sup>83</sup> FREEMAN, *supra* note 25, at 160.

<sup>84</sup> *Id.* at 174-82.

Powell was one of four new justices appointed by Nixon between mid 1969 and the beginning of 1972 in an effort to sharply change the direction of the Court after the retirement of Chief Justice Earl Warren.<sup>85</sup> “On the(?) crucial issues, the Nixon Justices could be expected, more often than not, to end up on the same side,” Justice Powell’s biographer wrote. “Each of them was more conservative than any of the holdovers from the Warren Court.”<sup>86</sup> Yet Justice Powell over the course of his time at the Court would prove by some measures to be its most centrist jurist, siding with the majority more than any other justice — in ninety percent of the cases —and also casting fewer dissenting votes.<sup>87</sup> Forming a majority in the *Bellotti* case, however, would require him to go to great lengths. Also evident in its development is the way that the dominant experiences from his professional life likely shaped the particular understanding of the corporate being that he assertively strove in that case to institutionalize in First Amendment law.

The argument has been made that Justice Powell’s judicial centrism derived more from a narrow “social vision of the class he represented” than from a broader philosophical grounding.<sup>88</sup> Legal scholar Mark Tushnet characterized that vision as having developed from “a relatively well-to-do background in the solid white Virginia middle class” and a rapid rise “to the upper echelon of corporate America” that “did not expose him to the wide range of human experiences that might have expanded his social vision.”<sup>89</sup> During the deliberations on *Bowers v. Hardwick*, for example, in which Justice Powell ultimately provided the fifth vote for a majority holding that criminal prosecutions of consensual homosexual sodomy were constitutional, he discounted assertions on the prevalence of homosexuality in society by insisting that he had never known a homosexual. It was common knowledge at the Court that he had worked with and even employed homosexuals, and in fact had discussions with a gay clerk working for him during *Bowers* — without either of them acknowledging the clerk’s sexual orientation — as Justice Powell wrestled with his decision.<sup>90</sup> Justice Powell later said he regretted that vote, and his biographer concluded that he maintained “he had never known a homosexual because he did not want to. In his world of accomplishment and merit, homosexuality did not fit, and Powell therefore did not see it.”<sup>91</sup>

Such accounts lend support to the structurally critical element of Becker’s theory of history that for, Mr. Everyman, it is not necessary or even possible that his historical understanding relevant to the problem before him

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<sup>85</sup> Chief Justice Warren E. Burger, and associate justices Harry A. Blackmun and William H. Rehnquist were the other justices who joined the Court during that period.

<sup>86</sup> JEFFRIES, *supra* note 47, at 252-3.

<sup>87</sup> Jacob W. Landynski, Charles M. Lamb & Stephen C. Halpern, eds., “Justice Lewis F. Powell, Jr.: Balance Wheel of the Court,” in *The Burger Court: Political and Judicial Profiles* (Urbana and Chicago :University of Illinois Press, 1991), 310. JACOB W. LANDYNSKI, CHARLES M. LAMB & STEPHEN C. HALPERN, EDS., *Justice Lewis F. Powell, Jr.: Balance Wheel of the Court* in THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES 310 (1991).

<sup>88</sup> Mark Tushnet, *Lives in the Law: Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854, 1854 (1995).

<sup>89</sup> *Id.* at 1854, 1883.

<sup>90</sup> JEFFRIES, *supra* note 47, at 511-30.

<sup>91</sup> *Id.* at 529.

“be complete or completely true” but only that “it should be useful to Mr. Everyman” and “can be related with some reasonable degree of relevance and harmony to his idea of himself and of what he is doing in the world and what he hopes to do.”<sup>92</sup> In Justice Powell, we can see an individual particularly focused on practical purposes, who served as a justice at a time when “there was a place on the Supreme Court for lawyers ... with practical experience who handled witness interviews and managed law firms and ran bar associations,” as Court journalist Jan Crawford Greenburg has characterized it. That had been the kind of lawyer that Powell had been “before President Nixon nominated him. But those days are gone. The job interview [today] is designed for the appeals court judge or the elite appellate lawyer.”<sup>93</sup> Becker argued, however, that it was not only the intellectual, the theoretician, or the academic who develops historical perspectives but his Mr. Everyman as his *own* historian, one who “cannot do what he needs or desires to do without recalling past events; he can not recall past events without in some subtle fashion relating them to what he needs or desires to do.”

Becker sketched out a hypothetical account of an individual putting together the pieces of his own “history” in order to correctly pay a bill for his coal delivery. “If Mr. Everyman had undertaken these researches in order to write a book instead of to pay a bill, no one would think of denying that he was an historian,” Becker contended, and thus, “in a very real sense it is impossible to divorce history from life.”<sup>94</sup> But Mr. Everyman’s “artificial extension of memory” will not derive from “knowledge alone; rather upon knowledge directed by purpose.”<sup>95</sup> And there Becker distinguished that sort of historiography from what is practiced by the professional historian whose “business in life [is] to be ever preoccupied with that far-flung pattern of artificial memories that encloses and completes the central pattern of individual experience.”<sup>96</sup> To that end, this study is preoccupied with the individual experience of Lewis F. Powell. It seeks to fulfill Becker’s dictum that as a profession, “We are Mr. Everybody’s historian as well as our own, since our histories serve the double purpose, which written histories have always served, of keeping alive the recollection of memorable men and events.”<sup>97</sup>

## V. Corporate Political Media Spending and the First Amendment

“What is perhaps most remarkable about the Court’s opinion in *First National Bank of Boston v. Bellotti* is the virtual absence of the corporation from it,” one scholar wrote a few years after the ruling.<sup>98</sup> “The opinion has a quality of abstraction, of disembodiment, of remoteness from social reality.... It reasons from highly abstract First Amendment principles. It supports its reasoning with arguments provable only through empirical investigation, but

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<sup>92</sup> BECKER, *supra* note 10, at 245.

<sup>93</sup> JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY FOR CONTROL OF THE UNITED STATES SUPREME COURT* 38 (2007).

<sup>94</sup> BECKER, *supra* note 10, at 239, 242.

<sup>95</sup> *Id.* at 241.

<sup>96</sup> *Id.* at 247.

<sup>97</sup> *Id.* at 247.

<sup>98</sup> Carl E. Schneider, *Free Speech and Corporate Freedom: A Comment on First National Bank of Boston v. Bellotti*, 59 S. CAL. L. REV 1227, 1287 (1986).

substitutes logic for evidence.”<sup>99</sup> That quality of artificiality arguably derives from a labored effort to avoid talking about what was actually at stake in the case: corporate political media spending. That was blurred from the beginning of Justice Powell’s discussions with the clerk who assisted him on *Bellotti*, reframing the matter at the heart of the case instead in terms of a corporation’s “expression of views.” In a literal sense, of course, the artificial being that is a corporation cannot “express” views, or anything else. Its managers, employees, stockholders, and other parties interested in a corporation’s operations can express *their* views — and of course their right to do so was constitutionally protected long before *Bellotti* reached the Court. So what was at issue in that case was whether the First Amendment could be used to block government restrictions on corporate managers spending directly from their companies’ profits — which in principle belong to their stockholders — on media messages aimed at influencing political outcomes.<sup>100</sup>

It was a truly dividing proposition among the justices on the Court in 1978, and that has never really changed since then. In his *Bellotti* dissent, Justice Byron R. White spelled out what Justice Powell’s majority opinion could not or did not want to see: “In short, corporate management may not use corporate monies to promote what does not further corporate affairs but what in the last analysis are the purely personal views of the management, individually or as a group.”<sup>101</sup> A clear articulation of the strategy Justice Powell would adopt to disregard the source of the spending in question and focus only on it as speech in the abstract appeared in a bench memorandum prepared for him before oral arguments in the case. In that memorandum, clerk Nancy J. Bregstein stressed that “both sides have phrased the central question of the case” as whether corporations have First Amendment rights.<sup>102</sup> She warned that the corporate appellants would likely lose if the Supreme Court began from that premise, grounded in an understanding “that corporations are unique because of their artificial, non-human existence” as a creation of state law.<sup>103</sup> So the memorandum went on to advance rhetorical emphasis on what corporations “think” and the “silencing” of corporations’ “views,” signaling the beginnings of what would become an enduring reframing effort. Bregstein’s memo conceded that the Court had never held “explicitly that the First Amendment protects corporate speech to the extent that it protects the speech of natural persons,” but proposed that was only the case because “until now government has not

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<sup>99</sup> *Id.* at 1232.

<sup>100</sup> Massive contributions from corporations to political candidates led Congress to corporations from direct financial involvement in federal elections, beginning in 1907. NANCY LAMMERS, ED., *DOLLAR POLITICS* 3 (1982). Campaign-finance regulations enacted by Congress in the early 1970s were challenged in 1976’s *Buckley v. Valeo* and partially struck down, but the Court did not at that time consider corporate campaign spending. 424 U.S. 1, 19, 21, 47 (1976). For more on that period of campaign-finance regulation and jurisprudence, see JEFFREY H. BIRNBAUM, *THE MONEY MEN: THE REAL STORY OF FUND-RAISING’S INFLUENCE ON POWER IN AMERICA* 32-33 (2000) and ANN B. MATASAR, *CORPORATE PACS AND FEDERAL CAMPAIGN FINANCING LAWS: USE OR ABUSE OF POWER* 14-15 (1986).

<sup>101</sup> *Bellotti*, 435 U.S. at 813 (White, J., dissenting).

<sup>102</sup> Memorandum from Bregstein to Justice Powell (Sept. 13, 1977 at 11 (*Bellotti*, 435 U.S. in LFP Papers)).

<sup>103</sup> *Id.* at 1.

attempted to restrict corporate speech.”<sup>104</sup> Actually, at the time of the *Bellotti* decision, thirty-one states had similar regulations to the Massachusetts law in question in the case, with many having been on the books for decades.<sup>105</sup>

In *Bellotti*, a five-to-four majority ultimately held that political media spending by corporations to influence the outcome of referenda does not lose its First Amendment protection “simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property.”<sup>106</sup> Justice Powell’s majority opinion declared that “self-government suffers when those in power suppress competing views on public issues ‘from diverse and antagonistic sources.’”<sup>107</sup> It was critical to Powell’s assertions to focus them on “views” rather than on spending, the latter representing the way courts had long approached the question.<sup>108</sup> Instead, Powell’s opinions would advance a premise that the bottom line in the case was not whether corporations should have the same First Amendment rights as human beings, but that the “inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”<sup>109</sup> It was through such alchemy that Justice Powell’s majority opinion was able to transform corporate political media spending into “the type of speech indispensable to decisionmaking in a democracy.”<sup>110</sup> Thus it was that in *Bellotti*, the Court for the first time brought corporate political media spending within the constitutional protections theretofore extended only to the freedom of speech of human beings.

In Justice Powell’s private papers, there are indications that his opinion very well might not have found a majority if not for his considerable efforts to assemble one. After circulating his early drafts of the opinion, Justice Powell had only two other justices with him, but was ultimately able to win over the fourth and fifth votes needed to form a majority by making changes in response to requests from Justice John Paul Stevens<sup>111</sup> and Justice Harry Blackmun — the latter through narrowing the *Bellotti* holding substantially by removing language that had asserted any such regulation of corporate political media spending could go no farther than the “least restrictive alternative.”<sup>112</sup> Justice Powell worked hard to broaden his majority, including a personal appeal to Justice William Rehnquist,<sup>113</sup> who ultimately responded instead with a fierce dissent proclaiming the majority decision to be greatly at odds with settled law. “A State grants to a business corporation the blessings of potentially perpetual

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<sup>104</sup> *Id.* at 3.

<sup>105</sup> *Bellotti*, 435 U.S. at 767-69.

<sup>106</sup> *Id.* at 784.

<sup>107</sup> *Id.* at 784, 777.

<sup>108</sup> Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1062-63 (1998).

<sup>109</sup> *Bellotti*, 435 U.S. at 777.

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

<sup>111</sup> Letter from Justice Stevens to Justice Powell (March 8, 1978) at 1 (*Bellotti*, 435 U.S. in LFP Papers); Letter from Justice Stevens to Justice Powell (March 10, 1978) at 1 (*Bellotti*, 435 U.S. in LFP Papers).

<sup>112</sup> Letter from Justice Blackmun to Justice Powell (March 13, 1978) at 1 (*Bellotti*, 435 U.S. in LFP Papers).

<sup>113</sup> Letter from Justice Powell to Justice Rehnquist (April 17, 1978) at 1 (*Bellotti*, 435 U.S. in LFP Papers).

life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere,” he wrote.<sup>114</sup> In his efforts to win over Justice Rehnquist, Justice Powell conceded that “no prior decision has expressly recognized corporate speech generally as explicitly as my opinion does.” Nevertheless, he maintained, “the trend of our decisions over the past century” supports “the proposition that artificial entities are treated as ‘persons’ for purposes of exercising and relying upon constitutional rights.”<sup>115</sup> Justices Rehnquist and Byron White disagreed so strongly and remained so opposed to the majority opinion in *Bellotti* that each not only authored harsh dissents but worked successfully in the years after that ruling to narrow its holding considerably.

## VI. The *Bellotti* Legacy

Justice Rehnquist in particular kept doggedly authoring opinions or joining dissents in the Court’s cases on corporate political media spending following *Bellotti*. Even while in the minority, he continued to press them, extending his argument against granting the same First Amendment rights to non-human entities as to human citizens.<sup>116</sup> “In a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence,” he warned.<sup>117</sup> Shortly before being appointed chief justice in 1986, he wrote in dissent that extending First Amendment protection to corporations based on “individual freedom of conscience ... strains the rationale ... beyond the breaking point. To ascribe to such artificial entities an ‘intellect’ or ‘mind’ ... is to confuse metaphor with reality.”<sup>118</sup> Over the course of the 1980s, the Court ultimately came to shape its doctrine on corporate political media spending in a manner clearly more consistent with Justice Rehnquist’s arguments, a process that produced the doctrine’s most forceful counterbalance to *Bellotti* in 1990’s *Austin v. Michigan State Chamber of Commerce*.<sup>119</sup>

In that ruling, a six-to-three majority declared it constitutional to bar corporations from making expenditures from treasury funds for independent expenditures in connection with state candidate elections.<sup>120</sup> Justice Thurgood Marshall wrote for the majority that because such funds accumulated through the “state-created advantages” bestowed upon the corporate form — particularly “limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets — that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders’ investments,” they undemocratically advantage corporate beings

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<sup>114</sup> *Bellotti*, 435 U.S. at 824-26 (Rehnquist, J., dissenting).

<sup>115</sup> POWELL, *supra* note 113, at 1-2.

<sup>116</sup> *Central Hudson Gas and Electric v. Public Service Commission*, 447 U.S. 557, 583-606 (1980) (Rehnquist, J., dissenting). See also *Consolidated Edison v. Public Service Commission*, 447 U.S. 530, 548-56 (1980) (Blackmun, J., dissenting).

<sup>117</sup> *Central Hudson* at 599.

<sup>118</sup> *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 33 (1986) (Rehnquist, J., dissenting).

<sup>119</sup> 494 U.S. 652 (1990).

