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# FIRST AMENDMENT LAW REVIEW

VOLUME 20

ISSUE 2

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# PHYSICIANS WHO DISSEMINATE MEDICAL MISINFORMATION: TESTING THE CONSTITUTIONAL LIMITS ON PROFESSIONAL DISCIPLINARY ACTION

CARL H. COLEMAN\*

*There have been increasing calls in the medical community for revoking the licenses of physicians who disseminate medical misinformation, such as false claims about the safety of vaccines or the effectiveness of nonpharmaceutical measures to prevent COVID-19. While no licensing board has yet imposed penalties on physicians for disseminating medical misinformation, there is evidence that boards are using the threat of disciplinary action to exert pressure on physicians who make public statements that conflict with professional standards of care. This Article argues that, in most cases, imposing disciplinary penalties on physicians for speech that takes place outside a physician-patient relationship would have dangerous policy implications and would almost certainly be unconstitutional. However, drawing on examples from the regulation of the legal profession, it argues that disciplinary actions would be appropriate under one set of circumstances: if a board can establish that a physician has disseminated information that she knows to be false or with reckless disregard as to whether it is true—i.e., with the “actual malice” standard applied to defamation cases brought by public officials and public figures. The Article considers the implications of this standard for different factual scenarios.*

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\* Professor of Law, Seton Hall Law School. I would like to thank Gail Coleman, Thomas Healy, Claudia Haupt, Tara Ragone, and Brian Sheppard for helpful comments on previous versions of this Article.



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## INTRODUCTION

The World Health Organization has characterized the proliferation of medical misinformation as an “infodemic,” with consequences ranging from jeopardizing the efficacy of public health campaigns to “threatening long-term prospects for advancing democracy, human rights and social cohesion.”<sup>1</sup> Of particular concern is medical misinformation disseminated by licensed physicians, whose professional credibility gives their voices inordinate weight.<sup>2</sup> Within the medical community, there have been increasing calls for revoking these physicians’ medical licenses or subjecting them to other disciplinary penalties.<sup>3</sup> While no licensing board has yet imposed penalties on a physician for disseminating medical misinformation to the public,<sup>4</sup> there is evidence that boards are using the threat of disciplinary action to exert pressure on physicians who make public statements that conflict with professional standards of care.<sup>5</sup>

In this Article, I argue that, in most cases, imposing disciplinary penalties on physicians for speech that takes place outside a physician-patient relationship would almost certainly be unconstitutional. Even if courts agree that such speech can lead to harmful public health consequences, they are unlikely to view disciplinary actions as the least restrictive way to respond to that risk.<sup>6</sup> Nor are they likely to agree that limitations on public speech can be justified under licensing boards’ authority to regulate professional conduct<sup>7</sup> or to set conditions on how the benefits of a medical license are used.<sup>8</sup> In addition, giving licensing boards broad authority to regulate the content of physicians’ public statements would have dangerous policy implications, as it could inhibit physicians from raising legitimate concerns about existing standards of care.<sup>9</sup>

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<sup>1</sup> Joint Statement, World Health Org. et al., *Managing the COVID-19 Infodemic: Promoting Healthy Behaviours and Mitigating the Harm from Misinformation and Disinformation* (Sept. 23, 2020), <https://www.who.int/news/item/23-09-2020-managing-the-covid-19-infodemic-promoting-healthy-behaviours-and-mitigating-the-harm-from-misinformation-and-disinformation>.

<sup>2</sup> Although this Article focuses on physicians, the analysis would also apply to other licensed healthcare professionals, such as nurses or physician assistants.

<sup>3</sup> See *infra* Part II.A.

<sup>4</sup> See *infra* notes 69–74 and accompanying text.

<sup>5</sup> See *infra* notes 76–77 and accompanying text.

<sup>6</sup> See *infra* note 87 and accompanying text.

<sup>7</sup> See *infra* Part III.B.

<sup>8</sup> See *infra* Part III.C.

