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UNIVERSITY OF BALTIMORE SCHOOL OF LAW

**JOURNAL OF MEDIA LAW & ETHICS**

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## **SHEPPARD V. MAXWELL REVISITED: A “ROMAN HOLIDAY,” A “CARNIVAL” OR “DECORUM COMPARABLE WITH THE BEST”?**

W. Wat Hopkins,\*

*Few cases in communication law are better known than that of Sam Sheppard. Other cases might be of more long-lasting import than Sheppard v. Maxwell, but they lack the pure drama of a high-society physician wronged by over-zealous public officials and scourged by intrusive media. Sheppard's trial for the murder of his wife on the Fourth of July weekend of 1954 was characterized as a “Roman holiday,” a term that has become synonymous with the case. Ten high-profile journalists who covered the trial, however, took issue with the way the Supreme Court characterized the trial. Trial judge Edward Blythin did not let journalists run amok in the courtroom, they asserted in a strongly worded, seven-page telegram delivered to the justices four months after the Court delivered its decision. The reporters who authored the letter expressed “shock at the Court's comments on the state of decorum maintained in the courtroom.” The authors wrote that the trial was “was run with a decorum comparable with the best” trials they had covered. This article, after reviewing a number of secondary and primary sources on the trial, concludes that the journalists were correct, and the Court incorrect, in the characterizations of what happened in Judge Blythin's courtroom in 1954.*

**Keywords:** Free Press/Fair Trial controversy, Sheppard v. Maxwell, courtroom disruption, constitutional law, U.S. Supreme Court

### **I. Introduction**

Few cases in communication law are better known than that of Sam Sheppard. *Near v. Minnesota*<sup>1</sup> or *New York Times Co. v. Sullivan*<sup>2</sup> might be of more long-lasting import than *Sheppard v. Maxwell*,<sup>3</sup> but they lack the pure drama of a high-society physician wronged by over-zealous public officials and scourged by intrusive media. The drama of Sheppard's plight to prove that he did not murder his wife on the Fourth of July weekend of 1954 is demonstrated by the opening paragraph of an Ohio Supreme Court decision:

Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the pre-indictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. Special seating facilities for reporters and columnists representing local papers and all major news

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<sup>1</sup> 283 U.S. 697 (1931).

<sup>2</sup> 376 U.S. 254 (1964).

<sup>3</sup> 384 U.S. 333 (1966).

services were installed in the courtroom. Special rooms in the Criminal Courts building were equipped for broadcasters and telecasters. In this atmosphere of a “Roman holiday” for the news media, Sam Sheppard stood trial for his life.<sup>4</sup>

Though sounding sympathetic to Sheppard’s plight, the court affirmed his conviction, and the “Roman holiday” term became an oft-used descriptor of a trial that another court characterized as a perfect example of the phrase “trial by newspaper.”<sup>5</sup> And while one might argue that other trials have commanded just as much attention — the trial of Bruno Hauptmann for the kidnapping and murder of Charles Lindberg’s son, for example, or that of O.J. Simpson for the murders of his former wife Nicole Brown Simpson and her friend Ron Goldman<sup>6</sup> — few trials have captured the public imagination as has that of Sam Sheppard.<sup>7</sup> The most recent iteration of the Sheppard case was the 2000 trial of a civil action brought against the state of Ohio by Sheppard’s son, Sam Reese Sheppard. The younger Sheppard was seeking \$2 million in damages for the wrongful imprisonment of his father.<sup>8</sup> The trial was a virtual third trial of the murder case on the merits, and a jury found in favor of the state.<sup>9</sup> Indeed, the Sam Sheppard murder trial has become the antithesis of what a good trial should be, and *Sheppard v. Maxwell* has become a standard in the discussion of the dynamics between a free press and a fair trial.<sup>10</sup> As Justice Tom Clark noted in his opinion for eight members of the Supreme Court of the United States:

The fact is, bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. . . . “In this atmosphere of a ‘Roman holiday,’ for the news media, Sam Sheppard stood trial for his life.” Indeed, every court that has considered this case, save the court that tried it, has deplored the manner in which the news media inflamed and prejudiced the public.<sup>11</sup>

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<sup>4</sup> State v. Sheppard, 135 N.E.2d 340, 341 (Ohio 1956).

<sup>5</sup> Sheppard v. Maxwell, 231 F. Supp. 37, 63 (S.D. Ohio 1964), *rev’d* 346 F.2d 707 (6th Cir. 1965), *rev’d* 384 U.S. 333 (1966).

<sup>6</sup> A Web page maintained by law professor Douglas O. Linder lists seventeen books about the Hauptmann case and forty-four books about the Simpson case. Simpson books include those by hangers-on, see PAULA BARBIERI, *THE OTHER WOMAN: MY YEARS WITH O.J. SIMPSON* (1997); lawyers who had nothing to do with the case, see VINCENT T. BUGLIOSI, *OUTRAGE: THE FIVE REASONS WHY O.J. SIMPSON GOT AWAY WITH MURDER* (1997); reputable journalists, see JEFFERY TOOBIN, *THE RUN OF HIS LIFE, THE PEOPLE V. O.J. SIMPSON* (1996); and parties involved, see MARSHA CLARK, *WITHOUT A DOUBT* (1998). FAMOUS TRIALS, <http://www.famous-trials.com/>.

<sup>7</sup> At least twelve books have dealt, in whole or in part, with the Sheppard case. See FAMOUS TRIALS, *id.*

<sup>8</sup> Sheppard was found not guilty when he was retried after the 1966 ruling of the Supreme Court of the United States overturning the guilty verdict. See JACK P. DESARIO & WILLIAM D. MASON, *DR. SAM SHEPPARD ON TRIAL 7* (2003).

<sup>9</sup> See *id.*

<sup>10</sup> See, e.g., KENT MIDDLETON & WILLIAM E. LEE, *THE LAW OF PUBLIC COMMUNICATION* 448-49 (2014); DON PEMBER & CLAY CALVERT, *MASS MEDIA LAW* 445-46 (2013); Dean Smith, *Access to Courts, COMMUNICATION AND THE LAW* 289 (W. Wat Hopkins ed., 2020); ROBERT TRAGER, SUSAN DENTE ROSS & AMY REYNOLDS, *THE LAW OF JOURNALISM & MASS COMMUNICATION* 352-53 (2007).

<sup>11</sup> 384 U.S. 333, 356 (1966) (quoting State v. Sheppard, 135 N.E.2d 340, 341 (Ohio 1956)).

While the Sheppard trial is undoubtedly one of the most well-known, and the case one of the most sensational in American jurisprudence, there are at least a couple of problems with Justice Clark's sweeping generalizations about the trial. First, and most obvious, not every court save the court that tried it deplored the manner in which the news media inflamed and prejudiced the public. At least three courts – the Ohio Court of Appeals, the Ohio Supreme Court and the Sixth U.S. Circuit Court of Appeals – found few problems with the trial, refusing to overturn Sheppard's conviction.<sup>12</sup> Indeed, the Supreme Court denied *certiorari* the first time it was asked to hear Sheppard's appeal.<sup>13</sup>

Second, and less well-known, ten journalists who covered the trial for major news organizations, shortly after the opinion was delivered, took issue with Justice Clark's characterization of the trial. Trial judge Edward Blythin did not let journalists run amok in the courtroom, they asserted in a strongly worded, seven-page telegram delivered to the justices of the Supreme Court four months after the Court delivered its decision. The reporters who authored the letter expressed "shock at the Court's comments on the state of decorum maintained in the courtroom."<sup>14</sup> The authors wrote that they believed they had "a moral obligation to speak in defense of a dead judge and in behalf of trial reporters everywhere." They were writing, they said, because after consultation, "[W]e find that each of us had the same sense of incredulity, the feeling that 'this part of the decision cannot be about the same trial I attended.'"<sup>15</sup>

The journalists hypothesize that over the twelve years the *Sheppard* case "shuttled among the courts," reports of courtroom conduct "ballooned out of proportion to the facts. We were in the courtroom," the journalists wrote, and it "was run with a decorum comparable with the best we have seen, both in well-attended 'big' trials and those that have little public interest."<sup>16</sup>

The telegram obviously raises some intriguing questions. Who was right – eight Supreme Court justices or ten journalists?<sup>17</sup> And what difference does it make? Even if the journalists are correct and bedlam did not reign in the *Sheppard* courtroom, the Court delineated other sufficient grounds for overturning the conviction. Pre-trial and during-trial publicity that undoubtedly reached jurors, questionable handling of jurors during deliberations, and other factors would probably have warranted reversal.<sup>18</sup>

If, in fact, the Court based a portion of its holding on a faulty finding, however, the record is worth setting straight. Historical accuracy is always important. In addition, the faulty holding might shed some light on the operations of the judicial system. Maybe such a flaw made no difference in *Sheppard v. Maxwell*, but might well make a difference in other cases, and such a possibility deserves study. And, as the

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<sup>12</sup> See discussion accompanying *infra* notes 83-94, 96-109.

<sup>13</sup> *Ohio v. Sheppard*, 352 U.S. 955 (1956) (denying certiorari). See discussion of the deliberations on this case accompanying *infra* notes 117-18.

<sup>14</sup> Western Union Telegram to the Chief Justice and Associate Justices (Oct. 17, 1966), in Justice William J. Brennan Papers, 1965 Term, Box 143, Manuscript Division, Library of Congress (copy on file with the author.).

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

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

<sup>17</sup> Justice Hugo Black dissented without opinion. 384 U.S. 333, 363 (1966).

<sup>18</sup> *Id.* at 356-62. Indeed, some justices said as much; see *infra* note 127 and accompanying discussion.

authors of the telegram point out, correcting the record might be important “for the defense of a dead judge.”<sup>19</sup>

Determining the accuracy of the reporters’ assertions is a daunting task, but several data sets might provide evidence supporting or contradicting their assertions. An examination of the media coverage of the nine-week trial is one way to attempt to learn what the atmosphere in the courtroom might have been, as might a review of books about the case. The papers of Supreme Court justices, where available, and opinions of lower courts in the case might also be valuable. The papers of justices often provide behind-the-scenes insights on how justices approach the cases that come to the Court.<sup>20</sup> Lower court opinions can be used to test the assertion that descriptions of the atmosphere in the courtroom became more overblown as the case snaked its way through the judicial system. Finally, a review of the transcript of the trial might provide evidence of in-court disruptions if there were any and responses to those disruptions by the judge, adding to the official record.

## II. The Sheppard Case

The Sam Sheppard case has long been one of the most notorious in the annals of American jurisprudence. In addition to the books, the case spawned its own filmography. A 1960s television show,<sup>21</sup> a 1970 movie<sup>22</sup> and a 1993 movie<sup>23</sup> have been loosely based on the facts, and Sheppard’s story was ostensibly told in a film titled *Guilty or Innocent: The Sam Sheppard Murder Case*.<sup>24</sup> The facts of the case, therefore, only need to be briefly summarized before the Court’s findings are reviewed.

Early on the morning of July 5, 1954, Sam Sheppard told a bizarre story, from which he would never waver.<sup>25</sup> He said he fell asleep on the sofa in his home after

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<sup>19</sup> Western Union Telegram, *supra* note 14.

<sup>20</sup> See, e.g., W. Wat Hopkins, *Justice Brennan, Justice Harlan and New York Times Co. v. Sullivan: A Case Study in Supreme Court Decision Making*, 1 COMM. L. & POL’Y 469 (Fall 1996).

<sup>21</sup> *The Fugitive* (ABC 1963-67).

<sup>22</sup> *THE LAWYER* (Paramount 1970). Though the movie focused on the eccentricities of the main character, an attorney named Tony Petrocelli, and was set in the West rather than in the Cleveland area, a number of elements from the actual case played prominently: questions about a folded garment of clothing, the bias of the chief medical examiner, media bias, a second trial due to the errors caused by the trial judge, charges and counter-charges of infidelity, and even the suggestion of an alternate murderer. The story told by the would-be physician-murderer was essentially the same as that told by Sam Sheppard, and the elements of that story that caused law enforcement authorities suspicion were similar. The film depicted no out-of-the-ordinary conduct within the courtroom, however, except that by counsel for both sides. The movie became the foundation for a television series, though the series did not focus on a Sheppard-like case. See *Petrocelli* (NBC 1974-76).

<sup>23</sup> *THE FUGITIVE* (Warner Brothers, 1993). Very little of the main character’s trial was depicted in the movie, most of which dealt with his escape from custody and efforts to clear his name.

<sup>24</sup> NBC, 1975. The case has also been highlighted in *The Sam Sheppard Story* (A&E Television 2009) and *American Justice: Sam Sheppard Story* (A&E Home Video 2000). In addition, *My Father’s Shadow: The Sam Sheppard Story* (CBS 1998) told the story of Sam Reese Sheppard’s efforts to clear his father’s name. A list of print and video iterations of the case is listed on the FAMOUS TRIALS Web page, *supra* note 6.

<sup>25</sup> While Sheppard adhered to the main story, various witnesses differed in their descriptions of the details he told them. The Court reported that “Sheppard claimed the vagueness of his perception was caused by his sudden awakening, the dimness of the light, and his loss of consciousness.” *Sheppard v. Maxwell*, 384 U.S. 333, 336 n.2 (1966).

entertaining friends, to be awakened sometime later by the cries of his wife. Sheppard said he ran upstairs, where he was confronted by an intruder and was knocked unconscious briefly. When he awoke, he checked his wife and found her dead. He then checked his son, whom he found unharmed. Sheppard went outside where he again was confronted by a person, struggled and was knocked down. He returned to the house, checked his family again, and eventually called a neighbor for help.<sup>26</sup>

Authorities immediately suspected Sheppard,<sup>27</sup> and Cleveland newspapers, almost as quickly, launched a campaign to have him arrested.<sup>28</sup> An inquest into the murder was held in a local gymnasium — because of the crowd expected to attend — and concluded with the medical examiner having Sheppard's attorney physically ejected from the building amidst cheers from the spectators.<sup>29</sup> Indeed, the journalists who complained that the Court had mischaracterized the trial, suggested that the Court might have confused some of the events from the inquest with those of the trial.<sup>30</sup>

In its eventual ruling setting aside Sheppard's murder conviction and remanding the case, the Supreme Court held that a trial judge has the responsibility of controlling conduct in and around the courtroom.<sup>31</sup> Not doing so was a fundamental error on the part of Judge Blythin, the Court held, and that fundamental error was "compounded by the holding that [he] lacked the power to control the publicity about the trial."<sup>32</sup> And,

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<sup>26</sup> *Id.* at 336.

<sup>27</sup> *Id.* at 337-42. Coroner Samuel Gerber is reported to have said on the morning of the murder after a search of the home, "Well, it is evident the doctor did this, so let's go get the confession out of him." *Id.* at 337.

<sup>28</sup> *Id.* at 337-38. See also *infra* note 47, quoting *Cleveland Press* editor Louis B. Selzer on his rationale for the sensational news coverage.

<sup>29</sup> *Id.* at 339-40.

<sup>30</sup> Western Union Telegram, *supra* note 14.

<sup>31</sup> 384 U.S. at 355-56.

<sup>32</sup> *Id.* at 357. The record of the case supports this contention by the Court. The trial transcript is 7,192 pages long. It has been reduced to twelve volumes in PDF form which are located on the "Engaged Scholarship" page of the Cleveland State University Web site. Citations in this article are to the PDFs. While many of the reproduced transcript pages contain the original page numbers, on just as many pages, those original numbers are indecipherable, requiring use the PDF page numbers. At least three times, Sheppard's lead counsel William J. Corrigan complained about the possibility that prejudicial publicity may be getting to the jury, complaints Judge Edward Blythin did not seem to take seriously. See *infra* notes 139-40 and accompanying discussion; *infra* notes 149-51 and accompanying discussion. The third incident occurred Nov. 26. Judge Blythin overruled a motion by Corrigan to continue the trial because of a story in *The Cleveland Press* about a reporter going to the home of a juror. 8 Transcript of Trial, 95-97, *Ohio v. Sheppard*, No. 64-571 (1954), available at <https://web.archive.org/web/20141017222507/http://engagedscholarship.csuohio.edu:80/sheppard/>. On Dec. 6, Corrigan complained about a Walter Winchell broadcast in which a woman claimed to have been Sheppard's mistress and had a baby by him. Two jurors admitted hearing the broadcast but said it would not impact their deliberations. 9 Trial Transcript, *id.* at 418-21. At the end of the day, however, Judge Blythin did not instruct jurors to avoid the media. Indeed, his practice was not to give that instruction, though he maintained that he did. When Corrigan specifically requested the instruction on Nov. 30, Blythin responded: "The court has already done so, of course, on several occasions, and the Court will repeat it again. I suggest to you that you do not read newspapers or listen to the radio or other kind of comments, and certainly not have any discussion, whatever, not even with members of your family." 8 Trial Transcript, *id.* at 653.

the Court noted, “The carnival atmosphere at trial could have been avoided since the courtroom and courthouse premises are subject to the control of the court.”<sup>33</sup>

The Supreme Court spent some time describing that carnival atmosphere:

The courtroom remained crowded to capacity with representatives of news media. Their movement in and out of the courtroom often caused so much confusion that, despite the loud-speaker system installed in the courtroom, it was difficult for the witnesses and counsel to be heard. Furthermore, the reporters clustered within the bar of the small courtroom made confidential talk among Sheppard and his counsel almost impossible during the proceedings. They frequently had to leave the courtroom to obtain privacy. And many times when counsel wished to raise a point with the judge out of the hearing of the jury it was necessary to move to the judge’s chambers. Even so, news media representatives so packed the judge’s anteroom that counsel could hardly return from the chambers to the courtroom. The reporters vied with each other to find out what counsel and the judge had discussed, and often these matters later appeared in newspapers accessible to the jury.<sup>34</sup>

The Court found that the erecting of a table within the bar for reporters was unprecedented, and continued:

Having assigned almost all of the available seats in the courtroom to the news media the judge lost his ability to supervise that environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial. And the record reveals constant commotion within the bar. Moreover, the judge gave the throng of newsmen gathered in the corridors of the courthouse absolute free rein. Participants in the trial, including the jury, were forced to run a gantlet of reporters and photographers each time they entered or left the courtroom.<sup>35</sup>

The Court devoted three pages of its decision describing the “carnival atmosphere” of the courtroom attributing generally to the record.

### **III. The Framework of the Problem**

The descriptions of the courtroom during the Sheppard trial by the Supreme Court are exaggerated at best, according to ten reporters who covered the trial and wrote to the Court October 17, 1966. Most of them were veteran court reporters working for some of the country’s leading news organizations: Ray Brennan of the *Chicago Sun-Times*, Bob Considine of King Features, Alvin Davis of the *New York Post*, Ira H. Freeman of the *New York Times*, Russel Harris of the *Detroit News*, Jack Lotto of the International News Service, Relman Morin of the Associated Press, Margaret Parton of

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<sup>33</sup> 384 U.S. at 358.

<sup>34</sup> *Id.* at 344.

<sup>35</sup> *Id.* at 355. Whether the record reveals “constant commotion within the bar” is in dispute. See, e.g., quotation of the Ohio Court of Appeals accompanying *infra* note 91. See also Justice Douglas’s assessment of the courtroom activity at *infra* note 126.

the *New York Herald Tribune*, H.D. Quigg of United Press International, and Theo Wilson of the *New York News*.<sup>36</sup>

Many of the reporters had notable credentials. Relman Morin of the Associated Press, for example, won two Pulitzer prizes, for reporting during the Korean war and for coverage of the integration of Central High School in Little Rock. He had also covered the execution of Julius and Ethel Rosenberg who were convicted of espionage.<sup>37</sup> H.D. Quigg, who covered the Sheppard trial for United Press International, had covered the trial of Alger Hiss and would later cover trials of Jack Ruby and James Earl Ray and the inquest into the drowning of Mary Jo Kopechne.<sup>38</sup> *New York News* reporter Theo Wilson was known as the “dean of trial reporters” and would later cover the trials of John De Lorean, Sirhan Sirhan, Charles Manson and Patty Hearst.<sup>39</sup> Others also were award-winning journalists or held notable positions in the media.<sup>40</sup>

The journalists used several pieces of evidence to bolster their contention that Judge Blythin adequately controlled conduct within his courtroom.<sup>41</sup> First, they wrote, Sheppard’s defense attorney prepared an affidavit in support of a motion for a new trial in 1954 “when the trial was still quite fresh in his mind.” In that affidavit, they argue, he never mentioned disruption. The attorney complained about the number of reporters in the courtroom and the movement of reporters in and out of court, but the journalists contend that the number of reporters does not jeopardize a defendant’s right to a fair trial. “Incidentally,” they wrote, “the press corps at the Sheppard trial was relatively small for a major trial.” They also argued that the movement in and out of the courtroom to meet deadlines was done “with the utmost discretion, and in silence” at infrequent intervals. This has been a common practice in federal and state courts, they wrote, “[A]nd the experience of some of us with courts goes back more than thirty years.”<sup>42</sup>

In addition, the journalists contend that books about the trial – including one by Sheppard’s brother – do not complain about the trial reporters, that the *New York Daily News* commented on the decorum and orderly conduct in the courtroom, and that William J. Corrigan, Sheppard’s lead attorney, while protesting the carnival atmosphere of the inquest, did not make the same complaint about the trial.<sup>43</sup>

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<sup>36</sup> Western Union Telegram, *supra* note 14.

<sup>37</sup> See Farnsworth Fowle, *Relman Morin of A.P. is Dead; Winner of Two Pulitzer Prizes*, N.Y. TIMES, July 17, 1973, at 42.

<sup>38</sup> See H.D. (Doc) Quigg, 86, *U.P.I. Correspondent*, N.Y. TIMES OBITUARIES, <http://www.nytimes.com/1998/05/15/nyregion/h-d-doc-quigg-86-upi-correspondent.html?pagewanted=print>.

<sup>39</sup> See Theo Wilson, 79, *Newspaper Reporter*, N.Y. TIMES OBITUARIES, <http://www.nytimes.com/1997/02/09/us/theo-wilson>. See also *Theo Wilson (1917-1997)*, State Historical Society of Missouri, [shsmo.org](http://shsmo.org); Michael Martinez, *Theo Wilson: Professionalism Through the Eyes of a “Nuclear Powered Pixie,”* unpublished paper [michalemartinez.com/documents/theo\\_wilson.pdf](http://michalemartinez.com/documents/theo_wilson.pdf).

<sup>40</sup> See, e.g., *Bob Considine Papers*, Syracuse University, [http://library.syr.edu/digital/guides/c/considine\\_b.htm](http://library.syr.edu/digital/guides/c/considine_b.htm); *Margaret Parton, Ex-Reporter for New York Herald Tribune*, N.Y. TIMES OBITUARIES, <http://www.nytimes.com/1981/08/12/obituaris/margaret-parton-ex-reporter-for-new-york-herald-tribune.html?>; *Ira H. Freeman, 90, a Retired Reporter*, N.Y. TIMES OBITUARIES, <http://www.nytimes.com/1997/01/16/nyregion.ira-h-freeman-90-a-retired-reporter.html?pagewanted=print>.

<sup>41</sup> Apparently the memorandum was sent to all justices, but references quoted here are from the copy in the papers of Justice Brennan, *supra* note 14. See information on paper collections *infra* note 116.

<sup>42</sup> Western Union Telegram, *supra* note 14.

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

The Court was wrong, the journalists wrote, when it reported that there was so much commotion that witnesses and counsel could barely be heard. The journalists were present to take down testimony, they wrote, and “would have been the first to straighten out our fellow reporters if they had made it impossible to hear one thing that was being said in the courtroom.” Though the trial has been criticized as being like a “Roman circus” in a “carnival atmosphere,” they conclude, “no such circumstances prevailed within the courtroom of the late Judge Blythin.”<sup>44</sup>

#### IV. Books About the Case

*Famous Trials*, a Web site that contains extensive information and holdings on more than seventy-five trials, lists twelve books related in whole or in part to the Sheppard case.<sup>45</sup> They ranged from relatively contemporaneous accounts,<sup>46</sup> to discussions of the case by reporters who covered the trial,<sup>47</sup> to accounts written much later analyzing the case.<sup>48</sup>

Some of the accounts refer to courtroom disarray, but none builds the case described by the Supreme Court, even those by participants who had the most to lose by the outcome of the trial: Sam Sheppard and members of his family. Both Sheppard and his brother Stephen Sheppard wrote accounts of the trial.<sup>49</sup>

The journalists who wrote to the justices about the characterization of the trial noted that Stephen Sheppard devoted thirty-one pages to the trial in his book, *My Brother's Keeper*, yet, “[N]ot one word appears about any trial reporter in the courtroom creating any noise, commotion or disturbance.” Stephen Sheppard, the reporters write, attended the trial daily and kept a trial diary. So, “If any newspaper reporter within the courtroom had caused any disturbance disruptive to the jurors, he surely would have noted it.”<sup>50</sup>

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

<sup>45</sup> FAMOUS TRIALS, *supra* note 6.

<sup>46</sup> See SAM SHEPPARD, ENDURE AND CONQUER: MY 12-YEAR FIGHT FOR VINDICATION (1966); STEPHEN SHEPPARD (WITH PAUL HOLMES), MY BROTHER'S KEEPER (1964). See also F. LEE BAILEY, THE DEFENSE NEVER RESTS (1971). Bailey became Sheppard's attorney in the habeas corpus action that resulted in the Supreme Court overturning the verdict and in the second trial, in which Sheppard was exonerated. In his chapter on the case, Bailey does not mention courtroom improprieties in his discussion of the violation of Sheppard's constitutional rights, though he does condemn the coverage of the case by Cleveland newspapers. *Id.* at 65-66.

<sup>47</sup> See DOROTHY KILGALLEN, MURDER ONE (1967); THEO WILSON, HEADLINE JUSTICE (1996). See also LOUIS B. SELTZER, THE YEARS WERE GOOD (1956). Seltzer was the editor of the *Cleveland Press*, the newspaper that helped create the prejudicial atmosphere in which Sheppard was tried. He wrote in this memoir that his purpose in demanding that Sheppard be brought to trial was to bring down the protective wall surrounding Sheppard and his family. He wrote, “I would do the same thing over again under the same circumstances.” *Id.* at 276.

<sup>48</sup> See CYNTHIA L. COOPER & SAM REESE SHEPPARD, MOCKERY OF JUSTICE (1995); JACK P. DESARIO & WILLIAM D. MASON, DR. SAM SHEPPARD ON TRIAL (2003); JAMES NEFF, THE WRONG MAN (2001); JACK HARRISON POLLACK, DR. SAM: AN AMERICAN TRAGEDY (1972). See also JURGEN THORWALD, CRIME AND SCIENCE: THE NEW FRONTIER IN CRIMINOLOGY (1967). Thorwald was a German criminologist who wrote that the coroner who decided early in the case that Sheppard was the murderer was incompetent.

<sup>49</sup> See *supra* note 46.

<sup>50</sup> Western Union Telegram, *supra* note 14.

They were right.

Three chapters of Stephen Sheppard's book cover the events of October 18, when jury selection began, through December 21, when the jury found Sam Sheppard guilty of second-degree murder. The first chapter is titled "Start of a Roman Holiday."<sup>51</sup> The reference, Sheppard notes, is from the Ohio Supreme Court's description of the trial as taking place in "an 'atmosphere of a "Roman holiday" for the news media,'"<sup>52</sup> but Sheppard himself has no criticism of the decorum in the courtroom. He reports that he was seated in the fourth row because the first three rows were reserved for reporters. And, he noted, as did the Supreme Court, "The press also had seats at tables specially erected inside the rail in space ordinarily reserved for attorneys, witnesses, and persons there for official business connected with court activities."<sup>53</sup> Sheppard wrote that the courtroom was often "jammed with spectators," and he complained about having to listen to the commentary of spectators seated around him,<sup>54</sup> but he was silent on the general decorum in the courtroom or on Judge Blythin's control — or lack thereof — over the events in the courtroom.

Sheppard also reported that a comment he made to his brother's attorney during a recess was overheard by a journalist and, therefore, was reported. On October 26, rules were imposed by the local sheriff's office prohibiting Sheppard's family from talking to him during recesses. Stephen Sheppard told William Corrigan that the rules were asinine. The reporting of the comment, Sheppard wrote, made him even less popular with local authorities, but in his recounting of the incident, he did not seem critical of the media.<sup>55</sup>

Stephen Sheppard also wrote that the three-day inquest held by Dr. Samuel Gerber — the coroner who reportedly identified Sam Sheppard as the murderer on the morning of July 5, 1954<sup>56</sup> — was "a grisly, obscene spectacle." Members of the Sheppard family were insulted, he wrote, and television and newspaper reporters and photographers were present in abundance.<sup>57</sup> "Our arrivals and departures were photographed and our testimony was punctuated by the popping of flashbulbs," he wrote.<sup>58</sup>

Gerber had told Sam Sheppard that he did not have the right of counsel during the inquest and "tolerated the presence of Corrigan as a spectator only and had threatened several times previously to have him thrown out if he opened his mouth." He did so after Corrigan "stepped to the desk of a private court reporter hired by us and asked the man to make a note in regard to behavior of the audience." Corrigan refused to sit down when ordered to do so by Gerber and was removed from the inquest by two

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<sup>51</sup> SHEPPARD, MY BROTHER'S KEEPER, *supra* note 46, at 156. The other two chapters are "I Can Tell it Now," *id.* at 155; "Judgment Day," *id.* at 166.

<sup>52</sup> *Id.* at 157. The quote is from *State v. Sheppard*, 135 N.E.2d 340, 341 (Ohio 1956).

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

<sup>54</sup> *Id.* at 171.

<sup>55</sup> *Id.* at 159.

<sup>56</sup> *Sheppard v. Maxwell*, 384 U.S. 333, 337 (1966) (reporting that Gerber said, "Well, it is evident the doctor did this, so let's go get the confession out of him").

<sup>57</sup> SHEPPARD, MY BROTHER'S KEEPER, *supra* note 46, at 106.

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

deputies on Gerber's orders.<sup>59</sup> Stephen Sheppard described the scene this way: The deputies, "[H]alf dragged and half pushed the sputtering lawyer out of the building while the crowd cheered and applauded in approval. 'Why don't you let Sam take a lie-detector test?' one woman screamed from the audience as Corrigan was being propelled through the door."<sup>60</sup>

Gerber promptly recessed the inquest, stating that if more sessions were necessary they would be held in his office. He was surrounded by admiring spectators, most of them women, Stephen Sheppard wrote, and some of the women threw their arms around him and hugged him.<sup>61</sup>

Sam Sheppard, in his account of the case, confirmed his brother's description of the inquest.<sup>62</sup> It was this inquest, wrote the journalists who complained about the Court's characterization of the Sheppard trial that might have been confused with the conduct of the trial after the twelve years the Sheppard case "shuttled among the courts."<sup>63</sup>

Sam Sheppard was more critical of the conduct of the press and Blythin's control of the courtroom than was his brother. He also was critical specifically of the placement of the table for what he called "elite" journalists – Dorothy Kilgallen and Bob Considine, for example – inside the bar. He wrote:

This was totally out of keeping with the dignity of the court. Too, some reporters were within a few feet of the jury box. When the jurors were finally selected they could measure the reactions of the newsmen to the statements of the lawyers and the witnesses and they could hear the murmured remarks of the press and the laughter, which was sometimes bordering on raucous.

The courtroom was crawling with photographers and cameramen. They were all over the place. During the first week or so, they were even allowed to take pictures inside the courtroom before the day's activity started. Finally, Judge Blythin put an end to this general situation, but there were photographers who violated his edict of no pictures in the courtroom at any time.<sup>64</sup>

A 2001 book about the trial also reported that photographs were taken in the courtroom daily before proceedings began:

Typically, the halls in the courthouse were filed with cumbersome film cameras set on sturdy tripods, stands of lights snaking power cords, and photographers with boxy cameras and flash attachments. Ten minutes

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<sup>59</sup> *Id.* at 114.

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

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

<sup>62</sup> SHEPPARD, ENDURE AND CONQUER, *supra* note 46, at 40.

<sup>63</sup> Western Union Telegram, *supra* note 14. See also KILGALLEN, *supra* note 47, at 79; DORIS O'DONNELL, FRONT-PAGE GIRL 76 (2006) (*quoted at infra* note 81).

<sup>64</sup> SHEPPARD, ENDURE AND CONQUER, *supra* note 46, at 64. The accounts of the number of reporters seated at the table and in the first three rows of the courtroom are in some dispute. See discussion accompanying *infra* notes 68-71.

before proceedings started, a deputy walked Dr. Sam from the police jail, through the barrage, and into court. The camera crews rushed into the courtroom and got set up while photographers climbed on chairs behind them to get unobstructed views, and grabbed their daily shots of the perpetrator on display.<sup>65</sup>

Dorothy Kilgallen corroborates the account in her contemporaneous account of the trial.<sup>66</sup>

It is equally unclear whether Sam Sheppard's criticism is based on courtroom conduct or for the intrusive and prejudicial publicity that permeated at least the Cleveland press. He reported, for example, that Corrigan was insulted because of the "Roman holiday" atmosphere surrounding the proceedings. He elaborated:

[Corrigan] was personally insulted, not because an innocent man was being tried for his life, but because an innocent man was being tried for his life in an atmosphere which the Ohio Supreme Court and other courts later called a "Roman holiday." Corrigan was insulted as an American and he told me he was. He said that what was taking place in that courtroom was not the true premise of justice. He reiterated time and again that perhaps as a result of my trial the courts would establish some limitation on the freedom of the press, as it jeopardized the guarantees of a fair trial.<sup>67</sup>

Reporters who covered the trial, however, were not nearly so critical and, indeed, disputed some of the facts used to support the description of a carnival atmosphere by the Supreme Court. The Court wrote:

The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. At a temporary table within a few feet of the jury box and counsel table sat some 20 reporters staring at Sheppard and taking notes. The erection of a press table for reporters inside the bar is unprecedented. . . . Having assigned almost all of the available seats in the courtroom to the news media the judge lost his ability to supervise that environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial.<sup>68</sup>

The Court was simply wrong, Paul Holmes, who covered the trial for the *Chicago Tribune*, wrote in his book on Sheppard's retrial: "[N]o more than ten newsmen ever sat behind this table at any one time – indeed, there was room for no more."<sup>69</sup> And, he

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<sup>65</sup> NEFF, *supra* note 48, at 122-23.

<sup>66</sup> See KILGALLEN, *supra* note 47, at 235. Corrigan also complained about the activity involved in the photographing of Sheppard. See discussion accompanying *infra* notes 147-48.