<sup>120</sup> Michigan Campaign Finance Act, Mich. Comp. Laws Ann. § 169.254 (West 1989).

over human citizens.<sup>121</sup> The holding was grounded in interests established as justifying the regulation in question in *Austin* other cases earlier in the decade.<sup>122</sup> Taken together, that *Austin* line of cases served to fully protect from regulation unlimited political expenditures by individuals and by individuals joined together for the same purpose — but firmly barring corporate managers from spending stockholders' money to promote political candidates.

That doctrine was again reinforced in 2002's *McConnell v. Federal Election Commission*, in which the Court upheld newer federal regulations on soft-money contributions and sham issue advertising, particularly on corporate involvement in such practices. The majority opinion, by Justices Stevens and Sandra Day O'Connor, emphasized efforts by Congress going back a century to limit corporate political spending through campaign-finance legislation "in order to prevent 'the great aggregations of wealth, from using their corporate funds, directly or indirectly,' to elect legislators who would 'vote for their protection and the advancement of their interests as against those of the public.'"<sup>123</sup> But just a few years after that, the Supreme Court would be reconfigured with the death of Chief Justice Rehnquist in 2005 and the retirement of Justice O'Connor the next year. Within two years of those changes, the new appointees — Chief Justice John G. Roberts and Justice Samuel A. Alito — shifted enough support on the Court to first weaken the doctrine limiting corporate political media spending,<sup>124</sup> and then three years after that to dismantle it — even though as Justice David Souter put it, "nothing [had] changed about the facts.... It is only the legal landscape that now is altered."<sup>125</sup> By the same five-to-four vote as in *Bellotti*, the Court in *Citizens United* declared virtually all limits on political media expenditures by corporations unconstitutional.

As noted, Justice Kennedy's majority opinion relied heavily on the thirty-two-year-old *Bellotti*, referencing it twenty-four times and characterizing it as a holding much more sweeping and deeply grounded in well established precedent than the historical record in *Bellotti* and the later cases narrowing it would indicate. Indeed, Justice Kennedy all but ignored those key cases that narrowed *Bellotti*, declaring after his assertion of it as controlling precedent: "Thus the law stood until *Austin*."<sup>126</sup> Justice Kennedy also maintained rhetorical consonance with Justice Powell's choice of framing the matter in

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<sup>121</sup> *Austin*, 494 U.S. at 658-59.

<sup>122</sup> Those interests — ensuring that aggregations of money amassed by the special advantages of the corporate form not be converted to potentially corrupting political war chests, protecting individuals who pay money into a corporation for purposes other than political activity from having their money used in support of candidates whom they may not support, and preventing organizations that accept contributions from business corporations from serving as conduits for corporate spending that threatens the political marketplace — were established as compelling in *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197, 208-09 (1982) and *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 264 (1986).

<sup>123</sup> 540 U.S. 93, 115-16 (2003) (quoting *United States v. United Automobile Workers*, 352 U.S. 567, 571 (1957)).

<sup>124</sup> *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007).

<sup>125</sup> *Wisconsin Right to Life*, 551 U.S. at 536-6 (Souter, J., dissenting).

<sup>126</sup> *Citizens United*, 558 U.S. 310 at 347.

question by declaring that the 1978 case “rested on the principle that the Government lacks the power to ban corporations from *speaking* [emphasis added].”<sup>127</sup> In dissent, Justice Stevens — the lone remaining member of the *Bellotti* majority still on the Court — denounced Justice Kennedy’s neglecting of the relevant cases since *Bellotti*.<sup>128</sup>

Thus, with semantic alchemy and a barely forged majority in *Bellotti*, Justice Powell had inserted in the case law the precedent that would allow another five-justice majority three decades later to open up the American election process to virtually unlimited corporate political media spending cases on behalf of candidates. If Justice Powell’s Mr. Everyman assessment led him to believe there was a problem that needed resolving in regard to the political influence of big business on democratic processes, then *Citizens United* might be seen as the ultimate solution for which he had hoped. Yet Justice Powell’s files from his last corporate political media spending case in 1986<sup>129</sup> indicate he likely would not have gone nearly so far as to declare virtually all limits on expenditures by corporations in political campaigns unconstitutional. In discussions with a clerk on that case, Justice Powell repeatedly agreed that while such spending should be protected as it was in *Bellotti*, other restraints on it were completely constitutional. He said that the holding to continue banning political media spending directly from stockholder funds while allowing it via political action committees that are “derived from contributions of subscribers or sympathizers” who had contributed just for such a purpose meant that such funds “could be used without limit to publish the corporation’s views” and “thus, the burdening of First Amendment rights is — at most — quite limited.”<sup>130</sup> Nevertheless, two decades later the author of the *Citizens United* opinion would hold forth *Bellotti* as unquestionable authority for constitutionalizing unlimited corporate political media expenditures.

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 441 (Stevens, J., dissenting).

<sup>129</sup> *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986).

<sup>130</sup> Personal notes by Justice Powell (August 11, 1986) at 5 (*Massachusetts Citizens for Life*, 479 U.S. in LFP Papers). In that case, the Court held that regulations of independent political expenditures applied not to business corporations but to ideological corporations — formed to disseminate political ideas rather than to amass capital — were unconstitutional and established a three-part test to distinguish between the two types of corporations. Justice Powell joined the majority opinion in full and in a number of assertions in his private papers he seemed to show no interest in expanding First Amendment rights for political spending by business corporations any further. Early in deliberations on *MCFL*, he expressed no disagreement with regulations limiting such expenditures to funds raised through corporate political action committees — rather than directly from corporate treasuries. Justice Powell also expressed acceptance for broader principles justifying such regulation, writing “Yes” in the margin of his clerk’s bench memorandum next to the statement: “There is a strong argument that unlimited expenditures by large corporations [in candidate elections] could indeed pose the danger of corruption.” Memorandum by Gielow for Justice Powell (Oct. 9, 1986) at 6 (*Massachusetts Citizens for Life*, 479 U.S. in LFP Papers). That passage went on to declare it “inconceivable that if Xerox spends a lot of money independently advancing an individual’s candidacy, that the fact is not brought to the individual’s attention. If a candidate knows of a large expenditure, it seems that the danger of corruption is there.” Notes in margin of *Id.*

## VII. Conclusion

For Justice Kennedy, as for Justice Powell, in terms of Becker's theory of history, it was not necessary or even possible that their historical understanding relevant to the problem before them "be complete or completely true" — only that "it should be useful" to each of them in an Everyman sense, in that it could "be related with some reasonable degree of relevance and harmony to his idea of himself and of what he is doing in the world and what he hopes to do."<sup>131</sup> In a process that arguably played out roughly along those lines, this study concludes Justice Powell found more relevance and harmony in what he hoped to do than in the unwavering arguments of fellow justices that he was introducing an unprecedented and dangerous element into First Amendment law. And a little over a quarter of a century later, another justice found even more relevance and harmony for what *he* hoped to do in Mr. Justice Everyman Powell's handiwork than in a considerable body of contradictory case law, four staunchly dissenting fellow justices, and even the historical record of Justice Powell's own broader views.

But, as Becker theorized, Mr. Everyman's "artificial extension of memory" will never derive from "knowledge alone" but rather from "knowledge directed by purpose." This study has sought to sketch out what can be considered the relevant "far-flung pattern of artificial memories that encloses and completes the central pattern of individual experience" that in this case quite plausibly contributed to significantly transforming a consequential body of First Amendment law and broader political culture in the latter twentieth and early twenty-first centuries. Mr. Justice Everyman Powell set out to solve a problem and in doing so wrote not "history that lies inert in unread books," but the "history that does work in the world, ... that influences the course of history,"<sup>132</sup> while — this study argues — "imaginatively recreat[ing history] as an artificial extension of his personal experience."<sup>133</sup> It suggests support for Becker's dictum that historians "do not impose our version of the human story on Mr. Everyman; in the end it is rather Mr. Everyman who imposes his version on us."<sup>134</sup>

Considering the age of *Citizens United* in terms of this study helps provide historical perspective on how its beginnings extend back decades before that 2010 ruling. And it offers fuller understanding of how what seemed to many a sudden and sharp turn of doctrine can be seen as having played out as something of a time-delay version of that doctrinal story, ticking away in the case law until it could be even more fully imposed upon us.

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<sup>131</sup> BECKER, *supra* note 10, at 245.

<sup>132</sup> *Id.* at 252.

<sup>133</sup> *Id.* at 245.

<sup>134</sup> *Id.* at 253.

# “LAWS ARE A BIG BELL...IT WILL NEVER RING ITSELF!”

## Journalistic Role in China’s First Freedom of Information Law<sup>1</sup>

YONG TANG\*

*In 2007, China passed its first national freedom of information (FOI) law: Open Government Information Regulations of the People’s Republic of China (OGI Regulations). The law took effect one year later. This paper explores Chinese journalism’s methods of and contributions to drafting, publicizing and enforcement of OGI Regulations. After examining databases, media reports and talking with journalists in China, this study finds that, unlike many foreign journalists who are instrumental in proposing, formulating, and using FOI laws, Chinese journalists have no involvement in recommending and formulating OGI Regulations. More importantly, unlike their Western counterparts, Chinese journalists have not systematically and vigorously used OGI Regulations to obtain official information for news reporting and writing purposes. One reason for Chinese journalists’ limited use of the FOI law is the law’s demand that reporters meet a special needs test. A more fundamental rationale is the lack of stronger legal protections for press freedom.*

**Keywords:** Freedom of Information Law, OGI Regulations, China, Journalists

### I. Introduction

As of September 2016, at least 111 countries and regions had various forms of freedom of information (FOI) laws.<sup>2</sup> In many FOI countries, media professionals (e.g., reporters, editors and executives) and news media outlets play a key role in the promotion and eventual enactment of access to information laws. Once formulated, professionals in media sectors become among the most frequent users of the laws.<sup>3</sup> For

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<sup>1</sup> The original manuscript was presented to the 2013 International Communication Association annual convention, London, UK. Thanks conference and journal reviewers for their excellent contributions to this project.

<sup>2</sup> Statement by European RTI Community on the world’s First Official Access to Information Day! Access Info Europe, September 28, 2016, retrieved from <<https://www.access-info.org/frontpage/26216>>. (last visited March 12, 2017); Country Data, Global Right to Information Rating, retrieved from <<http://www.rti-rating.org/country-data/>> (last visited March 12, 2017).

<sup>3</sup> Eduardo Bertoni, *Freedom of Information, Three Harmless Words? The Role of the Media and Access to Information Laws*, Center for Studies on Freedom of Expression and Access to Information at the Palermo University School of Law, Argentina, originally published by the World Bank Institute in Spanish, retrieved from <<http://www.palermo.edu/cele/pdf/ATIandMedia.pdf>> (last visited March 12, 2017).

example, the United States is where journalists have contributed enormously to the formulation, amendment and use of *Freedom of Information Act*.<sup>4</sup>

China joined the global FOI club in 2007 when the country adopted Regulations of the People's Republic of China on Open Government Information (OGI Regulations) and made the OGI Regulations effective one year later.<sup>5</sup> Like all FOI laws in the world, China's first FOI law aims to create a more transparent government. It compels all levels of administrative agencies to proactively publicize government-held documents and files if they are not exempted, and reactively releases government-held documents and files if they are not publicly available but demanded by people for disclosure. People have the right to sue government agencies for non-disclosure or partial disclosure of information they want. According to the law, such right is given to all legal persons, other organizations and citizens including journalists. The purpose of this article is to explore Chinese journalism's methods of and contributions to drafting, publicizing and enforcement of the FOI law. This project is significant. Research materials about Chinese FOI law abound,<sup>6</sup> but little research considers the role of Chinese journalists in the country's campaign for freedom of information.<sup>7</sup> Yang Guo of Xi'an-based Northwest University explored journalistic use of the OGI Regulations from 2011 to 2013.<sup>8</sup> FOI scholar Weibing Xiao examined how journalists, legal

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<sup>4</sup> Shannon E. Martin and Kamilla Benko, *Forming FOIA: The Influence of Editors and Publishers on the Freedom of Information Act*, 14 MEDIA HISTORY MONOGRAPHS 2 (2011-2012), retrieved from <<http://facstaff.elon.edu/dcopeland/mhm/mhmjour14-1.pdf>>. (last visited March 12, 2017).

<sup>5</sup> The OGI Regulations were adopted on April 5, 2007 and came into force on May 1, 2008. *Zhonghua renmin gongheguo zhengfu xinxi gongkai tiaoli* [中华人民共和国政府信息公开条例]. The Chinese language version of the law can be retrieved at: <[http://www.gov.cn/zwgk/2007-04/24/content\\_592937.htm](http://www.gov.cn/zwgk/2007-04/24/content_592937.htm)> (last visited March 12, 2017); the English translation of the law can be retrieved at: <[https://law.yale.edu/system/files/documents/pdf/Intellectual\\_Life/CL-OGI-Regs-English.pdf](https://law.yale.edu/system/files/documents/pdf/Intellectual_Life/CL-OGI-Regs-English.pdf)> or <<http://www.lawinfochina.com/display.aspx?lib=law&id=6011>> (last visited March 12, 2017).

<sup>6</sup> See HANHUA ZHOU, "Open Government in China: Practice and Problems," in THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD, ed. Ann Florini and Joseph E. Stiglitz (New York: Columbia University Press, 2007); WEIBING XIAO, FREEDOM OF INFORMATION REFORM IN CHINA: INFORMATION FLOW ANALYSIS (New York: Routledge, 2011); Changhua Wu, *Improving the Legal and Policy Foundation for Public Access to Environmental Information in China*, TEMPLE JOURNAL OF SCIENCE, TECHNOLOGY & ENVIRONMENTAL LAW 24 (2005), 291-323; Suzanne J. Piotrowski, Yahong Zhang, Wenxuan Yu and Weiwei Lin, *Key Issues for Implementation of the Chinese Open Government Information Regulations*, PUBLIC ADMINISTRATION REVIEW 69 (1) (2009); Paul Hubbard, *China's Regulations on Open Government Information: Challenges of Nationwide Policy Implementation*, OPEN GOVERNMENT JOURNAL 4 (2008); Renu Rana, *China's Information Disclosure Initiative: Assessing the Reforms*, 51 CHINA REPORT 2 (2015) 129-143; *State Administration of Cultural Heritage Freedom of Information Annual Work Report for 2013*, 48 CHINESE LAW AND GOVERNMENT 3 (2016) 230-233; Guosong Shao, Jiayin Lu and Ye Hao, *Assessing China's Media Reform*, 40 Asian Perspective (2016) 27-50; Yong Tang, *Chinese Freedom of Information: An Evaluation of the Legislative History, Rationales, Significance and Efficacy of Regulations of the People's Republic of China on Open Government Information*, unpublished doctoral dissertation at The Pennsylvania State University, December 2012.

<sup>7</sup> This conclusion is based on results of database searches including Communication & Mass Media Complete, Westlaw Campus and Google Scholar.

<sup>8</sup> Yang Guo, *Xinwen jizhe dui zhengfu xinxi gongkai tiaoli shiyong qingkuang de diaocha* [An Investigation into Journalistic Use of OGI Regulations,

professionals, rights activists and ordinary citizens have used OGI Regulations for information access.<sup>9</sup> However, few scholars including Guo and Xiao have systematically and comprehensively surveyed the role of Chinese journalists in the country's journey to government transparency and FOI law. This study aims to fill that gap.

As for methodology, this study employs legal research supported by information gathered through Internet searches, database searches and interviews with a group of conveniently sampled Chinese journalists.<sup>10</sup> In order to find media reports about Chinese reporters involved in the FOI law in various capacities, Baidu and Chinese-language Google searches were conducted by using key words “journalist (jizhe)” and “government information disclosure (zhengfu xinxi gongkai).” Also examined was the list of FOI-related court cases from 2008 to 2017 and compiled by ChinaTransparency.org.<sup>11</sup> Searched databases were China Academic Journal Database, Beida Fabao and Westlaw China.

In June and July 2012, contact with journalists in China via email and telephone queried journalists' and news media outlets' involvement in drafting FOI law and their use of OGI Regulations since 2008 to access official information. Each journalist from the following media outlets participated in the interviews through the author of this study and other contact persons: *People's Daily*, Xinhua News Agency, China Central Television, *Caijing*, *Southern Weekend*, *China Economic Times*, *Oriental Morning Post*, *Southern Metropolis Daily*, Hebei Daily Newspaper Group, Hebei Television, Hebei News Network, China News Service Hebei Bureau, *Yanzhao Metropolis Daily*, *Yanzhao Metropolis Daily Online Edition*, *Shijiazhuang Daily*, Shijiazhuang Television, *Yanzhao Evening News*, *Hebei Farmers News*, *Hebei Youth Daily*, *Hebei Legal Daily*, and Sichuan Bazhong City Television. The journalists were asked to answer the following four questions: “Do you know OGI Regulations?” “Do you and/or your news organization get involved in the legislative process of the law?” “Have you ever requested government-held documents via OGI Regulations?” “Have you ever sued government agencies for non-disclosure?” Although participants are definitely a convenience sample for the population of Chinese professional journalists, their employers represent a wide range of Chinese media, from print media to electronic media, from traditional party organs to market-oriented metropolitan newspapers, from news agencies to newspapers, periodicals, radio and television broadcasters, from central and national media to local media. Some journalists responded and offered details for use of OGI Regulations by their colleagues. Some journalists responded but demurred, claiming inappropriateness for involvement in this kind of research. Some journalists did not respond at all despite persistent email

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新闻记者对《政府信息公开条例》使用情况的调查], 1 SOUTHEAST COMMUNICATION (2016), pp.73-75.

<sup>9</sup> WEIBING XIAO, FREEDOM OF INFORMATION REFORM IN CHINA: INFORMATION FLOW ANALYSIS 120 (2011).

<sup>10</sup> All journalists surveyed are reporters/editors with press cards issued by the State Administration of Press, Publication, Radio, Film and Television of the People's Republic of China. “Journalists” in this article refer to licensed newsmen with professional affiliations with state-run or party-run news media outlets. Freelancers and citizen journalists are not included in this study.

<sup>11</sup> ChinaTransparency.org has started compiling OGI-related court cases since 2008. The full list of court cases can be found on its website: <http://www.ogichina.org>.

and telephone inquiries. The names of the journalists contacted do not appear due to the sensitivity of the interviews.

Are Chinese journalists filing more and more OGI requests since 2012? Are they suing more and more government agencies for non-disclosure since 2012? In order to find the answer, in February 2017, this study tried to contact those participating journalists again for follow-up interviews but the efforts yielded no results for various reasons. As a remedy, this study did searches on official websites of most news organizations mentioned above by using the keywords “government information disclosure (zhengfu xinxi gongkai)” and “journalist (jizhe).” The purpose of the searches is to locate OGI cases where journalists and news organizations requested government information via OGI, and OGI cases where they sued government agencies for non-disclosure.

Part II of this article discusses whether or not Chinese journalists contributed to the formulation of OGI Regulations and the nature of those contributions. Part III investigates Chinese journalists’ coverage and publicizing the freedom of information movement and the reasons for vigorous and extensive media coverage of a plethora of issues pertaining to OGI Regulations. More importantly, Part IV assesses Chinese journalists’ use of OGI Regulations to obtain official information for the purposes of newsgathering and reporting and how they are bringing agencies to court for judicial remedies. Part V explores various reasons for the limited journalistic use of OGI Regulations in China.

## **II. Role of Chinese Journalists in Formulating OGI Regulations**

Investigative journalism effectuates the people’s right to know events, procedures, and policies of government; that right is guaranteed by freedom of information legislation. It is reasonable to expect, therefore, that journalists will advocate establishing FOI laws. However, this study finds that, unlike their American colleagues, Chinese journalists are excluded from the entire Chinese legislative process for OGI Regulations. According to *Legislation Law* passed in 2000, the State Council has the power to formulate administrative regulations in accordance with the Constitution and laws.<sup>12</sup> In drafting administrative regulations, opinions from relevant agencies, organizations, and citizens were to be heeded, and relevant forums, seminars, and hearings held.<sup>13</sup> However, a database search and interviews with journalists show that, in drafting OGI Regulations, Chinese law reformers did not listen to opinions from journalists and news media. No Chinese reporters or editors participated actively in the formulation of the law, nor did leading professional organizations<sup>14</sup> participate in the process. OGI Regulations were elite-driven, proposed, drafted, and formulated entirely by officials and leading legal scholars.<sup>15</sup>

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<sup>12</sup>*Legislation Law 2000*. Art.56.

<sup>13</sup>*Legislation Law 2000*. Art.58.

<sup>14</sup> All China Journalists’ Association, China Media Culture Promotion Association, China Newspaper Association, China Radio and TV Association, and China Internet Association are prominent industrial organizations in journalism and media in China.

<sup>15</sup>Similar practices of closed-door legislation are numerous in China despite enactment of Legislative Law mandating more public participation in the legislative process. See DINGJIAN CAI & CHENGUANG WANG, *CHINA’S JOURNEY TOWARD THE RULE OF LAW: LEGAL REFORM, 1978-2008* 85 (2010).

Chinese editors and reporters were absent in the formulation of the freedom of information laws, which is rare in many other countries. In Western countries, freedom of expression and freedom of information are intertwined with each other. Both concepts spring from the same fountain of liberal philosophical and political thoughts advanced by thinkers such as three “Johns” (John Milton, John Locke, and John Stuart Mill).<sup>16</sup> Hence it is not surprising to see journalists actively engage in pushing FOI laws. In China, however, freedom of information and freedom of expression are treated by political and academic elites as totally different animals. Freedom of information research was politically sensitive in China in the late 1990s, and many leading hard-liners in the party and the government believed that the Glasnost reform in the Soviet Union in the late 1980s contributed to the deterioration of that communist empire. These officials asserted that a similar nation-wide transparency reform in China would lead to the same catastrophic consequences.<sup>17</sup> In addition, legal infeasibility and political inappropriateness would occur if linking freedom of information with freedom of expression because of “the lack of Freedom of the Press Act and an authoritative interpretation of freedom of expression laid down in Article 35 of the Constitution.”<sup>18</sup> Chinese reformers thus adopted a strategy of linking OGI legislation with economic growth and informationization development.<sup>19</sup> This strategy decreased political sensitivity toward FOI research and “allowed the idea of FOI to be openly discussed in China.”<sup>20</sup> However, this strategy created a misguided impression of journalism’s disassociation with OGI Regulations, thus marginalizing journalists’ roles promoting OGI legislation.

### **III. Role of Chinese Journalists in Covering and Publicizing OGI Regulations**

Chinese journalists had marginal roles in formulation of OGI Regulations, but reporters have been instrumental in ensuring effective enforcement of the law. Their reporting on non-compliance with the law has created significant pressures from public opinion on agencies and forced corrections. The vigorous coverage on a wide range of issues and events related to governmental transparency contributes to wider public awareness of the law. A random Baidu and Google search shows that the Chinese print media published large volumes of news stories and commentaries regarding open official information since adoption of OGI Regulations in 2007. Similar stories and critiques appear frequently on airwaves and the Internet portals. *Southern Weekend* is an example; as “China’s most influential liberal newspaper,”<sup>21</sup> the weekly publication, from May 1, 2008, to April 30, 2010, printed 129 articles concerning OGI

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<sup>16</sup> See JOHN MILTON, *AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING* (1644); JOHN LOCKE, *THE TWO TREATISES OF GOVERNMENT* (1689); JOHN STUART MILL, *ON LIBERTY* (1859) (in particular, Chapter II: Of the Liberty of Thought and Discussion).

<sup>17</sup>WEIBING XIAO, *FREEDOM OF INFORMATION REFORM IN CHINA: INFORMATION FLOW ANALYSIS* 40 (2011).

<sup>18</sup>*Id.* at 43.

<sup>19</sup>*Id.* at 65.

<sup>20</sup>*Id.* at 41.

<sup>21</sup>Elisabeth Rosenthal, *Under Pressure, Chinese Newspaper Pulls Exposé on a Charity*, *THE NEW YORK TIMES*, March 24, 2002, retrieved from <<http://www.nytimes.com/2002/03/24/world/under-pressure-chinese-newspaper-pulls-expose-on-a-charity.html>>. (last visited March 12, 2017).

matters.<sup>22</sup> During that time, 58 percent of the weekly's total coverage was in-depth investigative reporting (35 articles) and commentaries (40 articles) devoted to OGI.<sup>23</sup>

Legal professionals are allies of journalists for covering and publicizing OGI Regulations. Apparently, legal professionals are the most frequent requesters of governmental information under OGI Regulations.<sup>24</sup> Attorneys in China normally do not rely on OGI Regulations to obtain information for their cases; instead, they rely heavily on personal connections in government to obtain needed documents. The government discourages lawyers from becoming involved in OGI litigation;<sup>25</sup> however, increasing number of lawyers, law academics, and students actively use OGI legislation to access official information that is primarily in the public interest.<sup>26</sup> Many lawyers' involvements in OGI requests and litigations are not for commercial gain but for educational purposes.<sup>27</sup> These legal actions gain wide coverage from local and national media because of their newsworthiness.<sup>28</sup> Publicity is possible because legal

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<sup>22</sup> Lin Yu & Jun Guo, *Nanfang zhoumo zhengfu xinxi gongkai wenti baodao fenxi* [Examination of Coverage of *Southern Weekend* on OGI Matters, 《南方周末》政府信息公开问题报道分析], *The YOUTH JOURNALIST* (August 2010), posted on Sept. 10, 2010, retrieved from <[http://qnjz.dzwww.com/cmga/201009/t20100910\\_5817255.htm](http://qnjz.dzwww.com/cmga/201009/t20100910_5817255.htm)>. (last visited March 12, 2017).

<sup>23</sup> Lin Yu & Jun Guo, *Nanfang zhoumo zhengfu xinxi gongkai wenti baodao fenxi* [Examination of Coverage of *Southern Weekend* on OGI Matters, 《南方周末》政府信息公开问题报道分析], *The YOUTH JOURNALIST* (August 2010), posted on Sept. 10, 2010, retrieved from <[http://qnjz.dzwww.com/cmga/201009/t20100910\\_5817255.htm](http://qnjz.dzwww.com/cmga/201009/t20100910_5817255.htm)>. (last visited March 12, 2017).

<sup>24</sup> WEIBING XIAO, *FREEDOM OF INFORMATION REFORM IN CHINA: INFORMATION FLOW ANALYSIS 120* (2011); Yang Guo, *Xinwen jizhe dui zhengfu xinxi gongkai tiaoli shiyong qingkuang de diaocha* [An Investigation into Journalistic Use of OGI Regulations, 新闻记者对《政府信息公开条例》使用情况的调查], 1 *SOUTHEAST COMMUNICATION* (2016), pp.73-75.

<sup>25</sup> During a February 2012 telephone interview, a Beijing lawyer, who once studied at The Pennsylvania State University Law School, stated that internal policies circulated among lawyers in Beijing instructed them to avoid OGI litigation.

<sup>26</sup> WEIBING XIAO, *FREEDOM OF INFORMATION REFORM IN CHINA: INFORMATION FLOW ANALYSIS 120* (2011).

<sup>27</sup> Xixin Wang and two of his colleagues at Peking University Law School applied for information concerning the toll charges at the Beijing Capital Airport Express Way. Five law professors from Xiangtan University in Hunan Province submitted OGI requests for information of the toll charges in the city of Xiangtan. Xiangtan University professors sued the agency for non-disclosure. Both requests' intent was to educate the public on OGI issues, not for commercial gain. Shuming Li & Weihong Lv, *Beida san jiaoshou dingshang shoudu jichang gaosulu* [Three Professors at Beijing University Watched Closely on Tolls of Beijing Airport Expressway, 北大三教授“盯上”首都机场高速路], *PROCURATORIAL DAILY*, June 18, 2008, retrieved from <[http://news.xinhuanet.com/legal/2008-06/18/content\\_8389725.htm](http://news.xinhuanet.com/legal/2008-06/18/content_8389725.htm)>. (last visited March 12, 2017); Wenjie Liu, *Hunan xiangtan daxue wu boshi zhuanggao zhengfuyaoqiugongkaishoufeixinxi* [Five Professors with Doctoral Degrees in Law from Hunan's Xiangtan University Sue Government for Releasing Information about Administrative Fees, 湖南湘潭大学五博士状告政府要求公开收费信息], *XINHUANET.COM*, June 6, 2008, retrieved from <[http://news.xinhuanet.com/legal/2008-06/06/content\\_8319893.htm](http://news.xinhuanet.com/legal/2008-06/06/content_8319893.htm)>. (last visited March 12, 2017). WEIBING XIAO, *FREEDOM OF INFORMATION REFORM IN CHINA: INFORMATION FLOW ANALYSIS 120* (2011).

<sup>28</sup> China Transparency.org is China's first non-profit, non-governmental, academic website focusing on OGI matters. The website maintains a comprehensive list of OGI litigation filed by information requesters over the last nine years (2008 to 2017). The Chinese media covered

professionals and journalists successfully collaborated for the common goal of enhancing public awareness of OGI legislation.

Constant media exposure related to OGI Regulations promoted the public's understanding of the law and the concept of the right to know. According to a Peking University survey conducted prior to the May 2008 enactment of OGI Regulations, China's young Internet users, aged from 10 to 45, knew little about freedom of information. Among 197 respondents, 124 claimed unawareness of the promulgation, 145 admitted unfamiliarity with the key provisions in the law, and 127 said that they did not know that many other countries had adopted freedom of information laws.<sup>29</sup> Apparently, subsequent research to update the data is non-existent. However, given that the Chinese media inundated citizens with constant details of OGI matters during the last nine years, a safe assumption is the level of public awareness would be significantly higher for the same survey in 2017.<sup>30</sup>

As examined earlier, Chinese journalists enjoy relative freedom for exposing non-compliance of government agencies with FOI law because freedom of information is no longer a politically sensitive topic in China. In addition, central party and governmental leaders publicly announced full support for the media's role for covering irregularities and scandals related to official transparency.<sup>31</sup>

Another factor, equally important but widely ignored, could also help explain the freedom granted to Chinese journalists who write about OGI matters. The factor relates to the nature of China's political system. According to a typology generated by political scientist Barbara Geddes, the world's governments include three types of authoritarian regimes: single-party regimes such as China, military regimes such as Thailand after 2014 and Myanmar before 2015, and personalist/dictatorship regimes

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almost all the litigation. The website can be retrieved from <<http://www.ogichina.org>>. (last visited March 12, 2017).