<sup>67</sup> SHEPPARD, ENDURE AND CONQUER, *supra* note 46, at 67.

<sup>68</sup> Sheppard v. Maxwell, 384 U.S. 333, 355 (1966). See also quotation accompanying *supra* note 34.

<sup>69</sup> PAUL HOLMES, RETRIAL: MURDER AND DR. SAM SHEPPARD 116 (1966). In 1972, Jack Harrison Pollock wrote that twenty journalists were seated at the table, though his source for the number is not clear. POLLOCK, *supra* note 48, at 27.

added, a table inside the bar, contrary to what the Court had written, was not unprecedented: “I can cite instances going back half a century when press tables inside the bar were the unvarying rule, and I can recall no instance whatsoever when this common and usual courtesy was denied the press.”<sup>70</sup>

Holmes’s description of the table inside the bar was corroborated by the record of the trial, which reported that Judge Blythin assigned fifteen reporters to the table this way: three each for the *Cleveland Press*, the *Cleveland News* and the *Cleveland Plain Dealer*; two each for the International News Service and the Associated Press; one each for the *Akron Beacon* and the *New York Journal American*.<sup>71</sup>

The description of the movement of reporters was also incorrect, Holmes wrote. “It is true that some reporters, because their work demanded it, left or entered the courtroom while court was in session,” he wrote, “but as I recall it they did so as unobtrusively as possible and on tiptoe, causing no disturbance that might properly be described as confusion or disruption of trial.”<sup>72</sup> In addition, “[T]here was no ‘hounding’ in the courtroom,” because, in part, “by court order reporters were forbidden to talk to Sheppard or counsel during recesses. I saw no violations of that order.”<sup>73</sup> Indeed, Holmes wrote, reporters were often hounded by participants, who pursued them in the corridors with “unsolicited and unwanted comments on what had gone on in court.”<sup>74</sup>

Holmes wrote that United Press International veteran court reporter H.D. “Doc” Quigg said of the author of the Court’s opinion, “It is quite plain that Justice [Tom] Clark hasn’t attended many trials lately.”<sup>75</sup>

Theo Wilson, who covered the trial for the *New York News* and was a co-author of the telegram sent to the Court,<sup>76</sup> agreed with Holmes. Wilson wrote that reporters with whom he talked who had covered the trial “were appalled at the allegations of bedlam in the trial courtroom.” Sheppard attorney Corrigan had complained about the

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<sup>70</sup> HOLMES, *supra* note 69, at 116.

<sup>71</sup> The seating outside the jury box in the courtroom was delineated this way: First row, the Newspaper Enterprise Association, WGAR (2), WERE (2) WNBK (2), WCUE, WTAM, WDOK, WEWS, WHK, WXEL; second row: the *Newark News*, the *New York Post*, the *Pittsburgh Post Enterprise*, the *Cleveland News* (2), the *Cleveland Plain Dealer* (2), the *Cleveland Press* (2), the *Toledo Blade*, the *Pittsburgh Post-Gazette*, the *Lorain Journal*, the *Chicago Sun-Times*, the Scripps-Howard News Association; third row: WAKR, International News Service, the *New York Journal American*, Radio Station WSRs, the *Detroit News*, the *New York News*, *Life* magazine (2), NBC, the *St. Louis Post Dispatch*). 1 Trial Transcript, *supra* note 32, at 61-62. Judge George C. Edwards also reported the assigned seating for other news organizations in the courtroom. *Sheppard v. Maxwell*, 346 F.2d 707, 743 (6th Cir. 1965) (Edwards, J., dissenting). In addition, Doris O’Donnell who was one of the reporters covering the trial for the *Cleveland Plain Dealer*, reported in her memoir that reporters from local news organizations were seated within the bar and out-of-town journalists were “relegated to the back benches.” O’DONNELL, *supra* note 63, at 70.

<sup>72</sup> HOLMES, *supra* note 69, at 116-17. See also Western Union Telegram, *supra* note 14.

<sup>73</sup> *Id.* at 117.

<sup>74</sup> *Id.*

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

<sup>76</sup> See THEO WILSON, HEADLINE JUSTICE 75-78 (1996) (writing that he and Quigg wrote the telegram after consulting with other reporters who covered the trial and finding that they all wondered where the Court might have come up with the erroneous description of what had occurred).

carnival atmosphere of the inquest, Wilson wrote, “but he had never made such accusations about the trial itself.”<sup>77</sup>

Dorothy Kilgallen, who covered the trial for the *New York Journal-American*, was highly critical of judicial proceedings, but not of the goings-on in the courtroom. She reported in her book, *Murder One*, that when Sheppard entered the courtroom at the beginning of the trial, “[N]ewspaper and newsreel photographers circled around him, knelt in front of him, and climbed on empty chairs to shoot him from above.”<sup>78</sup> At other times, however, she reported that during testimony, “[T]here was no sound in the courtroom.”<sup>79</sup> Kilgallen also supported the suggestion that Corrigan referred to the inquest, rather than the trial, as “that carnival” where “the mob [was] moving in on the Sheppard family.”<sup>80</sup> Doris O’Donnell, who covered the trial for the *Cleveland Plain Dealer* agreed. She wrote:

There was no “Roman Holiday” or “circus” in Judge Blythen’s courtroom as [F. Lee] Bailey described it [in the appeal]. If anything, the defense counsel led the Supreme Court Justices to confuse the courtroom with the coroner’s inquest, which took place long before the trial and miles away at Normandy School in Bay Village.<sup>81</sup>

Ironically, O’Donnell reported that the only problem within the courtroom was caused by Kilgallen herself. Blythin, she wrote, “was a stickler for process” and was notoriously punctual. When Kilgallen violated his rules for punctuality by arriving after 9 a.m. one day, Blythin responded by locking the courtroom doors at 9 a.m. “If she was late,” O’Donnell reported, “Dorothy couldn’t get in – and we couldn’t get out for our relays of spot news. This, of course, made us all angry – our editors at us, we at her, and her at the judge.”<sup>82</sup>

## V. Lower Court Opinions

Sam Sheppard’s appeal went to the Supreme Court twice – once through the state courts, ending with a denial of *certiorari*,<sup>83</sup> and once on a federal *habeas corpus* action, resulting in his conviction being overturned.<sup>84</sup>

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<sup>77</sup> *Id.* at 75.

<sup>78</sup> KILGALLEN, *supra* note 47, at 235. See also *infra* notes 147-48 and accompanying discussion.

<sup>79</sup> *Id.* at 246, 294.

<sup>80</sup> *Id.* at 294. Kilgallen, herself, became part of the discussion of the violation of Sheppard’s constitutional rights at the trial. She reported that in a private meeting with Blythin, the trial judge told her, “It’s an open-and-shut- case,” because Sheppard was “guilty as hell. There’s no question about it.” *Id.* at 301-02. Kilgallen’s conversation with the judge barely made a footnote in the Court’s opinion, but garnered more attention in the deliberations of the case. 384 U.S. 333, 358 n.11 (1966). See also discussion accompanying *infra* notes 124-26.

<sup>81</sup> O’DONNELL, *supra* note 63, at 76.

<sup>82</sup> *Id.* at 71-72. O’Donnell does not report how the controversy was resolved. O’Donnell, however, was also skeptical of Kilgallen’s report that Blythin had told her in chambers that he believed Sheppard to be “guilty as hell.” Kilgallen “had no satisfactory answer” to the question as to why she waited ten years to expose the judge who, O’Donnell wrote, “[N]ever said so much as ‘God darn it.’” *Id.* at 72.

<sup>83</sup> *Sheppard v. Ohio*, 352 U.S. 955 (1956) (denying certiorari).

<sup>84</sup> *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

The state courts were unanimous in ruling against Sheppard, even though there was some recognition of problems with the trial and the press coverage of the trial in particular.

Allegations of improper in-courtroom conduct got traction in the opinion of the Ohio Court of Appeals.<sup>85</sup> Much of the description of courtroom behavior seems to have originated with some of the thirty-seven assignments of error alleged by Sheppard's attorneys. One complaint focused on the table situated within the bar, where Sheppard's attorneys reported that twenty reporters were seated at a table, one end of which "was within three feet of the jury box."<sup>86</sup> In addition, the judge reserved three of the four rows of benches in the courtroom for members of the press. "Many times during the trial," the attorneys alleged, "there was constant moving in the part of the courtroom occupied by said reporters, radio and television personnel. They kept going in and out and changing places and relieving one another."<sup>87</sup> The finding became part of the lore of the case.<sup>88</sup>

Sheppard's attorneys also complained that reporters were allowed to have telephone lines installed in the courtroom, that Sheppard was often photographed going in and out of the courthouse, that counsel had to push their way through reporters going in and out of the judge's chambers for conferences, that photographers were allowed to take pictures in the courtroom during recesses, and that television cameras were set up in the courthouse.<sup>89</sup> All this, the attorneys alleged, contributed to "mass hysteria and the creation of an atmosphere of public opinion which made a fair trial by jury impossible."<sup>90</sup>

The court of appeals, however, disagreed. The courtroom arrangements, the court held, were within the discretion of the judge, and:

[F]rom a reading of the record, we cannot say that the court in seeking to maintain an orderly proceeding abused its discretion in directing the courtroom arrangements. . . . A careful examination of the record as to each of the foregoing claims of error, shows that the proceedings were regular in every respect and the claims of the error are therefore overruled.<sup>91</sup>

While inconvenient, such activity is not unusual in a sensational case, and the Ohio Supreme Court affirmed the conclusion of the court of appeals. A jury was impaneled without difficulty, the court held, it was directed to deliver a verdict, and the trial judge believed the jury to be a good jury.<sup>92</sup> The evidence, the court held, did not support the assertion that the denial by the judge to order a change of venue was an

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<sup>85</sup> State v. Sheppard, 128 N.E.2d 471 (Ohio App. 1955), *aff'd* 135 N.E.2d 340 (Ohio 1956), *cert. denied* 352 U.S. 910 (1956).

<sup>86</sup> *Id.* at 476. See *supra* note 68-71 and accompanying discussion disputing this claim.

<sup>87</sup> *Id.* at 477.

<sup>88</sup> Indeed, the Supreme Court used similar language. See quotation accompanying *supra* note 35.

<sup>89</sup> 128 N.E.2d at 476-77.

<sup>90</sup> *Id.* at 478.

<sup>91</sup> *Id.* at 500.

<sup>92</sup> State v. Sheppard, 135 N.E.2d 3409, 343 (Ohio 1956). The state supreme court later issued two additional rulings in the Sheppard case, but neither contained discussion of improper in-courtroom conduct. See State v. Sheppard, 131 N.E.2d 837 (Ohio 1956) (*per curiam*), *aff'g* 128 N.E.2d 504 (Ohio App. 1955) (denying a motion for a new trial); State v. Sheppard, 135 N.E.2d 471 (Ohio 1956) (affirming the dismissal of the appeal).

abuse of discretion,<sup>93</sup> and in the absence of substantial evidence, it must be assumed that the jury did its duty.<sup>94</sup>

The Supreme Court denied *certiorari* in the case, but in a dissent from the denial, Justice Felix Frankfurter implied that he might have supported Sheppard's claim that he was denied a fair trial because of the "atmosphere of a 'Roman holiday.'" Justice Frankfurter took special note of the fact that the denial of *certiorari* "in no wise implies that this Court approves the decision of the Supreme Court of Ohio." It only means, he noted, that four members of the Court, for whatever reason, did not want to hear the case.<sup>95</sup>

Eight years after the denial of *certiorari* in the state case, Sheppard had a new attorney who filed a *habeas corpus* action in federal court. The writ was granted by the district court for the Southern District of Ohio in a scathing opinion in which the court concluded that the Sheppard trial "can only be viewed as a mockery of justice."<sup>96</sup> Not only could the jury that decided the case not be impartial, the court held, but, because of the volume of prejudicial publicity, no impartial jury could have been seated.<sup>97</sup> The court held that "there was such a plethora of prejudicial material contained in the newspapers that no admonition or charge of the court could vitiate the effect of the publicity."<sup>98</sup>

Prejudicial publicity was one "five separate violations of [Sheppard's] constitutional rights," the court held, but it did not list courtroom decorum as one of the five,<sup>99</sup> despite its harsh language for the trial judge and the press. In a separate part of the opinion, however, the court noted that "the requisite atmosphere for a fair trial could not, and in fact did not exist," noting that the Ohio Supreme Court characterized that atmosphere as "'a Roman holiday for the news media."<sup>100</sup>

The Sixth U.S. Circuit Court of Appeals reversed in an opinion that sharply criticized the district court.<sup>101</sup> While writing that the district court opinion was "painstakingly prepared and . . . laudable," the court noted that "nine Ohio Judges of the Common Pleas Court, the Court of Appeals and The Supreme Court did not find error or constitutional vice in the Sheppard trial and that the case 'did not commend itself to at

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<sup>93</sup> *Id.* at 344. Corrigan made motions for continuances and change of venue five times: Oct. 18, 1 Trial Transcript, *supra* note 32, at 27; Oct. 19, *id.* at 142; Oct. 25, 2 Trial Transcript, *id.* at 369; Nov. 22, 7 Trial Transcript, *id.* at 171-78; Nov. 26, 8 Trial Transcript, *id.* at 95-97. In addition, in the afternoon of Oct. 15, Corrigan made a motion to have the press table removed from within the bar. 1 Trial Transcript, *id.* at 66.

<sup>94</sup> *Id.* at 346.

<sup>95</sup> 352 U.S. 910, 911 (1956) (Frankfurter, J., dissent from denial of *certiorari*). See also *infra* notes 117-18 discussing deliberations by justices before the denial of *certiorari*.

<sup>96</sup> Sheppard v. Maxwell, 231 F. Supp. 37, 71 (S.D. Ohio 1964), *rev'd* 346 F.2d 707 (6th Cir. 1965), *rev'd* 384 U.S. 333 (1966).

<sup>97</sup> *Id.* at 60.

<sup>98</sup> *Id.* at 63.

<sup>99</sup> *Id.* at 71. The five violations of Sheppard's constitutional rights identified by the court were failure to grant a change of venue or continuance due to pre-trial publicity, failure to maintain impartial jurors due to during-trial publicity, failure of the judge to disqualify himself though there was uncertainty about his impartiality, improper introduction of certain evidence, and unauthorized communications to jurors during their deliberations. *Id.*

<sup>100</sup> *Id.* (quoting State v. Sheppard, 135 N.E.2d 3430, 341 (Ohio 1956)).

<sup>101</sup> Sheppard v. Maxwell, 346 F.2d 707 (6th Cir. 1965), *rev'd* 384 U.S. 333 (1966).

least four members of the [United States Supreme] Court.”<sup>102</sup> The court found “no infirmity in Dr. Sheppard’s conviction.”<sup>103</sup>

The court dismissed arguments that the judge contributed to the so-called “carnival atmosphere” of the trial by allocating special seating for journalists, allowing too much photography, and allowing the installation of a microphone and speakers in the courtroom. The court was unwilling to second-guess the judge’s decision to allocate the seating in a sensational trial ten years after the fact, noted that no photographs were allowed in the courtroom while court was in session, and found the complaint about the microphone and speakers, “[s]urprising in view of the fact that it has become regular practice to install such electronic equipment in modern courtrooms, including those occupied by the United States Districts Court.”<sup>104</sup>

The court’s biting criticism of the district court was countered by one of its judges, George C. Edwards, who began his dissent writing, “If ever flagrant and tolerated interference of news media in a criminal trial served to deprive a defendant of his constitutional rights to due process and a fair trial, this surely must be the case.”<sup>105</sup> Judge Edwards concluded his nineteen-page dissent by writing that the facts of the case came “as a distinct shock to this conscience of this former state court judge.”<sup>106</sup>

While Judge Edwards did not specifically write that courtroom decorum denied Sheppard a fair trial, he was much more friendly to the argument than the other members of the court or to those judges highlighted in the majority opinion. He found the in-court shenanigans more contributory than causal, specifically finding fault with both the publicity and the behavior of the journalists covering the trial. He wrote that “the news media were frequently allowed to become the dominant factor in the courtroom.”<sup>107</sup> Judge Edwards also found fault with the seating arrangements in the courtroom. He wrote that “elaborate measures” were provided for journalists, “But the standard measures which could have been employed to prevent the news media from influencing the outcome of the trial were not employed.”<sup>108</sup> In this case, he wrote, “[I]t must be recorded that the trial judge made no effective use of any of [seven] measures” available to ensure due process to a criminal defendant.<sup>109</sup>

The Supreme Court of the United States, of course, reversed the Sixth Circuit.<sup>110</sup> The brief for Sheppard filed by F. Lee Bailey was the first legal document in which an

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<sup>102</sup> *Id.* at 711. The reference to four Supreme Court justices is based on the so-called “rule of four,” that is, the Court’s protocol that certiorari in a case will only be granted if four justices want to hear the case. See WILLIAM H. REHNQUIST, *THE SUPREME COURT* 264 (1987). Justice Frankfurter made the same reference in his dissent from the denial of certiorari, but the Sixth circuit did not reference his admonition. See *supra* note 95 and accompanying discussion.

<sup>103</sup> *Id.* at 712

<sup>104</sup> *Id.* at 725.

<sup>105</sup> *Id.* at 738 (Edwards, J., dissenting).

<sup>106</sup> *Id.* at 756 (Edwards, J., dissenting).

<sup>107</sup> *Id.* at 739 (Edwards, J., dissenting)

<sup>108</sup> *Id.* at 738-39 (Edwards, J., dissenting).

<sup>109</sup> *Id.* at 739-40 (Edwards, J., dissenting) (listing: change of venue, adjourning the trial until public excitement has passed, sequestering the jury, screening jurors from extra-judicial influences, ordering jurors not to read or listen to media accounts of the trial, questioning jurors about what they may have heard or read, and being alert to possible outside communications of jurors during deliberations).

<sup>110</sup> *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

argument was made that Judge Blythin failed “to maintain constitutionally adequate decorum in the courtroom during the trial[.]”<sup>111</sup> The brief compared the seating for media representatives in the courtroom with the broadcast equipment that prompted the Court to overturn the conviction of Billie Sol Estes a year earlier,<sup>112</sup> and it delineated instances identified in the transcript of the trial that could be considered disruptive behavior. The transcript itself, however, demonstrated disagreements on the extent of improper activity. More than once, for example, Corrigan complained that members of the gallery were laughing at questions he asked,<sup>113</sup> at one point prompting this exchange between Corrigan, prosecutor Saul S. Danaceau and Judge Blythin:

MR. CORRIGAN: Will you put in the record that at this time the audience broke into loud laughter?

MR. DANACEAU: We object to that. There was not any loud laughter.

THE COURT: Yes, the Court will say it was not loud laughter. Certainly there was some laughter.<sup>114</sup>

## VI. Papers of Supreme Court Justices

A wealth of information about the operation and decision-making process of the Supreme Court is available through the papers of retired justices. Papers contain communications among the justices, early drafts of opinions, candid appraisals of issues, and sometimes reasons justices change their minds during discussions of cases – information that often does not appear in the final opinions.<sup>115</sup> Such material about the Sheppard case was located in the papers of four justices: William Brennan, Tom Clark, William Douglas and John Marshall Harlan.<sup>116</sup>

In the fall of 1956, law clerks for Justices Brennan and Harlan recommended that the Court deny *certiorari* in *Ohio v. Sheppard*. Though concluding that “this is the most extensive incident of trial by newspaper in any reported decision in the United States,” Justice Brennan’s clerk wrote that the Court should not review the record to determine whether there should have been a change of venue or continuance, the two primary questions being posed to the Court. Publicity was the only question at issue, the clerk noted, and though “there is no question that the trial of this case was profoundly influenced by the publicity prevalent at the time and by the trial by newspaper,” he wrote there was no hysteria during the trial and *certiorari* should be denied.<sup>117</sup>

Similarly, Justice Harlan’s clerk wrote that publicity and sensationalism were “pretty appalling,” but that the trial was not so unfair that there was a violation of the

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<sup>111</sup> Brief for Petitioner at 1, *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (No. 490), 1966 WL 100498.

<sup>112</sup> *Id.* at 39 (citing *Estes v. Texas*, 381 U.S. 532 (1965)).

<sup>113</sup> In addition to the discussion accompanying *infra* note 114, see *supra* note 61 and accompanying discussion.

<sup>114</sup> 8 Trial Transcript, *supra* note 32, at 329

<sup>115</sup> See, e.g., Hopkins, *supra* note 20.

<sup>116</sup> The following sets of documents were examined for this article: William J. Brennan Jr. Papers, 1956 Term, Box 5, Manuscript Division, Library of Congress; Brennan Papers, *supra* note 14; Tom Clark Papers, 1965 Term, Boxes A192 & A193, Tarlton Law Library, University of Texas School of Law; William O. Douglas Papers, 1965 Term, Box 1368, Manuscript Division, Library of Congress; John Marshall Harlan Papers, 1956 Term, Box 31, Manuscript Division, Library of Congress; John Marshall Harlan Papers, 1965 Term, Box 260, Manuscript Division, Library of Congress.

<sup>117</sup> Brennan Papers, *supra* note 113, Box 5.

constitution. The state judges were closer to the case, he wrote, and even the dissenters agreed that the publicity did not deprive Sheppard of a fair trial. The trial, however, the clerk wrote, was “carried on in something of a circus atmosphere,” but, he added, defense attorneys and Sheppard’s family contributed to that atmosphere with interviews.<sup>118</sup>

Despite the recommendations, Justices Brennan and Harlan voted to grant *certiorari*.

Nine years later, the clerks for Justices Brennan and Harlan were agreed again in their recommendations. In 1965, however, they both recommended that *certiorari* be granted.

The primary issue, Justice Brennan’s clerk wrote, is pre-trial publicity. The other issues, including the judge’s failure to admonish the jurors not to expose themselves to media coverage of the trial, were troublesome, “but not sufficiently persuasive.” He recommended granting *certiorari* on the question of pre-trial publicity.<sup>119</sup>

Justice Harlan’s clerk wrote that the trial was much worse than that of Billie Sol Estes, whose fraud conviction was overturned by the Supreme Court a year before the Sheppard case because cameras in the courtroom denied Estes “that judicial serenity and calm to which [he] was entitled.”<sup>120</sup> The clerk did not elaborate on the point. “The only question in my mind,” he wrote, “is whether adequate guidelines can be set down under the fourteenth amendment.”<sup>121</sup>

Some of the richest detail about the deliberations in the case is in the papers of Justice Douglas. Douglas, unlike some of the other justices, left his handwritten notes from conference discussions among his papers. His notes on the discussion of *Sheppard v. Maxwell*, held March 4, 1966, reveal a split among the justices as to the relevant issues in the case. Five justices – Hugo Black, Douglas, Harlan, Brennan and Abe Fortas – voted to reverse the conviction, and Justices Tom Clark and Potter Stewart indicated that they were inclined to reverse. Justice Byron White voted to affirm, and Chief Justice Earl Warren indicated that he was inclined to affirm.<sup>122</sup>

Only Justices Harlan and Fortas, however, had real concerns about the atmosphere at trial. Justice Harlan said he agreed with the language of the district court that the trial was a “Roman holiday.” He said he would reverse on the “totality of the atmosphere” of the trial. To do otherwise, he said, would allow the rights of the press to override the rights of a criminal defendant to a fair trial. Justice Fortas agreed, saying the Court must disapprove of the actions of the press. “We can’t affirm without saying this was not a Roman holiday,” he is quoted by Douglas as saying.<sup>123</sup>

Justices Black, Douglas and Brennan said they would reverse because of a statement Judge Blythin apparently made to journalist Dorothy Kilgallen. Kilgallen

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<sup>118</sup> Harlan Papers, *supra* note 113, Box 31.

<sup>119</sup> Brennan Papers, *supra* note 14, Box 143.

<sup>120</sup> Sheppard’s attorney had also compared the trial to *Estes v. Texas*, 381 U.S. 532 (1965). See *supra* note 112 and accompanying discussion.

<sup>121</sup> Harlan Papers, *supra* note 116, Box 260.

<sup>122</sup> Douglas Papers, *supra* note 116, Box 1368

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

reported ten years after Sheppard's conviction that she met with Judge Blythin in his chambers before the trial, and he told her that Sheppard was "guilty as hell."<sup>124</sup> The comment showed bias, the justices said, and was grounds for reversal. Chief Justice Warren and Justice Stewart, on the other hand, said the Kilgallen statement, even if true, did not constitute sufficient grounds for reversal. There was also disagreement on whether the judge acted in a way that tended to corroborate Kilgallen's assertion. Justice Clark said the trial judge took a number of actions that tended to demonstrate the bias the statement may have suggested, but Justice Harlan said none of Judge Blythin's rulings demonstrated sufficient prejudice to support the statement.<sup>125</sup>

At conference, then, there seemed to be at least five justices – and possibly as many as seven – willing to reverse the conviction. Justice Black was the senior associate justice in the majority and assigned the opinion to Justice Douglas.

But Douglas didn't keep it.

On March 17, two weeks after the conference discussion on the case, Douglas wrote a memo to the other justices indicating that the case needed to be reassigned. His vote to reverse, he said, was based on the Kilgallen statement, but further research indicated to him that "the judge handled the trial in a fairly evenhanded way." He could deduce no prejudice against Sheppard, and there was no evidence that the judge's actions with regard to the media were related to bias. The judge assigned seats to journalists, Douglas noted, but there was nothing wrong with that, and Douglas's research indicated that the judge "did not turn the whole courtroom over to them."<sup>126</sup>

Douglas also wrote that "the taint of publicity" should be kept from the courtroom. In a concurring opinion in *Sheppard v. Maxwell*, which he did not publish, Douglas indicated that had the judge taken "imaginative and careful steps" to control prejudicial publicity, the case might not be before the Court. The judge did not do that, however, Douglas wrote, and Sheppard did not receive a fair trial. "When convictions are obtained in the atmosphere of a carnival the very integrity of our criminal procedures are open to challenge," Douglas wrote.<sup>127</sup> Douglas's reference to a "carnival," therefore, was based on the prejudicial publicity that surrounded the case rather than the in-court atmosphere.

The papers of Justice Clark, who wrote the majority opinion, reveal that the justices had very few comments about early circulations of the opinion.<sup>128</sup> Eventually all the justices, except Black, joined without additional comment. Indeed, Justice Black did not write a dissenting opinion, he simply indicated that he was dissenting.<sup>129</sup> His papers reveal no rationale for his change of vote from the conference discussion of the case.<sup>130</sup>

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<sup>124</sup> 384 U.S. 333, 358 n.11 (1956). See also, O'DONNELL, *supra* note 63, at 72 (indicating skepticism at Kilgallen's claim because, she wrote, Blythin "never said so much as 'God darn it.'")

<sup>125</sup> Douglas Papers, *supra* note 116, Box 1368.

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

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

<sup>128</sup> Clark Papers, *supra* note 116.

<sup>129</sup> 384 U.S. at 363.

<sup>130</sup> There are very few documents among Justice Black's papers in the Library of Congress. When Justice Hugo Black was near death, he required his son to destroy many of his papers, including his notes from conference. HUGO BLACK JR., MY FATHER: A REMEMBRANCE 250-56 (1975).

## VII. Trial Coverage

The best sources for the identification of possible in-court disruptions would be those that provide day-by-day coverage of the trial. In the case of *Sheppard v. Maxwell*, those would be daily newspapers and the official trial transcript. Each source has some inherent flaws:

- Newspaper reports are filed by journalists who are required to make subjective judgements on what is and is not newsworthy; not everything that occurs in the courtroom, therefore, is captured in the published reports of the daily events in a courtroom.
- Official court reporters capture everything that occurs in a courtroom when court is in session; they do not capture occurrences when a judge goes off the record or other times when court is not in session, however, so off-the-record colloquies and other in-court occurrences may not be documented.

Use of both collections of data, however, is likely to provide the most relatively complete picture of what happens in court.

Newspaper accounts of the trial and the official trial transcript report few instances of disruptions while jurors were in the courtroom. There were, however, also reports of shenanigans during voir dire, before testimony began, and other times when jurors were not present.<sup>131</sup> While not witnessed by jurors, these disruptions could have had an impact on the atmosphere during trial by coloring the relationships among the attorneys and judge.

The trial began October 18, 1954, with lead defense counsel William J. Corrigan complaining about the atmosphere in the courtroom and asking for a change of venue and a continuance.<sup>132</sup> He didn't like the number of photographers in the courtroom, the television lights at the entrance to the courtroom, and the table inside the bar which he said was about six inches from the jury box and where fifteen were seated.<sup>133</sup> "[T]he very atmosphere of the court in this morning signifies that we are in a case which is unprecedented in this country,"<sup>134</sup> he told Judge Blythin. He argued that, while the Constitution provides for a public trial, "It doesn't provide for a trial for the benefit of publicity, and the atmosphere this morning is such that I don't see how we can receive a fair and impartial trial."<sup>135</sup> Judge Blythin overruled the motion for a continuance and held in abeyance the motion for a change of venue until after jury selection.<sup>136</sup>

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<sup>131</sup> The trial began Oct. 18, 1954, with motions and voir dire. Opening statements by counsel began Nov. 4, followed by the taking of testimony.

<sup>132</sup> 1 Trial Transcript, *supra* note 32, at 27.

<sup>133</sup> *Id.* For a delineation of news organizations whose reporters were seated at the table see *supra* note 71.

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

<sup>135</sup> *Id.* at 28. Corrigan reminded Judge Blythin that when he arrived at the bench, he found his place "occupied by a photographer taking pictures" who had to be removed from the bench. *Id.* See also Todd Simon, *First Sheppard Juror Seated; Heights Mann Quizzed Two Hours, Hurdles Defense Challenges*, CLEVELAND PLAIN DEALER, Oct. 19, 1954, at 1, 7; Ray Sprigle, *Three Talesmen Called in Day and 2 Barred*, PITTSBURGH POST-GAZETTE, Oct. 19, 1954, at 1, 4.

<sup>136</sup> *Id.* at 41.

In the afternoon session, Corrigan again complained about photography equipment in the courtroom and the table and assigned seats for reporters. His motion to remove the table was overruled.<sup>137</sup> Judge Blythin, however, admonished spectators: “The Court will not during the progress of this trial permit any standees in the courtroom, and we are going to conduct this trial with the kind of decorum which befits a trial of any criminal matter.”<sup>138</sup>

Corrigan’s complaints continued the second day of voir dire. He asked for a continuance based on what he called “derogatory remarks” made about him during a broadcast on WHK radio. Blythin overruled the motion, saying, “In any event, we cannot control sources of publicity – that is beyond the power of the court.”<sup>139</sup> Later in the day, Blythin denied Corrigan’s request to hear testimony from representatives of the radio station.<sup>140</sup>

The next Monday, October 25, Corrigan renewed his motions for a continuance and change of venue. The presence of journalist Bob Considine, he told Blythin, “[S]hows how tremendous the coverage of this particular case is.”<sup>141</sup> Blythin overruled the motion.<sup>142</sup> A day later, as if attempting to punctuate his point, Corrigan complained to Blythin that when the jury entered the courtroom:

[T]here were at least 15 photographers in this room on benches, on rails, on the Judge’s bench, flashing pictures of the jury, and that there was moving pictures taken of the jury. I don’t know what effect that has on the jury, but that existed in this room this morning.<sup>143</sup>

This time, Blythin complied:

The record may so show, and from this time on there will be no photographs of any kind at any time in this courtroom during the progress of this trial. The Court has made it perfectly clear that there were to be no pictures taken of the jury until they are empaneled.<sup>144</sup>

The order came two days after Blythin called down reporters for too much movement in the courtroom.<sup>145</sup> Blythin repeated the order the day before opening arguments and testimony from witnesses. This time, he added a threat: Unless disturbances in the

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<sup>137</sup> *Id.* at 66.

<sup>138</sup> *Id.* at 64-65.

<sup>139</sup> *Id.* at 142. *See also supra* note 32 and accompanying discussion.

<sup>140</sup> *Id.* Blythin left in place the subpoena for the radio representatives in case testimony might be taken at some later time. The same day, one newspaper reported, a member of the prosecution team expressed discomfort at the large number of reporters in the courtroom. Associated Press, *Defense Persists in Questioning Sheppard Panel on Moral Views*, ST. LOUIS POST-DISPATCH, Oct. 20, 1954, at 1, 4.

<sup>141</sup> 2 Trial Transcript, *supra* note 32, at 369.

<sup>142</sup> *Id.* at 381.

<sup>143</sup> *Id.* at 469

<sup>144</sup> *Id.* *See also* Associated Press, *Weeping Woman Asks Not to be on Sheppard Jury*, ST. LOUIS POST-DISPATCH, Oct. 26, 1954, at 1, 4; Ray Sprigle, *3 More on Sheppard Trial Jury Removed*, PITTSBURGH POST-GAZETTE, Oct. 27, 1954, at 1, 6.

<sup>145</sup> *See* George J. Barmann, *Dr. Sam is Drawn to Court Window*, CLEVELAND PLAIN DEALER, Oct. 23, 1954, at 6.

courtroom ceased, he would order the door locked and there would be no further movement in or out while the trial was in session.<sup>146</sup>

Corrigan renewed his motion for a continuance and change of venue one last time at the beginning of the proceedings Monday, November 22. Corrigan's primary complaints were that journalists and photographers were overrunning the halls and rooms near the courthouse, and that Sheppard was subjected to being photographed in the courtroom because he was brought to his seat at least 10 minutes before the start of trial.<sup>147</sup> Blythin overruled the motions and he and Corrigan engaged in a colloquy over photography. Blythin said Sheppard and Corrigan were being photographed with their consent:

MR. CORRIGAN: I have given no consent to that.

THE COURT: And let the record show that counsel for the defendant and the defendant, himself, have been voluntarily photographed in the court room from time to time during the progress of this trial.

MR. CORRIGAN: I haven't been voluntarily photographed. Neither has the defendant. We have been compelled to be photographed. We can't escape it.

THE COURT: Oh, no, I don't think that is so, Mr. Corrigan, and the court will say to you that the defendant is not to be photographed in the court room at all without your consent.

MR. CORRIGAN: Well, if there has been any consent by anybody in this matter, the consent is withdrawn.<sup>148</sup>

Later in the colloquy, Corrigan added an argument to his motion for a continuance. In a national broadcast the previous night, he said, Bob Considine compared Sheppard to Alger Hiss. He asked Blythin to query the jurors about the broadcast.<sup>149</sup> Blythin responded that he had not heard of the broadcast though, "Somebody usually tells me about these things." He added, "Well, I don't know, we can't stop people, in any event, listening to it. It is a matter of free speech, and the court can't control it."<sup>150</sup>

The issue, Corrigan insisted, was whether jurors heard the broadcast. "We are not going to harass the jury every morning," Blythin responded, and he had confidence in the jurors,<sup>151</sup> ending the discussion.