<sup>29</sup>Maosheng Lai & Hui Yan, *Woguo zheng fuxin xigongkaitiaoli de gongzhongren zhidudiao cha* [Survey on Public Awareness of OGI Regulations, 我国《政府信息公开条例》的“公众认知度”调查], 5 DIGITAL LIBRARY FORUM [数字图书馆论坛] (2008), retrieved from <<http://www.dlf.net.cn/manager/manage/photo/admin200885155735%B5%F7%B2%E9.pdf>>. (last visited March 12, 2017).

<sup>30</sup> Most information applicants are not highly educated professionals such as doctors, journalists, professors, or accountants (lawyers are an exception). Instead, the majority of OGI requesters in China are ordinary urban residents, workers, farmers, college students, NGO employees, rights activists, and many other people of low socio-economic status. This demographic pattern indicates that OGI Regulations have had wide publicity throughout Chinese society.

<sup>31</sup>Then-Premier Wen Jiabao stressed the role of watchdog for journalism in correcting official wrongs in administration in his speech at the National Meeting on Law-based Administration in 2010. Wen emphasized at the Fifth State Council Working Meeting on Anti-Corruption in 2011 that the government creates conditions for citizens to supervise officeholders. Wen Jiabao, *Wen Jiabao zai quanguo yifaxing zheng gong zuo hui yishang de jiang hua* [Speech delivered at the National Meeting on Law-based Administration, 温家宝在全国依法行政工作会议上的讲话 (3)], PEOPLE'S DAILY, September 20, 2010, retrieved from <<http://politics.people.com.cn/GB/101380/12772650.html>>. (last visited March 12, 2017); Yingfeng Zhou, *Guowuyuan zhaokaidiwucilian zheng gong zuo hui yi* [State Council Holds Fifth Working Meeting on Anti-Corruption, 国务院召开第五次廉政工作会议], XINHUANET.COM, March 26, 2012, retrieved from <[http://news.xinhuanet.com/politics/201203/26/c\\_111704718.htm](http://news.xinhuanet.com/politics/201203/26/c_111704718.htm)>. (last visited March 12, 2017).

such as North Korea.<sup>32</sup> A theory, advanced and empirically tested by political scholar, Bogdan Popescu, argued that these three regime types allow for varying degrees of press freedom. Single party regimes normally have the freest press (comparatively speaking), personalist/dictatorship regimes have the least free media, and military regimes stand between the two.<sup>33</sup> The theory explains that single-party regimes are relatively more transparent and inclusive than the other two non-democratic regime types, thus allowing for the greatest level of press freedom among the three. The personalist/dictatorship regimes, characterized by the most severe censorship, are the result of political insulation surrounding the ruling clique. Military regimes need no censorship because journalists resort to self-censorship due to the presence of military as a “symbol of coercive power.”<sup>34</sup> The vibrancy in coverage of OGI Regulations by Chinese journalists attests to the validity of this theory.

#### **IV. Role of Chinese Journalists in Using OGI Regulations to Access Government-held Information**

Chinese media reported official transparency vigorously, but their aggressive use of OGI Regulations to access governmental information remains a question, and the response is, for practical purposes, in the negative. After media interviews, database searches, and Internet searches, the results indicate that, as of March 2017, only a very small number of Chinese journalists used OGI Regulations to request official information. From 2008 to 2017, no single news organizations applied for government-held information through FOI. This is consistent with a prior study showing that among various kinds of OGI requestors, journalists are the least active.<sup>35</sup> A list, in chronological order for 2006 to 2017, details Chinese media professionals’ requests:

• Pin Ma is a reporter for *Jiefang Daily*, the official newspaper of the Shanghai Committee of the Communist Party of China. In April 2006, Ma twice vainly attempted to interview officials from the Shanghai Municipal Urban Planning Bureau for information needed for a news story. Ma submitted an application, in the name of a citizen, to the agency for the same information on April 23, 2006, two years after enactment of *Provisions of Shanghai Municipality on Open Government Information*.<sup>36</sup> On May 18, 2006, Ma sued the agency for failure to release the

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<sup>32</sup>BARBARA GEDDES, *AUTHORITARIAN BREAKDOWN: EMPIRICAL TEST OF A GAME THEORETIC ARGUMENT* (1999); BARBARA GEDDES, *PARADIGMS AND SAND CASTLES: THEORY BUILDING AND RESEARCH DESIGN IN COMPARATIVE POLITICS* (2003).

<sup>33</sup>Bogdan G. Popescu, *Press Freedom in Non-Democratic Regimes*, paper prepared for delivery at the European Consortium for Political Research Graduate Conference, Dublin City University, August 30-Sept.1, 2010, p.1 and 22, retrieved from <<http://www.ecprnet.eu/databases/conferences/papers/462.pdf>> (last visited March 12, 2017).

<sup>34</sup>*Id.*

<sup>35</sup> An analysis of four major categories of Chinese OGI requestors (lawyers, citizens, college students and journalists) applying from 2011 to 2013 for government-held information indicates that lawyers are the most active (52% of information requests were made by attorneys), journalists are the least active (7%), citizens (22%) and college students (19%) stand in the middle. Yang Guo, *Xinwenjizhe dui zhengfuxinxigongkaitiaolishiyongqingkuang de diaocha* [An Investigation into Journalistic Use of OGI Regulations, 新闻记者对《政府信息公开条例》使用情况的调查], 1 SE. COMM. 73-75 (2016).

<sup>36</sup> Implementation of local OGI rules occurred before enactment of the nation-wide *OGI Regulations* in 2007. Shanghai enacted *Provisions of Shanghai Municipality on Open*

information under Shanghai OGI Provisions. The Shanghai Huangpu District Court accepted the lawsuit, and Ma became the first Chinese reporter to sue the government under local OGI provisions. However, Ma withdrew the litigation on June 2, 2006, due to pressure from various parties.<sup>37</sup> The national and local media except *Jiefang Daily* covered the episode extensively.

- On April 8, 2008, *Press Digest*<sup>38</sup> editor, Ping Ma, submitted an OGI application to the Shanghai Municipal Urban Planning Bureau for the same information requested in 2006 while working as a *Jiefang Daily* reporter. The request coincided with the new *Provisions of Shanghai Municipality on Open Government Information*.<sup>39</sup> Considering the released information to be self-contradictory, Ma sued the agency for a second time, but the court declined to accept his complaint. On July 8, 2008, the editor sent a request to the National Development and Reform Commission for the same information. The agency redirected the query to the Shanghai Municipal Development and Reform Commission for the information.<sup>40</sup> Ma's newspaper and the other publications in the Jiefang Daily Newspaper Group did not cover the application and the ensuing attempt to seek judicial remedy.

- Ling Su and her colleagues at the influential *Southern Weekend* experimented with submitting OGI requests after enactment of OGI Regulations in May 2008. The OGI requests, filed with 25 Bureaus of Land and Resources in 21 cities, sought relevant real estate information. Only four agencies approved disclosure that otherwise should have had proactive dissemination, thereby creating an approval rate of only 16 percent.<sup>41</sup> The results of the experiment appeared in the newspaper to illustrate the difficulty citizens have using OGI Regulations for accessing information.

- On February 2, 2009, *Southern Weekend* reporter, Yongtong Su, made written request to the Ministry of Environmental Protection for an environmental impact assessment that approved construction of the PX chemical plant in the Chinese

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*Government Information in January 2004. The Provisions were repealed and replaced by a new OGI rule in 2008.*

<sup>37</sup>Jian Liu, *Quanguoshouqicaifangquan an jizhechesu* [Journalist Withdraws Country's First Lawsuit Filed to Uphold Right of Interviewing, 全国首起采访权案记者撤诉], *THE LEGAL DAILY*, June 8, 2006, retrieved from <[http://news.xinhuanet.com/legal/2006-06/08/content\\_4661995.htm](http://news.xinhuanet.com/legal/2006-06/08/content_4661995.htm)>. (last visited March 12, 2017). Dequan Zhu, *Zhengfuqinfanxinwencaifangquandiyianxuanji* [Questions About First OGI Litigation Involving A Journalist, “政府侵犯新闻采访权第一案”悬疑], 13 *THE YOUTH JOURNALIST* (2006), <[http://qnjz.dzwww.com/zk/200608/t20060801\\_1680429.htm](http://qnjz.dzwww.com/zk/200608/t20060801_1680429.htm)> (last visited March 12, 2017).

<sup>38</sup>*Press Digest* (*baokanwenzhai*报刊文摘) is a popular newspaper of the Jiefang Daily Newspaper Group in Shanghai.

<sup>39</sup>*Provisions of Shanghai Municipality on Open Government Information* (promulgated on April 28, 2008 by the Shanghai municipal people's government) (order No.2) (effective date: May 1, 2008) (amended on December 20, 2010) (order No.52).

<sup>40</sup> Henan Zheng, *Xinxigongkai you xiaticongminjiaojinguihuaaju* [A Citizen Challenges Bureau of Urban Planning for Flawed Information Disclosure, 信息公开有瑕疵公民较劲规划局], *PROCURATORIAL DAILY*, Aug. 4, 2008, retrieved from <[http://newspaper.jcrb.com/dzb/fukan/page\\_64/200808/t20080804\\_59078.html](http://newspaper.jcrb.com/dzb/fukan/page_64/200808/t20080804_59078.html)> (last visited March 12, 2017).

<sup>41</sup> Ling Su, *Jizheqinli 'xinxibugongkai* [Reporter Personally Experiences Non-Disclosure of Government Information, 记者亲历“信息不公开”], *SOUTHERN WEEKEND*, July 10, 2008, retrieved from <<http://www.infzm.com/content/14380>> (last visited March 12, 2017).

coastal city of Zhangzhou. The newspaper covered the request and application for information in an attempt to follow up the PX plant controversy, widely reported by Chinese media.<sup>42</sup>

- On March 8, 2010, 163.com auto editor, Wenjun Liu, submitted and publicized an OGI request, in the name of an ordinary citizen, with General Administration of Quality Supervision, Inspection and Quarantine for information concerning the number of people killed or injured in traffic accidents due to alleged malfunctioning auto parts. Also included in the request was the number of complaints filed by Chinese purchasers against Toyota over the years and the agency's investigation and resolutions for those complaints. Liu filed the application based on a sense of obligation to inform the public of the safety of Toyota vehicles in China, after the 2009-2011 global recall of Toyota vehicles.<sup>43</sup>

- On May 20, 2010, *Southern Weekend* journalists lodged OGI applications with bureaus of environmental protection in 31 major Chinese cities<sup>44</sup> for information concerning enterprises penalized from January 2010 to May 2010 for violating environmental laws and regulations, and information for justifying the penalties. The experimental use of OGI Regulations appeared prominently in the newspaper to demonstrate the difficulty with obtaining official information via the OGI platform.<sup>45</sup>

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<sup>42</sup>Sixteen days after submission of the request, YongtongSu received a copy of the report from the ministry. Yongtong Su, *Dujiapilu: Zhangzhou PX huanpingpifushu* [Exclusive: Zhangzhou PX Environmental Impact Assessment Approval Document [独家披露：漳州PX环评批复书], SOUTHERN WEEKEND, Feb. 22, 2009, retrieved from <<http://www.infzm.com/content/24173>> (last visited March 12, 2017).

<sup>43</sup>The agency accepted Liu's application immediately. On April 28, 2010, the agency responded that both the number of people affected by defective auto parts and the number of auto complaints do not fall into the category of official information released according to *OGI Regulations*. As for the investigation and resolution of the complaints, the agency directed the applicant to the agency's website for relevant information. Liu did not appeal for administrative reconsideration to rectify non-disclosure. Nor did he sue the agency. He did post the agency's official response letter on a personal blog. Dong Dong, *Guojiazhijianzongjushoulidiyilifengtianzhaohuixinxigongkaishenqing* [General Administration of Quality Supervision, Inspection and Quarantine Accepts First OGI Request for Information Concerning Toyota Recall Incident, 国家质检总局受理第一例丰田召回信息公开申请], 163.COM, March 9, 2010, retrieved from <<http://auto.163.com/10/0309/13/61BC5KAL000816HJ.html>>. (last visited March 12, 2017); The official response letter can be found on Wenjun Liu's personal blog, retrieved from <<http://gzdongdong007.blog.163.com/blog/#m=0&t=2&c=2010-4>> (last visited March 12, 2017).

<sup>44</sup> They include four municipalities directly under the State Council, five capital cities in autonomous regions, and 22 provincial capital cities.

<sup>45</sup>Submission of OGI applications to Lhasa and Haikou failed due to technical reasons. The newspaper successfully sent the applications to the environmental protection agencies in 29 cities by telefax from the publication's Guangzhou office. Among the 29 cities, 14 percent approved disclosure of the information requested; 14 percent denied the request; 27 percent responded that they had proactively released the information requested; 45 percent did not respond at all. Four cities (Xining, Tianjin, Guiyang and Hangzhou) rejected the request for different reasons. Xining held that compilation of the information was incomplete. Tianjin maintained that the information sought was pre-decisional and deliberative and disclosure may endanger state security, public security, economic security and social stability. Guiyang insisted that the information sought involved commercial secrets, personal privacy, and the third party did not consent to disclosure. Hangzhou required the newspaper to provide a photocopy of its

- On July 11, 2010, *Beijing News* journalist, Bo Chen, submitted an OGI request with the Beijing Municipal Traffic Law Enforcement General Team, in the name of a Chinese citizen, for information of the number of unlicensed taxis in Beijing and the total fines levied against those illegal cabs over the years. The reporter sought to expose police officers who willfully fined taxi drivers. The whole application process appeared in the newspaper as a part of coverage of unlicensed taxis.<sup>46</sup>

- On August 2010, *Press Digest* editor, Ping Ma, submitted an OGI application to the Shanghai Public Security Bureau Xuhui Branch. The request was for documents and records detailing certain types of public security cases received by the branch from March 1, 2006 to December 31, 2009. All those public security cases involved incidents of beating and slightly injuring innocent individuals and represented public security cases closed without adjudication and wrongdoers receiving administrative penalties.<sup>47</sup> Dissatisfied with the agency's responses,<sup>48</sup> Ma sued the agency, asking a local court to rule in favor of disclosure of the information.<sup>49</sup> Neither Ma's newspaper nor other

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certificate of business registration and documents certifying its status as legal person. Duanduan Yuan & Nan Xu, *Huanjingxinxigongkaizazhe'm nan, ershijiu fen xinxigongkaishenqingbiao de zaoyu* [Why Is Environmental Information Disclosure So Hard? Story of 29 OGI Request Forms, 环境信息公开咋这么难 29份信息公开申请表的遭遇], SOUTHERN WEEKEND, June 24, 2010, retrieved from <<http://news.qq.com/a/20100625/001011.htm>> (last visited March 12, 2017).

<sup>46</sup> The agency rejected the request on August 4, 2010, ruling that the applicant failed to satisfy the special needs test. In other words, the information sought was irrelevant to special needs of the journalist's production, livelihood and scientific research. The journalist did not resort to administrative appeal and judicial review to rectify non-disclosure. Bo Chen, *Guanfanghuiyingheichefakuanhuanjia* [Officials Respond to Allegations of "Bargaining for Reduced Fines Levied Against Unlicensed Cabs," 官方回应“黑车罚款还价”], THE BEIJING NEWS, August 5, 2010, retrieved from <[http://epaper.bjnews.com.cn/html/2010-08/05/content\\_133849.htm](http://epaper.bjnews.com.cn/html/2010-08/05/content_133849.htm)> (last visited March 12, 2017).

<sup>47</sup> On February 2, 2010, a traffic accident involved Ma's parking and a collision with a Passat sedan. Ma, beaten and slightly injured by the angry driver of the Passat, reported the beating to the Shanghai Public Security Bureau Xuhui Branch. The agency imposed no penalties against the Passat driver. Ma sought the information to determine if the agency enforced administrative penalties laws fairly. Shuming Li, *Shanghai shiminzhuiwen "da le bai da"* [Shanghai Resident Questions Fairness of Being Beaten Without Compensation, 上海市民追问"打了白打"], PROCURATORIAL DAILY, Nov. 3, 2010, retrieved from <[http://news.jcrb.com/jxsw/201011/t20101103\\_461426.html](http://news.jcrb.com/jxsw/201011/t20101103_461426.html)> (last visited March 12, 2017).

<sup>48</sup> Upon request from the branch, Ma rewrote the request into seven separate applications. On September 9, 2010, the agency responded that legal documents concerning public security cases, which imposed administrative penalties on wrongdoers, did not exist because the agency did not create or obtain them. On September 16, 2010, the agency responded again that it had received, from March 2006 to December 2009, a total of 14,404 public security cases, which recorded innocent persons' beatings and slight injuries. Shuming Li, *Shanghai shiminzhuiwen "da le bai da"* [Shanghai Resident Questions Fairness of Being Beaten Without Compensation, 上海市民追问"打了白打"], PROCURATORIAL DAILY, November 3, 2010, retrieved from <[http://news.jcrb.com/jxsw/201011/t20101103\\_461426.html](http://news.jcrb.com/jxsw/201011/t20101103_461426.html)> (last visited March 12, 2017).

<sup>49</sup> Shuming Li, *Shanghai shiminzhuiwen "da le bai da"* [Shanghai Resident Questions the Fairness of Being Beaten without Compensation, 上海市民追问"打了白打"], PROCURATORIAL DAILY, November 3, 2010, retrieved from <[http://news.jcrb.com/jxsw/201011/t20101103\\_461426.html](http://news.jcrb.com/jxsw/201011/t20101103_461426.html)> (last visited March 12, 2017).

newspapers in the Jiefang Daily Newspaper Group covered the application and the ensuing litigation.

- In December 2010, *Southern Weekend* reporter, He Huang, published a story about the controversial genetically modified rice (GMR). In the story, the journalist mentioned that he submitted an OGI application to Grain Administration of Fujian Province for a copy of an administrative order that temporarily banned sale of GMR in the province. The agency did not respond at all to the request.<sup>50</sup>

- In July 2011, *Southern Metropolis Daily* reporter, Baocheng Chen,<sup>51</sup> working outside official duties, sent an OGI request, in the name of a Chinese citizen to the Ministry of Railways for the full list of victims who died in the Wenzhou train collision.<sup>52</sup> The agency confirmed receipt of the application. Whether the agency responded or not is unknown, and the newspaper did not publicize the application, but it did appear on the reporter's personal Twitter-like microblogging site.

- In December 2011, Xing Wang, a journalist from *Southern Metropolis Daily* in Guangzhou, submitted OGI applications in the name of a Chinese citizen. The applications, forwarded to 32 environmental protection agencies at the central and provincial levels, requested surveillance data regarding PM<sub>2.5</sub><sup>53</sup> and ozone density. Among all the environmental protection agencies involved, only one released partial data.<sup>54</sup> The newspaper published the application process.

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<sup>50</sup>He Huang, *Zhuanjiyindami: Fujian jiaotingongzhibeijiaoting* [Genetically Modified Rice: Fujian Province Suspends Ban on GMR, 转基因大米: 福建“叫停通知”被叫停], QQ NEWS, December 20, 2010, retrieved from <<http://news.qq.com/a/20101220/001341.htm>>. (last visited March 12, 2017).

<sup>51</sup> The journalist's personal microblogging site can be accessed at <<http://t.ifeng.com/记者陈宝成/>> (last visited March 12, 2017, no longer accessible for unknown reasons). A news report mentioned Chen's OGI request. Chuanzhongxuanbuzhaoshouweibaodaogaotiezuiwei-shigujiangwen, [CCP Propaganda Department Reportedly Downplays Train Collision, 传中宣部着手为报道高铁追尾事故“降温”], DUOWEI NEWS, July 25, 2011, retrieved from <<http://china.dwnews.com/news/2011-07-25/57940062.html>> (last visited March 12, 2017).

<sup>52</sup> More than 40 people died on 23 July 2011 when two high-speed trains collided on a viaduct in the suburbs of Wenzhou, Zhejiang Province. Ian Johnson, *Train Wreck in China Heightens Unease on Safety Standards*, THE NEW YORK TIMES, July 24, 2011, retrieved from <<http://www.nytimes.com/2011/07/25/world/asia/25train.html>> (last visited March 12, 2017).

<sup>53</sup> PM 2.5 is a term for particles less than 2.5 micrometers in diameter. Arguably, PM<sub>2.5</sub> particles pose the greatest risk to health among all types of particles in the air. They can penetrate deeply into human lungs because of their small size. China has decided to monitor PM<sub>2.5</sub> pollution since 2011. *Frequent Questions about PM<sub>2.5</sub> Designations*, EPA, retrieved from <<http://www.epa.gov/pmdesignations/faq.htm>> (last visited March 12, 2017); KaiGuo, *China Decides to Accept PM<sub>2.5</sub>*, THE GLOBAL TIMES, December 23, 2011, retrieved from <<http://www.globaltimes.cn/content/689657.shtml>>. (last visited March 12, 2017).

<sup>54</sup> Submission of applications to 12 provincial-level agencies failed due to technical reasons, submission of 20 applications was successful. As of Jan. 10, 2012, the reporter received responses from the Ministry of Environmental Protection and 10 other relevant agencies at the provincial level. The response rate was 55 percent. Among all 11 agencies that responded, only the Shanghai Municipal Bureau of Environmental Protection released the average density data for PM 2.5. Xing Wang, *Gongkai PM<sub>2.5</sub> shuju de shenqingshiyuan* [Experiment of OGI Applications for PM<sub>2.5</sub> Data, 公开PM<sub>2.5</sub>数据的申请试验], SOUTHERN METROPOLIS DAILY, Jan.

- On April 1, 2012, Fuqiang Gao, an editor of *Rural Women*<sup>55</sup> in Beijing, sent an OGI request to the Wei County Civil Affairs Bureau in Hebei Province for a list of low-income rural families who receive monthly cash assistance.<sup>56</sup> The agency responded on May 9, 2012 that Gao could visit the agency to personally examine the document; but prohibited photocopying the document or removing a photocopied file.<sup>57</sup> Gao sued the agency on May 10, 2012 for its failure to comply with OGI Regulations.<sup>58</sup> Neither Gao's magazine nor the periodical's parent company, *China Women Daily* covered the application and the ensuing lawsuit.

- From 2008 to 2012, *Caijing* journalists lodged three to four OGI requests with various agencies. The prestigious financial news magazine has a reputation in China for investigative journalism. Its journalists once submitted an application to the State Council Information Office for the official schedule for restructuring the website of *People's Daily* and converting the website into a publicly-traded company. The agency denied the request on the grounds that the information sought has an exemption from disclosure.<sup>59</sup> *Caijing* did not cover the OGI applications of its journalists.<sup>60</sup>

- This study finds that no reporters in China filed OGI requests after 2012. After 2012, none of Chinese journalists sued any government agencies for denied access to governmental information. The result is according to recent Internet search, database search, interviews and reading of FOI requests and court cases compiled by OGIChina.org, a website that has started annual compilation of high-profile FOI cases in China since 2008.<sup>61</sup>

Another dataset, compiled by FOI scholar Yong Tang according to annual reports of OGI activities (2008-2011) made by central agencies and all provincial people's governments, speaks volumes about level of journalistic use of OGI to pry

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11, 2012, at AA33, retrieved from <<http://gcontent.oeeee.com/f/fe/ffeed84c7cb1ae7b/Blog/7e7/07d33d.html>> (last visited March 12, 2017).

<sup>55</sup>*Rural Women* is a magazine affiliated with *China Women Daily* in Beijing.

<sup>56</sup> The editor sought information to verify a rumor that some rural families in the county are not eligible for cash assistance, and they are on the subsidy's roles due to favoritism. Jing Wei, *Meitirensuhebeiveixianminzhengjuweifanzhengfuxinxigongkaitiaoli* [A Journalist Sues Wei County Civil Affairs Bureau in Hebei Province for Non-Compliance of OGI Regulations, 媒体人诉河北蔚县民政局违反《政府信息公开条例》], CHINA.COM.CN, 2012-5-17, retrieved from <<http://forum.china.com.cn/thread-2120089-1-1.html>> (last visited March 12, 2017).

<sup>57</sup>Jing Wei, *Meitirensuhebeiveixianminzhengjuweifanzhengfuxinxigongkaitiaoli*[A Journalist Sues the Wei County Civil Affairs Bureau in Hebei Province for Its Non-Compliance of the OIG Regulations, 媒体人诉河北蔚县民政局违反《政府信息公开条例》], CHINA.COM.CN, 2012-5-17, retrieved from <<http://forum.china.com.cn/thread-2120089-1-1.html>> (last visited March 12, 2017).

<sup>58</sup>Article 26 of OGI Regulations provides that official agencies shall provide the requested information in the form required by the applicant. OGI Regulations 2007. Art. 26.

<sup>59</sup>*Caijing* and other media did not publicize those OGI applications. The information is the result of a September 11, 2011 telephone interview with the editorial department director of a prestigious financial publication in China.

<sup>60</sup>No relevant stories could be found by using key words to search on the website of *Caijing*<http://www.caijing.com.cn/>.

<sup>61</sup> FOI Cases [信息公开案例], <http://www.OGIChina.org> (last visited March 12, 2017).

open government files and documents.<sup>62</sup> The dataset demonstrates that, from May 2008 to December 2011, reporters and editors originated a total of 84 OGI requests in China. During the same period, Chinese citizens, legal persons, and other organizations promulgated a total of 996,469 OGI requests. This indicates that the percentage of journalist-filed OGI requests is extremely low. The same period recorded a total of 6,157 administrative reconsideration cases and 3,435 OGI litigations in China. However, from May 2008 to December 2011, journalists in China filed zero administrative appeals and only one OGI lawsuit. The situation is not far better even if viewed with a much longer time frame. Within the 10 years beginning in 2002<sup>63</sup> and ending in July 2012, journalists were plaintiffs in only four recorded OGI litigations. The first litigation occurred in 2006, ending with withdrawal of the case.<sup>64</sup> The second occurred in 2008 and ended with the court dismissed the complaint.<sup>65</sup> The third<sup>66</sup> in 2010 and the fourth<sup>67</sup> in 2012 remain pending litigation. Filing of all four lawsuits are in the names of Chinese citizens, and currently almost no filings of OGI lawsuits represent interests of journalists or media outlets. In addition, unlike American journalists who use FOI requests to produce award-winning investigative reports, all current use of the freedom of information law in China by journalists focus on official agencies' enforcement of the law. Media exposure of non-compliance of the law itself is important; however, more significant is media exposure of official mismanagement, scandals, and corruptions found through examination of large volumes of governmental documents and records obtained via OGI requests.

## V. Reasons for Limited Use of OGI Regulations by Chinese Journalists to Access Governmental Information

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<sup>62</sup>Yong Tang, *Chinese Freedom of Information: An Evaluation of the Legislative History, Rationales, Significance and Efficacy of Regulations of the People's Republic of China on Open Government Information*, unpublished doctoral dissertation at The Pennsylvania State University, December 2012.

<sup>63</sup>In November 2002, the Guangzhou municipal people's government promulgated China's first local OGI rule. *Provisions of the Guangzhou Municipal Open Government Information* (promulgated on November 6, 2002) (effective on January 1, 2003).

<sup>64</sup>Jian Liu, *Quanguoshouqicaifangquan an jizhehesu* [Journalist Withdraws Country's First Lawsuit Filed to Upheld Right of Interviewing, 全国首起采访权案记者撤诉], LEGAL DAILY, June 8, 2006, retrieved from <[http://news.xinhuanet.com/legal/2006-06/08/content\\_4661995.htm](http://news.xinhuanet.com/legal/2006-06/08/content_4661995.htm)> (last visited March 12, 2017). Dequan Zhu, *Zhengfuqinfanxinwencaifangquandiyi an xuanyi* [Questions about First OGI Litigation Involving A Journalist, "政府侵犯新闻采访权第一案"悬疑], 13 YOUTH JOURNALIST (2006), <[http://qnjz.dzwww.com/zk/200608/t20060801\\_1680429.htm](http://qnjz.dzwww.com/zk/200608/t20060801_1680429.htm)> (last visited March 12, 2017).

<sup>65</sup>Henan Zheng, *Xinxigongkai you xiaticongminjiaojinguihuaaju* [A Citizen Challenges Bureau of Urban Planning for Flawed Information Disclosure, 信息公开有瑕疵公民较劲规划局], PROCURATORIAL DAILY, August 4, 2008, retrieved from <[http://newspaper.jcrb.com/dzb/fukan/page\\_64/200808/t20080804\\_59078.html](http://newspaper.jcrb.com/dzb/fukan/page_64/200808/t20080804_59078.html)> (last visited March 12, 2017).

<sup>66</sup>Shuming Li, *Shanghai shiminzhuiwen "da le bai da"* [Shanghai Resident Questions Fairness of Being Beaten Without Compensation, 上海市民追问"打了白打"], PROCURATORIAL DAILY, November 3, 2010, retrieved from [http://news.jcrb.com/jxsw/201011/t20101103\\_461426.html](http://news.jcrb.com/jxsw/201011/t20101103_461426.html) (last visited March 12, 2017).

<sup>67</sup>Jing Wei, *Meitirensuhebeiweixianminzhengjuweifanzhengfuxinxigongkaitiaoli* [A Journalist Sues Wei County Civil Affairs Bureau in Hebei Province for Non-Compliance of OIG Regulations, 媒体人诉河北蔚县民政局违反《政府信息公开条例》], CHINA.COM.CN, 2012-5-17, retrieved from <<http://forum.china.com.cn/thread-2120089-1-1.html>> (last visited March 12, 2017).