### **A. Press Coverage**

The Sheppard trial was covered by both local and national news organizations, with special seating arranged for journalists.<sup>152</sup> Fifty-two journalists were seated at a special table within the bar and in the first three rows of the courtroom. Such a collection of newspaper reporters would have been likely to report on anything in the courtroom that was out of the ordinary, including whatever attention the judge gave to

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<sup>146</sup> 4 Trial Transcript, *supra* note 32, at 30-31.

<sup>147</sup> 7 Trial Transcript, *supra* note 32, at 171.

<sup>148</sup> *Id.* at 173.

<sup>149</sup> *Id.* at 175.

<sup>150</sup> *Id.* at 176.

<sup>151</sup> *Id.* at 177.

<sup>152</sup> 1 Transcript of Trial, *supra* note 32, at 61-62.

disruptive behavior. While routine calls by the judge for quiet might not have appeared in news stories about the trial, sustained or extraordinary attention to disruption almost certainly would have been reported. And it was that kind of disruption that the Supreme Court highlighted.

Examination of gavel-to-gavel news coverage of the trial by six newspapers, however, gave little indication of such disruption.<sup>153</sup> The six newspapers were the *Chicago Tribune*, the *Cleveland Plain Dealer*, the *Cleveland Press*, the *New York Journal American*, the *Pittsburgh Post-Gazette* and the *St. Louis Post-Dispatch*.<sup>154</sup>

The newspapers reported four instances of what might be characterized as in-court disruption,<sup>155</sup> but the first didn't occur until some two weeks into the trial, and its impact on the jury is questionable. On November 17, Corrigan complained that journalists had been touching material at the defense table, and Blythin instructed reporters to refrain from doing so.<sup>156</sup>

On November 29, Corrigan asked Blythin to let the record show that there was "loud laughter" from reporters in the courtroom. Blythin disputed the characterization of "loud."<sup>157</sup>

Blythin, however, apparently had his own complaints. On December 1, he issued an ultimatum requiring journalists to be more orderly or no movement in or out of the courtroom would be allowed except during recesses. He said that during one half-hour period, nineteen people exited and thirteen entered. Notices were placed on press seats delineating that his rule would be enforced beginning December 2. Apparently

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<sup>153</sup> See Sally Dukes, Revisiting *Sheppard v. Maxwell*, May 16, 2019, unpublished research paper on file with the author; Sarah Sedwick, A 50-Year Dispute: The Role of the Media in the Dr. Samuel Sheppard Trial, Dec. 2, 2018, unpublished research paper on file with the author; David Snyder, Sheppard Trial Log Research Essay, June 24, 2017, unpublished research paper on file with the author.

<sup>154</sup> Three researchers, *id.*, were asked to select newspapers to examine. The requirements were (1) each newspaper covered the trial from beginning to end; (2) no newspaper represented by a reporter who signed the telegram to the members of the Supreme Court could be selected; (3) one selected paper should be considered a national outlet and one a local or regional outlet. Two researchers were seniors in the Department of Communication at Virginia Tech and had taken the senior-level survey course in communication law required for their majors; the third was a senior political science major and had also taken the communication law course as part of her pre-law sequence. Sally Dukes (B.A. political science) examined the *Pittsburgh Post-Gazette* and the *St. Louis Post-Dispatch*; Sara Sedwick (B.A. communication) examined the *Cleveland Press* and the *New York Journal American*; David Snyder (B.A. communication) examined the *Chicago Tribune* and the *Cleveland Plain Dealer*.

<sup>155</sup> Another instance of disruption occurred before the jury was seated. See Barmann, *supra* note 145 and accompanying discussion.

<sup>156</sup> See [No author], *Highlights of Corrigan-Gerber Courtroom Duel*, CLEVELAND PRESS, Nov 18, 1954, at 16. The issue was also reported in the trial transcript, 6 Trial Transcript, *supra* note 32, at 391. Corrigan told the judge papers were taken from the defense table, and Blythin responded that "under no conditions is anyone from the rear to enter into the center part of the courtroom," nor "touch anything belonging to any of the parties in this case." *Id.*

<sup>157</sup> [No author], *Dr. Hexter Describes July 4 Examination of Dr. Sam*, CLEVELAND PRESS, Nov. 29, 1954, at 16. This was not the first time Corrigan complained about laughter in the courtroom, bringing a response from Blythin. See *supra* note 114 and accompanying discussion.

journalists pleaded their case and were given another chance.<sup>158</sup> Blythin again ordered journalists to be more quiet a week later.<sup>159</sup>

### **B. Court Record**

The record of the trial proper runs 1,172 pages, and reported six instances that might be characterized as disruptive over seven days of the trial; three of the instances occurred on one day and two instances on another day.<sup>160</sup> Another instance was also reported by the press.<sup>161</sup>

Judge Blythin's first admonition to reporters in the presence of the jury occurred after opening statements by the prosecution on November 4. Blythin interrupted his instructions to jurors as he was dismissing them for the lunch break to call for quiet:

[P]lease gentlemen, gentlemen of the press, if we are going to have disturbance at the closing of these sessions, the Court will order that door locked. There will be no movement of any kind by anybody, please, from now on. It will only take us a second and we're going to maintain order in the trial of this case.<sup>162</sup>

Three times on the afternoon of Tuesday, November 9, Blythin called for quiet. "Let's have it quiet in the back, please, gentlemen," he said early into the afternoon testimony.<sup>163</sup> Moments later, he repeated the call. Halting the testimony without prompting from counsel, he said, "Just one moment, please. Will you folks in the rear be kind enough to be very quiet when moving? It just cuts off the speech and makes the situation impossible. We will have to have quiet."<sup>164</sup>

Later in the day, Blythin again requested, "Let's have quiet, please, ladies and gentlemen."<sup>165</sup> The request, however, came immediately after a discussion among Blythin, a witness and counsel as to whether questioning should continue or court should be adjourned for the day, so the extra motion could have been residue from that discussion.

The next morning, Blythin's request for quiet was accompanied by a threat. After Corrigan complained that "there is so much noise in this court room" that he couldn't hear, Blythin said, "Can we have quiet in the rear, please. We shall have to restrict the

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<sup>158</sup> See [No author], *Judge Hits Noise: Threatens to Bar Reporters' Raving*, CLEVELAND PLAIN DEALER, Dec. 2, 1954, at 12.

<sup>159</sup> See [No author], *Dr. Sam Tells His Account of Fight With His Wife's Killer*, CLEVELAND PRESS, Dec. 10, 1954, at 1.

<sup>160</sup> There were also two reports of noise in the hall. 7 Trial Transcript, *supra* note 32, at 28; 12 Trial Transcript, *id.* at 237; two other complaints about not hearing testimony without delineating the reason, *id.* at 34; and one complaint by prosecution attorneys about defense counsel talking and giggling during testimony, 7 Trial Transcript, *id.* at 551-52.

<sup>161</sup> The disruption reported by both the media and the transcript was Corrigan's complaint that reporters were tampering with items on the defense table, which Blythin ordered stopped. See *supra* note 160 and accompanying discussion.

<sup>162</sup> 4 Trial Transcript, *supra* note 32, at 30-31.

<sup>163</sup> 5 Trial Transcript, *supra* note 32, at 4.

<sup>164</sup> *Id.* at 36.

<sup>165</sup> *Id.* at 75.

movement in this court room unless we can have quiet. We just cannot continue.”<sup>166</sup> A bit later, Blythin repeated his request for quiet, adding another warning:

Can we have quiet, pleased gentlemen? The Court will, from now on, if we can't have quiet, the Court will definitely restrict movement in the courtroom. We will have to do it in the interest of moving along as we ought to with this trial. Counsel have a right to have their questions heard, so does the witness have a right, and the jurors must hear it, and we just can't hear it with this shuffling movement all of the time. You have to work out some scheme that will avoid it, and if you do not, the Court will do it.<sup>167</sup>

A week later, November 17, Corrigan interrupted a discussion about his questioning of a witness to complain that “the audience in the rear, the reporters, television men laugh in this case where this man is on trial for murder, for his life.”<sup>168</sup> Prosecution attorneys objected to Corrigan's comment, and Blythin told the jury: “Disregard that entirely. Let's forget the whole incident. Mr. Corrigan, when a witness does answer, you ought not to comment on it.”<sup>169</sup>

“If I was allowed to finish my question, maybe they wouldn't laugh,” Corrigan responded, before continuing his examination.<sup>170</sup>

As jurors were being dismissed for lunch on November 26, Corrigan complained that noise in the courtroom prevented him from hearing the judge's instructions, and Blythin seemed to agree:

Gentlemen, and ladies, too, if we do not have silence, the Court is going to make a fixed rule that there will be no entering or exit excepting at recess time. The Court has called attention to it on two or three occasions before. This is the last time he will do it. The rule will be no entering or exit by anybody excepting at recess times.<sup>171</sup>

Corrigan's final complaint came December 16, the last day of testimony, this time related to activity, not in the courtroom, but in the adjacent hallway. “I don't know where it comes from,” Blythin said. “It's in the hall, Judge,” said one of the prosecutors, Thomas J. Parrino. “I will see if I can quiet them down.”<sup>172</sup>

## VIII. Conclusions

Like a story about the big one that got away, stories about trials in which sex, murder and mystery are before the bar tend to grow with each telling. Ten reputable journalists for ten reputable news organizations asserted four months after the Supreme Court delivered its opinion in *Sheppard v. Maxwell*, that tales about courtroom shenanigans in the case did just that – they grew with the telling.

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<sup>166</sup> *Id.* at 321.

<sup>167</sup> *Id.* at 175.

<sup>168</sup> 6 Trial Transcript, *supra* note 32, at 321.

<sup>169</sup> *Id.* at 322.

<sup>170</sup> *Id.*

<sup>171</sup> 8 Trial Transcript, *supra* note 32, at 176-77.

<sup>172</sup> 12 Trial Transcript, *supra* note 32, at 137.

Much of what the Supreme Court wrote about Sam Sheppard's trial was clearly accurate. Prejudicial publicity was intense, and Judge Blythin did almost nothing to ensure that jurors were insulated from it.<sup>173</sup> Indeed, that issue was a primary focus of the Court. Justice Douglas supposed that, had the judge taken "imaginative and creative steps" to control prejudicial publicity it's unlikely the case would be before the Court.<sup>174</sup>

It is also clear that a large number of journalists covered the trial, despite the protest to the contrary in the telegram sent to the justices.<sup>175</sup> The record indicates that space was saved for at least fifty-two journalists either at a table within the bar or in the first three rows of the spectator section of the courtroom.<sup>176</sup> It is not clear, however, that either the number of journalists or the table were synonymous with a carnival atmosphere or with other than normal activity during a sensational trial. Indeed, journalists who covered the trial reported that a table situated within the bar of a courtroom was not unprecedented,<sup>177</sup> and that movement in and out of the courtroom was a common practice at trials and was done unobtrusively at the Sheppard trial.<sup>178</sup>

Defense attorneys argued to the Ohio Court of Appeals that the large number of reporters, the constant movement in and out of the courtroom, the presence of photographers, and the difficulty getting in and out of the judge's chambers for conferences contributed to "mass hysteria and the creation of an atmosphere of public opinion" which made a fair trial by an impartial jury impossible.<sup>179</sup> The Ohio Supreme Court disagreed with the defense arguments, however, finding, as the appeals court indicated, "[T]he proceedings. . . regular in every respect,"<sup>180</sup> affirming the ruling.<sup>181</sup>

The one court that ruled in favor of Sheppard was the federal district court for the Southern District of Ohio.<sup>182</sup> The court issued a scathing denunciation of the publicity that occurred before and during the trial, and found that no impartial jury could be seated. "The requisite atmosphere for a fair trial," the court held, "could not and in fact did not exist."<sup>183</sup> That court, however, did not attack Judge Blythin for the conduct within the courtroom during the trial. The court listed five violations of Sheppard's constitutional rights and courtroom decorum was not among them.<sup>184</sup> The Sixth Circuit overruled the lower court and found "no infirmity" in the conviction.<sup>185</sup> While a judge on the Sixth Circuit, George Edwards, wrote a dissent highly critical of Judge Blythin's lack of control, he found the in-court behavior more contributory than causal.<sup>186</sup>

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<sup>173</sup> See *supra* note 32 and accompanying discussion.

<sup>174</sup> See *supra* note 127 and accompanying discussion.

<sup>175</sup> See Western Union Telegram, *supra* note 14 ("[T]he press corps at the Sheppard trial was relatively small for a major trial.").

<sup>176</sup> See *supra* note 71 and accompanying discussion.

<sup>177</sup> See HOLMES, *supra* note 69, at 116.

<sup>178</sup> See Western Union Telegram, *supra* note 14; HOLMES, *supra* note 69, at 116-17.

<sup>179</sup> *State v. Sheppard*, 128 N.E. 471, 478 (Ohio App. 1955).

<sup>180</sup> *Id.* at 500.

<sup>181</sup> *State v. Sheppard*, 135 N.E.2d 340 (Ohio 1956).

<sup>182</sup> *Sheppard v. Maxwell*, 231 F. Supp. 37 (S.D. Ohio 1964), *rev'd* 346 F.2d 707 (6th Cir. 1964), *rev'd* 384 U.S. 333 (1966).

<sup>183</sup> *Id.* at 71.

<sup>184</sup> *Id.*

<sup>185</sup> *Sheppard v. Maxwell*, 346 F.2d 707, 712 (6th Cir. 1965), *rev'd* 384 U.S. 333 (1966).

<sup>186</sup> *Id.* at 102-04 (Edwards, J., dissenting). See also discussion accompanying *supra* notes 105-09.

When the case reached the Supreme Court in 1956, Justices Brennan and Harlan voted to grant *certiorari*, even though their law clerks recommended against doing so. One clerk wrote there was no hysteria during the trial; the other wrote that judges closer to the case decided that Sam Sheppard was not denied a fair trial, even though there was “something of a circus atmosphere” at trial.<sup>187</sup> Indeed, Justice Harlan’s clerk wrote that the in-court disruptions were worse than that of Billie Sol Estes, whose conviction was overturned by the Supreme Court.<sup>188</sup> Sam Sheppard, the clerk wrote, just like Billie Sol Estes, was denied the judicial serenity and calm he was entitled.<sup>189</sup> *Estes v. Texas*,<sup>190</sup> however, was not about courtroom disruption – it was about the presence of photographers in the courtroom and the violation of Fourteenth Amendment due process rights because of the televising of a hearing held during the trial.<sup>191</sup>

In 1965, trial conduct was again not much of an issue – the issue was publicity, particularly pre-trial publicity. The discussion at conference indicates a split on the issues, with most of the justices unconcerned about the conduct of the trial. Douglas, in particular, said that the judge “did not turn the whole courtroom” over to the press, even though there was somewhat of a “carnival atmosphere.”<sup>192</sup> His reference to a “carnival atmosphere,” however, was directed more at the publicity than at in-courtroom behavior.

Courts that grappled with the Sheppard case, therefore, were unanimous in their disdain for aspects of the trial, but were also nearly unanimous in their silence on the issue of in-court disruption. Such disruptions occurred, courts indicated, but not at the level reported by the Supreme Court.

Similarly, books about the case provide scant evidence of the carnival atmosphere that became synonymous with the trial. Sam Sheppard and his brother Stephen had complaints about aspects of the trial, but neither condemned the in-courtroom behavior,<sup>193</sup> nor did others who wrote contemporaneous accounts of the case.<sup>194</sup>

Finally, neither newspapers that covered the trial gavel-to-gavel nor the official transcript provide evidence of the carnival-like atmosphere described by the Supreme Court. Newspaper reporters independently identified four instances that might be described as in-court disruptions,<sup>195</sup> and the trial transcript recorded eight such instances over seven days.<sup>196</sup> One instance – which wasn’t really a disruption, but a complaint that journalists were touching materials belonging to defense attorneys during recesses – was reported both by a newspaper and the trial transcript,<sup>197</sup> and a complaint of noise in the hall was also reported.<sup>198</sup> During a trial that lasted some thirty-eight days, therefore, there were instances of possible disruption in the courtroom on eight days. In

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<sup>187</sup> Brennan Papers, *supra* note 14.

<sup>188</sup> See *supra* notes 117-18 and accompanying discussion. F. Lee Bailey, counsel for Sheppard, in his habeas brief, also compared the Sheppard courtroom to that in the *Estes* case. Brief for Plaintiff, *supra* note 111, at 39.

<sup>189</sup> Brennan Papers, *supra* note 15.

<sup>190</sup> 381 U.S. 532 (1965).

<sup>191</sup> *Id.* at 536

<sup>192</sup> Douglas Papers, *supra* note 110.

<sup>193</sup> See discussion accompanying *supra* notes 50-58, 62-67.

<sup>194</sup> See discussion accompanying *supra* notes 69-82.

<sup>195</sup> See discussion accompanying *supra* notes 153-59.

<sup>196</sup> See discussion accompanying *supra* notes 160-71.

<sup>197</sup> See discussion accompanying *supra* note 156.

<sup>198</sup> 12 Trial Transcript, *supra* note 32, at 137.

addition, two of the instances in which Judge Blythin called for quiet came while jurors were departing the courtroom for lunch, a time when it would not be unusual for journalists and other spectators to be gathering belongings and making their way towards exit doors.<sup>199</sup>

This is not a record that will support a charge that the trial was like a Roman holiday.

Judge Blythin's courtroom in the fall of 1954 was clearly a hotbed: "Murder and mystery, society, sex and suspense were combined. . . in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals."<sup>200</sup> Such a setting is sure to draw national, if not international, interest accompanied by a robust press corps. Examination of the wide variety of datasets about the trial, however, reveals scant evidence that behavior in the courtroom created the carnival-like atmosphere described by the Supreme Court.

What likely occurred in the case is that accounts of reporters simply doing their jobs inside the courtroom grew as did the case itself. Lower courts exaggerated the activity in the courtroom, possibly confusing the trial with the coroner's inquest, as the reporters suggested in their telegram. By the time the record reached the Supreme Court – 11 years after the trial ended – descriptions of in-court shenanigans expanded beyond the boundaries of reality, making the Supreme Court's description of the trial inaccurate and, therefore, another blot that became part of *Sheppard v. Maxwell*.

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<sup>199</sup> 4 Trial Transcript, *supra* note 32, at 30-31; 8 Trial Transcript, *supra* note 32, at 176-77.

<sup>200</sup> *Ohio v. Sheppard*, 135 N.E.2d 340, 341 (Ohio 1956).

# Exploring Legal Responses to Hate Speech In the United States

Caitlin Ring Carlson\*

*Unlike most other Western democracies, the United States provides near absolute protection for hate speech under the First Amendment. Unless expression falls into one of the narrow categories of exception carved out by the Supreme Court, which include fighting words, incitement, and true threats, there are no legal prohibitions against hate speech. However, public opinion on this issue is shifting, causing alarm among free speech advocates and raising questions about the legal responses currently available to address the issue.*

*This article explores these potential responses, which include an anti-hate speech law, a change in the federal threats statute, recognizing group defamation as a tort, and reconsidering intentional infliction of emotional distress as a viable legal response for victims of hate speech.*

*After reviewing the theoretical justifications in favor of and against protecting hate speech, the strengths and weaknesses of each idea are considered in light of existing U.S. jurisprudence. In the end, pursuing intentional infliction of emotional distress claims is identified as the best path forward for individuals intentionally harmed by hate speech.*

**Keywords:** hate speech, First Amendment, intentional infliction of emotional distress, group defamation, freedom of expression

## I. Introduction

In the United States, there are currently no legal prohibitions against hate speech, which is a broad and often contested term used to refer to vitriolic expression based on a person's membership in a protected class. The U.S. Supreme Court has from time immemorial, interpreted the speech and press clauses of the First Amendment as strict edicts against government attempts to interfere with expression. Today there are few if any prohibitions of hate speech directed at a group or an individual, regardless of whether it happens in-person or online. Unless expression falls into one of the narrow categories identified by the Supreme Court as unprotected, including incitement, true threats, or fighting words, hate speech is considered legal.<sup>1</sup>

Recently, public opinion on this issue has shifted, causing alarm among free speech advocates. According to Pew Research Center survey data, 40 percent of millennials are comfortable with limiting speech that is offensive to minorities.<sup>2</sup> Although the First Amendment is not designed to protect only the viewpoints of the majority, quite the opposite in fact, it is worth noting that many younger Americans support restrictions on racist expression. It is also important to acknowledge the extent to which U.S.

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<sup>1</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Virginia v. Black*, 538 U.S. 343 (2003).

<sup>2</sup> Jacob Pushter, *40% of Millennials OK with limiting speech offensive to Minorities*, PEW RESEARCH, (Nov. 20, 2015), <http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/>.

protection of hate speech stands in stark contrast to many other countries, such as Japan, Canada and members of the European Union, all of which have legal prohibitions against hate speech.<sup>3</sup> Regulations are particularly strong in nations that have a history of genocide or apartheid, such as Germany and South Africa.<sup>4</sup> Despite the United States' long history of racial violence in the form of slavery and the displacement of indigenous people, legislation has not emerged to address the issue of hate speech. While the United States claims that it is different from Europe, legal scholars such as Jeremy Waldron are quick to note the similarities between the Holocaust and U.S. racial terrorism consisting of lynchings, cross-burnings, and fire-bombing of churches.<sup>5</sup> Racial and other forms of hatred have unfortunately not been relegated to the nation's past. According to the Southern Poverty Law Center, changing demographics in the United States have caused the number of active hate groups in the country to double in the past 20 years.<sup>6</sup>

The emergence of social media in the mid-2000s has only exacerbated the volume of hate speech currently circulating in the public sphere. Today, social media platforms are used to spread misinformation and hateful rhetoric worldwide, with no legal repercussions for U.S. offenders. Moreover, the United States' unwillingness to prohibit hate speech has left social media organizations to regulate themselves. The resulting patchwork of community guidelines and terms of service has allowed hate speech to flourish on social media, along with other forms of misinformation and even propaganda.

Recognizing the danger in this lack of oversight, Germany passed the Network Enforcement Law, or NetzDG, in June 2017.<sup>7</sup> Enacted in January 2018, the law requires social media companies to block or remove reported content that violates restrictions against hate speech in the German Criminal Code.<sup>8</sup> Companies must remove "obvious hate speech" within 24 hours of receiving a notification or risk a \$60 million fine.<sup>9</sup> More nuanced but potentially illegal speech must be removed within one week of the initial

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<sup>3</sup> See, e.g., Honpōgai shusshinsha ni taisuru futō na sabetsuteki gendō no kaishō ni muketa torikumi ni kansuru hōritsu [The Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan], Law No. 68 of 2016 (Japan) *translated in* <http://www.moj.go.jp/content/001199550.pdf>. See also Canada Criminal Code, R.S.C. 1985, c. C-46, § 319(1); See also Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Article 14(1).

<sup>4</sup> See Criminal Code in the version promulgated on 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I p. 3322, last amended by Article 1 of the Law of 24 September 2013, Federal Law Gazette I p. 3671 and with the text of Article 6(18) of the Law of 10 October 2013, Federal Law Gazette I p. 3799 (Ger.); See also The Prevention of Combatting Hate Crimes and Hate Speech Bill, 2018, Bill 41543 (GN) (S. Afr.).

<sup>5</sup> JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2012).

<sup>6</sup> *Hate Groups Reach Record High*, SOUTHERN POVERTY LAW CENTER (FEB. 19, 2019), <https://www.splcenter.org/news/2019/02/19/hate-groups-reach-record-high>.

<sup>7</sup> *Beschlussempfehlung und Bericht [Resolution and Report]*, Deutscher Bundestag: Drucksache [BT] 18/13013, <http://dip21.bundestag.de/dip21/btd/18/130/1813013.pdf> (Ger.) [hereinafter NetzDG].

<sup>8</sup> Criminal Code in the version promulgated on 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I p. 3322, last amended by Article 1 of the Law of 24 September 2013, Federal Law Gazette I p. 3671 and with the text of Article 6(18) of the Law of 10 October 2013, Federal Law Gazette I p. 3799 (Ger.).

<sup>9</sup> Ben Knight, *Germany Implements New Hate Speech Crackdown*, DW NEWS (Jan. 1, 2018), <https://www.dw.com/en/germany-implements-new-internet-hate-speech-crackdown/a-41991590>.

report. To prepare for the new law, Facebook and Twitter both created new ways for users to flag offensive content and hired more German-language moderators.<sup>10</sup>

While the German approach is likely too speech-restrictive to be accepted in the United States, there are responses that should be considered. This article seeks to explore potential legal remedies for addressing the proliferation of hate speech in the United States. To begin, the article gives a definition of hate speech and outlines the scope of the issue. It discusses the theoretical arguments in favor of and against protecting hate speech, along with critiques of those justifications. The article then provides an overview of U.S. jurisprudence related to hate speech. Next, it presents and analyzes the potential legal remedies for addressing the matter of hate speech. These proposals include criminal sanctions, such as a federal content-based, anti-hate speech law and a change in the interpretation of the existing federal threats statute. It also considers civil remedies, such as expanding libel law to include large groups and reconsidering intentional infliction of emotional distress. The article analyzes the strengths and weaknesses of each approach in light of existing jurisprudence and the theoretical frameworks presented earlier. The article concludes with a recommendation for the best path forward for addressing hate speech in the United States.

## II. Defining Hate Speech

Hate speech is an expansive and contested term. Broadly, it refers to expression that seeks to malign individuals for their immutable characteristics, such as their race, ethnicity, national origin, religion, gender, gender identity, sexual orientation, age, or disability. The Anti-defamation League's (ADL) former national director, Abraham H. Foxman, and attorney Christopher Wolf, define hate speech as broad categories of expression that include racism, anti-Semitism, homophobia, bigotry against the disabled, political hatred, rumor-mongering, misogyny and violent pornography, promotion of terrorism, cyberbullying, harassment, stalking, and the sale and promotion of online products.<sup>11</sup> The European Union's "Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law" defines hate speech as the public incitement to violence or hatred directed to groups or individuals on the basis of certain characteristics, including race, color, religion, descent and national or ethnic origin.<sup>12</sup> Notably, the EU does not include gender, sexual orientation, gender identity, age, or disability on this list.

In addition to defining hate speech as expression that attacks individuals based on their identity characteristics, it should also be viewed as a structural process that helps to maintain existing systems of racial or gender dominance. In her 2018 book, *Down Girl*, philosopher Kate Manne re-conceptualizes the definition of misogyny. Rather than thinking of it as an ideology of hatred toward women, Manne reframes misogyny as a structural phenomenon that works to control, police, and punish women who subvert the existing system of male dominance.<sup>13</sup> Like Manne's definition of misogyny, hate speech should also be viewed as a structural phenomenon in which

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<sup>10</sup> *Id.*

<sup>11</sup> ABRAHAM H. FOXMAN & CHRISTOPHER WOLF, VIRAL HATE: CONTAINING ITS SPREAD ON THE INTERNET 49 (2013).

<sup>12</sup> Council Framework Decision 2008/913, Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Law, 2008 O.J. (L 328).

<sup>13</sup> KATE MANNE, DOWN GIRL: THE LOGIC OF MISOGYNY (2018).

verbal assaults and offensive imagery are used by those in power to maintain their preferred position in the existing social order.

Hate speech happens both in-person and online. In fact, many U.S. citizens have found themselves on the receiving end of this vitriolic expression, which can include insults, slurs, and attacks on various aspects of their identity. A 2017 Online Harassment study by the Pew Research Center for Internet and Technology found that approximately one in ten Americans had been harassed online because of their race, ethnicity, or gender. Notably, one-in-four African Americans said they had been targeted online because of their race or ethnicity, as had one in ten Hispanics.<sup>14</sup>

### **III. Theoretical Justifications for Protecting or Prohibiting Hate Speech**

Given the extent to which hate speech permeates public discourse, it is important to understand the justifications for why the United States, under the banner of the First Amendment, chooses to protect even the most offensive expression. Similarly, the reasons cited for curtailing hate speech must also be reviewed and considered. This section will present the theoretical arguments in favor of allowing and restricting hate speech. The merits of each argument will be considered alongside its potential drawbacks.

#### *A. Reasons for Protecting Hate Speech*

The theoretical justifications for allowing all expression, including hate speech, include: the marketplace of ideas, democratic self-governance, the bellwether argument, the safety valve argument, and personal liberty.

##### **1. The Marketplace of Ideas**

One of the most widely used justifications for allowing all expression, including hate speech, is the marketplace of ideas. This concept dates back to John Milton's *Areopagitica* in 1644 and also John Stuart Mill's book, *On Liberty*, in 1859. It was introduced to U.S. jurisprudence by Justice Oliver Wendell Holmes who famously used the notion in his dissent in the case, *Abrams v. United States* (1919), which upheld the conviction of a man for distributing leaflets denouncing the war and the plan to send American troops to Russia.<sup>15</sup> Here, Holmes argued that the ultimate good that we all desire is better reached by free trade in ideas, rather than their suppression. The best test of truth, said Justice Holmes, "is the power of the thought to get itself accepted in the competition of the market."<sup>16</sup> Essentially, the marketplace theory suggests that in order for truth to be found, all ideas, even bad ones, must be thrown into competition with one another so that the best among them may emerge. Therefore, no idea should be silenced before it has had a chance to be heard.

This theory reflects the thinking of the Enlightenment period, which saw truth as objective rather than subjective. However, critics of this theory are quick to point out that truth is not objective and not all ideas have equal access to the marketplace.<sup>17</sup> In

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<sup>14</sup> See Meave Duggan, *Online Harassment 2017*, PEW RESEARCH (JULY 11, 2017), <http://www.pewinternet.org/2017/07/11/online-harassment-2017/>.

<sup>15</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919).

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

<sup>17</sup> See C. EDWIN BAKER, *MEDIA, MARKETS AND DEMOCRACY* (2001).

today's media environment, some individuals and organizations, such as celebrities or broadcast news companies, have far more influence over which ideas get to be considered. Mass media can work as a microphone that makes it much easier for people with money or power to reach an audience.

The emergence of social media has democratized this process. Anyone with access to the Internet can tweet their opinion on a range of issues. However, the fact remains that those individuals and organizations with resources and notoriety are far more likely to have their ideas heard.

## 2. Democratic Self-Governance

This theory, which originated in John Locke's political philosophy and popularized by Alexander Meiklejohn in the middle of the twentieth century, suggests that in a democracy, all expression must be permitted so that citizens have access to the information they need to govern themselves effectively.<sup>18</sup> Rather than having rules imposed from on high, citizens in a representative democracy enter into a social contract with one another. We elect members of our community to make decisions on our behalf. For this process of making and remaking decisions to be effective, we need access to all available information.<sup>19</sup> People, Meiklejohn said, should be able to freely discuss, praise, or criticize government policies and practices in order to carry out their civic duty.<sup>20</sup> Robust and open public debate is essential to achieving our shared social or democratic goals.

Meiklejohn and his contemporaries viewed the process of self-government much like a town hall meeting. As long as a fair process, such as Roberts Rules of Order, was followed, all voices would get a chance to be heard. Then we, the citizens, could consider what had been said and use that information to decide which candidates or policies to support. However, some scholars have pushed back against this notion, saying that modern civic discourse is neither orderly nor fair.<sup>21</sup>

Moreover, this idea focuses primarily on political expression and our ability to criticize the government, rather than considering the impact of being able to freely criticize one another using hate speech. This raises questions about the extent to which we consider hate speech political. For example, does allowing hate speech help us make decisions about whom to vote for or what policies to support?

## 3. Bellwether

Questions about the value of hate speech in the process of self-governance lend themselves to a discussion of the bellwether argument. Proponents of this idea say that allowing hate speech is necessary so that we can clearly see our society's true position on problematic issues such as racism or xenophobia.<sup>22</sup> If hate speech were prohibited, citizens would have no way to know how truly racist, misogynistic, or homophobic our

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<sup>18</sup> See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 9 (1948).

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

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

<sup>21</sup> See, e.g., DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* (2014).

<sup>22</sup> See RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS? HATE SPEECH, PORNOGRAPHY AND THE NEW FIRST AMENDMENT* 114-115 (1997).

society really was. This could cause a false sense of security by leading people to believe that issues such as racism or sexism no longer existed, when in fact they had merely moved underground.

As mentioned previously, many countries, such as Germany or Canada, ban hate speech. Yet citizens there do not seem to be under the false impression that racism or homophobia ceases to exist. For example, building on the #MeToo campaign about women's experiences with sexual harassment, in August 2018 Germans began using the hashtag #MeTwo to share their experiences with everyday racism.<sup>23</sup> Three months into that campaign, over 200,000 posts containing anecdotal evidence racism had been shared on German social media.<sup>24</sup> Thus, it may be incorrect to assume that hate speech acts as an accurate bellwether for the level of racism, sexism, homophobia or xenophobia present in a particular society or community.

#### 4. Safety Valve

Somewhat like the bellwether argument, this theory warns against the dangers of prohibiting hate speech. Proponents of this approach suggest that allowing racist, misogynistic, and other forms of bigoted expression is necessary in order to provide people with an opportunity to "blow off steam."<sup>25</sup> If people are prohibited from using hate speech, they may instead turn to violent action toward members of certain groups, such as women or people of color. By giving bigots a chance to vent their frustration through expression, we avoid further violent action.

Despite being widely referenced, this theory is not supported by empirical evidence. In their book, *Must We Defend the Nazis?*, Richard Delgado and Jean Stefancic explain that allowing hate speech actually has the opposite effect. Giving people a chance to stigmatize others makes them more, not less, aggressive.<sup>26</sup> For example, there are many times throughout history when the process of "othering" through language has been used to make violence against certain groups of people more palatable.<sup>27</sup>

#### 5. Personal Liberty and Self-Fulfillment

Unlike political self-governance or the marketplace of ideas, this theory, which can be traced back to Thomas I. Emerson, suggests that we should not curtail hateful or bigoted speech because every human being deserves the right to express herself or himself fully.<sup>28</sup> Infringing on this right infringes on our personal liberty. In order to reach our true human potential, we need to be able to express ourselves completely and without fear of reprisal.<sup>29</sup>

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<sup>23</sup> Elizabeth Schumacher, *#MeTwo: Germany Shares Stories of Everyday Racism, Germany Implements New Hate Speech Crackdown*, DW NEWS (JULY 26, 2018), <https://www.dw.com/en/metwo-germany-shares-stories-of-everyday-racism/a-44841447>.

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

<sup>25</sup> Mark L. Rienzi, Note, *Safety Valve Closed: The Removal of Non-Violent Outlets for Dissent and the Onset of Anti-Abortion Violence*, 113 HARV. L. REV. 1210 (2000).

<sup>26</sup> DELGADO & STEFANCIC, *supra* note 22, at 114-115.

<sup>27</sup> See ALEXANDER TSEHIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* (2002).

<sup>28</sup> THOMAS EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 10 (1966).

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

Instead of focusing on collective ends such as a functioning democracy or ascertainment of truth as the reason for protecting expression, theorists in this camp suggest that the focus should be on the individual. People cannot become who they are truly meant to be if the government or other groups are able to curtail their expression. Society then, should not deny any individual the right to speak, no matter how offensive their expression.

What this theory does not account for are the instances when one individual's liberty infringes on another's dignity. Governments are often required to engage in an ad hoc balancing of interests. Here, the question is whether an individual's right to express herself should outweigh another individual's right to human dignity? In the United States, the area of civil law known as torts provides a form of legal recourse for harm done by one person to another. However, when it comes to hate speech, the United States currently does not recognize any torts to address the harm caused by hate speech.

### *B. Reasons for Prohibiting and Punishing the Use of Hate Speech*

Although the United States chooses to prohibit hate speech, many other countries, as well as U.S. institutions, such as workplaces, choose to prohibit hate speech and punish its use. The reasons cited for this are the psychological damage caused by this kind of expression, its role in generating bias-motivated violence, its influence on issues such as discrimination, its capacity to silence public debate, and the negative impact it has on an individual's dignity.

#### 1. Psychological Damage

Hate speech can cause psychological harm to those targeted. Laura Leets's 2002 study, "Experiencing Hate Speech: Perceptions and Responses to Anti-Semitism and Anti-Gay Speech," exposed Jewish and LGBTQ college students to harmful speech based on real scenarios. Leets found that the short- and long-term effects of participants' exposure to hate speech might be similar in form (but sometimes not in intensity) to the effects of other kinds of traumatic experiences.<sup>30</sup>

Critical Race Theorist Mari Matsuda's book, *Words that Wound*, which she wrote with co-authors Charles R. Lawrence III, Richard Delgado, and Kimberlé Williams Crenshaw, characterizes hate speech as a form of assault, which creates real injury to those targeted.<sup>31</sup> Worst among these impacts is the tendency for members of the defamed group to internalize these messages and come to believe in their own inferiority.<sup>32</sup>

#### 2. Precursor to Violence

Throughout history, hate speech has been used to dehumanize or "other" groups of people, which can make violence against them more palatable. Hate speech acts as the proverbial bark that comes before the bite of racial or ethnic violence. The most widely known example of this is the Holocaust. The propaganda used by German politicians and

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<sup>30</sup> Laura Leets, *Experiencing Hate Speech: Perceptions and Responses to Anti-Semitism and Anti-Gay Speech*, 58 J. OF SOC. ISSUES 341, 350 (2002).

<sup>31</sup> MARI J. MATSUDA, CHARLES R. LAWRENCE, RICHARD DELGADO, & KIMBERLÉ CRENSHAW. WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

<sup>32</sup> *Id.* at 12.

media outlets referred to Jewish people as “rats” and much worse. According to Georgetown Law Professor Alexander Tsesis, the casual use of racist or xenophobic slurs like these creates the conditions in which crimes against humanity, such as American slavery or the Holocaust, are tolerated.<sup>33</sup> Language, says Tsesis, plays a critical role in developing the mechanisms necessary for engaging in this conduct. Hate speech provides the “vocabulary and grammar depicting a common enemy,” and establishes a “mutual interest in trying to rid society of the designated pest.”<sup>34</sup>

After World War II, the United Nations formally recognized the relationship between hate speech and genocide by enacting the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>35</sup> This law, also known as the “Genocide Convention” makes “direct and public incitement to commit genocide” a crime. Here, incitement refers to any form of communication that encourages or persuades another person to commit an offense. This can include broadcasts, publications, drawings, images, or speeches.

In 1997, three Rwandan media owners were indicted by the United Nations under the Genocide Convention for their role in spreading vitriolic articles and broadcasts which dehumanized the Tutsi as inenzi (cockroaches) and even called directly for their murder.<sup>36</sup> The hateful rhetoric broadcast on the radio station, Radio Television Libre des Mille Collines (RTLM), helped create the climate in which 500,000 Tutsi were massacred by members of the Hutu majority in the spring of 1994.<sup>37</sup>

Today, violence against the Rohingya in Myanmar has been fueled in large part by Facebook posts. A 2018 Reuters investigation done in conjunction with the Human Rights Center and the UC Berkeley School of Law found over 1,000 posts calling the Rohingya or other Muslims dogs, maggots and rapists.<sup>38</sup> Reuters also identified content that said the Rohingya should be fed to pigs and urged that they be shot or exterminated.<sup>39</sup> The problem has gotten so bad that the United Nations was called upon to investigate the issue. U.N. investigators sharply criticized Facebook for letting its platform be used to incite violence and hatred.<sup>40</sup>

### 3. Climate of Discrimination

Racist, misogynistic, homophobic, or xenophobic insults serve as the primary channel for the delivery of discriminatory attitudes.<sup>41</sup> Failure to regulate this form of expression sends a message to members of a society or community that intolerance of

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<sup>33</sup> See TSESIS, *supra* note 27.

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

<sup>35</sup> The Genocide Convention, G.A. Res. 3/260, U.N. Doc. A/RES/3/260 (Jan. 12, 1951).

<sup>36</sup> David Yanagizawa-Drott, *Propaganda and Conflict: Evidence from the Rwandan Genocide*, 4 THE Q. J. OF ECON. 1947, 1950 (2014).

<sup>37</sup> *Id.* at 1951.

<sup>38</sup> Steve Stecklow, *Why Facebook is Losing the War on Hate Speech in Myanmar*, REUTERS (AUG. 15, 2018), <https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/>.

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

<sup>40</sup> Stephanie Nebehay, U.N. calls for Myanmar Generals to be Tried for Genocide, Blames Facebook for Incitement, REUTERS (AUG. 27, 2018), <https://www.reuters.com/article/us-myanmar-rohingya-un/u-n-calls-for-myanmar-generals-to-be-tried-for-genocide-blames-facebook-for-incitement-idUSKCN1LC0KN>.

<sup>41</sup> The Pyramid of Hate, Anti-Defamation League, (2018), <https://www.adl.org/education/resources/tools-and-strategies/pyramid-of-hate-en-espanol>

difference will be permitted. This intolerance then fuels a range of discriminatory practices.

For example, although Title VII of the Civil Rights Act of 1964<sup>42</sup> protects individuals against employment discrimination on the basis of race, color, national origin, sex or religion, in the United States women and people of color still make far less than their white male counterparts. According to data from the U.S. Bureau of Labor Statistics' 2017 Current Population Survey, African American women earn an average of \$16,328 less per year than white males. Overall, women in the United States earn about 18.2 percent less than men.<sup>43</sup>

Although it is difficult to establish a causal link between hate speech and discrimination or wage differentials, empirical research suggests discrimination based on race or gender can play a substantial role in earnings differences. For example, a 2013 study published in the *Journal of Law & Economics* found that racial discrimination accounted for one-third of the difference in wages among workers.<sup>44</sup> Although it is unlikely that regulations prohibiting hate speech would end discrimination, the reality is that the proliferation of hate speech creates a climate of intolerance which fuels the discrimination that is at least partially responsible for differences in earnings between white people and people of color, and men and women.

#### 4. Silencing Effect

While some people believe that all expression, including hate speech, should be made public in order for us to engage in the process of democratic self-governance, others, such as Danielle Keats Citron and Helen Norton, have argued that the cacophony of noise created by this vitriol actually works to limit civic engagement, particularly online.<sup>45</sup>

Citron and Norton developed a theory of digital citizenship, which refers to the various ways that online activities deepen civic engagement, political participation, and public conversation.<sup>46</sup> In her 2014 book on the subject, *Hate Crimes in Cyber Space*, Citron argues that cyber harassment does little to enhance self-governance and instead works to destroy it.<sup>47</sup> Victims cannot participate in their online networks if they are under assault from a barrage of gendered slurs. Rather than encouraging individuals to participate in public debate, hate speech may limit the contributions of women and people of color by creating an environment that dissuades them from speaking out. In this way, failing to regulate hate speech can serve to close the existing universe of discourse and harm the democratic process.

#### 5. Violation of Human Dignity

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<sup>42</sup> Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (1964).

<sup>43</sup> Women's Earnings 2017, Bureau of Labor Statistics, (2017), <https://www.bls.gov/opub/reports/womens-earnings/2017/home.htm>.

<sup>44</sup> Roland G. Fryer Jr., Devah Pager, & Jörg L. Spenkuch, *Racial Disparities in Job Finding and Offered Wages*, 56 J. L. & ECON. 633 (2011).

<sup>45</sup> Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435 (2011).

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

<sup>47</sup> CITRON, *supra* note 21.

Finally, one of the most widely cited justifications for prohibiting hate speech is that it infringes on an individual's dignity. While freedom of expression is an important right, so is the right to dignity. Although the term "dignity," which means being worthy of respect, is not included in the U.S. Constitution, Article I of the U.N. Declaration of Human Rights says that "all human beings are born free and equal in dignity."<sup>48</sup> Hate speech denies people of their dignity by belittling them based on their individual and immutable characteristics such as their race, gender, gender identity, sexual preference, or ethnicity.<sup>49</sup> Thus, the question becomes, which of these rights is more important? Is one person's right to free expression more important than another human's right to dignity?

#### **IV. U.S. Hate Speech Jurisprudence**

In the United States, the First Amendment protects most hate speech. Unless expression falls into one of the categories of exception carved out by the Supreme Court, which includes fighting words, incitement to violence, or true threats, it is permitted. In the past, individuals have also brought civil cases under the torts of defamation and intentional infliction of emotional distress. However, these have generally been rejected by the Supreme Court as being viable punishments for the harm caused by hate speech.

##### *A. Fighting Words*

Fighting words were defined by the Supreme Court in *Chaplinsky v. New Hampshire* as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction."<sup>50</sup> However, since the *Chaplinsky* decision in 1942, the Supreme Court has been reluctant to find much expression that falls within the narrow definition of this standard. For example, the Supreme Court invalidated a breach of peace conviction against a man who denounced Jewish people to a crowd outside an auditorium as "slimy scum" and "bed bugs."<sup>51</sup> The trial judge in that case had instructed the jury to convict if the speech "stirs public anger, invites dispute or brings about a condition of unrest."<sup>52</sup> The Supreme Court deemed that instruction an error in violation of the First Amendment and thus a conviction based on those grounds would not be able to stand.<sup>53</sup>

Additionally, in *R.A.V. v. St. Paul*, a 1992 case dealing with the constitutionality of a cross burning statute, the Supreme Court said what makes fighting words unprotected are their non-speech elements.<sup>54</sup> Like regulating a sound truck, it is the noise caused by fighting words that the Supreme Court has said warrants regulation.<sup>55</sup> In *R.A.V. v. St. Paul* (1992) the Supreme Court ruled that the government may not regulate the use of fighting words based on hostility or favoritism toward the underlying message because the First Amendment imposes a viewpoint discrimination limitation.<sup>56</sup> That case also serves as a reminder that content-based regulations must meet the threshold of

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<sup>48</sup> *Universal Declaration of Human Rights*, G.A. Res. 217A (III), *U.N. Doc. A/810* at 71 (1948).

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

<sup>50</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

<sup>51</sup> *Terminiello v. Chicago*, 337 U.S. 1 (1949).

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

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

<sup>54</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

<sup>55</sup> *Id.*

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

strict scrutiny, which requires the government to demonstrate a compelling interest and for the regulation to be narrowly drawn. Thus, courts have found hate speech statutes not limited to the narrow definition of fighting words to be unconstitutional.<sup>57</sup>

### *B. Incitement*

Incitement refers to expression that calls on bystanders to engage in immediate violent action. To be considered unprotected incitement to violence under the *Brandenburg* test, content must be directed to inciting or producing imminent lawless action and be likely to produce such action.<sup>58</sup> To bring an effective charge, there must be a specific and immediate call to violence. William White, an active white supremacist, received a three-year jail sentence for using his website, [www.overthrow.com](http://www.overthrow.com), to incite violence against the jury foreman in a trial of another neo-Nazi named Matthew Hale.<sup>59</sup> In this instance, a judge said that posting the jury foreman's name, address and phone numbers online were considered incitement to illegal activity.<sup>60</sup> Notably, the imminence standard can be particularly difficult to meet in cases involving online content because of the difficulty proving that a particular website or social media post caused an individual to engage in an illegal action.

### *C. True Threats*

The Supreme Court confirmed this category of unprotected speech in the *Virginia v. Black* case, which asked the Court to consider whether a State's cross-burning statute was permissible. In her plurality opinion, Justice Sandra Day O'Connor was joined by four other justices in the decision to strike down the statute as unconstitutional but to allow States to ban cross burning carried out with the intent to intimidate. The Court said that Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence.<sup>61</sup>

The reason the Court considered this approach constitutional and the statute in the *R.A.V. v. St. Paul* (1992) case unconstitutional was the fact that a narrowly drawn anti-cross burning statute would not single out speech directed toward one specified, disfavored topic. It was irrelevant, said the Court, whether an individual burned a cross to intimidate someone because of their race, gender, religion, political affiliation, union membership, or homosexuality.<sup>62</sup> "Just as a State may regulate only that obscenity which

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<sup>57</sup> *UWM Post v. Board of Regents of U. of Wis.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (hate speech codes are not a reasonable extension of the fighting words doctrine).

<sup>58</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>59</sup> *United States v. White*, 670 F.3d 498 (2012).

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

<sup>61</sup> *Virginia v. Black*, 538 U.S. 343, 363 (2003) ("Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan, which, following its formation in 1866, imposed a reign of terror throughout the South, whipping, threatening, and murdering blacks, southern whites who disagreed with the Klan, and "carpetbagger" northern whites. The Klan has often used cross burnings as a tool of intimidation and a threat of impending violence although such burnings have also remained potent symbols of shared group identity and ideology, serving as a central feature of Klan gatherings. To this day, however, regardless of whether the message is a political one or is also meant to intimidate, the burning of a cross is a 'symbol of hate.'")

<sup>62</sup> *Id.* at 362.

is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm.”<sup>63</sup>

The Court said that the government may regulate certain categories of expression consistently with the Constitution. Among them are true threats, which “encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>64</sup>

Although the Supreme Court did not carve out the true threats exception for Virginia’s cross-burning statute until 2003, in the late 1990s, Congress adopted a law<sup>65</sup> that articulates the elements of a true threat. Since then, there have been a handful of successful prosecutions of individuals who create and disseminate threats, either in person or online.<sup>66</sup> For example, the U.S. Circuit Court of Appeals for the Fifth Circuit upheld in 2001 an 18-year-old high school student’s guilt of making true threats when he repeatedly said in an Internet chat room that he planned to kill other students at his school, and gave no indication he was joking.<sup>67</sup>

To support a conviction like this one under the true threats statute, the government must prove three elements of the crime: a transmission in interstate or foreign commerce, a communication containing a threat, and a threat to injure or kidnap the person of another.<sup>68</sup> Specifically, the U. S. Code states, “Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.”<sup>69</sup> Cases regarding a violation of this statute often fail to meet the threshold of a direct threat to injure or kidnap an individual.<sup>70</sup> In their application of this law, courts have considered the extent to which the threat is believable — an essential determinant of whether or not an utterance or expression should be considered a true threat.<sup>71</sup> Circuit courts are split on how they make this determination. The Ninth and Tenth Circuits apply a subjective test, which looks at whether or not the speaker intended to convey a threat, while the others apply an objective test, which asks whether the speaker knew and understood the content of the communication and could have reasonably foreseen that the words would be understood as a threat.

Recently, the Supreme Court had a chance in *Elonis v. United States* to reconcile the true threats doctrine from *Virginia v. Black* with the existing federal statute and demonstrate its application to threatening posts made on social media. However, the Court chose not to do this. According to legal scholar Joseph Russomanno, the Court

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<sup>63</sup> *Id.* at 363.

<sup>64</sup> *Virginia v. Black*, 538 U.S. 343, 359 (2003).

<sup>65</sup> 18 U.S.C. § 875(c).

<sup>66</sup> *United States v. Morales*, 272 F.3d 284 (9<sup>th</sup> Cir. 2001), *cert. denied*, 536 U.S. 941, 287 (2002).

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

<sup>68</sup> *United States v. DeAndino*, 958 F.2d 146, 147 (6<sup>th</sup> Cir. 1992), *cert. denied*.

<sup>69</sup> 18 U.S.C. § 875(c).

<sup>70</sup> *United States v. Alkhabaz*, 104 F.3d 1492 (6<sup>th</sup> Cir. 1997).

<sup>71</sup> *Id.*

missed an opportunity in the case to place threats like the ones used by Anthony Elonis into the already-established category of low-value speech.<sup>72</sup>

During the trial, Elonis's estranged wife said she took the posts seriously, while Elonis claimed they were lyrics to rap music.<sup>73</sup> When the Third Circuit heard the case it rejected Elonis's claims and instead held that a defendant must only intend to communicate a threat, not also have intended to threaten, and that the decision about whether or not speech threatens another should be in the hands of the target of the speech.<sup>74</sup> On appeal, the Supreme Court took up the question of whether or not a conviction under 18 U.S.C. §875(c) requires proof of the defendant's subjective intent to threaten.<sup>75</sup> In an 8-1 decision, the Court held that the prosecution needed to show that the person posting the threats actually *intended* to threaten another person.<sup>76</sup> Thus, Elonis had to be aware of his actions to threaten another person in order to be convicted of them.

#### *D. Group Libel*

In the United States there are very few options for victims seeking damages for the harm caused by individuals who engage in hate speech. While many other countries recognize the tort of "group libel," the identification standard used by most states in the U.S. only recognizes defamatory statements made to small groups or individuals as harmful. Therefore, comments aimed at entire ethnicities do not qualify as grounds for a successful suit. However, legal scholar Jeremy Waldron argues that group libel should be considered as a means of recourse for victims. In *Beauharnais v. Illinois* (1952)<sup>77</sup> the Supreme Court upheld an Illinois group libel statute that declared the distribution of publications that disseminate hate-laden information to be an act of criminal libel. However, people rarely rely the logic offered in the *Beauharnais* case as the justification for exempting hate speech from First Amendment protection because the case predated the civil rights era and the adoption of strict scrutiny as the test that content-based laws restricting speech must pass in order to be considered constitutional.<sup>78</sup>

#### *E. Intentional Infliction of Emotional Distress*

Legal theorists Richard Delgado and Jean Stefancic have also advocated for a civil action for racially insulting language under the intentional infliction of emotional distress tort.<sup>79</sup> To prove IIED in most states, a plaintiff must show: (1) that there has been extreme and outrageous conduct that is beyond the bounds of decency tolerated in a civilized society; (2) that the conduct caused severe emotional distress; and (3) that the

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<sup>72</sup> Joseph Russomanno, *Facebook Threats: The Missed Opportunities of Elonis v. United States*, 21 COMM. L. & POL'Y 1 (2016).

<sup>73</sup> Trial Transcript 97, *United States v. Elonis*, No. 11-13, 127 (E.D. Pa. Oct. 19, 2011).

<sup>74</sup> 730 F.3d 321 (2013).

<sup>75</sup> 135 S.Ct. 2001 (2015).

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

<sup>77</sup> *Beauharnais v. Illinois*, 343 U.S. 250, 259 (1952).

<sup>78</sup> *See Chicago Police Dept. v. Mosley*, 408 U.S. 92, 95 (1972) (holding that the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content).

<sup>79</sup> DELGADO & STEFANCIC, *supra* note 26, at 110.

conduct was intentional or reckless.<sup>80</sup> Courts have also said that public figures are required to prove actual malice to win an IIED lawsuit.<sup>81</sup>

The first and third elements of the IIED tort are often the most difficult to prove. The question of outrageousness is subjective and therefore difficult to prove to a jury. Intent is also difficult to prove because it requires the plaintiff to show that the defendant intended for them to suffer severe emotional distress, rather than simply demonstrating that the emotional distress occurred as a byproduct of the outrageous conduct in question.

In *Snyder v. Phelps* (2011), Albert Snyder sued members of the Westboro Baptist Church, including Fred W. Phelps, for intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy for protesting the funeral of his son, Marine Lance Corporal Matthew Snyder with signs that said, “ F\*gs doom nations,” “Thank God for Dead Soldiers,” and “Priests Rape Boys.”<sup>82</sup>

Although a Maryland jury had returned a verdict in favor of Snyder on three claims, including IIED, the Supreme Court found, in an 8-1 decision, that the First Amendment shielded Westboro from tort liability because the speech was a matter of public concern and happened in a public place.<sup>83</sup> Writing for the majority, Justice John Roberts noted that under Maryland law a successful IIED claim must show that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress.<sup>84</sup> Despite the evidence of Snyder’s emotional distress that was presented at the trial, including the fact that he regularly became tearful, angry, and so sick that he vomited, Snyder could not demonstrate that the group intended to cause severe emotional distress to his mourning family. Instead, the Court found that the emotional distress was simply a byproduct of the group’s picketing, rather than their intent, which was to protest the inclusion of LGBTQ folks in the military. The Supreme Court held that the protest was a matter of public concern – the United States’ tolerance of homosexuality – and not outrageous enough to overcome the First Amendment defense.<sup>85</sup> The Court also called attention to the fact that the protest took place on a public street as an additional reason for the protection of the church’s hateful expression.<sup>86</sup>

The sole dissenter in the case, Justice Samuel Alito, said that a profound national commitment to free and open debate is not a license for vicious verbal assaults, especially considering the fact that Snyder was not a public figure.<sup>87</sup> Alito disagreed with Justice Roberts’s suggestion that the expression contributed to public debate on a matter of public concern, particularly because Albert and Julie Snyder’s names were included in an online post created by the church about their protest. Alito also said that the fact that the protest took place on a public street did not preclude the church from IIED liability, just as fighting words or defamation is not immunized when it occurs in a public place.<sup>88</sup>

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<sup>80</sup> RESTATEMENT (SECOND) OF TORTS § 46 (1965).

<sup>81</sup> *Hustler v. Falwell*, 485 U.S. 46, 55 (1988).

<sup>82</sup> *Snyder v. Phelps*, 562 U.S. 443, 445 (2011).

<sup>83</sup> *Id.* at 449.

<sup>84</sup> *Id.* at 448.

<sup>85</sup> *Id.* at 452.

<sup>86</sup> *Id.* at 454. Since the trial, Maryland has enacted a law against picketing at funerals.

<sup>87</sup> *Hustler v. Falwell*, 485 U.S. 46, 55 (1988).

<sup>88</sup> *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

Despite the Supreme Court's ruling in this case, additional IIED cases are being brought to trial by those on the receiving end of hate speech and harassment. For example, in 2017 Tanya Gersh filed a suit against Andrew Anglin in U.S. District Court for the District of Montana accusing him of violating her privacy, inflicting emotional distress upon her and violating Montana's Anti-Intimidation Act.<sup>89</sup> Anglin, who is the moderator of the Neo-Nazi web forum, the *Daily Stormer*, published 30 articles instructing his followers to wage a "good old fashioned troll storm" on Gersh, which resulted in her and her family being targeted by more than 700 social media posts and phone calls to her home. Many of the messages directed at Gersh, who is Jewish, included slurs and Holocaust imagery. One tweet, directed at Gersh's son, featured an image of an open oven and the message: "*psst kid, there's a free Xbox One inside this oven.*" Gersh originally came under fire by Anglin for a real-estate-related disagreement she had with Sherry Spencer, who is the mother of the well-known white nationalist, Richard Spencer.

The vile messages and phone calls directed at Gersh have caused her emotional and physical damage. Gersh now has panic attacks, is scared to leave her home, and experiences anxiety in large crowds. She has gained weight, lost hair, has been prescribed medication, and sought treatment including trauma therapy. In July 2019, U.S. magistrate Richard Lynch recommended Anglin pay \$14 million in damages to Gersh – \$4 million of that amount was compensation for lost earnings and emotional distress, and the remaining \$10 million in punitive damages, which is the statutory cap on punitive damages in the state of Montana. The ruling is now awaiting approval from U.S. District Court Judge Dana Christensen.

## **V. Potential Legal Responses to Hate Speech**

Although the First Amendment currently protects most hate speech in the United States, the reality of U.S. jurisprudence is that things change. Looking back to cases such as *Bowers v. Hardwick* (1986), which allowed states to constitutionally prohibit same-sex intercourse,<sup>90</sup> or *Plessy v. Ferguson* (1896), which upheld the constitutionality of racial segregation in public facilities,<sup>91</sup> serves as a valuable reminder that Supreme Court precedent can evolve over time. Laws are shaped by social, cultural, economic, and political forces. The legal system reflects the experiences and values of the people who serve within it. Therefore, it is possible that as the makeup of Congress and the Supreme Court changes over time to include more women and people of color, new interpretations of existing laws may materialize.

Keeping existing jurisprudence in mind, there are four legal pathways that are likely to emerge in the effort to respond to the issue of hate speech in the United States. Two are criminal prohibitions and two are civil actions. In this section, each of these approaches will be presented and considered in light of the theoretical justifications for and against protecting hate speech, as well as the existing jurisprudence related to each.

The first approach being considered here is a federal law prohibiting the use of hate speech in public places. The next proposal is an expansion of the application of the true threats statute to consider the perspective of the individual being threatened, rather than focusing solely on the intent of the person making the threat. The civil remedies

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<sup>89</sup> *Gersh v. Anglin*, 353 F. Supp. 3d 958 (D. Mont. 2018).

<sup>90</sup> *Bowers v. Hardwick* 478 U.S. 186 (1986).

<sup>91</sup> *Plessy v. Ferguson* 163 U.S. 537 (1896).

presented here include a change in states' libel laws to account for defamatory statements about groups and a reconsideration of intentional infliction of emotional distress as a viable tort for addressing the harm caused by hate speech.

#### *A. Approach No. 1: Federal Regulation Prohibiting Hate Speech*

Laws that restrict expression based on its content can be considered constitutional provided that they pass strict scrutiny. Here, the government must demonstrate that it has a compelling interest in curtailing speech and that the regulation is narrowly drawn. A compelling interest is the highest level of judicial review and one that is necessary to protect public health, safety, or welfare. The *Miller* test for obscenity is an example of a content-based regulation that passes strict scrutiny.<sup>92</sup> If expression appeals to the prurient interest, is patently offensive, and lacks serious literary, artistic, political, or scientific value, it is considered unprotected by the First Amendment.

Using the laws for existing unprotected categories of speech such as obscenity, incitement to violence, and true threats as a guide, along with other countries' hate speech codes, Congress could develop a law prohibiting the use of hate speech in public. The language of that law might look something like this:

“Use of expression in a public place to harass, attack, or malign an individual based on his or her immutable characteristics, is an indictable offense and is liable to imprisonment for a term not exceeding six months and/or a fine of \$1,000. Examples of immutable or fixed characteristics include but are not limited to: race, gender, gender identity, sexual preference, age, religion, ethnicity, national origin, or ability.”

A test, similar to the *Miller* test could also be developed to determine which expression meets the definition provided by the law. The test may look something like this:

1. The average person, applying contemporary local community standards, finds the speech taken as a whole maligns an individual based on his or her immutable characteristics.
2. The speech lacks serious literary, artistic, political, or scientific value.

By borrowing the requirement that the content “lack serious literary, artistic, political, or scientific value,” this framework could potentially differentiate ethnic slurs used in literary or humorous contexts from those used to attack or harass individuals.

Although in the past, the Supreme Court has invalidated hate speech codes as unconstitutional because of the inherent viewpoint-based discrimination embedded

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<sup>92</sup> *Miller v. California*, 413 U.S. 15 (1973). The *Miller* Test asks whether 1. The average person, applying contemporary local community standards would find that such speech, taken as a whole, appeals to the prurient interest (i.e. a morbid or degrading interest in sexual activity, as opposed to simply a curious interest). 2. The speech depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law. 3. The speech lacks serious literary, artistic, political, or scientific value.

within them,<sup>93</sup> there are instances when content-based restrictions have been able to avoid the prohibition on viewpoint discrimination and thus pass strict scrutiny. In *Virginia v. Black*, the Supreme Court held that Virginia could regulate cross burning because of its long and pernicious history as a signal of impending violence.<sup>94</sup> The reason the Court considered this rule constitutional and the statute in the *R.A.V. v. St. Paul* case unconstitutional was the fact that the Virginia statute did not single out speech directed toward one specified, disfavored topic. It was irrelevant whether an individual burned a cross to intimidate someone because of his or her race, gender, religion, political affiliation, union membership, or homosexuality.<sup>95</sup>

The regulation being proposed here intentionally does not single out a particular identity characteristic, such as race, but instead seeks to place all fixed characteristics under the same umbrella so that all attacks based on identity characteristics may be subject to punishment. As Catharine MacKinnon has noted, when legislatures regulate harassment, they do not regulate the content of expression, although the expression has content.<sup>96</sup> Instead, regulating harassment is simply regulating inequality. Much like segregation is not permitted, neither should expressive content that serves as a practice of inequality be allowed under the law.<sup>97</sup>

In addition to removing viewpoint discrimination from this regulation, it may also be necessary to gather empirical data linking hate speech to bias-motivated violence. If social scientists can provide evidence demonstrating the relationship between hate speech and acts of bias-motivated violence, this law may be able to pass judicial review. For example, there is anecdotal evidence suggesting that the white nationalists who perpetrated mass shootings at the Emanuel African Methodist Episcopal Church in downtown Charleston in 2015 and at the Tree of Life Synagogue in Pittsburgh in 2018 both produced and consumed a substantial amount of social media content that included hate speech.<sup>98</sup> The shooter at the Tree of Life Synagogue reportedly had several neo-Nazi references on his Gab social media page, such as the code “1488,” where “14” references “Fourteen Words”<sup>99</sup> and “88” references “Heil Hitler.”<sup>100</sup> The shooter at the AME Church in Charleston posted a 2,500-word manifesto online in which the author criticized African Americans as being inferior while lamenting the cowardice of white flight. Had these posts triggered the attention of authorities, it may have put these shooters on police radar before the incidents occurred.

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<sup>93</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (Minnesota statute invalidated because not all immutable characteristics were included). See also *UWM Post v. Board of Regents of U. of Wis.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (Hate speech codes are not a reasonable extension of the fighting words doctrine).

<sup>94</sup> *Virginia v. Black*, 538 U.S. 343, 363 (2003).

<sup>95</sup> *Id.* at 362.

<sup>96</sup> CATHARINE MACKINNON, *SEXUAL HARASSMENT IN THE WORKPLACE OF WORKING WOMEN* (1979).

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

<sup>98</sup> See Louise Matsakas, *Pittsburgh Synagogue Shooting Suspect's Gab Posts Are Part of a Pattern*, WIRED (OCT. 27, 2018), <https://www.wired.com/story/pittsburgh-synagogue-shooting-gab-tree-of-life/>.

<sup>99</sup> “Fourteen words” is a reference to the fourteen-word slogan “We must secure the existence of our people and a future for white children,” which was originally coined by white supremacist David Lane, a founding member of the terrorist organization “The Order.” Southern Poverty Law Center, <https://www.splcenter.org/fighting-hate/extremist-files/individual/david-lane>.

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

Not only would empirically linking hate speech to bias-motivated violence make the proposed regulation more like the true threats category of unprotected expression, it would also establish a link between hate speech and public health, which could also help the regulation to pass strict scrutiny.

Critics of this proposal will rightly raise concerns about how this law could be used to stifle political dissent. It is possible that the government may attempt to call speech it disagrees with “hate speech” and prosecute those engaging in it. In addition, this approach could stymie the marketplace of ideas by creating a chilling effect among those concerned that their expression may be interpreted as violating this law. It could also send this type of expression underground, which could create the incorrect impression that issues such as racism or sexism are not as pressing as they once were.

Those in favor of this proposal may cite the respect for human dignity inherent in a law like this. This statute may also work to increase civility in public discourse and make it possible for all people, particularly those with marginalized identities, feel comfortable participating in the process of self-government. Today, the noise created by hate speech, particularly online, can work to silence speech. Prohibiting that level of vitriol may free up space for a more diverse voices to be heard. Perhaps most importantly, limiting hate speech in public discourse may minimize the amount of discrimination and violence that this speech leads to.

#### *B. Approach No. 2: Reinterpret “True Threats” Statute to Consider the Victim’s Perspective*

A second legal remedy for addressing the issue of hate speech would be to rework the true threats statute to better take into account the perspective of the person being targeted by the threat. The current statute says that “Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.”<sup>101</sup>

In *Elonis v. United States*, the Supreme Court was asked to consider whether a conviction under this statute requires proof of the defendant’s subjective intent to threaten.<sup>102</sup> Although the Third Circuit rejected the claim that the speaker needed to intend to communicate and intend to threaten the victim, the Supreme Court, in an 8-1 decision, held that the prosecution needed to show that the person making the threats actually *intended* to threaten another person.<sup>103</sup> Thus, *Elonis* had to be aware of his actions to threaten another person in order to be convicted of them.

What if instead courts assessed charges brought under this statute by first considering whether the person targeted felt threatened by the expression? Under this proposal, threats of violence would be defined not by the intent of the speaker but by the interpretation of the receiver. This would shift the focus away from what the speaker intended to communicate and instead consider how the targeted individual interprets the expression.

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<sup>101</sup> 18 U. S. C. §875(c).

<sup>102</sup> *Elonis v. United States*, 135 S. Ct. 2001 (2015).

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

Under this proposed framework, social media posts, like those leveled at Whitefish Montana realtor Tanya Gersh, could be criminally prosecuted as true threats, rather than relying on civil remedies. Posts like this one would be assessed based on Gersh's interpretation, rather than the poster's intent:

*"Thanks for demonstrating why your race needs to be collectively ovened. You have no idea what you are doing, six million are only the beginning. We are going to keep track of you for the rest of your life. You will be driven to the brink of suicide & we will be there to take pleasure in your pain & eventual end."*<sup>104</sup>

This proposal is far more narrowly drawn than a federal anti-hate speech statute and potentially more practical in light of previous jurisprudence. By expanding an existing category of unprotected speech, rather than attempting to create a new one, this approach may survive judicial review.