In the United States and many other Western countries, freedom of information laws are very important reporting and research tools for reporters. Johan Lidberg, an Australian FOI scholar, said, “The most frequent, experienced, and at times frustrated, users of FOI are journalists and media organizations. It can be argued that FOI needs journalists to realize its potential as a political accountability tool and journalists need FOI to fulfill their role[s] as the fourth estate, scrutinizing societal power in general and political power in particular.”<sup>68</sup>

The anecdotal examples mentioned above, however, demonstrate that, Chinese journalists are far less passionate than their Western colleagues about FOI law as a reporting and research tool. From 2008 to 2017, Chinese reporters and editors did occasionally use OGI Regulations to obtain documents from the government. While some reporters and editors resorted to actions in court for non-disclosure, such Chinese newsmen were too few. Compared with lawyers, college students and citizens, journalists are the least active users of government documents obtained through OGI requests. The use of administrative and judicial reviews for rectifying non-compliance with OGI Regulations is even more uncommon among Chinese journalists.

A migrant worker in Beijing said to a *Caixin* journalist, “Laws are a big bell made by a country. If you don’t ring it, it will never ring itself!”<sup>69</sup> Sixin Wang, a media law professor from the Communication University of China in Beijing, said in an interview with *TheWall Street Journal* that OGI Regulations could be a “sword” for Chinese journalists.<sup>70</sup> It is worthwhile to ask why Chinese editors and reporters do not ring the “bell” harder. It is worthwhile to ask why Chinese editors and reporters do not use the “sword” more frequently. The reasons for the insufficient use of the OGI Regulations by news media outlets to access information are multifold.

First, the FOI law in China requires information seekers to prove that the documents sought are for special needs of the applicants’ production, livelihood and scientific research. Journalists often find it hard to meet this “special needs test” and government agencies often use the argument “the information sought was irrelevant to your special needs.”<sup>71</sup> Second, many government officials and employees are often cautious with reporters. Reporters often find that they can get the information through OGI more easily if they hide their professional affiliations.<sup>72</sup> Third, OGI Regulations

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<sup>68</sup> Johan Lidberg, *Keeping the Bastards Honest-The Promise and Practice of Freedom of Information Legislation*, dissertation submitted to the faculty of the Murdoch University in Australia in partial fulfillment of the requirements for the degree of Doctor of Philosophy, 2006, p.12.

<sup>69</sup>Hongqing Duan, *Zhongguomeitiruhetuijinxinxi Gongkai* [How Chinese Media Shall Push Forward Open Government Information, 中国媒体如何推进信息公开], 9 CHINA REFORM (2011), retrieved from <[http://article.chinalawinfo.com/Article\\_Detail.asp?ArticleID=63344](http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=63344)> (last visited March 12, 2017).

<sup>70</sup> Geoffrey A. Fowler and Juying Qin, *China Pushes Openness: First Order: Unveil Rules Dictating Transparency*, the WALL STREET JOURNAL, February 28, 2007, retrieved from <<http://online.wsj.com/article/SB117260663002921026.html>> (last visited March 12, 2017).

<sup>71</sup>OGI Regulations of People’s Republic of China, Art. 13.

<sup>72</sup> Xing Wang, *Caifangzhengfunan? Bieshuonishijizhejiuxingle* [Is It Hard to Interview Government? Much Easier If Don’t Say You Are A Reporter, 采访政府难? 别说你是记者就容易了], GUANCHA, July 12, 2014, retrieved from

have been enforceable for only nine years, and many reporters are still not fully aware of the law's magnitude, especially among journalists from local media and underdeveloped regions.<sup>73</sup> Fourth, obtaining official information via the lengthy process of filing OGI requests is time-consuming, and consequently, ill-suited for reporters with restrictive deadlines.<sup>74</sup> Another factor that limits journalistic use of OGI Regulations is the low percentage of OGI requests approved by official agencies<sup>75</sup> and the remote possibility of succeeding in OGI litigation.<sup>76</sup> The prospect of failure in

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<[http://www.guancha.cn/WangXing/2014\\_07\\_12\\_246113.shtml](http://www.guancha.cn/WangXing/2014_07_12_246113.shtml)> (last visited March 12, 2017).

<sup>73</sup> Random email and telephone interviews from June 2012 to July 2012 to measure Chinese journalists' use of OGI Regulations showed that most reporters from national media in Guangzhou, Beijing, and Shanghai have familiarity with OGI Regulations, whereas many reporters from local media in Hubei and Sichuan Provinces have no familiarity.

<sup>74</sup>The managing editor of a prestigious financial publication known for investigative journalism in China stated in a September 11, 2011 telephone interview that his journalists have occasionally used OGI Regulations. But most of his reporters prefer to obtain official information from other sources because the OGI approach is too slow.

<sup>75</sup> Annual reports of OGI activities of central and provincial-level agencies (2008-2011) indicate that the majority of OGI requests submitted to provincial and local agencies gained approval. However, those numbers deserve cautious interpretation because the raw data arises from official agencies, not from independent sources. The OGI request approval rate provided by research organizations and news media such as the *China Academy of Social Science*, Peking University, *Southern Weekend*, and *Southern Metropolis Daily* is far lower. Those independent sources obtained the approval rate by sending staff to apply for information under the guise of ordinary requesters. Those rates are likely more reliable. For example, the China Academy of Social Sciences conducted an OGI application experiment in 2010 and found that the OGI request approval rate was 6.7 percent for central agencies and 4.6 percent for local agencies. Peking University Center for Public Participation Studies and Supports has not released any approval rates, but its staff reportedly faced frequent complaints when applying for information from all agencies. *Southern Weekend* conducted an OGI application experiment in 2010 and found that the approval rate was 41 percent. The *Southern Metropolis Daily* experiment in 2011 found that the corresponding rate was 5 percent. The approval rate may be even lower if requesters are journalists. Governmental agencies may reject disclosure, claiming that the journalists failed to satisfy the special-needs test or argue that the materials sought might be used for sensationalism. HongqingDuan, *Zhongguomeitiruhetuijinxinxigongkai* [How Chinese Media Shall Push Forward Open Government Information, 中国媒体如何推进信息公开], 9 CHINA REFORM (2011), retrieved from <[http://article.chinalawinfo.com/Article\\_Detail.asp?ArticleID=63344](http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=63344)> (last visited March 12, 2017); Xing Wang, *Gongkai PM2.5 shuju de shenqingshiyan* [Experiment of OGI Applications for PM2.5 Data, 公开PM2.5数据的申请试验], SOUTHERN METROPOLIS DAILY, Jan. 11, 2012, at AA33, retrieved from <<http://gcontent.oeeee.com/f/fe/ffeed84c7cb1ae7b/Blog/7e7/07d33d.html>> (last visited March 12, 2017); Mingyan Wei and ShaofengGuo, *Xinxigongkaitiaolishishinianrengzaozhixing nan* [OGI Regulations Still Encounter Implementation Bottlenecks Four Years After Law Was Enforced, 信息公开条例实施4年仍遭执行难], BEIJING NEWS, May 15, 2012, retrieved from <<http://www.bjnews.com.cn/news/2012/05/15/199113.html>> (last visited March 12, 2017).

<sup>76</sup> Judicial review is normally ineffective for rectifying non-disclosure of information. The chance of winning OGI litigation is even slimmer if the plaintiffs are journalists. Zhengjun Zhao, an ordinary citizen in Zhenzhou City, Heinan Province, filed 12 OGI lawsuits since May 2008 when upon enactment of *OGI Regulations*. His success rate was high: nearly 60 percent. Among the 12 litigations he filed, he won 7, lost 2 and withdrew 3. Zhao is fortunate, unlike most reporters, such as *Jiefang Daily* journalist, Pin Ma. As mentioned earlier in this paper, Ma filed several OGI litigations and won none. ChangrongQu, *Cong ling daobai fenzhiliushi: gongmin Zhao Zhengjun de "gongkai" weiquanlu* [From Zero to 60 Percent: Citizen Zhengjun

obtaining the materials sought convinces journalists that the information request is useless. Lack of support from newsrooms and media attorneys also contributes to the reluctance of journalists to use the law for access to information.<sup>77</sup>

The limited use of OGI Regulations to access information may also have an explanation from the changing prototype of the Chinese news media. As a newly emerging model that directly challenges the dominance of party journalism, professional journalism has created favorable conditions for the use of OGI Regulations. However, breathing space available to professional journalism remains limited in China. As Chinese media are moving toward liberalization, commercialization, industrialization, technological innovation, and professionalism since the 1980s, professional journalism has emerged as a new paradigm and a direct competitor to the dominant party-journalism model.<sup>78</sup> Market-oriented metropolitan newspapers exemplify professional journalism whereas party organs exemplify party journalism. The two journalistic models embrace sharply different journalistic values and practices. Since they are much less censored than party organs, metropolitan dailies have greater involvement in investigative journalism, thus creating a need for information obtained through filing OGI requests. Both media interviews and careful examination of OGI articles published by Chinese media confirm this speculation. Most media outlets that used OGI Regulations since 2002 are metropolitan publications. A *People's Daily* journalist disclosed no need for journalists at his newspaper to apply for information via OGI requests because information released through official meetings and websites is sufficient. He admitted that the information released through these two channels is far from sufficient for market-oriented metropolitan newspapers.

One of the more important reasons for media's limited use of OGI Regulations for information access, however, is the lack of stronger legal protection for Chinese journalists' right to gather and publish news. A journalist would not seek

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Zhao's Journey to Protect His Right to Know, 从0到60% : 公民赵正军的“公开”维权路], PEOPLE'S DAILY, May 5, 2009, retrieved from <<http://cpc.people.com.cn/GB/64093/64387/9237160.html>> (last visited March 12, 2017).

<sup>77</sup> Pin Ma is a good case in point. The ambitious *Jiefang Daily* journalist applied for governmental information several times and brought agencies to court several times. Unfortunately, his persistent use of OGI Regulations was not career enhancing. His newspaper did not publish any articles to support his applications. To the contrary, his newspaper persuaded him to withdraw the 2006 lawsuit because of pressure the publication received from powerful party and official censors. The newspaper demoted him, transferred him from *Jiefang Daily* to another much less prominent sister newspaper, *Press Digest*. His newspaper also rejected his application for a senior professional title. The situation for Ma would improve if he could obtain free legal assistance from media attorneys and public interest organizations, similar to American colleagues. Unfortunately, media attorneys in China are scarce; public interest groups specializing in providing free-of-charge legal services to media organizations do not exist in China. Hongqing Duan, *Zhongguomeitiruhetuijinxinxigongkai* [How Chinese Media Shall Push Forward Open Government Information, 中国媒体如何推进信息公开], 9 CHINA REFORM (2011), retrieved from <[http://article.chinalawinfo.com/Article\\_Detail.asp?ArticleID=63344](http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=63344)> (last visited March 12, 2017).

<sup>78</sup>Zhongdang Pan and Joseph Man Chan, *Assessing Media Exemplars and Shifting Journalistic Paradigms: A Survey Study of China's Journalists*, paper presented at the annual meeting of International Communication Association, San Diego, CA, p1-54, May 23, 2003.

information via OGI requests in the first place, knowing in advance of the application that the censors would consider the information inappropriate for public view.

The Chinese journey to freedom of expression and freedom of the press is clearly less smooth than the journey to its freedom of information law. Modern Chinese media originated in the early 1900s after the Qing Dynasty collapsed. Enactment of the Publishing Act occurred in 1930, amended in 1937,<sup>79</sup> followed by Press Act in 1943.<sup>80</sup> Chiang Kai-shek and his Kuomintang regime used both laws to suppress freedom of expression and the press, however, with lackluster enforcement.<sup>81</sup> After Mao Zedong and his communist comrades created the People's Republic of China, Chinese political elite included concepts of freedom of expression and the press into the 1954 Constitution.<sup>82</sup> The same aspirations appear in the subsequent 1975 Constitution,<sup>83</sup> 1978 Constitution<sup>84</sup> and 1982 Constitution.<sup>85</sup> Under Mao's leadership, the twin freedoms of expression and the press never reached practice, since the party established a Soviet Union-like media system characterized by complete party control.<sup>86</sup> During the Cultural Revolution (1966-1976), the Constitution became a worthless piece of paper. The Constitution failed to protect Chinese President Liu

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<sup>79</sup>Xiuqing Yang, *the Publishing Act*, Encyclopedia of Taiwan, retrieved from <<http://taiwanpedia.culture.tw/en/content?ID=3967>> (last visited March 12, 2017).

<sup>80</sup>Xiaowei Song, *Xinwenlifashiyanjiuxuzhongchuantong* [Research on Legislative History of the Press Shall Value the Tradition, 新闻立法史研究须重传统], CHINESE SOCIAL SCIENCES TODAY, May 30, 2012, at B02, retrieved from <<http://www.gongfa.org/html/gongfapinglun/20120605/1182.html>> (last visited March 12, 2017).

<sup>81</sup>YUTANG LIN, A HISTORY OF THE PRESS AND PUBLIC OPINION IN CHINA 177 (1936).

<sup>82</sup> Article 87 of the 1954 Constitution proclaimed that “[c]itizens of the People's Republic of China enjoy freedom of speech, freedom of the press, freedom of assembly, freedom of association, freedom of procession and freedom of demonstration. To ensure that citizens can enjoy these freedoms, the state provides the necessary material facilities.” The Chinese Constitution 1954. Article 87 (adopted in 1954 and repealed by 1975 Constitution) retrieved from <<http://e-chaupak.net/database/chicon/1954/1954bilingual.htm>> (last visited March 12, 2017).

<sup>83</sup> Article 28 of the 1975 Constitution provided that “Citizens enjoy freedom of speech, correspondence, the press, assembly, association, procession, demonstration and the freedom to strike, and enjoy freedom to believe in religion and freedom not to believe in religion and to propagate atheism.” The Chinese Constitution 1975. Article 28. (adopted in 1975 and repealed by 1978 Constitution) retrieved from <<http://www.e-chaupak.net/database/chicon/1975/1975e.htm>> (last visited March 12, 2017).

<sup>84</sup> Article 45 of the 1978 Constitution provided that “Citizens enjoy freedom of speech, correspondence, the press, assembly, association, procession, demonstration and the freedom to strike, and have the right to speak out freely, air their views fully, hold great debates and write big-character posters.” (adopted in 1978 and repealed by the 1982 Constitution) retrieved from <[http://www.lawtime.cn/zhishi/fagui/2007031747932\\_8.html](http://www.lawtime.cn/zhishi/fagui/2007031747932_8.html)> (last visited March 12, 2017).

<sup>85</sup> Article 35 of the 1982 Constitution provides that “Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.” (adopted in 1982 and amended in 1988, 1993, 1999 and 2004) retrieved from <<http://english.people.com.cn/constitution/constitution.html>> (last visited March 12, 2017).

<sup>86</sup>FRED S. SIEBERT, THEODORE PETERSON and WILBUR SCHRAMM, FOUR THEORIES OF THE PRESS: THE AUTHORITARIAN, LIBERTARIAN, SOCIAL RESPONSIBILITY AND SOVIET COMMUNIST CONCEPTS OF WHAT THE PRESS SHOULD BE AND DO 105-146 (1956).