Moreover, this proposal would minimize threats of violence leveled at individuals with marginalized identity characteristics. For example, if a social media poster threatened to "Kill all Muslims" and it caused an individual Muslim to feel threatened, he or she could potentially bring a successful suit under this revised interpretation of the statute. This approach would hopefully limit the psychological damage caused by hate speech that includes specific threats while providing a path to criminal justice for those targeted.

On the downside, this proposal may also create a chilling effect on speech, causing speakers to second guess their expression and avoid certain topics that may be interpreted as a threat. Additionally, it may result in people being punished for statements they have no intention of following through on. This approach would also remove the "safety valve" currently provided to those who make offhand comments not intended as actual or true threats. Finally, this approach makes it difficult to account for humorous or hyperbolic statements that include threats.

### *C. Approach No. 3: Recognize Group Libel*

Existing defamation laws provide civil recourse for individuals whose reputations are damaged by statements of false fact. As part of the plaintiff's case, an individual must prove that he or she was identified in the libelous statement, meaning that the story or post in question was "of and concerning" the plaintiff. In some circumstances, libel laws allow for a member of a small group that has been libeled to sue. In cases where recovery of damages has been allowed, the size of that group has generally been smaller than 25.<sup>105</sup> There are even rulings that indicate individuals in groups as large as 100 may file a successful libel claim.<sup>106</sup> However, in the United States, unlike in Norway or Denmark, members of groups larger than 100 may not claim that a libelous statement is about them and thus, damages their reputation. The third approach proposed here calls for a change in states' libel laws to allow for members of large groups to sue for defamation.

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<sup>104</sup> *SPLC Sues Neo-Nazi Leader Who Targeted Jewish Woman in Anti-Semitic Harassment Campaign*, SOUTHERN POVERTY LAW CENTER (APRIL 18, 2017), <https://www.splcenter.org/news/2017/04/18/splc-sues-neo-nazi-leader-who-targeted-jewish-woman-anti-semitic-harassment-campaign>.

<sup>105</sup> Restatement (Second) of Torts § 564A cmt. B (1976).

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

As Jeremy Waldron has argued, group libel provides a feasible means to address the problem of hate speech. Waldron sees hate speech as reputational attacks on dignity, on people's sense of basic social standing, and on the recognition that all people are social equals who deserve the same constitutional rights.<sup>107</sup> According to Waldron, the ultimate concern is what happens to individuals when defamatory imputations are associated with shared characteristics such as race, ethnicity, religion, gender, sexuality, and national origin.<sup>108</sup> These attacks on reputation, and ultimately dignity, are what create the climate for discrimination and inequality.

As Catharine MacKinnon noted in her brief submitted on behalf of the Women's Legal Education and Action Fund (LEAF) in the Canadian case, *R. v. Keegstra*,<sup>109</sup> which upheld the conviction of an Alberta high school teacher for anti-Semitic statements made in his class, "stereotyping and stigmatization of historically disadvantaged groups through group hate propaganda shape their social image and reputation, which controls their access to opportunities more powerfully than their individual abilities ever do."

In the United States, the Supreme Court, in *Beauharnais v. Illinois*<sup>110</sup> actually upheld a conviction under an Illinois libel statute that declared the distribution of publications that disseminated hate-laden information to be an act of criminal libel, which only some states continue to recognize. However, people rarely rely on the logic offered in the *Beauharnais* case as the justification for exempting hate speech from First Amendment protection because it predated the civil rights era and happened before the Supreme Court established that content-based restrictions on speech would be considered unconstitutional unless they could pass strict scrutiny.

Although *Beauharnais* is the exception to the judiciary's response to group libel statutes rather than the rule, there are many benefits to this approach. First, recognizing group libel as a tort to punish those who make false statements of fact that defame members of a particular race, gender, ethnicity, etc. provides a form of recourse for victims without triggering the heightened concerns about the government's ability to silence dissenting speech. Moreover, by making this small shift to an aspect of the plaintiff's case for libel, lawmakers and judges can rely on the substantial existing jurisprudence for defamation.

For example, statements about public officials and public figures must still pass the actual malice standard, as will any claims seeking punitive damages. This approach would also serve to minimize "misethnic" discourses, which legal scholar Alexander Tsesis has linked through an empirical and socio-psychological analysis to crimes against humanity such as American slavery or the Holocaust. Tsesis argues that, "narrowly tailored laws should be adopted prohibiting the dissemination of misethnic stereotypes that are intended to elicit crimes against outgroups."<sup>111</sup> This approach would provide a form of civil recourse against inaccurate claims while still providing room for individuals to have their own opinions.

As with many of the other remedies examined here, the potential drawback of this approach is a chilling effect on speech. Fear of a civil suit may cause people to avoid

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<sup>107</sup> WALDRON, *supra* note 5, at 59.

<sup>108</sup> *Id.* at 67.

<sup>109</sup> *R. v. Keegstra* [1990], 3 S.C.R. 697 (Can.).

<sup>110</sup> *Beauharnais v. Illinois*, 343 U.S. 250, 259 (1952).

<sup>111</sup> *See* TSESIS, *supra* note 27, at 6.

certain topics of discourse or avoid sharing their opinion lest it be read as a statement of false fact. This approach also infringes on individuals' liberty to say what they want, when they want, without fear of reprisal.

*D. Approach No. 4: Recognize the Emotional Distress Caused by Hate Speech*

The fourth and final legal approach for addressing the issue of hate speech in the United States is to reconsider intentional infliction of emotional distress (IIED) as a form of civil recourse for those targeted by vitriolic expression. To be considered under this tort, hate speech between private citizens must be considered extreme and outrageous conduct, beyond the bounds of decency in a civilized society that causes severe emotional distress, and is intentional or reckless. Thinking about the impact of the messages Tanya Gersh received from Andrew Anglin and his followers, including one post that featured an image of Gersh being sprayed with green gas, along with the words: "*Hickory dickory dock, the k\*ke ran up the clock. The clock struck three and the Internet Nazis trolls gassed the rest of them,*"<sup>112</sup> *the answer seems to be a resounding yes.*

Currently, though, the Supreme Court would disagree. In *Snyder v. Phelps* (2011) the Court chose to interpret the Westboro Baptist Church's protest at a soldier's funeral featuring signs containing homophobic slurs as a debate on a matter of public concern.<sup>113</sup> According to the Court, the issues the Church highlighted, such as the political and moral conduct of the United States and its citizens, the fate of the nation, homosexuality in the military, and scandals involving the Catholic clergy, were matters of public import.<sup>114</sup>

Moreover, as Wat Hopkins has noted, the *Snyder* case was not about a debate, which implies two-way communication.<sup>115</sup> Albert and Julie Snyder had done nothing to provoke or engage the members of the Westboro Baptist Church. It was also not about a matter of public concern because Albert Snyder is not a public figure.<sup>116</sup> The question, according to Hopkins, is whether the speaker intended to inflict serious emotional harm on a specific person and whether the conduct or speech was outrageous.<sup>117</sup>

"The claim is not based on distaste for the message; it is based on the targeted attack on private persons. While it is true that citizens in a free society must tolerate much offensive speech, and damages should not be awarded because of mere offensiveness, the threshold for intentional infliction of emotional distress extends well beyond those descriptors. The issue is not offensiveness; it is outrageousness."

Hopkins's perspective echoes the issues raised by Justice Samuel Alito in his solitary dissent. Justice Alito disagreed with the majority's decision that the expression contributed to public debate on a matter of public interest.<sup>118</sup> Alito also said that the fact

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<sup>112</sup> SPLC, *supra* note 104.

<sup>113</sup> *Snyder v. Phelps*, 562 U.S. 443, 445 (2011).

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

<sup>115</sup> W. Wat Hopkins, *Snyder v. Phelps, Private Persons and Intentional Infliction of Emotional Distress: A Chance for the Supreme Court to Set Things Right*, 9 FIRST AMEND. L. REV. 149, 192 (2010).

<sup>116</sup> *Hustler v. Falwell*, 485 U.S. 46, 55 (1988).

<sup>117</sup> Hopkins, *supra* note 115 at 181.

<sup>118</sup> *Snyder v. Phelps*, 562 U.S. 443, 452 (2011).

that the protest took place on a public street did not preclude the church from IIED liability, just as fighting words or defamation is not immunized when it occurs in a public place.<sup>119</sup>

While it is possible that the Supreme Court made a mistake in its application of the law in this case, the ruling could also be viewed as a misinterpretation of the factual elements of the case regarding the intent of the picketers. The Court found that the emotional distress caused to the Snyder family was a byproduct of the Westboro Baptist Church's picketing about what the Court agreed was a matter of public concern. However, given that Albert and Julie Snyder were mentioned by name in an online post associated with the protest, it is possible that the Church did intend to cause harm to the plaintiffs. If future plaintiffs can demonstrate the intent of the defendants to cause emotional distress, IIED can and should be considered a viable legal response for victims of egregious hate speech to pursue.

Like group libel, IIED recognizes the difference between public and private figures. It also sidesteps the issues associated with statutory prohibitions against hate speech, which could open the door for the government to silence dissent. After all, there is a substantial difference between what citizens say to and about our government and its policies, and what they say to one another. Allowing suits for IIED to move forward provides recourse for victims without creating the same chilling effect that criminal sanctions might. Moreover, the standard of outrageousness would work to ensure that only the most egregious and intentional attacks on a person's immutable characteristics could be punished.

While there is the possibility that fear of a civil suit could chill speech, this approach seems best suited to address the harm caused by hate speech, without inviting suppression of dissent. This approach respects human dignity and provides a path to legal recourse for those on the receiving end of attacks on their identities, which lead to severe emotional distress.

## **VI. Recommendations & Conclusions**

The potential remedies provided here and the analysis of each suggests that there are multiple paths forward. However, the civil approaches presented, including group libel and IIED, are the most desirable and least speech-restrictive among the possibilities considered and should therefore be pursued.

Notably, neither of these approaches is new. Jeremy Waldron has previously identified group libel as a potential form of recourse for those targeted by hate speech,<sup>120</sup> and Richard Delgado and Jean Stefancic decades ago called on courts to recognize IIED as a civil punishment for this vitriolic expression.<sup>121</sup> While the ideas themselves are not new, the context in which they are applied is shifting. Public opinion is changing to become more accepting of limitations on speech to protect minorities.<sup>122</sup>

Among the civil remedies presented, IIED is the best option for victims of hate speech because unlike group libel, this tort provides a form of recourse for individuals on

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

<sup>120</sup> WALDRON, *supra* note 5.

<sup>121</sup> DELGADO & STEFANCIC, *supra* note 26.

<sup>122</sup> Pushter, *supra* note 2.

the receiving end of hate speech that includes opinions rather than statements of false facts. This approach also recognizes the difference between public and private figures and establishes a much higher standard for those in the public eye. Moreover, this tort requires the expression to be outrageous, intentional and cause severe emotional distress. Thus, the use of a single slur in an online post is not likely to meet the threshold, but a barrage of racist messages, like those directed at Tanya Gersh, might.

By pursuing civil remedies such as IIED, most concerns about government restrictions on dissenting speech are sidestepped. While there is still a potential for speech to be chilled, that possibility is much smaller when civil, rather than criminal, penalties are used. After all, hate speech between private citizens is unlikely to be characterized as political speech. It is low value speech, expression of “such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>123</sup>

As Justice William Douglas said 70 years ago in *Terminiello v. Chicago* (1949), “a function of free speech under our system of government is to invite dispute,” but the ideas embedded in hate speech are no longer up for debate. Science has demonstrated that race is socially constructed and that a person’s ethnicity, gender, or sexual preference has no bearing on their humanity and therefore their right to equal protection under the law.<sup>124</sup>

The reality is that in the United States, certain groups of people have historically had more economic, social, and political power than others. One of the ways this hierarchy of inequality is maintained is by promoting the notion that not all humans are equal and therefore deserving of the same rights and protections. This tension is particularly evident in the continued protection of hate speech, even that which causes severe emotional harm. The time for change is now, and civil remedies, such as IIED, provide a pathway forward for victims to recoup damages for the harm caused by hate speech.

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<sup>123</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>124</sup> U.S. CONST. amend. XIV, § 2.

# **Press Freedom in Ghana: A Survey of Journalists' Attitudes Toward Libel Law, Right to Information, and Reporting Practices**

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*This paper analyzes original survey data (N=241) to investigate Ghanaian journalists' attitudes toward libel law protections, Right to Information legislation, and professional roles. Findings show journalists in Ghana perceive themselves as straddling normative press freedom roles of watchdog and social responsibility while incorporating unique elements of their culture in their work. The results provide context for the successes and challenges of Ghana's journalists and contribute to the more precise theoretical explanations of press freedom protections for journalists in understudied contexts such as the Global South.*

## **I. Introduction**

Ghana President Nana Akufo-Addo called the 2001 repeal of the nation's criminal and seditious libel laws the highlight of his public service career.<sup>1</sup> As the country's attorney general, Akufo-Addo advocated for repeal to strengthen independent media and enhance the democratic function of journalists in the country.<sup>2</sup> As a direct result of these and related press-supportive initiatives in the past quarter-century, international experts evaluate Ghana in 2019 as having a vibrant, pluralistic, and free environment for journalists that is among the most protective of freedom of expression on topics of public concern in Western Africa.<sup>3</sup>

Despite those positive developments, other legal challenges and practical constraints have undermined Ghanaian media's reporting on government actions and public services.<sup>4</sup> Chief among those obstacles has been the absence of a Right to Information law to facilitate more transparent and open government reporting; self-censorship resulting from fear of heavy monetary penalties via civil libel action by private parties; threat of contempt charges and fines from the judiciary for reporting on matters of public interest; and lack of clarity on speech-chilling elements of the 1960

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<sup>1</sup> GHANAWEB, <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Repeal-of-the-criminal-libel-law-represented-a-high-point-of-my-public-career-Akufo-Addo-648383> (last visited June 17, 2019).

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

<sup>3</sup> See FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2019/ghana> (last visited June 17, 2019).

<sup>4</sup> See, e.g., WILLIAM YAU OWUSU, THE GHANAIAN MEDIA LANDSCAPE: HOW UNETHICAL PRACTICES OF JOURNALISTS UNDERMINE PROGRESS 68 (2012).

Criminal Code and related national laws that restrict journalists from reporting information that may or may not threaten public safety and order.<sup>5</sup>

The Ghanaian media's ability to secure more legal rights also is thwarted by factors such as low levels of monetary support and autonomy for quasi-government bodies;<sup>6</sup> a reluctance by journalists to engage in professional associations to advocate for a freer press;<sup>7</sup> threats of violence and intimidation by law enforcement and private security entities;<sup>8</sup> and allegations of media corruption based on culturally accepted practices.<sup>9</sup>

Ghanaian citizens also notably have a relatively negative overall assessment of the media as a check on the powerful despite broader constitutional powers, which also contributes to a political climate in which leaders are not incentivized to pursue further open government legislation and reform.<sup>10</sup> While a majority of the public say they trust information from public and private media, a 2017 Afrobarometer survey showed only 36% of Ghanaians support full media freedom, down from 55% in 2014.<sup>11</sup>

Due to these tensions, Ghana presents an interesting opportunity to investigate and contextualize how legal frameworks relate to legislative, policy, and normative cultural issues that underpin a country's press freedom and performance. While Ghana has been marked by digital media development and a thriving marketplace for mass communication in recent years, scholars have argued that many press freedom goals have not been achieved at least in part due to incompatibility between normative Western democratic goals reflected in government policy and Ghanaian cultural values that include complicated attitudes about the role of the press in a relatively new democratic society.<sup>12</sup>

The situation in Ghana reflects a reality that has been long-theorized but understudied internationally, especially in the Global South: partial guarantees of communication freedom in legal documents do not necessarily translate to greater freedom of the press in ways that neatly align with normative theories of press

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<sup>5</sup> Jacob Nyarko, Eric Opoku Mensah & Stephen Kwame Owusu-Amoh, *Achieving Media Independence through Legal and Regulatory Measures: A Formality or Reality?* 5 COGENT ARTS & HUMAN., no. 1455625, 2018, at 1-17 (discussing the regulatory framework of Ghanaian media in its Fourth republication constitution).

<sup>6</sup> Jacob Nyarko & Ruth E. Teer-Tomaselli, *Print Media Standardization and Professionalism: Determinants of Independence of Ghanaian Media*, 12 JOURNALISM PRAC. 81-82, 86 (2018).

<sup>7</sup> *Id.* at 82-83.

<sup>8</sup> Jacob Nyarko & Ufuoma Akpojivi, *Intimidation, Assault, and Violence Against Media Practitioners in Ghana: Considering Provocation*, 7 SAGE OPEN, no. 1, 2017, at 1.

<sup>9</sup> Amin Alhassan & Muhammed Abdulai, *Cultural and Moral Implications of Soli and Its Effects on Journalism in Northern Ghana*, 34 J. MEDIA ETHICS, no. 1, 2019, at 1-10 (2019) (discussing impact of soli on journalism ethics and public perception).

<sup>10</sup> See Thomas Isbell & Josephine Appiah-Nyamekye, *Ghanaians Rely on Radio and TV, but Support for Media Freedom Drops Sharply*, AFROBAROMETER (June 17, 2019), <https://www.afrobarometer.org/publications/ad250-ghanaians-rely-radio-and-tv-support-media-freedom-drops-sharply>.

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

<sup>12</sup> See, e.g., UFUOMA AKPOJIVI, MEDIA REFORMS AND DEMOCRATIZATION IN EMERGING DEMOCRACIES OF SUB-SAHARAN AFRICA (2018). See also Terje S. Skjerdal, *The Three Alternative Journalisms of Africa*, 74 INT'L COMM. GAZETTE, no. 7, 2012, at 648-649.

freedom.<sup>13</sup> Relatively few systematic studies have examined what African journalists think about their constitutional protections and societal roles as they navigate situations in which press freedom elements such as criminal and civil libel, right to information, independent media regulation, and partisan manipulation of the press are in various stages of implementation.<sup>14</sup>

Therefore, this study addresses gaps in the literature through analysis of original survey data to better understand Ghanaian journalists' attitudes about the climate of press freedom in which they work. The study responds to the need for closer examination of the concepts that underpin press freedom theory<sup>15</sup> and provides more focus on analysis of international contexts such as the Global South in mass communication law literature.<sup>16</sup> The results and discussion help situate the successes and challenges of Ghana's media within their cultural context and contribute to the development of theoretical explanations for variations in international press freedom.

## II. Literature Review & Research Questions

### A. Press Freedom in Ghana

Ghana's media has a competitive free media environment with independent statutory regulatory bodies.<sup>17</sup> Freedom House rated Ghana 83/100 and one of the most protective nations in Africa for protecting freedom of expression,<sup>18</sup> and a 2017 Afrobarometer survey of citizens found media personnel more trustworthy than law enforcement, the judiciary, and government officials at all levels.<sup>19</sup> In Ghana, constitutional guarantees of the establishment of independent private media, free exchange of ideas, and the repeal of criminal and seditious libel are generally respected in practice.<sup>20</sup> Newspapers, magazines, television, and radio have healthy competition of

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<sup>13</sup> See, e.g., CHRISTIAN BREUNIG, KOMMUNIKATIONSFREIHEITEN: EIN INTERNATIONALER VERGLEICH [COMMUNICATION FREEDOMS: AN INTERNATIONAL COMPARISON] 32 (1994) (discussing normative theories of press freedom in comparative and international contexts). See also Elizabeth Blanks Hindman, *First Amendment Theories and Press Responsibility: The Work of Zechariah Chafee, Thomas Emerson, Vincent Blasi and Edwin Baker*, 69 JOURNALISM Q. 48-64 (discussing framework for researching normative press freedom theories).

<sup>14</sup> See Skjerdal, *supra* note 12, at 638-640 (discussing the need for more empirical research that accounts for cultural elements contributing to African media performance). But see Meghan Sobel & Karen McIntyre, *The State of Journalism and Press Freedom in Postgenocide Rwanda*, 96 JOURNALISM & MASS COMM. Q. 558-578 (2019) (providing a recent example of empirical research on press freedom issues in an African nation).

<sup>15</sup> Lee B. Becker et al., *An Evaluation of Press Freedom Indicators*, 69 INT'L COMM. GAZETTE 5-28 (2007).

<sup>16</sup> Edward L. Carter, *Mass Communication Law and Policy Research and the Values of Free Expression*, 94 JOURNALISM & MASS COMM. Q. 641-662 (2017).

<sup>17</sup> Murtada Busair Ahmad et al., *Free Speech, Press Freedom, and Democracy in Ghana: A Conceptual and Historical Overview*, in POLITICAL INFLUENCE OF THE MEDIA IN DEVELOPING COUNTRIES 59-70 (Lynete Lusike Mukhango & Juliet Wambui Macharia, eds., 2016).

<sup>18</sup> Freedom House, *supra* note 3.

<sup>19</sup> Isbell & Appiah-Nyamekye, *supra* note 10.

<sup>20</sup> Freedom House, *supra* note 3.

public and private outlets, while the Internet and social media remain unregulated and sites of entrepreneurship and investment.<sup>21</sup>

Despite progress, several obstacles remain in the legal framework that prevent Ghanaian media from capitalizing on their constitutional freedoms to better serve a societal role through accountability journalism.<sup>22</sup> For instance, Section 208 of Ghana's Criminal Code contains language that press freedom advocates label "inimical" to free expression.<sup>23</sup> The law says "any person who publishes or reproduces any statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace knowing or having reason to believe that the statement, rumour or report is false is guilty of a misdemeanor."<sup>24</sup> However, the parameters of what constitutes fear, alarm, and disturbance are ill-defined and unevenly applied.<sup>25</sup>

Related studies in a variety of African nations reveal similar concerns about professional standards of operation, ethics, and partisanship that inhibit public and government support for greater press freedom.<sup>26</sup> In Ghana, acts and threats of violence, provocation, and intimidation by law enforcement and private security forces are reportedly relatively common.<sup>27</sup> Corruption in the judiciary also manifests with punitive fines and charges levied toward media members in retribution for reporting on political allies.<sup>28</sup>

Other concerns are grouped around the need for greater professionalism in news reporting. Some critics have cited low levels of formal training and low pay for journalists as culprits.<sup>29</sup> Scholars also have identified relatively lack of monetary, government, and journalist support for Ghana's independent regulatory bodies and professional associations as explanations for the deficiency of stronger professional ethics and lack of advocacy for greater statutory protections.<sup>30</sup> For instance, although the Ghana Journalists Association is long-standing and has in excess of 600 members, a study revealed that its Code of Ethics has moderate levels of awareness and relatively little influence on ethics decisions made by many journalists.<sup>31</sup>

Another ethical dilemma specific to African culture that is entangled with press freedom in Ghana is the broadly accepted practice of *solli*, or "brown envelope

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<sup>21</sup> Seyram Avle, *Situating Ghana's New Media Industry: Liberalization and Transnational Entrepreneurship*, in LOCATING EMERGING MEDIA 123-138 (Germaine R. Halegoua & Ben Aslinger, eds., 2016).

<sup>22</sup> Media Foundation for West Africa, <http://www.mfwa.org/ghana/> (last visited June 17, 2019).

<sup>23</sup> Ghana Criminal Code § 208 (1960).

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

<sup>25</sup> See Nyarko et al., *supra* note 5, at 8-10.

<sup>26</sup> See, e.g., Helge Rønning, *The Politics of Corruption and the Media in Africa*, 1 J. AFR. MEDIA STUD. 163-167 (2009) (discussing linkages of government corruption and press freedom). See also Bernadin F. Mfumbusa, *Newsroom Ethics in Africa: Quest for a Normative Framework*, 1 AFR. COMM. RES. 145-151 (2008) (arguing for more attention by scholars and journalists to systems of ethics as a means for gaining press freedom).

<sup>27</sup> See Nyarko & Akpojivi, *supra* note 8, at 10.

<sup>28</sup> See Nyarko et al., *supra* note 5, at 10-11.

<sup>29</sup> See Nyarko & Teer-Tomaselli, *supra* note 6, at 81, 86-87.

<sup>30</sup> See Nyarko et al., *supra* note 5, at 12-13.

<sup>31</sup> Owusu, *supra* note 4, at 54-60.

journalism.”<sup>32</sup> *Soli* is short-hand in Ghanaian journalistic jargon for the practice of offering journalists money or other forms of gifts as a “sitting allowance” for covering an event.<sup>33</sup> In context of Ghanaian culture of welcoming guests and the realities of low salaries, many journalists see no moral concern about the practice of *soli* and differentiate it from corruption or bribery.<sup>34</sup> Many observers liken *soli* to an honorarium, similar to meals and “swag” provided in Western media events (generally \$5-30 U.S. dollars in value) that do not influence the content or direction of coverage of important news events.<sup>35</sup> However, critics of Ghanaian media use evidence of *soli* to assert that the media is corrupt and untrustworthy, and thus undeserving of its freedoms and credibility, despite research indicating nuanced cultural opinions on the topic and little empirical evidence of corruption.<sup>36</sup>

These contradictions coalesce toward an overarching research question worthy of closer examination: How do Ghanaian journalists’ attitudes about these overlapping issues of press freedom and professional ethics reveal new insights into interpreting theories of press freedom in various global contexts? Empirical analyses are few and inconclusive on the matter. Previous studies employing surveys to measure support for press freedom in the African region have been limited to a series of studies of Zambian parliament,<sup>37</sup> studies of citizens in the Arab world’s assessments of *Al-Jazeera*,<sup>38</sup> and a recent qualitative inquiry into Rwandan journalists’ attitudes about press freedom and societal development.<sup>39</sup>

Research Question 1: How do Ghanaian journalists’ attitudes toward the media law landscape, press performance, and journalism ethics contribute to a more robust empirical understanding of how the media navigates press freedom in Ghana?

## ***B. Libel Laws in Ghana***

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<sup>32</sup> Twange Kasoma, *Development Reporting as a Crumbling Tower? Impact of Brown Envelope Journalism on Journalistic Practice in Zambia and Ghana*, 3 GLOBAL MEDIA J., no. 1, 2009, at 18-32.

<sup>33</sup> Alhassan & Abdulai, *supra* note 9, at 1.

<sup>34</sup> Nyarko & Teer-Tomaselli, *supra* note 6, at 86-87.

<sup>35</sup> *Id.* at 87 (“If the subject is a controversial one, the journalist will always give priority to news content [rather] than what the company might want to bury.”).

<sup>36</sup> See Nyarko & Akpojivi, *supra* note 8, at 3-4. See also Kasoma, *supra* note 32, at 19, investigating “brown envelope” influence on development reporting in Zambia and Ghana, finding no material evidence of corruption but differing cultural attitudes in the two countries.

<sup>37</sup> See Twange Kasoma & Greg Pitts, *The Zambian Press Freedom Conundrum*, 9 J. AFR. MEDIA STUD. 129-144 (2017); Twange Kasoma & Gregory Pitts, *Mapping Zambia’s Press Freedom Trajectory*, in PERSPECTIVES ON POLITICAL COMMUNICATION IN AFRICA 95-112 (Bruce Mutsvairo & Beschara Karam, eds., 2018); Gregory Pitts, *Democracy and Press Freedom in Zambia: Attitudes of members of Parliament Toward Media and Media Regulation*, 5 COMM. L. & POL’Y 269 (2000).

<sup>38</sup> Shahira Fahmy & Thomas J. Johnson, *Show the Truth and Let the Audience Decide: A Web-Based Survey Showing Support Among Viewers of Al-Jazeera for Use of Graphic Imagery*, 51 J. OF BROADCASTING & ELECTRONIC MEDIA 245-264 (2007); Thomas J. Johnson & Shahira Fahmy, *The CNN of the Arab World or a Shill for Terrorists? How Support for Press Freedom and Political Ideology Predict Credibility of Al-Jazeera Among Its Audience*, 70 INT’L COMM. GAZETTE 338-360 (2008).

<sup>39</sup> Sobel & McIntyre, *supra* note 14, at 569-570.

The expansion of independent media and the ascension of Ghana in world press freedom rankings has been attributed directly to the 2001 repeal of the Criminal Libel and Seditious Libel Laws that had been used to jail journalists for publishing unfavorable news about the government.<sup>40</sup> However, some media critics in Ghana have called for the restoration of criminal libel laws as a means of curtailing what they see as unprofessional practice and sensational, reckless reporting.<sup>41</sup>

The other area of libel law where Ghanaian media continue to encounter restrictions on reporting is civil action on defamation, where an estimated 90% of cases involved media defendants who bear the burden of proof for truth and falsity of facts.<sup>42</sup> Research has shown that this legal climate results in chilled speech in which journalists self-censor for fear of lawsuits and possible fines and contempt charges in court.<sup>43</sup> Therefore, the second research question focuses on producing a better understanding for how Ghanaian journalists perceive these issues of libel and press freedom in their working lives.

Research Question 2: What individual characteristics and attitudes of Ghanaian journalists are associated with higher levels of support for criminal and civil libel protection for the media?

### ***C. Right to Information Legislation in Ghana***

On March 26, 2019, Ghana's parliament passed a Right to Information bill into law after more than two decades of stalled legislation. First introduced in 1999, the RTI law took effect in January 2020 and requires establishment of information administrators for all public offices.<sup>44</sup> Previously, access to information was limited to requests placed with the Communication Ministry, which faced problems such as inefficient response and mixture of information and party-line propaganda in responses.<sup>45</sup> One study found Ghanaian government officials fully complied with public records requests only 9% of the time.<sup>46</sup>

The passage of the RTI law brings Ghana more into line with its more progressive press freedom neighbors in Africa.<sup>47</sup> Ghana is a member of the Open Government Partnership, a multilateral initiative created in 2011 by United States President Barack Obama that includes 70 countries whose governments and civil society groups are joined by principles of transparency, government accountability, citizen participation, technology, and innovation.<sup>48</sup> Ghana ranked well on the OGP's measures of fiscal transparency, World Bank financial disclosures, and elements of citizen engagement, but

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<sup>40</sup> Ahmad et al., *supra* note 16, at 67.

<sup>41</sup> See Owusu, *supra* note 4, at 7, 12.

<sup>42</sup> Nyarko et al., *supra* note 5, at 10-11.

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

<sup>44</sup> Ghana Journalists Association, *After 2 Decades of Waiting, Ghana Now Has RTI Law* (March 26, 2019), <http://www.gjaghana.org/index.php/newsss/326-after-2-decades-waiting-ghana-now-has-rti-law>.

<sup>45</sup> Nyarko et al., *supra* note 5, at 6-7.

<sup>46</sup> Ahmad et al., *supra* note 16, at 68.

<sup>47</sup> Ugonna Ukaigwe, *A Missed Opportunity for RTI in Ghana*, FREEDOMINFO.ORG (Jan. 19, 2017), <http://www.freedominfo.org/2017/01/missed-opportunity-rti-ghana/>.

<sup>48</sup> Suzanne J. Piotrowski, *The 'Open Government Reform' Movement: The Case of the Open Government Partnership and U.S. Transparency Policies*, 42 AM. REV. PUB. ADMIN. 155-171 (2017).

did not qualify in 2018 in the category of Access to Information laws due to the absence of RTI legislation.<sup>49</sup>

However, the passage of RTI legislation is not a panacea for open government. To reach a more valid level of transparency and freedom of information, Ghana will need to create conditions of publicity and accountability that limit the corruption that pervades other developing democracies.<sup>50</sup> Transparency literature also points to the need for civil society organizations to support proactive dissemination of public records, open meetings, and requester release policies to bring Ghana in line with international RTI standards.<sup>51</sup> Based on previous research on RTI laws and access to public documents in Ghana, this study's third area of interest focuses on journalists' attitudes regarding support or lack of support for the implementation of Ghana's Right to Information legislation.

Research Question 3: What individual characteristics and attitudes of Ghanaian journalists are associated with higher levels of support for Right to Information law?

#### ***D. Normative Roles of the Press in Cultural Context***

Just as guarantees of communication freedom in states' legal documents but do not necessarily provide greater freedom to the press, normative theories of press freedom do not always apply uniformly across international or cultural contexts.<sup>52</sup> Even in the United States, where a libertarian watchdog philosophy of the press is strongly enshrined in the First Amendment legal framework and the media culture, there have always been tensions between traditional liberal theories of a free press and social responsibility concerns.<sup>53</sup> By comparison, Ghanaian media have alternately been situated in roles of watchdog, "guide dog" straddling accountability and social change, mediator, advocate, and ideological state apparatus.<sup>54</sup>

African journalism scholar Keyan G. Tomaselli highlights the theoretical ambiguities regarding press freedom in African countries: the classic libertarian role of the press does not effectively apply to locations without highly developed social, economic, and technical infrastructures, and yet, an inward focus on African "values, virtues, and morality" that support nation-building also does not satisfy normative

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

<sup>50</sup> See, e.g., Kofi Koranteng Adu, *The Paradox of the Right to Information Law in Africa*, 35 GOV'T INFO. Q. 669-674 (2018).

<sup>51</sup> See, e.g., SUZANNE J. PIOTROWSKI, GOVERNMENTAL TRANSPARENCY IN THE PATH OF ADMINISTRATIVE REFORM (2008); Seyram Avle & Omolade Adunbi, *Whose Freedom? Whose Information? Discourses on Freedom of Information Policies*, 5 J. OF INFO. POL'Y 179-203 (2015).

<sup>52</sup> See Agnès Callamard, *Accountability, Transparency, and Freedom of Expression in Africa*, 77 SOC. RES. 1237 (2010) (discussing lack of independent, transparent, and credible press freedom regulatory frameworks in African governments). See also Breunig, *supra* note 13, at 55 (discussing difficulty in applying press freedom frameworks across cultures); Keyan G. Tomaselli, *Our Culture v. Foreign Culture: An Essay on Ontological and Professional Issues in African Journalism*, 65 GAZETTE 427, 429-431 (2003) (discussing need for greater integration of perspectives on journalistic roles, Western normative press theories, and Afrocentric cultural theories).

<sup>53</sup> See Hindman, *supra* note 13, at 49, 63-64.

<sup>54</sup> See FRANCIS P. KASOMA, THE PRESS AND MULTIPARTY POLITICS IN AFRICA (2000); see also Ahmad et al., *supra* note 17, at 67-69.

explanations for press freedom and performance.<sup>55</sup> Additionally, Terje S. Skjerdal has explored how African journalism models have focused variously on social change, communal journalism, and journalism based on oral discourse while highlighting the need for more empirical data that takes into account journalists' professional attitudes and values regarding dimensions of social interventionism and cultural essentialism.<sup>56</sup> Thus, this study's final research question explores how the context of Ghanaian press freedom contributes to normative theories of press freedom.