Shaoqi from illegal imprisonment, torture, and death.<sup>87</sup> Many reporters, purged by the authorities for being rightists, investigated and imprisoned without the due process of the law,<sup>88</sup> committed suicide.<sup>89</sup>

Legal protections for journalists became stronger after Mao died and Deng Xiaoping emerged as the leader of the country in the late 1970s. As a part of Deng's effort to reestablish a legal system severely damaged by Mao, journalists in China began reflecting on the lessons of the Cultural Revolution and the experiences of the rule of law in journalism in Western countries. Journalists, scholars, and the National People's Congress (NPC) deputies began proposing the enactment of the Freedom of the Press Law in the early 1980s. In 1980, many articles advocating greater rule of law in journalism appeared in leading periodicals.<sup>90</sup> Since the common notion was that judges could not cite constitutional provisions an authority in China,<sup>91</sup> Freedom of the Press Law would be vital for translating ideals in Article 35 of the 1982 Constitution into reality. The law would also allow judicial remedy for violations of journalists' legal rights.

In 1983, some NPC deputies<sup>92</sup> submitted proposals to the first session of the sixth National People's Congress, calling on the NPC to "legislate the Freedom of the Press Law of the People's Republic of China when the opportunities are ripe."<sup>93</sup> In January 1984, The Central Propaganda Department of the Chinese Communist Party issued a report for instructions on the drafting of the Press Law. The CPC Secretariat and the Chairman of the NPC Standing Committee soon approved the report.<sup>94</sup> In May 1984, the Press Law Research Institute, established in Beijing under the auspices of the NPC and the Chinese Academy of Social Sciences, produced a draft of the Freedom of the Press Law in 1985. In 1986, Shanghai produced a local version of the press law

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<sup>87</sup> On the eve of the Cultural Revolution when Red Guards physically attacked Liu Shaoqi, Liu produced a copy of the Constitution and said angrily with the document in his hand, "I am the president! I am protected under the constitution." But he was still tortured to death. JIAQI YAN and GAOGAO, *TURBULENT DECADE: A HISTORY OF THE CULTURAL REVOLUTION* 156 (1996).

<sup>88</sup> YUEZHI ZHAO, *MEDIA, MARKET, AND DEMOCRACY IN CHINA: BETWEEN THE PARTY LINE AND THE BOTTOM LINE* 30 (1998).

<sup>89</sup> Two top journalists who committed suicide during the Cultural Revolution were Tuo Deng and Changjiang Fan. Deng was founding editor of *People's Daily*. Fan once served as publisher of *People's Daily* and Xinhua News Agency. Both killed themselves for being criticized and purged by Mao. TIMOTHY CHEEK, *PROPAGANDA AND CULTURE IN MAO'S CHINA: DENG TUO AND THE INTELLIGENTSIA* (1997) *Biography of Changjiang Fan*, posted on the website of the Humanism Memorial Museum in Shanghai, retrieved from <[http://www.rwjnbwg.com/index\\_en.php?c=grand&m=person&id=35](http://www.rwjnbwg.com/index_en.php?c=grand&m=person&id=35)> (last visited March 12, 2017).

<sup>90</sup> Xupei Sun, *Sanshinianxinwenlifalichengyusikao* [Reflections on 30-year-long Legislative History of Press Law, 三十年新闻立法历程与思考], 2 *YAN-HUANG HISTORICAL REVIEW* (2012), retrieved from <<http://www.yhcqw.com/html/wenzjc/2012/26/122618287I7I9A8677DJGE4F05KA09HBI.html>> (last visited March 12, 2017).

<sup>91</sup> Bo Li, *What Is Constitutionalism?* 1 *PERSPECTIVES* (2000).

<sup>92</sup> Many were journalists.

<sup>93</sup> Xupei Sun, *Sanshinianxinwenlifalichengyusikao* [Reflections on 30-year-long Legislative History of Press Law, 三十年新闻立法历程与思考], 2 *YAN-HUANG HISTORICAL REVIEW* (2012), para. 4-5, retrieved from <<http://www.yhcqw.com/html/wenzjc/2012/26/122618287I7I9A8677DJGE4F05KA09HBI.html>> (last visited March 12, 2017).

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

known as *Provisions of the Shanghai Municipality on Journalism Work*. In 1987, the Administration of Press and Publication,<sup>95</sup> created in Beijing, authored another draft of the Freedom of the Press Law appearing in early 1989.<sup>96</sup>

Among the three drafts of the Freedom of the Press Law, the draft produced by the Press Law Research Institute is the most comprehensive and progressive for guaranteeing journalistic rights. The draft, after three revisions, was complete in 1988. Article 1 of the third version provides that freedom of the press means the right of the citizens to publish and obtain news via news media and the right of citizens to enjoy and exercise freedom of expression and publication. Article 7 provides that citizens and social organizations enjoy the right to criticize the government and public officials. Article 8 provides that the state may not engage in any forms of censoring the content of news media, except when the country is in a state of national emergency/general mobilization. Article 12 provides that citizens' groups and natural persons may establish newspapers and periodicals. Article 22 provides that news media can make editorial judgments, independently, without the need for approval from any individual or organization outside the news organization. News gathered by the journalist may arrive at a news organization without undue interception. Individuals or organizations may not obstruct, threaten, persecute, or endanger journalists who are fulfilling their professional duties.<sup>97</sup>

Although conservative hardliners in the party strongly opposed to the passage of the Press Law,<sup>98</sup> Zhao Ziyang<sup>99</sup> and many reform-minded leaders supported the

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<sup>95</sup> The Administration of Press and Publication is a vice ministerial-level administrative agency directly under the supervision of the State Council. It is responsible for regulating and distributing news, print and Internet publications in China. Renamed the General Administration of Press and Publication in 2001, its upgraded administrative rank became ministerial-level. The agency was then renamed in 2013 as State Administration of Press, Publication, Radio, Film and Television.

<sup>96</sup>Xupei Sun, *Sanshinianxinwenlifalichengyusikao*[Reflections on 30-year-long Legislative History of Press Law,三十年新闻立法历程与思考], 2 YAN-HUANG HISTORICAL REVIEW (2012), retrieved from <<http://www.yhcqw.com/html/wenzjc/2012/26/122618287I7I9A8677DJGE4F05KA09HBI.html>> (last visited March 12, 2017).

<sup>97</sup> All the key provisions of the draft of the law appear in an article written by Hu Jiwei, former editor-in-chief and publisher of *People's Daily* and one of the leading writers of the law. Hu Jiwei, *Zhidingshongguodiyibuxinwenfa de jianxinyueyun (qi)* [Hardships and Misfortunes in Formulation of First Press Law in China, 制定中国第一部新闻法的艰辛与厄运(七)], August 7, 2001, retrieved from <<http://www.bullogger.com/blogs/clx/archives/81869.aspx>> (last visited March 12, 2017).

<sup>98</sup> Some high-ranking officials in the party strongly opposed enactment of the Freedom of the Press Law. They argued that the Press Act led to the breakdown of many regimes such as Chiang Kai-shek's rule in Mainland China, the Soviet Union and many Eastern European countries. They also argued that the Freedom of the Press Law would displace various propaganda departments. Hu Jiwei, *Zhidingshongguodiyibuxinwenfa de jianxinyueyun (qi)* [Hardships and Misfortunes in Formulation of First Press Law in China, 制定中国第一部新闻法的艰辛与厄运 (八)], August 7, 2001, retrieved from <http://www.bullogger.com/blogs/clx/archives/81870.aspx>.

<sup>99</sup>As the party general secretary in the late 1980s, Zhao was very supportive of political reform including greater rule of law in journalism. One day during the Spring Festival in 1989, Zhao invited one of the leading framers of the *Press Law* to his office. The two discussed formulation of Freedom of the Press Law for a whole morning. Hu Jiwei, *Zhidingshongguodiyibuxinwenfa de jianxinyueyun (qi)* [Hardships and Misfortunes in Formulation of First Press Law in China,

idea of Freedom of the Press Law. However, coincidentally, the 1989 Tiananmen Square incident occurred, unexpectedly, just when the three drafts of Freedom of the Press Law were ready for submission to the State Council and the NPC Standing Committee for review. The gunshots on the Tiananmen Square in the early morning of June 4, 1989 not only killed student demonstrators but also killed Freedom of the Press Law prematurely.

Since the 1989 Tiananmen Square incident, legislation of Freedom of the Press Law has stalled. Although Freedom of the Press Law appears in the legislative plan's agenda of the eighth National People's Congress Standing Committee, the law-making process lost momentum.<sup>100</sup> In March 1998, 33 NPC deputies submitted a proposal to the NPC, calling on the speedy formulation of *Freedom of the Press Law*. In December 1998, The Chairman of the NPC Standing Committee, Li Peng, said during an interview, that China would formulate a press law that is consistent with Chinese national conditions. Beginning in 2003, NPC deputies have submitted proposals for the establishment of Freedom of the Press Law almost every year.<sup>101</sup> In 2008, *People's Daily* published an article urging relevant agencies to speed work on formulating the long-delayed Freedom of the Press Law.<sup>102</sup> Despite all these efforts, no indications exist that the law will become a reality in the near future.

Limitations to press freedom in China are due to a lack of Freedom of the Press Law. Then how is China ranked against other countries in terms of press freedom? Several measures are available to quantify a country's press freedom.<sup>103</sup> Freedom

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制定中国第一部新闻法的艰辛与厄运 (八) ], August 7, 2001, retrieved from <http://www.bullogger.com/blogs/clx/archives/81870.aspx>.

<sup>100</sup>Xupei Sun, *Sanshinianxinwenlifalichengyusikao* [Reflections on 30-year-long Legislative History of Press Law, 三十年新闻立法历程与思考], 2 YAN-HUANG HISTORICAL REVIEW (2012), retrieved from <http://www.yhcqw.com/html/wenzjc/2012/26/122618287I7I9A8677DJGE4F05KA09HBI.html> (last visited March 12, 2017); Jin Zhao, *Xinwenfaweihezhi jinxuanerweili?* [Why Is Press Freedom Law Still A Dream in China? 《新闻法》为何至今悬而未立?], THE YOUTH JOURNALIST, February 12, 2009, retrieved from <http://media.people.com.cn/GB/22114/42328/145310/8792516.html> (last visited March 12, 2017); Lu Keng, *Press Control in "New China" and "Old China,"* in CHIN-CHUAN LEE (ed.), MEDIA'S CHINA, CHINA'S MEDIA 147-162 (1994).

<sup>101</sup>Xupei Sun, *Xinwenlifa: zuikunnan he zuixuyao de lifa* [Legislation of the Press Law: Most Challenging and Most Pressing, 新闻立法：最困难和最需要的立法], MEDIACHINA.NET, retrieved from <http://academic.mediachina.net/article.php?id=4038> (last visited March 12, 2017). Shu Wang, *Daibiaosandutiyizhidingxinwenjiandufa* [NPC Deputy Proposes Three Times for Drafting of Press Supervision Law, 代表三度提议制定《新闻监督法》], GMW.CN, March 8, 2006, retrieved from [http://www.gmw.cn/content/2006-03/08/content\\_385074.htm](http://www.gmw.cn/content/2006-03/08/content_385074.htm) (last visited March 12, 2017).

<sup>102</sup> Qing Hua, *Kexueyifayouxiaoguanlijiaquaixinwenlingyulifagongzuo* [Speed up Work on Legislation of Press Law According to Scientific Principle of Rule of Law and Effective Management, 科学、依法、有效管理加快新闻领域立法工作], PEOPLE'S DAILY, November 3, 2008, retrieved from <http://media.people.com.cn/GB/40606/8270047.html> (last visited March 12, 2017).

<sup>103</sup> For example, Committee to Protect Journalists quantifies a country's press freedom by identifying the number of reporters killed, imprisoned, exiled, or missing in a certain year. *31 Journalists Killed in 2012*, posted on the website of Committee to Protect Journalists, retrieved from <http://www.cpj.org/killed/2012/> (last visited March 12, 2017); Reporters Without Borders Press Freedom Index ranks a country's press freedom by incorporating the number of violations directly affecting journalists, frequent users of the Internet and news media, and the

House press freedom score is a widely used indicator of press freedom because it is the “most comprehensive data on global media freedom available.”<sup>104</sup> Freedom House press freedom scores have constantly ranked the United States (see Table 1 at the end of the paper) as one of the most “free” countries in terms of press freedom and rated China as one of the least free. The scores for China’s press freedom (see Table 2 at the end of the paper) is so low that it trails closely behind North Korea (see Table 3 at the end of the paper) and Cuba (see Table 4 below), two communist regimes widely considered in the West as highly authoritarian.<sup>105</sup> Among almost all non-democratic regimes with freedom of information laws, China again ranks at the bottom in terms of each country’s press freedom for the year of enactment of the freedom of information legislation (see Table 5 below).

Although freedom house scores seem unable to capture the subtle change in a country’s media freedom on a yearly basis, they do reflect, in some way, the worrisome status of journalists’ rights in China. Largely due to the lack of Freedom of the Press Law, the Chinese government has the discretion to use party directives and rules to suppress the freedom of the media in news reporting.<sup>106</sup> Propaganda departments at various levels of the party bureaucracy formulate and enforce those directive and rules.<sup>107</sup> Since those directives and rules are vague, censors from propaganda

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level of self-censorship and financial pressures on news organizations. *Press Freedom Index (2011-2012)*, posted on the website of Reporters Without Borders, retrieved from <<http://en.rsf.org/press-freedom-index-2011-2012,1043.html>> (last visited March 12, 2017); IREX Media Sustainability Index ranks a country’s press freedom by quantifying the ability of media to play its vital role as the “fourth estate.” Measurement of the ability is an assessment of five objectives that shape a media system: freedom of speech, professional journalism, and plurality of news, business management, and supporting institutions. *Media Sustainability Index (MSI)*, posted on the website of IREX, retrieved from <<http://www.irex.org/project/media-sustainability-index-msi>> (last visited March 12, 2017); Freedom of the Press quantifies a country’s press freedom annually by measuring the legal environment, political environment and economic environment in which media system operate. *Freedom of the Press*, posted on the website of the Freedom House, retrieved from <<http://www.freedomhouse.org/report-types/freedom-press/>> (last visited March 12, 2017).

<sup>104</sup> Countries receive scores from 0 (best) to 100 (worst) on the basis of a set of 23 methodological questions, divided into three subcategories: legal environment, political influences, and economic pressure. For each question, a lower number of points coincides with a more free situation, while a higher number of points represents a less free environment. *Freedom of the Press*, posted on the website of the Freedom House, retrieved from <<http://www.freedomhouse.org/report-types/freedom-press/>> (last visited March 12, 2017).

<sup>105</sup>The degree to which each country permits the free flow of news and information determines the classification of its media as Free, Partly Free, or Not Free. Countries scoring 0 to 30 have Free media; 31 to 60, Partly Free media; and 61 to 100, Not Free media. Freedom House began to compile press freedom scores in 1980, with scores compiled annually. The four tables above list press freedom scores for 2008 to 2016 because the Chinese *OGI Regulations* have had enforcement only since 2008. Also including all the years in the tables is infeasible. *Freedom of the Press Methodology*, FREEDOMHOUSE.ORG, retrieved from <<http://freedomhouse.org/images/File/fop/2010/Methodology2010--final5May10.pdf>> (last visited March 12, 2017).