Research Question 4: How are Ghanaian journalists' attitudes about their country's legal framework associated with concepts of watchdog, social responsibility, and cultural essentialism roles of the media in normative press freedom theories?

### **III. Method**

The method for this study was a purposive online survey of Ghanaian journalists. An online survey measuring attitudes about press freedom and reporting conditions in Ghana was distributed by email on January 19, 2019. A total of 653 email addresses of members of the Ghana Journalists Association were acquired to represent the survey population. Potential respondents were emailed a link to the questionnaire that included explanation of a \$10 (approximately 50 Ghanaian cedi) incentive for the first 100 completed surveys and \$5 (approximately 25 cedi) incentive for all surveys completed after the 100<sup>th</sup>. Repeat email invitations followed each week for three weeks. Survey responses were separated from respondent email addresses prior to analysis. Incentives were sent to email addresses associated with completed questionnaires via MoneyGram. A total of 241 surveys were completed by March 19, 2019, for a final response rate of 36.9%, and a final margin of sampling error of  $\pm 5\%$ . All indices demonstrated suitable internal reliability, with Cronbach's alphas of greater than .70.

#### **A. Demographics**

Sex, age, years of professional journalism experience, education level, type of mass media for which they worked, and affiliation with a public or independent private news organization were measured as demographic controls. Respondents were asked their sex; year in which they were born; and level of education (primary, secondary, tertiary, master's degree). Sex was re-coded as a dichotomous variable (1 for female; 0 for male).

Respondents were 44.4% female. In the sample, median reported age was 33.2, median number of years of professional journalism experience was 7.4, and the majority of respondents (83.0%) had completed tertiary education (see Table 1). Most respondents worked in either newspapers (36.5%) or radio (29.0%). Slightly more respondents worked in public media (51.5%) than independent private media (48.5%). These demographics are consistent with previous survey studies of Ghanaian journalists and population data from the World Bank.<sup>57</sup>

#### **B. Support for Transparency**

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<sup>55</sup> Tomaselli, *supra* note 52, at 429-430.

<sup>56</sup> Skjerdal, *supra* note 12, at 648-649.

<sup>57</sup> Ahmad et al., *supra* note 17, at 64-66; Bernard Appiah, et al., *Science Reporting in Accra, Ghana: Sources, Barriers and Motivational Factors*, 24 PUB. UNDERSTANDING OF SCI. 26 (2015); The World Bank, <https://data.worldbank.org/country/ghana>.

Support for government transparency was assessed by a four-item index that measured respondents' attitudes toward the principles of open government and right to government information with items based on previous studies of transparency and press freedom.<sup>58</sup> Respondents indicated the extent of their agreement with each of the following statements using a 7-point scale where 1 meant strongly disagree and 7 meant strongly agree: "Government records belong to the people, not to the government" ( $M=4.99$ ,  $SD=2.12$ ); "Citizens have a right to know about everything government does" ( $M=4.84$ ,  $SD=2.09$ ); "Every citizen should have complete access to information about government" ( $M=4.56$ ,  $SD=2.07$ ); and "It's important to be able to get any document you from the government" ( $M=4.44$ ,  $SD=2.14$ ). Responses on these items were averaged and combined into the Government Transparency index ( $\alpha = .78$ ,  $M=4.75$ ,  $SD=2.21$ ).

### **C. Professional Association Attitudes**

Attitudes toward and support of professional journalism associations in Ghana were measured by two indices regarding the Ghana Journalists Association based on previous studies of press freedom and journalism ethics in African democracies.<sup>59</sup> The GJA is a government-recognized professional body that has parliamentary authority to liaise with the National Media Commission, the National Communications Authority, and other civil society entities, established a code of ethics in 1994, and created a permanent secretariat in 2003 known as the Ghana International Press Centre.<sup>60</sup>

For professional association awareness and support, respondents were asked to evaluate their awareness of the Ghana Journalists Association using a 7-point scale where 1 meant not at all aware and 7 meant very aware ( $M=6.11$ ,  $SD=1.95$ ). They also indicated their level of support for the GJA using a 7-point scale where 1 meant do not support at all and 7 meant fully support for the statement "I support the mission of the Ghana Journalists Association to advocate for professional journalists, a free press, and freedom of expression" ( $M=5.56$ ,  $SD=2.07$ ).

Support for elements of the GJA code of ethics was measured by a 24-item index that measured respondents' attitudes toward the statements that comprise the code.<sup>61</sup> Respondents indicated the extent of their agreement with each of the statements using a 7-point scale where 1 meant strongly disagree and 7 meant strongly agree (see Table 2). Responses were averaged and combined into a code of ethics support index ( $\alpha = .73$ ,  $M=5.85$ ,  $SD=2.12$ ).

### **D. Independent Regulatory Body Attitudes**

Attitudes about effectiveness and support for independent regulatory bodies in Ghana were measured by six questions regarding the National Media Commission (print

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<sup>58</sup> See Piotrowski, *supra* note 48, at 155-171; David Cuillier & Bruce E. Pinkleton, *Suspicion and Secrecy: Political Attitudes and Their Relationship to Support for Freedom of Information*, 16 *Comm. L. & Pol'y* 227, 231-233 (2011); Suzanne J. Piotrowski & Gregg G. Van Ryzin, *Citizen Attitudes Toward Transparency in Local Government*, 37 *AM. REV. PUB. ADMIN.* 306, 315 (2007).

<sup>59</sup> Kasoma & Pitts, *Mapping Zambia's Press Freedom Trajectory*, *supra* note 37, at 135-136; Nyarko & Teer-Tomaselli, *supra* note 6, at 79-80.

<sup>60</sup> GHANA JOURNALISTS ASSOCIATION, <http://www.gjaghana.org/>.

<sup>61</sup> *Id.* at <http://www.gjaghana.org/index.php/code-of-ethics>.

media) and the National Communications Authority (broadcast media) based on previous studies of press freedom and journalism ethics in African democracies.<sup>62</sup>

For perceived regulatory body independence, respondents specified the extent of their agreement with each of the following statements using a 7-point scale where 1 meant strongly disagree and 7 meant strongly agree: “The National Media Commission operates independent of the government and without political interference” ( $M=6.01$ ,  $SD=2.05$ ) and “The National Communications Authority operates independent of the government and without political interference” ( $M=5.67$ ,  $SD=2.11$ ). The responses were averaged and combined into an index indicating attitudes toward regulatory effectiveness ( $\alpha = .82$ ,  $M=4.40$ ,  $SD=2.08$ ).

For perceived regulatory body effectiveness, respondents denoted the extent of their agreement with each of the following statements using a 7-point scale where 1 meant strongly disagree and 7 meant strongly agree: “The National Media Commission is effective at regulating media conduct and promoting a free press in Ghana” ( $M=4.66$ ,  $SD=2.10$ ) and “The National Communications Authority is effective at regulating broadcast media conduct and promoting a free press in Ghana” ( $M=4.01$ ,  $SD=2.07$ ). The responses were averaged and combined into an index indicating attitudes toward regulatory effectiveness ( $\alpha = .79$ ,  $M=4.40$ ,  $SD=2.08$ ).

To measure support for regulatory bodies, respondents indicated their level of support for the independent regulatory bodies using a 7-point scale where 1 meant do not support at all and 7 meant fully support for the NMC ( $M=4.54$ ,  $SD=2.11$ ) and the NCA ( $M=4.05$ ,  $SD=2.37$ ). The responses were averaged and combined into an index of support ( $\alpha = .71$ ,  $M=4.36$ ,  $SD=2.19$ ).

### ***E. Perceived Ethical Challenges Related to Press Freedom***

Concern about practical ethical challenges facing Ghanaian journalists that are at odds with press freedom was assessed by seven questions that captured respondents' attitudes about prominent ethics issues raised by previous empirical studies.<sup>63</sup> Respondents indicated the extent of their agreement with each of the following statements using a 7-point scale where 1 meant strongly disagree and 7 meant strongly agree: “Political bias in Ghanaian media harms how the public perceives journalists' credibility” ( $M=4.72$ ,  $SD=2.10$ ); “Government interference in the reporting of Ghanaian media harms how the public perceives journalists' credibility” ( $M=3.08$ ,  $SD=1.94$ ); “Public and private threats on the safety and well-being of Ghanaian journalists harms how the public perceives journalists' credibility” ( $M=3.55$ ,  $SD=2.09$ ); “Questionable reporting that invades privacy by Ghanaian media harms how the public perceives journalists' credibility” ( $M=2.81$ ,  $SD=2.07$ ); “Sensationalism in Ghanaian media harms how the public perceives journalists' credibility” ( $M=4.54$ ,  $SD=2.11$ ); “Low pay for journalists results in poor performance that harms how the public perceives journalists' credibility” ( $M=4.01$ ,  $SD=2.00$ ); “The practice of *solì* harms how the public perceives journalists' credibility” ( $M=3.05$ ,  $SD=2.12$ ).

### ***F. Dependent Variables***

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<sup>62</sup> See Owusu, *supra* note 4, at 73-74; Nyarko & Teer-Tomaselli, *supra* note 6, at 84-86; Kasoma & Pitts, Mapping Zambia's Press Freedom Trajectory, *supra* note 37, at 135-136.

<sup>63</sup> See Nyarko & Akpojivi, *supra* note 8, at 5-10; Nyarko & Teer-Tomaselli, *supra* note 6, at 82-87; Nyarko et al., *supra* note 5, at 12-13; Owusu, *supra* note 4, at 54-64.

To uncover new insights about the press freedom, four dependent variables asked journalists about Ghana's specific legal situation and concepts relevant to the role of the media in press freedom theories.

Support for legal protection against libel in Ghanaian society was measured by a four-question Libel Protection Index that captured respondents' attitudes about legal realities related to government accountability reporting in Ghana.<sup>64</sup> Respondents indicated the extent of their agreement with each of the following statements using a 7-point scale where 1 meant strongly disagree and 7 meant strongly agree: "Constitutional repeal of criminal libel has benefitted a free press in Ghana" ( $M=6.13$ ,  $SD=1.84$ ); "Journalists in Ghana need more protections from costly civil libel lawsuits" ( $M=6.06$ ,  $SD=2.03$ ); "Journalists in Ghana need greater protection from fines and contempt charges levied by the judiciary for reporting on matters of public concern" ( $M=5.96$ ,  $SD=2.01$ ); and "Criminal Code provisions prohibiting reporting on public safety issues should be clarified to better protect journalists" ( $M=6.55$ ,  $SD=1.88$ ). Responses were averaged and combined into the Libel Protection Index ( $\alpha = .84$ ,  $M=6.15$ ,  $SD=2.03$ ).

Support for a Right to Information Law in Ghana was measured by a three-question index that captured respondents' attitudes about freedom of information legislation in the country that was proposed and pending at the time of the survey.<sup>65</sup> Respondents indicated the extent of their agreement with each of the following statements using a 7-point scale where 1 meant strongly disagree and 7 meant strongly agree: "I support passage of a Right to Information law in Ghana" ( $M=6.59$ ,  $SD=1.89$ ); "The Communication Ministry is inefficient at providing public information to the Ghanaian media and would be improved by stronger transparency laws" ( $M=5.91$ ,  $SD=2.01$ ); and "Media and the public in Ghana should have access to public documents without government interference" ( $M=5.04$ ,  $SD=2.11$ ). Responses were averaged and combined into the RTI Law Support Index ( $\alpha = .80$ ,  $M=5.96$ ,  $SD=2.09$ ).

Support for the watchdog or libertarian accountability role of the media in a democracy was measured by a three-question index based on press freedom literature that has focused on African countries.<sup>66</sup> Respondents indicated the extent of their agreement with each of the following statements using a 7-point scale where 1 meant strongly disagree and 7 meant strongly agree: "The media should serve as a watchdog over the powerful in society and hold them accountable for their actions" ( $M=5.88$ ,  $SD=2.04$ ); "The media should promote transparency and an openness in government toward citizens and the media" ( $M=5.81$ ,  $SD=1.99$ ); and "The media should encourage close scrutiny of the government by the public" ( $M=4.96$ ,  $SD=2.15$ ). Responses were averaged and combined into the Watchdog Role Index ( $\alpha = .74$ ,  $M=5.63$ ,  $SD=2.07$ ).

Support for the social responsibility or social change role of the media in a democracy was measured by a three-question index based on press freedom literature in an African context.<sup>67</sup> Respondents indicated the extent of their agreement with each of the following statements using a 7-point scale where 1 meant strongly disagree and 7

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<sup>64</sup> See Freedom House, *supra* note 3; Nyarko et al., *supra* note 5, at 5-6, 8-11.

<sup>65</sup> Ukaigwe, *supra* note 47.

<sup>66</sup> See Becker et al., *supra* note 15, at 19-26; Tomaselli, *supra* note 52, at 427, 429; Kasoma & Pitts, Mapping Zambia's Press Freedom Trajectory, *supra* note 37, at 135-136.

<sup>67</sup> See Skjerdal, *supra* note 12, at 646, 648-649; Tomaselli, *supra* note 52, at 427, 429; Kasoma & Pitts, Mapping Zambia's Press Freedom Trajectory, *supra* note 37, at 135-136.

meant strongly agree: “Journalists should help build the nation through reporting that serves the national interest” ( $M=4.99$ ,  $SD=2.13$ ); “Journalists should prioritize the political agenda of the country” ( $M=4.65$ ,  $SD=2.41$ ); and “News coverage should contribute toward socioeconomic development in Ghana” ( $M=6.01$ ,  $SD=2.11$ ). Responses were averaged and combined into the Social Responsibility Role Index ( $\alpha = .71$ ,  $M=5.11$ ,  $SD=2.21$ ).

Support for the media’s role as a representation of Ghanaian’s specific cultural values was measured by a three-question cultural essentialism index based on press freedom literature that focuses on African cultural context.<sup>68</sup> Respondents indicated the extent of their agreement with each of the following statements using a 7-point scale where 1 meant strongly disagree and 7 meant strongly agree: “Some aspects of Ghanaian culture make the media here unique and not comparable to other nations” ( $M=4.23$ ,  $SD=2.19$ ); “News coverage should align with cultural priorities of the Ghanaian people” ( $M=3.88$ ,  $SD=2.33$ ); and “Media need to align with the values and morality expected by the Ghanaian people” ( $M=3.59$ ,  $SD=2.10$ ). Responses were averaged and combined into the Cultural Essentialism Role Index ( $\alpha = .74$ ,  $M=3.81$ ,  $SD=2.13$ ).

#### **IV. Findings**

Analysis of the results of questions about libel, transparency, professional ethics, and civil society support reveals the complex ways in which journalists’ attitudes regarding their legal protections and constraints contribute to a more robust explanation of how press freedom operates on the ground in Ghana (see descriptive data and frequencies in Tables 1 and 2).

Delving deeper into journalists’ specific attitudes about press freedom, Table 3 summarizes the results of two regression estimations predicting support for legal protections against libel followed by support for a Right to Information Law in Ghana. Demographic control variables along with attitudes about journalism ethics, regulatory bodies, perceived ethical challenges, and support for related press freedom laws combined to predict about 47% of the variance in support for libel protection and about 51% of the variance in support for Right to Information legislation. These data and the statistical fit of the models support the validity of the results and explain roughly half of the variance in each criterion variable. These results explain roughly half of the variance in support for each type of legislation and thus help provide a new understanding for RQ1 by displaying many of the key factors that contribute toward a Ghanaian journalist’s support for press freedom legislation.

RQ2 focused specifically on learning which individual characteristics and attitudes of Ghanaian journalists were most closely associated with higher levels of support for libel protection for the media. The first column in Table 3 contributes an explanation. Stronger support for RTI legislation ( $\beta=.22$ ,  $p<.001$ ), lower perception of privacy invasion as an ethical challenge to reporting ( $\beta= -.17$ ,  $p<.01$ ), stronger perception of government interference as an ethical challenge to reporting ( $\beta= .16$ ,  $p<.01$ ), stronger support for government transparency in principle ( $\beta= .16$ ,  $p<.01$ ), and stronger perception of political bias in some news outlets ( $\beta=.14$ ,  $p<.01$ ) were the greatest predictors of support for libel protection by the law. Journalism experience ( $\beta=.11$ ,

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<sup>68</sup> See Mfumbusa, *supra* note 26, at 149-152; Callamard, *supra* note 52, at 1235-1238; Skjerdal, *supra* note 12, at 646, 648-649; Tomaselli, *supra* note 52, at 427, 429;

$p < .01$ ) and support for independent regulatory bodies ( $\beta = .10$ ,  $p < .01$ ) also produced significant positive associations. Notably, sex, age, and education were not significantly associated with support for libel protections. Neither was awareness or support of a professional association or support for a professional code of ethics. These results indicate that attitudes about the role of the media in relation to government and perceived ethical challenges created by problems in that relationship were more likely to predict support for stronger libel law protections than other individual-level characteristics and attitudes.

The second column in Table 3 examined support for the RTI law (RQ3). In this instance, stronger support for libel law protections ( $\beta = .30$ ,  $p < .001$ ), stronger support for government transparency in principle ( $\beta = .21$ ,  $p < .001$ ), stronger support for independent regulatory bodies ( $\beta = .10$ ,  $p < .01$ ), and higher perceptions of ethical challenges raised by low pay in the industry ( $\beta = .10$ ,  $p < .01$ ) were the greatest predictors of support for the RTI law. Journalism experience ( $\beta = .08$ ,  $p < .05$ ) also produced a significant positive association. Notably, as with libel protections, sex, age, and education were not significantly associated with support for RTI legislation. Awareness or support of a professional association and support for a professional code of ethics also had no significant relationship. For RQ3, these results again indicate that awareness and support for a stronger press freedom legal framework and conceptual support for government transparency were most likely to predict support for right to information legislation than other individual-level characteristics and attitudes.

The final research question, RQ4, focused on how Ghanaian journalists' attitudes about their country's legal framework were associated with the watchdog, social responsibility, and cultural essentialism roles of the media according to press freedom theory. Table 4 displays the results.

In the first column, support for the watchdog role of the press was most closely associated with support for RTI legislation ( $\beta = .34$ ,  $p < .001$ ), support for libel law protections ( $\beta = .31$ ,  $p < .001$ ), support for government transparency in principle ( $\beta = .21$ ,  $p < .001$ ), and the perceptions that threats to journalists' safety ( $\beta = .19$ ,  $p < .001$ ) and government interference in reporting ( $\beta = .17$ ,  $p < .001$ ) were serious ethical challenges. Among demographics, years of experience and higher levels of education produced significant results. Altogether, the independent variables predict about half of the variance in support for the watchdog role.

In the second column, support for the social responsibility or nation-building role of the press was most closely associated with ethical concerns about sensationalistic news coverage ( $\beta = .25$ ,  $p < .001$ ), support for RTI legislation ( $\beta = .22$ ,  $p < .001$ ), perceived problems with reporting that invades citizens' privacy ( $\beta = .22$ ,  $p < .001$ ), and support for libel law protections ( $\beta = .20$ ,  $p < .001$ ). Support for the social responsibility role of the press also produced significant positive association with support for professional associations ( $\beta = .15$ ,  $p < .01$ ) and higher levels of education ( $\beta = .13$ ,  $p < .01$ ). This model predicted more than half of the variance in support for the social responsibility role.

In the third column, support for the cultural essentialism role unique to Ghanaian media was most closely associated with greater perceived concern about reporting that invades privacy ( $\beta = .19$ ,  $p < .001$ ), more journalism experience ( $\beta = .18$ ,  $p < .01$ ), lower levels of concern about *solli* as an ethically challenging practice ( $\beta = -.17$ ,  $p < .01$ ), more support for libel law protections ( $\beta = .17$ ,  $p < .01$ ), higher levels of education

( $\beta=.17$ ,  $p<.01$ ), and more support for RTI legislation ( $\beta=.12$ ,  $p<.01$ ). This model predicted more than a third (adjusted  $R^2=.37$ ) of the variance in support for the cultural essentialism role.

## V. Discussion

Press freedom in Ghana is characterized by partial guarantees of protection in nation's legal documents in statute and in application. The findings in this study reveal that journalists navigate their work with an appreciation for both the advancements and challenges raised by this imperfect legal framework in their country. These results contribute to the literature on press freedom in Africa by supplying a nuanced explanation for how journalists navigate their societal roles in Ghana and contributing to a clearer theoretical explanation of how journalists' attitudes are related in areas of libel law, right to information, and attempts by partisans to influence their reporting.<sup>69</sup>

Ghanaian journalists surveyed tend to be supportive of internationally held professional ethical values such as spreading observable and accurate truths, promoting government transparency, providing free and fair accounts of the news, and placing the news in its proper context to help citizens understand the world around them. These findings help clarify scholarly speculation and theoretical predictions about journalists' attitudes toward press freedom in African nations.<sup>70</sup> Analysis also indicates that most Ghanaian journalists surveyed are cognizant of the legal framework and constitutional rights afforded to them and navigate other legal and ethical concerns on a daily basis to the best of their abilities.

Regarding support for libel law protections, it is notable that support of Right to Information legislation, support for government transparency, and perceptions of government and partisans' negative influence on independent reporting were the strongest significant predictors. These results support related research that indicates that the Ghanaian press holds high ideals for press freedom while navigating a media system hindered by corruption and inefficiency in enforcing constitutional protections.<sup>71</sup>

Analysis also demonstrates that Ghanaian journalists' awareness and support for a stronger press freedom legal framework and support for government transparency were most likely to predict support for outcomes such as right to information legislation, reinforcing results from related studies on open government and press freedom regardless of national context.<sup>72</sup> Journalists in Ghana were more likely to support RTI legislation if they also perceived a need for stronger libel protections, were more likely to support a strong and independent regulatory body, and had a stronger stance on

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<sup>69</sup> See Breunig, *supra* note 13, at 32 (addressing need for nuance in comparative press freedom research); Nyarko & Teer-Tomaselli, *supra* note 6, at 80-86 (discussing analysis of qualitative interviews with Ghanaian journalists); Nyarko et al., *supra* note 5, at 13-14 (discussing key issues facing Ghanaian journalists requiring further research); Skjerdal, *supra* note 12, at 648-649 (discussing need to reconcile competing theoretical viewpoints on African journalist attitudes and orientations).

<sup>70</sup> See Tomaselli, *supra* note 52, at 429 (calling for research that reconciles classic libertarian theories of press performance and press freedom with integration of African values and context); Hindman, *supra* note 13, at 63-64 (identifying historical tensions between press freedom theories focused on libertarian philosophy and social responsibility of the press).

<sup>71</sup> See Nyarko et al., *supra* note 5, at 13-15; Owusu, *supra* note 4, at 68-72.

<sup>72</sup> See Cuillier & Pinkleton, *supra* note 58, at 227; Piotrowski & Van Ryzin, *supra* note 58, at 306.

supporting government transparency in principle. Notably, journalists surveyed did not see professional associations or codes of ethics as concepts they linked to their support for RTI laws. This finding supports previous studies on climates of RTI law effectiveness that indicate Ghana will need to implement structures of publicity and accountability to limit the corruption that pervades some nations who have transparency laws on their books.<sup>73</sup>

Data indicate that Ghanaian journalists do not identify neatly with any single preconceived normative role related to press freedom theory. This finding reinforces previous research on tensions between outward-facing international and libertarian goals for the media and inward-facing concerns about constraints and cultural values within a national developing in complicated ways on many societal fronts.<sup>74</sup>

Overall, these findings show that journalists in Ghana perceive themselves as straddling the normative roles of a watchdog and social responsibility press while incorporating elements of cultural essentialism specific to their situations. Respondents more likely to identify with the watchdog role tended to be more experienced, better educated, and more supportive of government transparency and removing government interference in news production. Meanwhile, respondents identified slightly more strongly with the social responsibility role and were more likely to raise concerns about traditional nation-building dysfunction by the press such as ethical concerns about sensationalistic coverage and invasions into private lives. However, experienced and educated journalists also were more likely to perceive the need to carve out support for cultural exceptionalism, which coincided with their concern about reckless reporting on private matters and little concern for broadly accepted practices such as *sofi* that mark a media climate in which remuneration challenges are notable. The mixture of these findings supports research on African journalism models and demonstrates how journalists' professional values regarding dimensions of social interventionism and cultural essentialism contribute to a better understanding of how normative press freedom theory applies to the work of the media in Ghana.<sup>75</sup>

## VI. Conclusion

This study furthers literature on communication law and policy through analysis of original survey data that explores how journalists' attitudes about the legal framework reveal important insights into how press freedom theory applies in the setting of Ghana. These new insights answer calls from scholars for the need for a better understanding of press freedom theory in international contexts with particular focus on the dearth of knowledge about the Global South.<sup>76</sup> This study also contributes to a more nuanced understanding of the successes and challenges of Ghana's media in their specific cultural context.<sup>77</sup>

Some limitations must be noted. As with any cross-sectional survey, a single snapshot in time prevents drawing further systematic or longitudinal conclusions about how these concepts develop over time. Purposive sampling also precludes generalizing

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<sup>73</sup> See Piotrowski, *supra* note 48, at 155; Adu, *supra* note 50, at 669-674; Avle & Adunbi, *supra* note 51, at 196-199.

<sup>74</sup> See Kasoma, *supra* note 54, at 55; Tomaselli, *supra* note 52, at 429-430.

<sup>75</sup> See Skjerdal, *supra* note 12, at 648-649.

<sup>76</sup> See Carter, *supra* note 16, at 653; Becker et al., *supra* note 15, at 18-19.

<sup>77</sup> See Skjerdal, *supra* note 12, at 648-649.

these results to broader populations of journalists in Ghana and other nations. Triangulating methods, particularly using qualitative methods to delve deeper into issues of press freedom in Ghana and the specifics of the regulatory framework within which journalists operate, also would build upon the theoretical insights revealed. For example, face-to-face interviews and observation would better unpack how findings from this study tend to conflict with previous research on complicated culturally specific journalism ethics dilemmas such as *solli*.<sup>78</sup>

The timing of the passage of Ghana's RTI law in March 2019 one week after the closure of the survey analyzed for this study also must be acknowledged. While items were crafted to measure support for pending legislation, respondents may have reacted differently to the law becoming a reality. Future studies should focus not only on support for such laws but more closely examine the effectiveness of their implementation. Other suggestions for further research in this area include the obvious need for more comparative work that explains cross-cultural differences in press freedom theory and data collection on attitudes about press freedom from Ghana citizens and government officials.

Democracies such as Ghana in regions such as sub-Saharan Africa which are undergoing rapid change due to digital media proliferation, foreign investment, and transnational entrepreneurship initiatives present exciting loci for future research on important topics such as press freedom.<sup>79</sup> A better understanding of how elements of journalism and democracy manage these changes and the implications for mass communication theory are critical for scholars and free press advocates everywhere.

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<sup>78</sup> See, e.g., Kasoma, *supra* note 32, at 29-30.

<sup>79</sup> See Avle, *supra* note 21, at 123-138.

**Table 1: Demographics of Ghanaian journalists sampled**

<b>Demographic</b>	<b>Number (%)</b>
<b>Age (n = 241)</b>	
Up to 30 years	58 (24.1%)
31–40 years	111 (46.1%)
41–50 years	62 (25.7%)
More than 50 years	9 (3.7%)
<b>Gender (n = 241)</b>	
Female	107 (44.4%)
Male	134 (55.6%)
<b>Education (n = 241)</b>	
Secondary	24 (10.0%)
Tertiary	200 (83.0%)
Master's degree	17 (7.1%)
<b>Journalism experience (n = 241)</b>	
Less than 5 years	55 (22.8%)
5–10 years	86 (35.7%)
11–15 years	65 (27.0%)
More than 15 years	35 (14.5%)
<b>Type of mass media (n = 241)</b>	
Newspaper	88 (36.5%)
Magazine	19 (7.9%)
Radio	70 (29.0%)
Television	42 (17.4%)
Wire service	13 (5.4%)
Online	9 (3.7%)

## **Table 2: Respondents support for Ghana Journalists Association Code of Ethics statements**

### **Code of Ethics statement: “A journalist should...” M (SD)**

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At all times upholds and defends the principles of media freedom and independence	6.88 (1.84)
Reports the truth at all times	6.90 (1.81)
Upholds the public interest and the right of the public to be informed	6.94 (1.76)
Makes adequate enquiries and cross-checks facts	6.80 (1.80)
Makes and verifies the source of every information	6.78 (1.79)
Recognizes the public’s right to fair, unbiased, accurate, balanced and comprehensive information	6.04 (2.03)
Places accuracy above speed in all forms of publications	6.11 (2.09)
Differentiates fact, opinion and commentary such that news is presented objectively without embellishments	6.03 (2.10)
Does not suppress news on the basis of threats, inducements, and individual preferences or for personal gain	5.93 (2.06)
Does not accept a bribe or any form of inducement to influence the performance of professional duties	4.95 (2.15)
Does not take unfair personal advantage of information gained before it is made public	5.45 (2.22)
Does not plagiarise because it is unethical and illegal	6.01 (2.31)
Obtains news only by honest, straightforward, fair and open means	5.78 (2.03)
Protects confidential sources of information	5.44 (2.26)
Corrects inaccuracies and mistakes at the earliest opportunity and offers a chance for a rejoinder and/or an apology	6.14 (1.94)
Does not intrude into private life, grief or distress unless justified by overriding consideration of public interest	4.96 (2.22)
Respects the individual’s rights to privacy and human dignity	5.74 (2.08)
Avoids identifying victims of sexual assault	5.15 (2.31)
Protects the rights of minors before interviewing or photographing them	5.68 (2.26)
Produces no material that has potential to lead to hatred, ridicule or discrimination on the grounds of age, education, religion, gender, ethnicity, colour, creed, legal status, disability, marital status or sexual orientation.	5.02 (2.21)
Respects embargoes from news sources	4.57 (2.15)

Ensures that news headlines are fully warranted by the contents of the articles they accompany 5.85 (1.99)

Ensures that photos and multimedia contents adequately reflect an event in context 6.05 (2.01)

Shows good taste, avoids vulgarity and the use of indecent language and images 5.33 (2.13)

**Table 3: Hierarchical regression analysis – support for Ghanaian media law protections**

<b>Predictor Variables</b>	<b>Support for libel protection</b>	
<b>Support for RTI law</b>		
<b><i>Demographics</i></b>		
Sex (female)	.04	.05
Age	-.06	-.05
Education	.02	.03
Journalism experience	.11**	.08*
<b><i>Incremental Adjusted R<sup>2</sup></i></b>	<b>.09***</b>	<b>.10***</b>
<b><i>Journalism ethics attitudes</i></b>		
Government transparency index	.15**	.21***
Professional association awareness	.02	.07
Professional association support	-.01	.00
Code of ethics support index	.05	.02
<b><i>Incremental Adjusted R<sup>2</sup></i></b>	<b>.08***</b>	<b>.11***</b>
<b><i>Independent regulatory body attitudes</i></b>		
Perceived independence	-.04	.07
Perceived effectiveness	.01	.02
Support for regulatory bodies	.10**	.12**
<b><i>Incremental Adjusted R<sup>2</sup></i></b>	<b>.03***</b>	<b>.04***</b>
<b><i>Perceived ethical challenges to credibility</i></b>		
Political bias	.14**	.05
Government interference	.16**	.09*
Threats to journalist safety	-.05	.04
Reporting that invades privacy	-.17**	-.02
Sensationalism	-.08	-.05
Low pay	-.01	.10**
<i>Soli</i>	-.04	-.02
<b><i>Incremental Adjusted R<sup>2</sup></i></b>	<b>.14***</b>	<b>.09***</b>
<b><i>Support for open government legislation</i></b>		
Libel protection support index	---	.30***
Right to information support index	.22***	---
<b><i>Incremental Adjusted R<sup>2</sup></i></b>	<b>.13***</b>	<b>.16***</b>
<b>Total Adjusted R<sup>2</sup></b>	<b>.47***</b>	<b>.51***</b>

Standardized  $\beta$ . N=241; \*  $p < .05$ ; \*\*  $p < .01$ ; \*\*\*  $p < .001$

**Table 4: Hierarchical regression analysis of press freedom theoretical roles**

Predictor Variables	Watchdog	Social
Resp.	Cultural Ess.	
<b>Demographics</b>		
Sex (female)	-.04	.09*
Age	-.07	-.04
Education	.12**	.13**
Journalism experience	.15**	.02
<b>Incremental Adjusted R<sup>2</sup></b>	<b>.08***</b>	<b>.09***</b>
<b>Journalism ethics attitudes</b>		
Government transparency index	.21***	.10*
Professional ass'n awareness	.08	.05
Professional ass'n support	.11**	.15**
Code of ethics support index	.12**	.10*
<b>Incremental Adjusted R<sup>2</sup></b>	<b>.11***</b>	<b>.10***</b>
<b>Independent regulatory body attitudes</b>		
Perceived independence	-.04	.02
Perceived effectiveness	-.05	.05
Support for regulatory bodies	.01	.07
<b>Incremental Adjusted R<sup>2</sup></b>	<b>.01***</b>	<b>.03***</b>
<b>Perceived ethical challenges to credibility</b>		
Political bias	.06	.05
Government interference	.17**	-.07
Threats to journalist safety	.19***	.09*
Reporting that invades privacy	-.05	.22***
Sensationalism	-.04	.25***
Low pay	-.07	-.06
<i>Soli</i>	.00	.07
<b>Incremental Adjusted R<sup>2</sup></b>	<b>.12***</b>	<b>.20***</b>
<b>Support for open government legislation</b>		
Libel protection support index	.31***	.20***
Right to info. support index	.34***	.22***
<b>Incremental Adjusted R<sup>2</sup></b>	<b>.18***</b>	<b>.13***</b>
<b>Total Adjusted R<sup>2</sup></b>	<b>.50***</b>	<b>.53***</b>

Standardized  $\beta$ . N=241; \*  $p < .05$ ; \*\*  $p < .01$ ; \*\*\*  $p < .001$ .