<sup>106</sup>Xupei Sun, *Sanshinianxinwenlifalichengyusikao*[Reflections on 30-year-long Legislative History of Press Law,三十年新闻立法历程与思考], 2 YAN-HUANG HISTORICAL REVIEW (2012), retrieved from <<http://www.yhcqw.com/html/wenzjc/2012/26/122618287I7I9A8677DJGE4F05KA09HBI.html>> (last visited March 12, 2017).

<sup>107</sup> The Central Propaganda Department formulates many party rules and directives. For example, in July 1987, the Central Propaganda Department, CPC Foreign Propaganda Small Leading Group and Xinhua News Agency issued a joint opinion, which provides that news

departments enjoy wide latitude for restricting the flow of any information they dislike.<sup>108</sup>

A common notion is that China is “cautiously but resolutely” on the road to media freedom.<sup>109</sup> The reality, however, is quite the opposite. Various movements in the Chinese media law environment indicate that legal protection for professional and citizen journalism is becoming weaker and weaker in recent years. In 2013, The Supreme Court criminalized online defamation by stating that anyone posting defamatory comments online may face up to three years in prison, probation or deprivation of political rights if such statements are clicked and viewed more than 5,000 times, or reposted/retweeted more than 500 times.<sup>110</sup> In 2015, China adopted a

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media adhere to the principle of being conducive to social stability, stable economic development, smooth operation of reform, and open to publishing articles on sensitive social issues and major public emergencies or incidents. All the important numbers and key facts about those issues and incidents are to remain unpublished until verified and approved by relevant official agencies. In January 1989, the Central Propaganda Department issued a notice, which provided that news media ask for instructions from the State Council leading officials before journalists report on major emergencies or incidents. Normally, only news media outlets at the central level may report on those emergencies or incidents. Xinhua News Agency has exclusive right to cover those emergencies or incidents whenever the situation warrants. In August 1994, the General Office of the CPC Central Committee and the General Office of the State Council issued another notice, which reaffirms the spirit of the January 1989 notice. In addition, the new notice provides that the CCP Office of Foreign Propaganda coordinate foreign audience-intended news coverage of emergency incidents. Xinhua News Agency is the only domestic news organization that can report on those incidents. Other news media outlets are not to report those incidents without proper prior authorization from relevant official agencies. From the middle of the 1990s to the present, party and governmental censors have changed their methods of circulating orders and directives. Similar orders and directives are no longer printed and circulated in party and official documents and files. Instead, most such orders and directives transmit through telephone calls or small internal meetings. News media normally receive a few telephone calls from party and governmental propaganda officials for instructions for reports' contents. Tingjun Wu and Changyong Xia, *Dui woguogonggongweijichuanbo de lishi huiguoyu xianzhuang fenxi* [Historical Review and Status Quo Analysis on Chinese Public Crisis Communication, 对我国公共危机传播的历史回顾与现状分析], 8 TODAY'S MASS MEDIA (2010), republished on people.com.cn on Sept. 2, 2010, retrieved from <<http://media.people.com.cn/GB/40628/12617768.html>> (last visited March 12, 2017).

<sup>108</sup> *People's Daily* published, in 2005, an interview with an American writer and investment banker. Editors' enthusiasm for this interview caused its prominent placement in the paper and they planned an award for the reporter in recognition of his outstanding work. However, one official from the Central Propaganda Department News Reading and Evaluation Small Group was highly critical of this article. He wrote a letter to the Department head and forwarded the letter to *People's Daily* for censure. After the investigation, the newspaper editors insisted that the Propaganda Department was inappropriately concerned and declined to punish the author. This incident reflects that the severity of punishment imposed by the party on politically incorrect journalists is on the decline. However, the incident also exposes the truth that party directives and rules on journalism are normally vague and overly broad. They can be interpreted from many perspectives. Even senior editors in party organs may not easily distinguish what is publishable from what is off limits.

<sup>109</sup> *China's Road of Free Information Flow Cautious but Resolute*, PEOPLE'S DAILY ONLINE, November 08, 2007, para. 1, retrieved from <<http://english.people.com.cn/90001/90782/6299198.html>> (last visited March 12, 2017).

<sup>110</sup> SPC and SPP, *Zuigaorenminfayuan zuigaorenminjianchayuan guanyubanliliyongxinxi wangluoshishifeibang dengxing shianjianshiyongfalvruoganwenti de jieshi* [Interpretation of

new national security law that the country will use to defend its sovereignty and security and “maintain political security and social stability.”<sup>111</sup>In 2016, the country passed a cyber security law that aims to “safeguard sovereignty on cyber space, national security and the rights of citizens.”<sup>112</sup> In 2017, China’s first unified code of civil law added a draft rule and once it is approved, anyone who defames communist heroes and revolutionary martyrs will face civil liability.<sup>113</sup>In recent years, many high-profile detainees have appeared on TV, making forced confessions even before arrest or conviction.<sup>114</sup> All these laws and developments may have potential chilling effect on journalism.

Given the current status of media freedom in China, the continuing current state of languidness among journalists in China in terms of using OGI Regulations for quality news reporting and writing, would not be surprising. Above all, journalists

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Supreme People's Court and Supreme People's Procuratorate on Several Issues Regarding Applicable Law in Cases of Using Information Networks to Commit Defamation and Other Such Crimes, 最高人民法院、最高人民检察院关于办理利用信息网络实施诽谤等刑事案件适用法律若干问题的解释], Beijing, China [issued on September 6, 2013 and took effect on September 10, 2013].

<sup>111</sup> *Zhonghuarenmingongheguoguojiiaanquanfa* [National Security Law of People’s Republic of China, 中华人民共和国国家安全法], Beijing, China [adopted on July 1, 2015]; *China Adopts National Security Law*, CHINA DAILY, July 1, 2015, retrieved from <[http://www.chinadaily.com.cn/china/2015-07/01/content\\_21150783.htm](http://www.chinadaily.com.cn/china/2015-07/01/content_21150783.htm)> (last visited March 12, 2017).

<sup>112</sup> *Zhonghuarenmingongheguowangluoanquanfa* [Cyber Security Law of People’s Republic of China, 中华人民共和国网络安全法], Beijing, China [adopted on November 7, 2016]; *China Adopts Law on Cyber Security*, PEOPLE’S DAILY, November 7, 2016, retrieved from <<http://en.people.cn/n3/2016/1107/c90000-9138132.html>> (last visited March 12, 2017).

<sup>113</sup> Xiaosong Zhang and ZhengguangLuo, *Minfazongzecaanzuo126 chuxiugaimoheiying xionglieshijiangbeizhuize* [Code of Civil Law Draft Rules See 126 Revisions And Anyone Who Defames Communist Heroes And Revolutionary Martyrs Will Face Civil Liability, 民法总则草案作126处修改 抹黑英雄烈士将被追责], HUANQIU, March 13, 2017, retrieved from <<http://lianghui.huanqiu.com/2017/roll/2017-03/10298234.html>> (last visited March 12, 2017).

<sup>114</sup> Tania Branigan, *Televised Confessions on State-Run TV Consolidate China's Social Control*, THE GUARDIAN, August 11, 2014, retrieved from <<https://www.theguardian.com/world/2014/aug/11/televised-confessions-state-tv-china-social-control>> (last visited March 12, 2017); Steven Jiang, *Trial By Media? Confessions Go Prime Time in China*, CNN, January 26, 2016, retrieved from <<http://www.cnn.com/2016/01/26/asia/china-television-confessions/>>. (last visited March 12, 2017); Jonathan Kaiman, *China Airs “Confession” By Swedish Rights Worker; Critics Charge Coercion*, THE LOS ANGELES TIMES, January 20, 2016, retrieved from <<http://www.latimes.com/world/asia/la-chinese-held-swedish-rights-activist-20160120-story.html>>. (last visited March 12, 2017); Russell Lynch, *A Chinese Journalist Has Appeared on State Television “Confessing” to Causing the Stock Market Chaos: Journalist and Brokers Admit Trading Abuses After Two-Month Share Slump*, INDEPENDENT, August 31, 2015, retrieved from <<http://www.independent.co.uk/news/business/news/a-chinese-journalist-has-appeared-on-state-television-confessing-to-causing-the-stock-market-chaos-10480041.html>>. (last visited March 12, 2017).

would not seek information via filing OGI requests knowing in advance, through the slightest indication, that the information pursued would not appear in print.

## VI. Summary and Conclusion

This article examines the role of journalists in China's first freedom of information law. Unlike American journalists who play a pivotal role in proposing, formulating, and using freedom of information legislation, Chinese journalists have no involvement in the recommendation and formulation of OGI Regulations. Chinese law reformers delinked freedom of information from freedom of expression and the press and convinced leaders that promoting freedom of information would contribute greatly to economic growth and development of informationization. This strategy, although rendering freedom of information research politically acceptable in the late 1990s, marginalized the role of journalists in the drafting of the law.

This paper also finds that Chinese editors and reporters play a much more prominent role in covering and publicizing OGI Regulations. Constant media coverage of OGI Regulations has promoted the public's understanding of the law and the level of public consciousness of the concept of the right to know. Vibrant media exposure of non-compliance of OGI Regulations creates significant pressure on administrative organs that ignore legal obligations to exercise power transparently. Freedom of information is no longer a politically sensitive topic, which leads journalists in China to cover official transparency issues and vigorously expose irregularities.

This paper finds that Chinese journalists are among the least active users of the FOI law. They do file OGI requests to obtain government-held files and documents. They do bring government agencies to court for legal remedies when their information requests are fully or partially rejected. However, on average, they do so rarely, which is in sharp contrast to their Western colleagues. One reason for Chinese journalists' limited use of the FOI law is the law itself demanding reporters to meet a special needs test. A more fundamental rationale is the lack of stronger legal protections for press freedom. Freedom House scores show that China is one of the least free countries in terms of press freedom, attributable to many factors. One of the most important is the lack of Freedom of the Press Law. Although Chinese reformers expended great effort to formulate a law to protect the rights of journalists to gather and publish news, the law died in infancy amid political upheavals in the late 1980s. Without stronger legal protection, meaningful journalism encounters heavy suppression from censors in propaganda departments at various levels. This paper concludes that lack of stronger legal protections for press freedom contributes substantially to the limited use of OGI Regulations among Chinese journalists.

It is thus highly advisable for the Chinese government to revise the FOI law in the future to ensure that the special needs test will be removed. FOI lawmakers must also make sure that journalists receive preferential treatment in OGI requests such as fee waiver and expedited services. Journalism schools in China must offer media law courses and include FOI as a part of course offerings.<sup>115</sup> News organizations must encourage journalists to attend OGI workshops. The top legislature must speed up

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<sup>115</sup> One of the most popular Chinese media law textbooks, *Journalism and Communications Law*, does not include FOI law. Yongzheng Wei, *Xinwenchuanbofajiaocheng* [Journalism and Communications Law, 新闻传播法教程], China Renmin University Press, Beijing, China (fourth edition, 2013).

drafting laws and regulations that expand protection on freedom of expression and the press enshrined in the Chinese constitution.

Freedom of information law is a vital tool by which the Chinese public will learn what the government is up to. Most Chinese citizens, however, will not file an OGI request throughout their lives. They expect the news media to pry open government files and dig up some dirt. In light of these considerations, Chinese journalists and news organizations must use the OGI Regulations more vigorously and sue government agencies more fearlessly if officials choose to seal documents without a good reason.

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**Table 1: Freedom House Scores for U.S. Press Freedom (2008-2016)**

Year	Legal Environment	Political Environment	Economic Environment	Total Score	Freedom Status
2008	5	8	4	17	Free
2009	5	8	5	18	Free
2010	5	8	5	18	Free
2011	4	8	5	17	Free
2012	3	10	5	18	Free
2013	3	10	5	18	Free
2014	6	10	5	21	Free
2015	6	11	5	22	Free
2016	6	10	5	21	Free

**Table 2: Freedom House Scores for China's Press Freedom (2008-2016)**

Year	Legal Environment	Political Environment	Economic Environment	Total Score	Freedom Status
2008	28	35	22	85	Not Free
2009	28	34	22	84	Not Free

2010	28	34	22	84	Not Free
2011	29	34	22	85	Not Free
2012	29	34	22	85	Not Free
2013	29	32	22	83	Not Free
2014	29	33	22	84	Not Free
2015	30	34	22	86	Not Free
2016	30	35	22	87	Not Free

**Table 3: Freedom House Scores for North Korea’s Press Freedom (2008-2016)**

Year	Legal Environment	Political Environment	Economic Environment	Total Score	Freedom Status
2008	30	39	29	98	Not Free
2009	30	40	29	99	Not Free
2010	30	40	29	99	Not Free
2011	30	38	29	97	Not Free
2012	30	38	29	97	Not Free
2013	30	37	29	96	Not Free
2014	30	38	29	97	Not Free
2015	30	38	29	97	Not Free
2016	30	38	29	97	Not Free

**Table 4: Freedom House Scores for Cuba’s Press Freedom (2008-2016)**

Year	Legal Environment	Political Environment	Economic Environment	Total Score	Freedom Status
2008	30	36	28	94	Not Free
2009	30	35	28	93	Not Free
2010	30	35	28	93	Not Free
2011	30	34	28	92	Not Free
2012	29	34	28	92	Not Free
2013	29	35	28	92	Not Free
2014	28	34	28	90	Not Free
2015	28	35	28	91	Not Free
2016	28	35	28	91	Not Free

**Table 5: Freedom House Scores for A List of Non-Democratic Countries With FOI Laws**

Country	Legal Environment	Political Influences	Economic Pressure	Total Score	Press Freedom Status
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China (2007)	28	34	22	84	Not Free
Angola (2002)	21	33	25	79	Not Free
Zimbabwe (2002)	26	34	23	83	Not Free
Russia (2009)	23	33	24	80	Not Free
Uzbekistan (1997)	N/A	N/A	N/A	N/A	N/A
Azerbaijan (2005)	23	27	22	72	Not Free
Tajikistan (2002)	29	27	24	80	Not Free
Iran (2009)	30	36	24	90	Not Free
Jordan (2007)	21	22	18	61	Not Free
Kazakhstan (2015)	29	33	23	85	Not Free
Guinea (2010)	24	30	17	71	Not Free
Vietnam (2016)	30	33	22	85	Not Free
Afghanistan (2014)	20	27	19	66	Not Free
Rwanda (2013)	24	32	24	80	Not Free
Kyrgyzstan (2007)	22	25	20	67	Not Free
Liberia (2010)	17	23	21	61	Not Free
Sri Lanka (2016)	19	26	19	64	Not Free
Tunisia (2011)	27	33	25	85	Not Free
Ethiopia (2008)	27	30	19	76	Not Free
Bangladesh (2009)	20	27	16	63	Not Free
Yemen (2012)	27	33	23	83	Not Free
Armenia (2003)	23	26	16	65	Not Free