# Toward Regulation of Music Payola in Jamaica

Roxanne Watson\*

*In the U.S., a radio station that plays music in exchange for money must disclose this transaction and that the song is being played on sponsored, rather than regular, airtime. However, no laws are in place to address payola in Jamaica. The lack of such regulation has led to its increase. This increase poses a problem for the development of Jamaica's music industry, and has the potential to contribute to the diminishing of the reputation of Jamaican music internationally. Despite recommendations for a law suggested by the Broadcasting Commission of Jamaica (BCJ), the Jamaican Parliament has not acted. This article chronicles the issues surrounding payola in Jamaica suggesting the need for legislation. The article also attempts to use Immanuel Kant's deontological ethics theory to provide an ethical rationale, in the absence of laws, to underpin an argument for the need to contain this bane of the Jamaican music and broadcast industries.*

**Keywords:** Broadcasting, regulation, payola, Jamaica, Caribbean

## I. Introduction

In Jamaica payola has become a real issue for people in the music business. Karlene Salmon-Johnson, assistant executive director of the Broadcasting Commission of Jamaica (BCJ), defines payola as “the widespread practice of secretly giving or accepting bribes in a variety of forms in exchange for music airplay or other means of media exposure.”<sup>404</sup> These bribes can take the form of jewelry, cellphones, and even trips.<sup>405</sup>

The word “payola” appears to have originated from a combination of the words “pay” and “Victrola”—the latter word being the trademark name of the now defunct record players manufactured by RCA Victor in the 1950s.<sup>406</sup> The practice was rampant in the U.S. in the late

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<sup>404</sup> Karlene Salmon-Johnson, *Payola: Why we need to stop Paying the Piper*, (presentation for JIPO week, 2013, April 23, 2013), file:///C:/Users/Owner/AppData/Local/Packages/Microsoft.MicrosoftEdge8wekyb3d8bbwe/TempState/Downloads/Paying\_the\_Piper%20(1).pdf (last visited March 22, 2019).

<sup>405</sup> Roland Henry, *Payola on the Increase*, JAM. OBSERVER, Jan. 1, 2006, as reprinted on BOYCOTT-RIAA.COM (last visited March 21, 2011, no longer accessible online).

<sup>406</sup> Dennis Howard, *Payola in Jamaica: Illegal and Unethical or Standard Business Practice?* (Presentation at BCJ's Seminar on Payola and Anti-Piracy, Mar. 22, 2011), <https://www.scribd.com/document/187866434/Payola-in-Jamaica-Illegal-and-Unethical-or-Standard-Business-Practice> (last visited May 29, 2020).

1950s-1960s when several disc jockeys were accused of accepting bribes, ending in the conviction of controversial disc jockey Alan Freed.<sup>407</sup>

Payola incidents occur in secrecy, making its pervasiveness hard to prove. Dancehall artiste Wayne Marshall estimated in 2009 that payola spanned 80 percent of the Jamaican music industry.<sup>408</sup> “Payola is [a] very prevalent part of the business now,” Marshall said, according to *Rock Jamaica*. “Money is all over the place on the charts, the radio stations ...payola is all over and that contributes to the stagnant nature of the business.”<sup>409</sup> While participants are tight-lipped, the industry recognizes that payola is on the rise.<sup>410</sup> Producers, artistes and artistes’ managers complain that they do not get airplay unless they pay.<sup>411</sup>

In the U.S., a radio station can play music in exchange for money, but must disclose this transaction and that the song is, therefore, sponsored airtime rather than regular airtime.<sup>412</sup> However, payola is not addressed in Jamaican law. In the absence of such a law, today payola incidents have “extended to include pay for video play, as well as pay for newspaper articles.”<sup>413</sup> Music payola creates “a distorted perception of the popularity of a song or artiste” according to entertainment attorney Lloyd Stanbury, and contributes to “the very lucrative business of hype, which apparently now takes precedence over the business of music in Jamaica.”<sup>414</sup> Stanbury charges that, because of payola, “several thriving music consultancies and entertainment publicity operations have been established, based on the ability of the operators to skillfully navigate their way through the very well-established payola network.”<sup>415</sup>

This article examines the issue of payola in Jamaica and its effects in an effort to identify a way to stop this bane of the music industry. The author explores the right to freedom of press and the regulation of broadcasting in Jamaica. The author will also look at how U.S. law has addressed payola and the existing legal avenues within Jamaica to curtail the practice. In the absence of a law, the article identifies efforts by the BCJ to stem its incidence. Because payola is not against the law in Jamaica, the author looks to Immanuel Kant’s deontological ethics, which posits a universally correct behavior based on duty, to determine the ethical response to payola.

## II. The Constitutional Protection for Freedom of Expression in Jamaica

The 2011 Jamaican *Charter of Fundamental Rights and Freedoms Act*<sup>416</sup> protects the right to “freedom of thought, conscience, belief and observance of political doctrines”<sup>417</sup> and also

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<sup>407</sup> *Id.* at 1-2.

<sup>408</sup> *Chris Blackwell and Wayne Marshall say Payola Ruining Jamaica’s Music Biz*, in *ROCK JAM.*, June 12, 2009, <https://rockjamaica.wordpress.com/2009/06/12/chris-blackwell-wayne-marshall-say-payola-ruining-jamaicas-music-biz/> (last visited March 16, 2019).

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

<sup>411</sup> *Id.*

<sup>412</sup> 47 USC § 317 (1) & (2) (1982).

<sup>413</sup> Lloyd Stanbury, Letter to the Editor, *Have a law against payola*, *JAM. OBSERVER*, Dec. 30, 2010 (last visited March 21, 2011, no longer accessible online).

<sup>414</sup> *Id.*

<sup>415</sup> *Id.*

<sup>416</sup> This statute repealed and replaced the original Bill of Rights in the 1962 Constitution. See *Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 § 2 (Act No. 12-2011)* which provides, “Chapter III of the Constitution is repealed and the following substituted therefor.”

<sup>417</sup> See *Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act § 13(b) (Act No. 12-2011)*.

to “freedom of expression”<sup>418</sup> and to “seek, receive, distribute or disseminate information, opinions and ideas through any media.”<sup>419</sup> These rights are protected so long as their exercise does “not prejudice the rights and freedoms of others.”<sup>420</sup> The statute binds “the legislature, the executive and all public authorities,”<sup>421</sup> and even “natural or juristic persons,” in some circumstances.<sup>422</sup> Thus, the protection extends beyond state bodies to include individuals, and some private or quasi-public organizations.<sup>423</sup>

### III. Regulation of the Broadcast Media in Jamaica

Jamaica has consistently been rated among the top countries in the world in terms of freedom of the press, ranking sixth in the world in 2020.<sup>424</sup> The strong protection for freedom of press in Jamaica means that Jamaicans have an unfettered right to open and operate a newspaper.<sup>425</sup> However, broadcasting as a public resource operating on a scarce spectrum is subject to regulation.<sup>426</sup> In Jamaica licenses are required to broadcast content commercially.<sup>427</sup> While licenses are granted by the relevant minister, the Broadcasting Commission of Jamaica (BCJ) is the body created to regulate the broadcast media.<sup>428</sup> The Commission’s role includes advising the Minister on “terms and conditions on which licenses may be granted”<sup>429</sup> and the allocation of time for local programming.<sup>430</sup>

Caribbean courts have held that, because of the limited spectrum, there is no constitutional right to a broadcast license.<sup>431</sup> But a license cannot be arbitrarily refused for political purposes,<sup>432</sup> and a three-year delay in processing an application for a license may be

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<sup>418</sup> See Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act § 13(c) (Act No. 12-2011).

<sup>419</sup> See Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act § 13(d) (Act No. 12-2011).

<sup>420</sup> See Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act §13(1) (No. 12-2011).

<sup>421</sup> See Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act §13(2)(b) & (4) (No. 12-2011).

<sup>422</sup> See Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act §13(5) (No. 12-2011).

<sup>423</sup> See *Tomlinson v. TVJ* ¶ 203 [2013] JMFC Full 5; see also *Bain v. University of the West Indies* ¶ 75 [2017] JMFC Full 3.

<sup>424</sup> REPORTERS WITHOUT BORDERS: 2020 WORLD PRESS FREEDOM INDEX, <https://rsf.org/en/ranking> (last visited May 21, 2020).

<sup>425</sup> See, e.g., *Attorney General of Antigua v. Antigua Times* [1976] A.C. 16, holding that while an Antiguan statute requiring newspaper publishers to acquire a license at the cost of \$600 per annum was unconstitutional, nonetheless the license fee was allowed since it fell within another section of the Constitution which allowed taxes to raise money in the interest of “defence, public safety, public order, public morality or public health and the tax was reasonably required to protect the reputations, rights and freedoms of other persons.” *Id.*

<sup>426</sup> See EVE SALOMON, GUIDELINES FOR BROADCASTING REGULATION ¶ 2.5 (2d ed., Commonwealth Broadcasting Association, 2008), [www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/guidelines-for-broadcasting-regulation/](http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/guidelines-for-broadcasting-regulation/) (last visited March 28, 2019).

<sup>427</sup> See Broadcasting & Radio Rediffusion Act § 3 (1949).

<sup>428</sup> See Broadcasting & Radio Rediffusion Act § 12(1) (1949).

<sup>429</sup> See Broadcasting & Radio Rediffusion Act § 16(a)(i) (1949).

<sup>430</sup> See Broadcasting & Radio Rediffusion Act § 16(a)(ii) (1949).

<sup>431</sup> See *Observer Publications Ltd. v. Campbell* (Privy Council Appeal No. 3 of 2000).

<sup>432</sup> See *Observer Publications Ltd. v. Matthew* (2001) 58 WIR 188.

capricious and infringe on the constitutional right of the applicant.<sup>433</sup> The closure of a radio program critical of the government also contravenes the right to freedom of expression.<sup>434</sup> But there is no constitutional right to have your message played on a broadcast station.<sup>435</sup>

Alongside its advisory functions, the BCJ is authorized to engage in, sponsor or assist in research aimed at ensuring content is being received island-wide, to oversee operations subject to regulation under the act, and to establish a system to monitor transmissions by licensees. The BCJ has been proactive in monitoring content that is inappropriate for airplay.<sup>436</sup> The BCJ has also been active in identifying and researching issues such as payola and piracy that plague the broadcasting industry, and trying to identify appropriate measures for their eradication.

#### **IV. The Evolution of Jamaica's Popular Music**

The issue of payola in Jamaica necessarily connects with the development of the music. Thus, it is important briefly to discuss the development of Jamaican music. With the decline in popularity of black-based R&B and its replacement with Rock 'n' roll in the U.S., Ska emerged as Jamaica's first popular music in 1960.<sup>437</sup> Initially a remake of American R&B, Ska had developed its own unique, local flavor by 1962. Reflecting the spirit of the newly independent country, the music was joyful and uplifting.<sup>438</sup>

But by the early 1960s, young migrants from rural Jamaica filled the inner cities. Jobless, excluded and unable to relate to the happy Ska beat, these youth, who came to be known as "rude boys," connected with the underworld, joining political gangs in the Kingston ghetto.<sup>439</sup> The music slowed down to reflect this group's discontent and became known as Rocksteady, popular between 1966 and 1968, celebrating the lifestyle of these "rude boys."<sup>440</sup>

In 1968, reggae emerged in Jamaica in the context of the repressive regime of the governing Jamaica Labor Party (JLP), which harassed "radical political activists, seizing passports and banning literature and music with potent political messages."<sup>441</sup> The poverty and political alienation of the black majority led to social unrest and rioting.<sup>442</sup> Reggae, protest music, used lyrics that reflected political and racial tensions in post-independence Jamaica.<sup>443</sup> The sound mixed Ska, Rocksteady and traditional Mento with the Rastafarian drumming

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<sup>433</sup> See *Central Broadcasting & Sanatan Dharma Maha Sabha v. A.G. of Trinidad & Tobago* (Privy Council Appeal No. 49 of 2009).

<sup>434</sup> See *Benjamin v. Minister of Information and Broadcasting* [2001] 58 WIR 171.

<sup>435</sup> *Tomlinson v. TVJ* [2013] JMFC Full 5, holding that the TVJ did not deprive Tomlinson of his right to free speech by refusing to carry his advertisement.

201. <sup>436</sup> See, e.g. Roxanne Watson, "Dagging" and the Regulation of Questionable Broadcast Media Content in Jamaica, 16 COMM. L. & POL'Y 255 (2011), for a general discussion of the regulation of a genre of music in Jamaica by the Broadcasting Commission.

<sup>437</sup> Steve Barrow, *The Story of Jamaican Music: Tougher than Tough*, 11. (Text to Compact Disc Edition, produced by Mango, an Island Records Co., 1993).

<sup>438</sup> *Id.*

<sup>439</sup> *Id.* at 15.

<sup>440</sup> KEVIN O'BRIEN CHANG & WAYNE CHEN, W. REGGAE ROUTES: THE STORY OF JAMAICAN MUSIC, x (1998).

<sup>441</sup> Gladstone Wilson, *Local Music and Jamaican Politics: The 1972 Elections*, in CARIBBEAN POPULAR CULTURE 99 (John Lent, ed., 1990).

<sup>442</sup> *Id.*

<sup>443</sup> *Id.* See, e.g. Bob Andy's song, "I've Got to Go Back Home," which spoke of repatriation to Africa. See also Justin Hines' "Carry go Bring Come," which posed the question, "How long shall the wicked reign over my people?"

tradition known as Nyabinghi.<sup>444</sup> Reggae was the most popular Jamaican music between 1969 and 1983.<sup>445</sup>

Dancehall music emerged shortly after the 1980 election when Michael Manley's democratic socialist government was replaced by Edward Seaga's JLP, focused on a capitalist free-market economy.<sup>446</sup> Dancehall celebrates "consumerism, sexuality, the gunplay of gangsters."<sup>447</sup> Designated by the descriptor "slackness," dancehall was criticized for featuring elements such as "sexual boasting, drug references and macho challenges" and the violence of the "lickshot" assimilated gunfire. Dancehall music resonated with the young, dispossessed, ghetto youths of the 1990s,<sup>448</sup> but didn't convey a moral code to its audience.

## V. The Beginnings of Payola in America

Although other disc jocks were playing the music, Alan Freed was the first to refer to the popular music form as rock 'n' roll on his Cleveland WJW AM program running between 11:15 p.m. and 2 a.m. and drawing both Black and White teenagers.<sup>449</sup> When Freed hosted the first Rock 'n' roll concert, he was almost arrested as the crowd of 20,000 that showed up to the arena almost broke down the doors. Rock 'n' roll gained a reputation of being evil, but Freed's popularity among the youth flourished.<sup>450</sup> Later, Freed's show on ABC was cancelled in 1957 when Black performer Frankie Lymons "danced with a white girl on stage, outraging Southern affiliates."<sup>451</sup> Thus, Freed was already controversial before his payola conviction.<sup>452</sup>

Record producer Henry Stone chronicles that it was known that musicians and producers were paying Freed somewhere between \$1,000 and \$5,000 to have a record played.<sup>453</sup> However, in addition to this, he took writing credit for several songs with which he had no involvement.<sup>454</sup> Freed's notation as songwriter created a conflict of interest when he

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<sup>444</sup> Kenneth Bilby, *The Caribbean as a Musical Region*, in *CARIBBEAN CONTOURS* 207 (S. Mintz & S. Price eds., 1985).

<sup>445</sup> O'BRIEN CHANG, *supra* note 37, at x.

<sup>446</sup> NORMAN STOLZOFF, *WAKE THE TOWN AND TELL THE PEOPLE: DANCEHALL CULTURE IN JAMAICA* 99 (2000).

<sup>447</sup> *Id.* at 99, 111.

<sup>448</sup> *Id.* See also Kenneth Bilby, *Jamaica*, in *CARIBBEAN CURRENTS: CARIBBEAN MUSIC FROM RUMBA TO REGGAE* p. 173-4 (P. Manuel, with K. Bilby & M. Largey eds., 1995). Though derived from the word ragamuffin, the dancehall version is spelled with two "gs." See Bilby at 174.

<sup>449</sup> Jude Sheerin, *How the World's first rock concert ended in chaos*, BBC NEWS, (March 21, 2012), <https://www.bbc.com/news/magazine-17440514> (last visited March 16, 2019). "Rock 'n' roll" was a term which had existed in Blues music from the early 1920s as a euphemism for sexual intercourse. *Id.* See also Alan Duke, *Rock and Roll Hall of Fame ousts DJ Alan Freed's ashes, adds Beyonce's Leotards*, CNN ENT., Aug. 4, 2014, <https://www.cnn.com/2014/08/03/showbiz/rock-and-roll-hall-of-fame-alan-freed/index.html> (last visited March 16, 2019).

<sup>450</sup> Joyce Halasa, *Rock 'n' roll*, *ENCYCLOPEDIA OF CLEVELAND HISTORY, CASE W. RESERVE U.*, <https://case.edu/ech/articles/r/rock-n-roll> (last visited March 16, 2019).

<sup>451</sup> Sheerin, *supra* note 46.

<sup>452</sup> Bernard Weinraub, *The Man who knew it wasn't only Rock 'n' roll*, N.Y. TIMES (Oct. 14, 1999), <https://www.nytimes.com/1999/10/14/arts/the-man-who-knew-it-wasn-t-only-rock-n-roll.html> (last visited March 16, 2019).

<sup>453</sup> Roger Friedman, *Rock Hall Gets Burned for Removing Famed DJ's Ashes from Exhibit*, ROGER FRIEDMAN'S SHOW BIZ 411 HOLLYWOOD TO THE HUDSON (Aug. 4, 2014), <https://www.showbiz411.com/2014/08/04/rock-hall-gets-burned-for-removing-famed-djs-ashes-from-exhibit> (last visited March 16, 2019).

<sup>454</sup> Weinraub, *supra* note 49. The songs included the Moonglows' "Sincerely," Chuck Berry's "Maybelline," and music by the Flamingoes, according to Ronnie Italiano, owner of Clifton Music. Berry had Freed's

received royalties each time these songs were played and he was, as a disc jockey, in a position to play and promote these songs, thus gaining profits for himself.

At the time, payola was only illegal in New York and Pennsylvania; elsewhere it was legal as long as proceeds were reported to the IRS.<sup>455</sup> But when several disc jocks came under investigation for payola in 1959, Freed was fired by WABC.<sup>456</sup> Some 335 disc jockeys admitted to receiving approximately \$263,000 in “consulting fees” in open and closed sessions before the House Oversight Committee.<sup>457</sup> Freed and Dick Clark, the two most prominent DJs, both denied accepting payola. Only Freed was charged, taking the fall for disc jocks everywhere when, in 1960, he was convicted of 26 counts of commercial bribery for which he was fined and received a suspended sentence.<sup>458</sup> The scandals forced Congress to pass laws to address payola.<sup>459</sup>

Under section 508 of the Communications Act, an employee who accepts or agrees to accept payment in return for promoting particular content must inform his or her employer of such agreement.<sup>460</sup> Failure to disclose this information is a criminal offence carrying a fine of up to \$10,000, a maximum jail term of one year, or both.<sup>461</sup> Broadcasting stations are also required to announce, contemporaneously with the broadcast,<sup>462</sup> that content is being broadcast because of some benefit paid or promised to the station or its employees.<sup>463</sup> Further, the broadcaster must reveal the identity of the sponsor,<sup>464</sup> whether an individual or corporation, including the names of officers of the sponsoring company.<sup>465</sup> Broadcast stations are also required to “exercise reasonable diligence” to obtain necessary information about such payments from employees and other associates in order to make the required announcements of such payments.<sup>466</sup> Broadcasters must also maintain a list of the names, addresses and telephone numbers of each adviser for two years after broadcast,<sup>467</sup> and make the list available to members of the public with “a legitimate interest in obtaining” information in the list.<sup>468</sup>

Despite this, producers can give radio stations gift cards and certificates, up to 20 copies of a CD, electronic copies of recordings for websites, promotional items valued each at no more than \$25, up to 20 concert tickets, reasonable gifts not exceeding \$150—meals, coach class

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name removed from the credits of his song in a court case, but Bobby Lester of the Moonglows “bitterly resented [Freed]” as he shoveled coal to pay rent while “Sincerely” was No. 1 on the hit parade. *Id.*

<sup>455</sup> *Id.*

<sup>456</sup> JIM CURTIS, *ROCK ERAS: INTERPRETATIONS OF MUSIC AND SOCIETY, 1954-1984*, 37 (1987).

<sup>457</sup> Bill Demain, *Paying the Piper a Little Something Extra: A short History of Payola*, MENTAL FLOSS (Nov. 7, 2011), <http://mentalfloss.com/article/29183/paying-piper-little-something-extra-short-history-payola> (last visited March 13, 2019).

<sup>458</sup> *Id.* Demain suggests that Freed was singled out because of his controversial nature—“abrasive,” consorting with black artistes, jive talking and a smoker. “Clark was squeaky clean, brylcreemed handsome and polite,” and the Committee chairman called Clark “a fine young man.” But, also, Clark was shrewd enough to divest himself of all evidence of a conflict of interest. *Id.*

<sup>459</sup> *Id.*

<sup>460</sup> 47 U.S.C. § 508(a) (1982).

<sup>461</sup> 47 U.S.C. § 508(g) (1982).

<sup>462</sup> 47 C.F.R. § 73.1212 (1985).

<sup>463</sup> 47 U.S.C. § 317(a)(1) & (b) (1982).

<sup>464</sup> 47 C.F.R. § 73.1212(a)(2).

<sup>465</sup> 47 C.F.R. § 73.1212(e).

<sup>466</sup> 47 C.F.R. § 73.1212(b).

<sup>467</sup> 47 C.F.R. § 73.1212(g)(1).

<sup>468</sup> 47 C.F.R. § 73.1212(g)(2).

travel and several other promotional gifts, according to Maryland attorney Jeneba Jalloh Ghatt.<sup>469</sup>

Bill Demain suggests that, although payola is now a misdemeanor, the law contains loopholes.<sup>470</sup> No one has ever gone to prison in the U.S. for payola charges, yet it continues in many forms, “everything from a line of coke to the services of an independent promoter to a spot ad masquerading as just added song—while playing duck and cover with the law.”<sup>471</sup>

## VI. Payola in Jamaica

While U.S. payola laws are not without problems, no laws exist in Jamaica to regulate or contain payola. Thus, entertainment attorney Lloyd Stanbury notes that artistes and producers have complained to him about demands made on them by radio personalities.<sup>472</sup> Veteran reggae artiste Freddy McGregor has also been vocal in his criticism. “Music needs to get a fair chance if the industry is to make sense once again. The payola thing is a demon because it destroys the fabric of our music.”<sup>473</sup> For McGregor, payola allows mainstream acceptance of inferior music.<sup>474</sup> “It just allow [sic] for the rotation of garbage over the local airwaves,” he said.<sup>475</sup>

Pay for play is not new to Jamaica. At least two radio personnel were fired in the 1960s for pay for play.<sup>476</sup> In 1968 a *Gleaner* columnist lamented that payola had “reached such effective proportions in Jamaica that the popularity ratings have become largely a farce, and the record retailing business, a minor nightmare.”<sup>477</sup> Payola was not new to the industry in 1968, but he bemoaned, “A few years ago the ‘operators’—the men behind the turntables—would accept the occasional favour for spinning a disc just those few extra times. When pay-for-play became more frequent and more lucrative one or two of the stations’ more popular deejays got into the act. Today a sliding scale of payouts appears to have materialized, taking in many of the people involved in the process of putting pop music on radio.”<sup>478</sup>

At independence in 1962 there were only two radio stations in Jamaica. The first was the commercial Radio Jamaica Re-diffusion (RJR), a station owned by the British Re-diffusion group which, buying the local commercial radio in 1949, had mainly represented British programming, advertisements and talents.<sup>479</sup> The second, public radio, introduced in 1958 in the wake of the burgeoning nationalism, was the Jamaica Broadcasting Corporation (JBC). Funded by the Jamaican government, JBC promoted Jamaican culture, accent and language, it also played an important role in supporting the booming music recording industry and providing a

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<sup>469</sup> Jeneba Jalloh Ghatt, *Payola, Cable Piracy and Re-transmission Consent, the U.S. Model*, Presentation at BCJ Payola and Anti-piracy Seminar, Kingston, Jamaica (March 22, 2011), file:///C:/Users/Owner/AppData/Local/Packages/Microsoft.MicrosoftEdge\_8wekyb3d8bbwe/TempState/Downloads/Jeneba\_Ghatt-BCJPayola%20(1).pdf (last visited March 16, 2019).

<sup>470</sup> Demain, *supra* note 54.

<sup>471</sup> *Id.*

<sup>472</sup> Stanbury, *supra* note 10.

<sup>473</sup> Henry, *supra* note 2.

<sup>474</sup> *Id.*

<sup>475</sup> *Id.*

<sup>476</sup> Howard, *supra* note 3 at 2.

<sup>477</sup> *Merry go Round*, THE DAILY GLEANER, Feb. 8, 1968, at 6.

<sup>478</sup> *Id.*

<sup>479</sup> Cinzia Padovani, *Would we Create it if it Did not Exist? The Evolution of Public Broadcasting in Jamaica*, at 6 (Paper presented at the annual meeting of the International Communication Association, 2008).

forum for local musicians “contributing to the growing legitimacy of Jamaican music.”<sup>480</sup> RJR and JBC competed for the Jamaican public’s ear for many years. Several notable disc jockeys rose to fame on these stations. But pay for play existed from the early days.

Back in 1968, the columnist who wrote *Merry go Round* suggested that payola income supplemented the “moderate salaries” that disc jocks enjoyed.<sup>481</sup> He suggested that disc jocks were accepting approximately five pounds per producer per week as “a reasonable fee” and, other than cash, there were rumors of a disc jockey receiving a car or having his rent paid.<sup>482</sup> The extent of payola was not known, but the writer was certain “the practice is common knowledge and openly practiced.”<sup>483</sup> However, he was hopeful that “the pay-for-play dilemma [would] resolve itself by getting into such a mess that everyone will back off...”<sup>484</sup>

But by 1982 payola had become a mainstay. *Gleaner* opinion columnist Arthur Kitchin wrote, “As a result of payola, a lot of bad records receive airplay. Although artistes complain about the seemingly unfair scheduling of airplay no one has yet come forward with the names of those individuals who demand \$500 or more to ensure adequate airplay.”<sup>485</sup> He also noted that “established names in the music business who can afford to buy air time in the form of radio programmes usually receive extra plugs which are considered quite legal a sort of ‘brawta’ for the money spent with the station.”<sup>486</sup>

## VII. Payola Today

The JBC and RJR continued to be the only two radio stations in Jamaica for more than two decades, but as a result of liberalization policies during the 1980s and 1990s, as of 2019 there are 28 licensed radio stations in the nation with a diversity of offerings.<sup>487</sup>

By 2013, according to the late Lester Spaulding, then managing director of RJR Communications Group, the group had instituted dismissal in its written guidelines for anyone found guilty of accepting bribes, but it is hard to track the practice of payola.<sup>488</sup> Brian Schmidt, marketing manager at IRIE FM, a radio station dedicated to reggae music, acknowledges that he has been approached by people offering him a bribe to play their music.<sup>489</sup>

“We have people from all over the world ask us, ‘how much will it cost to play our material?’ The issue is not specific to Jamaica.”<sup>490</sup> But identifying incidents of payola is complicated. “It’s not easy. Payola is something that is not readily identified because it can take so many forms,” he said. “You have to be careful [in accusing people of taking bribes] because sometimes what people perceive to be payola really isn’t. The disc jock might just like what this artiste or label does, or get lots of requests from the public.”<sup>491</sup>

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<sup>480</sup> *Id.*

<sup>481</sup> *Merry go Round*, *supra* note 75.

<sup>482</sup> *Id.*

<sup>483</sup> *Id.*

<sup>484</sup> *Id.*

<sup>485</sup> Arthur Kitchin, *Musical rip-offs*, THE DAILY GLEANER, April 26, 1982, p. 6.

<sup>486</sup> *Id.* In Jamaican slang “brawta” means a little something extra.

<sup>487</sup> See BROADCASTING COMMISSION WEBSITE: *Services and Programs*, [www.broadcastingcommission.org/services/radio-tv-cable-services/licensees](http://www.broadcastingcommission.org/services/radio-tv-cable-services/licensees) (last visited March 29, 2019) for a list of all broadcasting licensees in Jamaica, including three television licensees.

<sup>488</sup> Henry, *supra* note 2.

<sup>489</sup> *Id.*

<sup>490</sup> *Id.*

<sup>491</sup> *Id.*

Radio 92 FM disc jockey Jennifer “Jenny” Small recognizes that the practice, abhorrent to her, “will not stop until the media fraternity collectively addresses it.”<sup>492</sup>

“Some of my industry mates are busy playing crap because they took money to do so... and it chokes talent. There are several people out there with real talent that nobody is looking at, just because they can’t afford to pay.”<sup>493</sup> For Small, payola is largely driven by greed. “Many of them get good salaries, and are popular and well respected within the entertainment industry.”<sup>494</sup>

Dr. Marcia Forbes, one-time TVJ General Manager, has indicated that “payola is rife across ALL sectors of the Jamaican society.”<sup>495</sup> This includes the print media where she says, people who “regularly appear on the social pages” pay for the opportunity. This is because “Media visibility acts as one form of validation that we count, that we matter, that we are important,” and, because of this, she believes payola will always survive.

She notes, also, that another form that music payola takes is that DJs and VJs are not only playing, but are producing music and promoting their own shows. Her beef against music payola is that “it creates its own poverty by robbing us of the diversity of voices in our music.” Thus, “we keep hearing the same people over and over again—mainly those who pay to play! Payola also robs us of the variety of music genres of which our island and its artistes are fully capable. So we keep hearing mainly dancehall [music].”<sup>496</sup>

Apart from discouraging up-and-coming artistes who are unable to pay, “payola lowers industry standards by setting poor role models and examples for new artistes.”<sup>497</sup> Ultimately for Forbes, apart from the “person(s) who collected the payola, the rest of us all loose [sic].”<sup>498</sup>

Still, there continues to be the vexing problem of how to identify and quantify the impact of payola on the music industry.<sup>499</sup> The Jamaica Reggae Industry Association (JaRIA), a non-profit, non-governmental organization dedicated to advocacy on behalf of the music industry and artistes in Jamaica, has attempted to define its effects and some indicators of payola.

JaRIA charges that some quality songs have not seen “the light of day because of inability or reluctance to pay payola,” and suggests that payola may end budding careers since “those who decry [the practice] are blacklisted and refused airplay.”<sup>500</sup> Joan Webley of JaRIA also suggested that music production standards could be diminished because of a budget shift to facilitate payola or “marketing” costs. JaRIA reported that influential disc jockeys at no less than four of the five leading national radio stations “consistently” practice payola. While JaRIA also mentioned unconfirmed incidents of violence against participants in payola and loss of trust in

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<sup>492</sup> *Id.*

<sup>493</sup> *Id.*

<sup>494</sup> *Id.*

<sup>495</sup> Marcia Forbes, *Payola not only in music*, in MARCIA FORBES: MEDIA MATTERS WEBSITE, N.D., <http://www.marciaforbes.com/article/payola-not-only-music> (last visited March 16, 2019).

<sup>496</sup> *Id.*

<sup>497</sup> *Id.*

<sup>498</sup> *Id.*

<sup>499</sup> Joan Webley, *Anti-Piracy & Payola: Have we sold our standards*, (presentation at Broadcasting Commission of Jamaica’s Payola & Anti-Piracy Seminar, Kingston, Jamaica, March 22, 2011).

<sup>500</sup> *Id.*

Jamaican music quality on the international market, the major impetus to protect against payola for the organization was to preserve standards of local music being produced.<sup>501</sup>

JaRIA suggests a list of indicators of payola. These include frequent rotation of a song; mixing of the rhythm; interfacing with the playing of the song with words such as “haul and pull up;”<sup>502</sup> hyping the introduction of the song; frequent propaganda interviews of the artiste; unheard requests for the song gathered through texting and/or telephone calls; presenting the artiste as a co-host for one of the disc jock’s programmes; regular music news/revues of artiste (acting as publicist).<sup>503</sup> The BCJ also suggests that payola songs may appear or rise on music charts.<sup>504</sup>

### VIII. The Broadcasting Commission’s Solution

As far back as 2010, the BCJ recommended a range of fines for payola with a maximum amount of J\$15 million (approximately US \$120,000)<sup>505</sup> for multiple infringements and a minimum fine of J\$5 million (approximately US \$40,000) to the minister.<sup>506</sup> The fines were based on the calculation by the BCJ that artistes were paying bribes as large as \$350,000 for airplay, according to Dr. Hopeton Dunn, then chairman of the BCJ.<sup>507</sup>

“This could escalate into much larger sums, if it is to give an unknown artiste a ‘buss,’ meaning exposure to become a star,” Dr. Dunn said. “We understand that folks are having their mortgages paid (and) folks are having opportunities to do international travel on the strength of a promise of airplay.”<sup>508</sup> While acknowledging the challenge of apprehending perpetrators, Dr. Dunn focused on the deterrent effects of the imposition of penalties.

Along with criminal charges, the BCJ has recommended that the regulations should require disc jockeys to disclose situations where music is being played because of monetary or other incentives as sponsored, rather than regular, air time; disclose affiliations with music being played; and that management be responsible for determining when and how often such “connected content” is rotated.<sup>509</sup> The BCJ also wants to require licensees to keep and maintain records of “play lists” and program logs of music played for examination by the BCJ and accredited rights agencies; to put in place a station-approved method for compiling music charts; and designate a specific person responsible for controlling media output at each station.<sup>510</sup>

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<sup>501</sup> *Id.*

<sup>502</sup> “Haul and pull up” is a popular phrase used in Jamaican dancehall meaning: “This song is so good, I’m going to start it over again.”

<sup>503</sup> Webley, *supra* note 98.

<sup>504</sup> Salmon-Johnson, *supra* note 1.

<sup>505</sup> See The Money Converter.com, <https://themoneyconverter.com/USD/JMD.aspx> (last visited March 28, 2019). As at March 28, 2019 the exchange rate for US\$1 was J\$125.1. *Id.*

<sup>506</sup> *Broadcasting Commission recommends \$15 m Payola Fine*, JAMAICA INFO. SERV., June 22, 2011, <https://jis.gov.jm/broadcasting-commission-recommends-15m-payola-fine/> (last visited April 4, 2019).

<sup>507</sup> *Id.*

<sup>508</sup> *Id.*

<sup>509</sup> Nicole Morrison, News Release, *Broadcasting Commission Proposes up to 15 Million Dollar Fines for Breaches of Payola: Proposals to criminalise Payola included in amendments to Regulations*, BROADCASTING COMMISSION, Nov. 12, 2010, [pData/Local/Packages/Microsoft.MicrosoftEdge\\_8wekyb3d8bbwe/TempState/Downloads/Release-BCJ%20proposals%20against%20Payola%20\(1\).pdf](pData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/Release-BCJ%20proposals%20against%20Payola%20(1).pdf) (last visited April 4, 2019).

<sup>510</sup> *Id.*

In 2010, after assurances that the BCJ's recommendations would go to Parliament, Dr. Dunn predicted "by next year this time, many of these pieces of legislation should be enacted. I say that, knowing that it's not the Broadcasting Commission that will determine whether that happens and we are going on the strength of indications that we have received."<sup>511</sup>

To date no such provisions have been passed.

## **IX. Toward an Ethical Response**

But how effective are payola laws? Charles Fairchild reminds us that, even in the U.S., "the act of exchanging cash for promotional consideration for airplay is not actually illegal," except where this transaction is not acknowledged.<sup>512</sup> Further, the effectiveness of such laws in stemming incidents of payola is questionable. In Canada, like Jamaica, no laws exist to regulate payola. Canadian attorney and adjunct professor at York University Richard O. Gasparini, notes that "the American experience" has showed the impositions of fines and regulations on payola were not effective in ending payola, but "led it to become more convoluted."<sup>513</sup>

"No one can literally 'hear' the effects of payola when they listen to the radio," so "why should it matter?" Fairchild asks.<sup>514</sup> Payola matters because it operates "in a system of 'complex product placement' set among an increasing number of similar mechanisms" which appeared to be "increasing both the depth of their penetration into everyday life and the sophistication of their abilities to do so without any concomitant scrutiny, openness or transparency."<sup>515</sup>

In the absence of a legal response, are there ethical implications of payola? To explore this, we turn to the deontological theory as discussed by German philosopher Immanuel Kant.

## **X. Kant's Universalism and Categorical Imperative**

In his book *Groundwork for the Metaphysics of Morals*, Kant discussed "the concept of duty which contains that of a good will, though under great subjective limitations and hindrances," which, instead of "concealing it and making it unrecognizable, ... bring it out by contrast and make it shine forth all the more brightly."<sup>516</sup>

Kant distinguished between actions based on inclination rather than duty. Acts of benevolence, though a duty, would not fall within the moral category where done for vanity, self-interest or "inner gratification in spreading joy."<sup>517</sup> The distinction, for Kant, is that, where an honorable action is pursued because of "inclination" and not "from duty," it "lacks moral content."<sup>518</sup> In other words, the desire to be benevolent should emanate "not from inclination,

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<sup>511</sup> *Id.*

<sup>512</sup> Charles Fairchild, *Alan Freed still casts a long shadow: the persistence of payola and the ambiguous value of music*, 34 MEDIA CULTURE & SOC. 328, 328-389.

<sup>513</sup> RICHARD O. GASPARINI, ETHICS AND PAYOLA AT A SMALL TOWN RADIO STATION 6 (2016), available online at [https://www.academia.edu/34596648/Ethics\\_and\\_Payola\\_at\\_a\\_Small\\_Town\\_Radio\\_Station](https://www.academia.edu/34596648/Ethics_and_Payola_at_a_Small_Town_Radio_Station) (last visited May 3, 2020).

<sup>514</sup> Fairchild, *supra* note 109 at 331.

<sup>515</sup> *Id.*

<sup>516</sup> IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 12 (Mary Gregor & Jens Timmermann, eds., rev'd ed. 2019).

<sup>517</sup> *Id.* at 13-14.

<sup>518</sup> *Id.* at 14.

but from duty.”<sup>519</sup> Kant compares this perspective to the scriptural command to love even one’s enemy.<sup>520</sup> For Kant, “love as inclination cannot be commanded, but beneficence from duty itself—even if no inclination whatsoever impels us to it,” was commanded by God.<sup>521</sup>

This leads to Kant’s second point that, “an action from duty has its moral worth *not* in the purpose that is to be attained by it, but in the maxim according to which it is resolved upon.”<sup>522</sup> For Kant, then, the ends achieved did not justify the means used, but rather the worth of an action should be judged by the will to do the action, based on duty.<sup>523</sup>

Third, based on this, Kant wrote that “duty is the necessity of [performing] an action from respect of the law.”<sup>524</sup> Kant believed “A good will is good not because of what it effects or accomplishes, not because of its fitness to attain some intended end, but just by its willing: i.e., in itself, and considered by itself, it is to be esteemed beyond compare much higher than anything that could ever be brought about by it in favor of some inclination.”<sup>525</sup>

Kant embraces “the universal conformity of actions with law.”<sup>526</sup> For Kant, only rational beings have “the capacity to act according to the representation of laws.”<sup>527</sup> Essentially, they can “choose only that which reason independently of inclination, recognizes as practically necessary, i.e., good.”<sup>528</sup> These he dubs “commands (of reason),” or “imperatives” expressed as “oughts.”<sup>529</sup>

There are two types of imperatives—hypothetical and categorical. Hypothetical imperatives relate to “the practical necessity of a possible action as a means to achieving something else that one wants,” while categorical imperatives relate to an action “objectively necessary by itself, without reference to another end.”<sup>530</sup> While hypothetical imperatives were best epitomized in the pursuit of happiness, categorical imperatives were objective in nature.

Kant identified only one such categorical imperative that “without presupposing as its condition any other purpose to be attained by a certain course of conduct commands this conduct immediately,” and that was morality, which he saw as equivalent to law.<sup>531</sup> While the search for happiness was a necessity, it was also subjective, varying depending on the individual involved in the search. Morality was “unconditional and objective” and therefore a “universally valid necessity.”<sup>532</sup> Morality, thus, took effect as commands, which he describes as “laws that must be obeyed,” regardless of inclination.<sup>533</sup> Similarly, because of its objectivity and universality, morality was a categorical, rather than an hypothetical, imperative—“an objective necessity.”<sup>534</sup>

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<sup>519</sup> *Id.*

<sup>520</sup> *Id.*, citing Matthew 5:43-44.

<sup>521</sup> KANT, *supra* 113 at 14.

<sup>522</sup> *Id.* at 15.

<sup>523</sup> *Id.* at 15-16.

<sup>524</sup> *Id.* at 16.

<sup>525</sup> *Id.*

<sup>526</sup> *Id.* at 17.

<sup>527</sup> *Id.* at 26.

<sup>528</sup> *Id.* at 27.

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

<sup>530</sup> *Id.* at 28.

<sup>531</sup> *Id.* at 30.

<sup>532</sup> *Id.*

<sup>533</sup> *Id.* at 30.

<sup>534</sup> *Id.* at 33.

Second, Kant wrote, morality has “only a single categorical imperative” which is to “act only according to that maxim through which you can at the same time will that it become universal law,” the test of this he set out in the following terms:

“In every transgression of duty we actually do not will that our maxim should become a universal law,” but “we take the liberty of making an *exception* to it for ourselves, or (just for this once)...” follow our inclination.<sup>535</sup> Thus, even though our actions may not reflect this, “it still proves that we actually acknowledge the validity of the categorical imperative,” permitting ourselves exceptions that seem “immaterial.”<sup>536</sup> He referred to this as duty, only relevant to categorical imperatives. Unlike nature and reasoning, for Kant, duty was objective.<sup>537</sup> The focus is not on what happens, but “on what ought to happen, even if it never does.”<sup>538</sup>

For Kant, “objective practical law is discernible only by the wills of rational beings who have the capacity to use their will.” While subjective grounds for decisions rely on incentives, objective decisions are motivated on grounds “that hold for all rational beings.”<sup>539</sup> The categorical imperative, with regard to human will is “an objective principle of will,” and so “a universal practical law.”<sup>540</sup> For Kant, “rational nature exists as an end in itself,” and when “everyone represent[ed] themselves,” the ground becomes “an objective principle.”<sup>541</sup>

Thus, the third principle is “all maxims are rejected that are not consistent with the will’s own universal legislation.”<sup>542</sup> For Kant the will is subject to law, but it is also self-legislating. Further, each person, “being universally legislating through all the maxims of its will,” judges “itself and its actions from the point of view of a kingdom of ends,” being “a union of several rational beings through common laws.”<sup>543</sup> In this kingdom, “all rational beings stand under the law that each of them is to treat itself and all others *never merely as a means*, but always *at the same time as an end in itself*.”<sup>544</sup> The ideal then is a kingdom of ends—rational beings belonging to this kingdom—legislating in it and/or subject to the laws.<sup>545</sup> For Kant, “morality consists in referring all actions to the legislation by which alone a kingdom of ends is possible.”<sup>546</sup>

The solution to payola, in the absence of laws, might be discovered through the lens of Immanuel Kant’s categorical imperative.

## **XI. Ethics of Payola and Bribery**

The 2011 Code of Practice for Jamaican Journalists and Media Organizations prohibits journalists from accepting “monetary gifts or favours of any kind from any source...seeking or likely to seek influence, publication or non-publication or special placement of any story, article,

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<sup>535</sup> *Id.* at 36.

<sup>536</sup> *Id.* at 37.

<sup>537</sup> *Id.* at 38.

<sup>538</sup> *Id.* at 39.

<sup>539</sup> *Id.* at 40.

<sup>540</sup> *Id.* at 41.

<sup>541</sup> *Id.*

<sup>542</sup> *Id.* at 43.

<sup>543</sup> *Id.* at 45.

<sup>544</sup> *Id.*

<sup>545</sup> *Id.*

<sup>546</sup> *Id.* at 46.

video, or photograph.”<sup>547</sup> The Code also requires “full and accurate disclosure where a commercial or public body makes a financial or in-kind contribution towards coverage, publication or broadcast of an event or issue.”<sup>548</sup> The remedy provided for a breach is a right of appeal to the Media Complaints Council for redress.<sup>549</sup> However, there is today no such council and some disagreement about what such a council should look like.<sup>550</sup> The code governs specifically “print and electronic media and all practitioners whose duties include the gathering, editing, processing and dissemination of news and other public information” and it is, therefore, questionable whether it would bind disc jocks and their stations.<sup>551</sup>

Even in the absence of laws against payola, there are laws against bribery. Libertarian economist Murray Rothbard, while not necessarily agreeing with the position that bribes should be outlawed, suggests that in a transaction involving bribery, the person who pays the bribe is not acting illegally, but the taker of the bribe is.<sup>552</sup> Speaking specifically about payola, Rothbard sees the process of playing music because money has been exchanged as a betrayal of the public’s trust “in the disc jockey’s sincerity.”<sup>553</sup> Nonetheless, because neither the public nor the record company had a property right in the program, neither had an action against the disc jockey. However, by engaging in pay-for-play, “the disc jockey violated his contractual obligation to his employer”—the station owner or the program sponsor—to whom he did owe an obligation to play records that, in his opinion, would fit the public’s taste.<sup>554</sup>

Gasparini, a one-time disc jock in a small-town radio station, notes that the “self-gratifying acceptance of a bribe” violated Kant’s categorical imperative and was, thus “morally repugnant” and that such gifts should be rejected, regardless of any long-term argument of greater public benefit.<sup>555</sup> On the other hand, ethical relativists, who see ethics as “situation sensitive” and “relative to the individual and culture,” rather than having one universal response,<sup>556</sup> suggest “while bribery is a criminal offense in Canada [and Jamaica] as well as an ethical transgression, it is a normal and expected way of conducting business in many EDCs.”<sup>557</sup>

One anonymous Jamaican producer saw payola as a necessary evil. In the context of a risky music industry, producers often spend more than J\$1.5 million to compose a song, pay

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<sup>547</sup> Code of Practice for Jamaican Journalists and Media Organizations § 13 b. (Ratified Aug. 8, 2011), available online at [pressassociationjamaica.org/wp-content/uploads/2010/09/Code\\_for\\_Media\\_Practitioners-Ratified-8.8.11.pdf](http://pressassociationjamaica.org/wp-content/uploads/2010/09/Code_for_Media_Practitioners-Ratified-8.8.11.pdf) (last visited May 28, 2020).

<sup>548</sup> Code of Practice for Jamaican Journalists and Media Organizations § 13 c. (Ratified Aug. 8, 2011).

<sup>549</sup> Code of Practice for Jamaican Journalists and Media Organizations § iv (Ratified Aug. 8, 2011).

<sup>550</sup> See variously Alicia Sutherland, *PAJ wants media complaints council*, JAMAICA OBSERVER, March 30, 2015, available at [www.jamaicaobserver.com/news/PAJ-wants-media-complaints-council\\_18673632](http://www.jamaicaobserver.com/news/PAJ-wants-media-complaints-council_18673632); Andrine Davidson, *Time Ripe for Media to set up Complaints Council—Minister Falconer*, JIS, Nov. 26, 2013, available at <https://jis.gov.jm/time-ripe-media-set-complaints-council-minister-falconer/>; Clare Forrester, *Should a media complaints commission be set up in Jamaica?* JAMAICA OBSERVER, Dec. 12, 2012, available at [www.jamaicaobserver.com/columns/Should-a-media-complaints-commission-be-set-up-in-Jamaica-\\_13186353](http://www.jamaicaobserver.com/columns/Should-a-media-complaints-commission-be-set-up-in-Jamaica-_13186353) (all sites last visited May 28, 2020).

<sup>551</sup> Code of Practice for Jamaican Journalists and Media Organizations § 13 c. (Ratified Aug. 8, 2011).

<sup>552</sup> MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* 29 (1998).

<sup>553</sup> *Id.* at 129.

<sup>554</sup> *Id.* at 130. On the other hand, for Rothbard, if the record company had bribed the employer, there would be no violation of property rights.

<sup>555</sup> GASPARINI, *supra* note 110, *citing* OTFRIED HÖFFE, *IMMANUEL KANT* (1992).

<sup>556</sup> GASPARINI, *supra* note 110 at 7, *citing* Hugh LaFollette, *The Truth of Ethical Relativism*, 1991 J. Soc. PHIL. 146.

<sup>557</sup> GASPARINI, *supra* note 110 at 7, *quoting* David J. Doorey, *International business and globalization*, in W. PETER KISSICK, *BUSINESS ETHICS: CONCEPTS, CASES AND CANADIAN PERSPECTIVES* 175 (2012).

artistes to voice it, and pay for studio time, airplay was necessary to recoup expenses.<sup>558</sup> “Let’s face it, the music industry has become so demanding, talent alone can no longer propel an artiste. Sometimes you find that a disc jockey will have your tune for all three weeks without ever playing it once—what must the producer do? He wants to make back his money so he or she pays off the disc jockey.”<sup>559</sup>

## **XII. Other Relevant Laws**

In 2007, then Minister of Tourism Aloun Ndombet Assamba, while demurring from labelling payola as illegal, and emphasizing the industry’s responsibility to address the problem, pointed to the Fair Competition Act<sup>560</sup> as an appropriate law to address payola.<sup>561</sup> Under the Fair Competition Act,<sup>562</sup> the Fair Trading Commission<sup>563</sup> investigates allegations of unfair trade by Jamaican businesses,<sup>564</sup> and, on its own initiative or at the request of any “adversely affected” person, “the abuse of a dominant position by any enterprise.”<sup>565</sup> The Commissioner also helps organizations to develop and promote required standards of fair practice.<sup>566</sup>

Since disc jocks who accept payola also promote music on the basis of a bribe, rather than their considered opinion that the music is good, they could arguably be investigated. Under the act where a person “in pursuance of trade and for the purpose of promoting, directly or indirectly, the supply or use of goods or services or for the purpose of promoting, directly or indirectly, any business interest,” makes a false or misleading representation to the public or one that “is likely to be misleading in a material respect.”<sup>567</sup> Arguably, by not revealing to the public that a particular song is being played because of a financial contribution made to the disc jock, rather than the music’s own value, the program misleads consumers to believe something about the song that is not true. Thus, arguably, the disc jock could be liable under the Fair Competition Act for false advertising. Guilty persons pay damages “for any loss caused to any other person by such conduct.”<sup>568</sup> This is one possible solution to payola.

Dr. Dunn has also identified another statute that could be helpful — the Protected Disclosure Act.<sup>569</sup> This act, aimed at encouraging the disclosure of improper conduct made in the public interest and in good faith,<sup>570</sup> protects employees who make such disclosure from

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<sup>558</sup> Henry, *supra* note 2.

<sup>559</sup> *Id.*

<sup>560</sup> Act 9 of 1993; amended by Act 22 of 2001.

<sup>561</sup> Mel Cooke, *Assamba points to ‘payola’ redress*, STAR ONLINE, April 27, 2007 (last visited March 21, 2011, no longer accessible online).

<sup>562</sup> (Act 9 of 1993; 22 of 2001).

<sup>563</sup> Fair Competition Act § 4(1) (Act 9 of 1993; amended by Act 22 of 2001).

<sup>564</sup> Fair Competition Act § 5(1)(a) (Act 9 of 1993; amended by Act 22 of 2001).

<sup>565</sup> Fair Competition Act § 5(1)(a) & (d) (Act 9 of 1993; amended by Act 22 of 2001).

<sup>566</sup> Fair Competition Act § 5(2)(c) (Act 9 of 1993; amended by Act 22 of 2001). The Commissioner also guides businesses and consumers on their relevant rights and obligations in relation to the statute (§ 5(2)(a)(i)); compile and publish studies, reports and information “about matters affecting the interests of consumers;” (§ 5(2)(b)). The Commission can hear evidence of breaches, summon witnesses, call for documents, administer oaths; require affidavit evidence, and adjourn investigations (§ 7(1)(a)-(e)); and under warrant, authorize the entry and search of any premises and the inspection and removal of documents for copying or otherwise (§ 10(3)).

<sup>567</sup> Fair Competition Act § 37(1)(a) (Act 9 of 1993; amended by Act 22 of 2001).

<sup>568</sup> Fair Competition Act § 48(1) (acts 9 of 1993; amended by Act 22 of 2001). Actions must be brought within 3 years (§ 48(2)) and subject to appeal before a judge in chambers (§§ 49 & 50).

<sup>569</sup> (No. 3-2011).

<sup>570</sup> Protected Disclosure Act § 3(a) (No. 3-2011).

“occupational detriment.”<sup>571</sup> The statute appears to provide immunity for persons involved in payola who voluntarily decide to confess to receiving bribes, and also to people who have knowledge of other person’s bad behavior. The statute could be a valuable means of regulating payola in a context where it is difficult to identify incidents of same.

### **XIII. Other Efforts**

Although supportive of the BCJ’s proposed legislation, JaRIA believes that the industry must set sustainable standards for the business operation for itself, alongside a system for self-regulation. JaRIA suggests regulation could include licensing and monitoring entities engaged in chart production and promotion; setting limits around the number of times a song can be played in a single 2- to 3-hour program by a single on-air personality. JaRIA suggests on-air personalities, themselves, could be subject to licensing, revocable when there was an infringement. The organization also suggests the establishment of a complaints unit to address payola issues.<sup>572</sup>

Music producer Dennis Howard also suggests that radio stations should employ a music director to implement regulations and guidelines for managing music content on the radio. The music director would also be “responsible for interacting with the record company reps, auditioning new music, making decisions (sometimes in conjunction with the programs director) about which songs get airplay, how much and when.”<sup>573</sup> The music director would also determine the rotation of songs and programs. This would prevent the personality disc jocks from controlling the decision process, leaving less room for payola abuse.<sup>574</sup> He cites examples of Irie FM and Zip FM, both of which implemented play-lists and quality guidelines, significantly reducing incidents of payola. He notes, if not ending payola, this “certainly can make the playing field easier to navigate and increase the possibility of detecting payola.”<sup>575</sup>

### **XIV. The National Campaign against Payola**

The BCJ has the ability and mandate to educate the public about payola, even in the absence of laws. In 2014, the Executive Director of the BCJ, Cordel Green, announced, thanks to a “rigorous campaign to clamp down on payola and make people more aware of it and its effects,” it appeared to have abated.<sup>576</sup> While there was no scientific data to support the downturn, he notes that he had not received “the same volume of anecdotal evidence and complaints about payola.”<sup>577</sup> Acknowledging that payola might never be fully eradicated, he was encouraged by the campaign’s success. “The entire country is sensitized to payola. It is now on the lips of everybody and it is being condemned broadly.”<sup>578</sup> He believes “the more the issue is spotlighted, the more people will be less bold.”<sup>579</sup>

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<sup>571</sup> Protected Disclosure Act § 3(c) (No. 3-2011). Such disclosure should be made in writing (§ 6(1)), or reduced to writing within 24 hours of oral disclosure (§ 6(2)); or made in accordance with standards set out by a company for making such disclosure where such standards exist (§ 13(a)).

<sup>572</sup> Webley, *supra* note 96.

<sup>573</sup> Howard, *supra* note 3 at 5.

<sup>574</sup> *Id.* at 6.

<sup>575</sup> *Id.* Howard also encourages the need to educate the public and media consumers to allow them to better appreciate and understand music. While this is not the subject of this paper, the author is wary of this advice because of its bourgeois tendencies. *Id.*

<sup>576</sup> Sadeke Brooks, ‘Say No to Payola’ Campaign Paying Off, JAMAICA GLEANER ONLINE, Sept. 21, 2014 (last visited Feb. 28, 2019, no longer accessible online).

<sup>577</sup> *Id.*

<sup>578</sup> *Id.*

<sup>579</sup> *Id.*

Artiste Spice (Grace Hamilton) commended the BCJ. “I think there have been improvements ‘cause I haven’t been hearing about [payola] as much as before. In a sense, I can commend the BCJ because I am seeing the ads and it keeps reminding people about payola.”<sup>580</sup> But Twin of Twins’ Patrick Gaynor does not believe payola has decreased, but that people have stopped reporting it. “I think it has become the norm, people have come to see it as a reality. It is not that it [sic] ease off or change. People are seeing it as natural as breathing where the music industry is concerned.”<sup>581</sup>

## XV. Marketing Music in the 21<sup>st</sup> Century

One way in which the campaign is working is that young artistes no longer feel compelled to engage in payola to have their music heard. One artiste, Chevaughn, doesn’t pay payola anymore. “Now I’ve learnt greater business skills when it comes to getting your thing out there. A lot of persons turn to payola for a quick hype, but every DJ knows when a song is really good,” he said in a *Gleaner* interview.<sup>582</sup> Chevaughn has found new marketing alternatives to payola. This includes “distributing CDs, doing free dubplates, free performances” and sharing music on social media. “In you promoting yourself, other DJs will hear you and start playing you. Let your music speak for you and DJs will respect you,” he said. “The more heart people see you put into your thing, the more people will respect you.”<sup>583</sup>

Terry Lyn also markets her music online rather than pay the piper.<sup>584</sup> She manufactured 1,000 copies of her debut album, “Kingston Logic 2.0” and distributed them throughout the country, particularly in impoverished communities. Each copy carries an anti-payola message: “My music is about the people, for the people, it’s about change. We will not pay media a ransom to play this for people, we are instead paying for phree [sic] copies for you.”<sup>585</sup>

While lauding BCJ, Dennis Howard is reluctant to blame payola for either the lack of creativity or the corruption in the industry. Instead, for Howard, payola was “simply a part of a broader problem of corruption in the wider society,” in both the private and public sectors.<sup>586</sup> Howard believes the problem of payola is becoming “irrelevant” among people in the 15 to 40 age range who are “totally immersed in technology” with lifestyles “intertwined with cell phones, laptops, videogames, text messages, e-mails, Facebook, BlackBerry messenger; iPods and iPads,” rather than free-to-air broadcasting.<sup>587</sup> Thus, “technology and competition have created a paradigm shift that put traditional broadcasters at the lower end of the ‘cool and hip’ totem pole.” Instead, people “listen to what they want, when they want to.”<sup>588</sup> New talent has emerged, despite pay-for-play, through alternative media, and, Howard notes, “A song of poor quality will remain just that, no matter how much is paid for play.”<sup>589</sup>

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<sup>580</sup> *Id.*

<sup>581</sup> *Id.*

<sup>582</sup> *Id.*

<sup>583</sup> *Id.*

<sup>584</sup> Terry Lyn’s *anti-payola Logic*, ACTIVE VOICE, March 15, 2009, <https://anniepaulactivevoice.blogspot.com/2009/03/terry-lynns-anti-payola-logic.html> (last visited April 4, 2019).

<sup>585</sup> *Id.*

<sup>586</sup> Howard, *supra* note 3 at 3.

<sup>587</sup> *Id.* at 6.

<sup>588</sup> *Id.* at 6-7.

<sup>589</sup> *Id.* at 7.

Marcia Forbes agrees with Howard, that “technology will be the great equalizer in our battle against payola.”<sup>590</sup> She commends Gyptian (Windel Edwards), a young artiste rarely heard on radio, but doing well on iTunes.<sup>591</sup>

This is consistent with recent studies that have found increased radio play does not generally boost record sales.<sup>592</sup> A 2010 New Zealand study found radio airplay had little effect on the sale of digital media, indicating that payola may not increase sales for average songs.<sup>593</sup> On the other hand, a 2014 study found that, while radio play did have a positive impact on the sale of both albums and songs, the relationship between social media and album sales was insignificant; and with sale of songs, negative.<sup>594</sup> This might be explained by the fact that social media is a platform for sharing music, negating the need to purchase the song.<sup>595</sup> Also, younger consumers purchase less music than older audience, who are replacing their LPs with CDs.<sup>596</sup> Thus, payola is beginning to lose currency as an issue for the younger generation.

Gasparini believes that Kant’s theory could accommodate a more forgiving posture since, despite Kant’s anti-utilitarian stance, he might be open to a universal law allowing “pay-for-play across the media industry.”<sup>597</sup> This is because pay-for-play could allow “more inclusive programming.”<sup>598</sup> For him, payola “can expand cultural diversity, awareness and tolerance by allowing new multi-racial and ethnic artists a competitive chance at airplay.”<sup>599</sup> Thus, “payola ‘combats’ monopolistic ‘conformity’ and discrimination in larger recording companies.”<sup>600</sup>

Dennis Howard questions whether pay for play “promoted only poor quality at the expense of good songs,” noting that “this presupposes that producers of good quality songs don’t engage in payola.”<sup>601</sup> He doesn’t agree that the industry is suffering under the weight of poor quality music. For him, broadcast media never played a definitive role in promoting Jamaican music since “the evidence suggests that many Jamaican recordings which are now considered classics at no time enjoyed any steady rotation on radio and were never placed on any of the many media record charts.”<sup>602</sup> Instead, in the context of a corrupt system, “the emergence of the Gen-Tek Nation operates in a more democratic milieu, resulting in the continuing decline in the

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<sup>590</sup> Forbes, *supra* note 92.

<sup>591</sup> *Id.*

<sup>592</sup> See generally, Stan J. Liebowitz, *Don’t Play it Again Sam: Radio Play, Record Sales, and Property Rights*, (Jan. 5, 2007), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=956527](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=956527) (last visited May 4, 2020); Stan J. Liebowitz, *The Elusive Symbiosis: The Impact of Radio on the Record Industry*, 1 REV. OF ECON. RES. IN COPYRIGHT ISSUES 93 (2004).

<sup>593</sup> Mehnaz Bandoowala, *Radio airplay, digital music sales and the fallacy of composition in New Zealand*, 2010 SOC’Y FOR ECON. RES. ON COPYRIGHT ISSUES 7.

<sup>594</sup> Sanjeev Dewan & Jui Ramaprasad, *Social Media, Traditional Media & Music Sales*, 38 MIS Q. 101 (2014).

<sup>595</sup> *Id.*

<sup>596</sup> Martin Peitz & Patrick Waelbroeck, *Digital Music*, in INDUSTRIAL ORGANIZATIONS AND THE DIGITAL ECONOMY 95 (Gerhard Illing & Martin Peitz eds., 2006).

<sup>597</sup> GASPARINI, *supra* note 110, at 9.

<sup>598</sup> *Id.* at 9, citing D. Bruce Johnsen, *The Ethics of “commercial bribery”: Integrative social contract theory meets transaction cost economics*, J. BUS. ETHICS 88, 791 (2009).

<sup>599</sup> GASPARINI, *supra* note 110, at 9.

<sup>600</sup> *Id.*, citing TYLER COWEN, IN PRAISE OF COMMERCIAL CULTURE (2009); ERIN S. SHIN, THE EVOLUTION AND EFFECTS OF PAYOLA ON POPULAR CULTURE, Senior Thesis, Texas Tech. University (2004), available at file:///C:/Users/Owner/AppData/Local/Packages/Microsoft.MicrosoftEdge\_8wekyb3d8bbwe/TempState/Downloads/31295019381150%20(1).pdf (last visited May 3, 2020);

<sup>601</sup> *Id.*

<sup>602</sup> *Id.* at 8.

monopoly status of traditional broadcast media.” Thus, he questions in relation to payola “do we need to criminalize or do we need to educate, regulate, and manage more effectively?”<sup>603</sup>

## **XVI. Conclusion**

The author dismisses Gasparini’s claim that legitimizing payola will benefit disadvantaged Jamaican musicians. Such laws can only be beneficial to producers and artistes who have already acquired the financial wherewithal to pay the piper. Also, the evidence continues to be that payola has had a negative effect on the music industry, the quality of music produced and, possibly, the international stature of Jamaican music.<sup>604</sup> The law proposed by the BCJ is one approach to addressing the issue of payola.

However, Parliament has not passed the legislation. Maybe because laws already exist that can be used to prosecute such cases; or Parliament wants to leave the job of regulating the industry to the BCJ; or Parliament does not see such laws as effective in abating payola.

It is true that laws criminalizing payola have not been effective in stemming incidents in the U.S. Such laws do not, for example, address the difficulty in detecting incidents that could lead to actual prosecutions. The author agrees with Howard that the corruption at the base of payola is societal. But this does not release the government from its responsibility to address this recognized corrupt behavior. In the absence of laws, we need to find a solution to payola.

Viewing the broadcast station disc jocks as operating within Kant’s kingdom of ends, the question arises whether the behavior of charging musicians money in order to play their music truthfully reflects an understanding of others as an end in themselves? Bribery is not only illegal, but it is also unethical. It may be true that only the person who accepts the bribe is in breach and this breach is of a contract duty owed only to his employers, rather than the audience at law. But isn’t there a stronger ethical argument that there is a greater responsibility to the public? There are at least two reasons to argue this position.

The first reason why disc jocks are accountable to the public is the scarce spectrum on which content is broadcast. The author disagrees with Rothbard’s position that consumers have no property right in radio programs. Because radio is a public trust, operating on a scarce spectrum, consumers do have an interest in what is published. Unlike the right to publish a newspaper, there is no constitutional right to own a radio station. But, the space in which broadcasting is done belongs to the public and is regulated on their behalf by the government in the public’s best interest. Forcing members of the public to pay a ransom if they want their music played is not in the public’s best interest.

Pursuant to Kant’s deontological argument, the government has a *duty* to ensure that broadcast licensees operate in the public’s best interest. This duty is not based on the rationale of ensuring only good music is played, but on the fact that there is in place a trust for the general public and failing to respond to the manipulation of the public by playing music for money would be a breach of this trust, a dereliction of *duty*. The BCJ has the duty to regulate stations and, where such conflict is found, the mechanism needs to be in place to take away licenses from offending stations that are aware of and turn a blind eye to payola incidents by its employees.

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<sup>603</sup> *Id.*

<sup>604</sup> See generally, Webley, *supra* note 96.

But there is a second and more important ethical issue at stake. Each time a record is played, and another is not, a representation is made about the worth of one over the other. Thus, each time a piece of music is played because money has passed, and another piece of music is not played because its authors refuse to pay payola, there is a misrepresentation by DJs to the public about the intrinsic value of the payola piece and of the other rejected piece.

The Kantian response, however, will focus less on the outcome of this misrepresentation than on the actual ethical implications of the act. A misrepresentation is a lie. Consistent with Kant's categorical imperative, there should be a universally understood perspective that honest disc jocks *ought* to choose music because of its intrinsic value, rather than because of personal financial incentive. Disc jocks are paid to select music by their bosses on this basis, but also the audience tunes in, trusting that they will be listening to the disc jocks' true perspective, untainted by personal greed. If it is argued that one of the roles of the jock is to educate the public about the "good" music available, by allowing his choice to be dictated by financial gain, he has betrayed the trust of the other persons in the kingdom who rely on his honesty, and manipulated their perspectives, tainting the process of discovering good music.

While there is no constitutional right to have any content played on radio, the reason for promotion or non-promotion of a particular song should be based on the quality of the song, rather than financial gains to the player. The author believes that payola distorts the Jamaican music industry every time it happens and affects the quality, marketability and, possibly, the international potential of the product. This misrepresentation then, could have dire consequences.

There are real ethical implications of payola and a need to regulate it. However, piecemeal regulation by individual broadcasting companies to govern incidents of payola internally, are not sufficient. The only way to truly address the issue of payola is through an industry-wide response. The industry needs to put in place an ethical code of conduct to govern how disc jocks operate, outlawing payola and bribery. However, unlike the 2011 Code of Practice, the code should include a complaints council of some sort so that there is an avenue for appeals.

In the absence of an ethical code, the Fair Competition Act provides a possible venue for aggrieved artistes to find relief. However, educating artistes about their rights under, and how to use these laws, could be very time-consuming and cumbersome—and their application to broadcasting, questionable.

The broadcasting sector is regulated by the BCJ, and regulation of unfair practices such as payola should be within the purview of this body, rather than forcing affected artistes to approach another body for relief. The need for regulation in the area of payola is clear, but the burden of such regulation should fall to a body that is already charged with a greater understanding and duty to engage in research relevant to the industry. The BCJ needs to be enabled to police unethical practices relevant to the industry.

In the face of inaction by Parliament, the BCJ is educating musicians and the community about payola and its effects. This campaign has seen success in stemming the number of reported incidents of payola. The wider awareness created by this Campaign has led artistes to seek alternative marketing methods, which is a good development.

New media provides innovative new ways of marketing music. In the era of social media the consumer gets to call the tune. But this does not eliminate the need for there also to be truth

on the mainstream media. While alternative media as an answer to payola may be strongly persuasive for younger artistes, there are a number of older artistes who may not be able to engage in these new types of marketing strategies. Thus, the Internet does not remove the responsibility for the broadcast industry to self-monitor. Music artistes' role is to produce music, where the music reaches the necessary standards and is good, it should be played on the radio stations, free of cost, so the public that owns the space can be exposed to it. We should not be forced to attend to alternative media to find our music.

A sound and unbiased system of broadcast radio should complement, rather than be replaced by, social media as a place to search for music. The mainstream media can play a mediating role in educating our consumer to understand music, rather than being dismissed as irrelevant. The Broadcasting Commission and the music and the broadcasting fraternities must keep the evils associated with payola in the mind of the public and hold disc jocks accountable.

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