<sup>9</sup> See *infra* notes 131–136 and accompanying text.

However, drawing on examples from the regulation of the legal profession, I argue that disciplinary actions should survive constitutional scrutiny under one set of circumstances: if a board can establish that a physician has disseminated information that she knows to be false or with reckless disregard as to its truthfulness—i.e., with the “actual malice” standard applied to defamation cases brought by public officials and public figures.<sup>10</sup> Physicians who knowingly or recklessly misrepresent medical information do more than simply encourage people to engage in unhealthy behavior; they also cause the independent harm of undermining the public’s trust in the medical profession’s commitment to truthfulness. States have a compelling interest in preserving the public’s ability to trust in physicians, and disciplining physicians who knowingly or recklessly tell falsehoods to the public is a narrowly tailored means of achieving this goal.

Part I of this Article provides examples of physicians who have disseminated false or misleading medical information to the public, including physicians who have fomented fears about vaccine safety and efficacy, undermined public health measures to reduce the spread of COVID-19, and promoted unproven medical products. Part II reviews calls for disciplining physicians who disseminate medical misinformation, as well as existing professional standards and enforcement activities. Part III considers three potential analytical frameworks for assessing the constitutionality of professional discipline as a response to physicians who disseminate medical misinformation: disciplinary penalties as content-based limitations on speech, disciplinary penalties as the regulation of professional conduct, and disclaimer requirements as conditions on the use of a medical license. Based on this analysis, I conclude that disciplinary actions against physicians who disseminate medical misinformation can be justified in only one set of circumstances: when physicians disseminate misinformation with knowledge that it is false or with reckless disregard of whether it is true.

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<sup>10</sup> See *infra* notes 107–118 and accompanying text.

## I. EXAMPLES OF PHYSICIAN DISSEMINATION OF MEDICAL MISINFORMATION

Medical misinformation has been defined as “information that is contrary to the epistemic consensus of the scientific community regarding a phenomenon.”<sup>11</sup> These claims can be spread either negligently or with a deliberate intent to deceive.<sup>12</sup> A large percentage of medical misinformation comes from individuals or entities with economic or political incentives to promote untruthful information.<sup>13</sup> Physicians are a relatively uncommon source of medical misinformation, but because of their professional status their claims tend to receive inordinate attention. This Part reviews some of the most prominent examples.

### A. Fomenting Fears about Vaccine Safety and Efficacy

Vaccines are widely regarded as “one of modern medicine’s greatest success stories.”<sup>14</sup> They are responsible for eradicating smallpox<sup>15</sup> and nearly eradicating polio,<sup>16</sup> as well as substantially reducing the prevalence of once-common childhood diseases like

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<sup>11</sup> Briony Swire-Thompson & David Lazer, *Public Health and Online Misinformation: Challenges and Recommendations*, 41 ANN. REV. PUB. HEALTH 433, 434 (2019); see also Wen-Ying Sylvia Chou et al., *Where Do We Go from Here: Health Misinformation on Social Media*, 110 AM. J. PUB. HEALTH S273, S273 (2020) (defining health misinformation as “any claim of fact that is false based on current scientific consensus”). Some commentators have called for a broader definition of misinformation, arguing that requiring information to deviate from a scientific consensus sets too high a bar. For example, in a 2021 report, the U.S. Surgeon General defined misinformation as “information that is false, inaccurate, or misleading according to the best available evidence at the time,” noting that “claims can be highly misleading and harmful even if the science on an issue isn’t yet settled.” DEP’T OF HEALTH & HUMAN SERVICES, CONFRONTING HEALTH MISINFORMATION: THE U.S. SURGEON GENERAL’S ADVISORY ON BUILDING A HEALTHY INFORMATION ENVIRONMENT 4, 17 (2021).

<sup>12</sup> See Yuxi Wang et al., *Systematic Literature Review on the Spread of Health-Related Misinformation on Social Media*, SOC. SCI. & MED., November 2019, at 2 (distinguishing between “misinformation,” which “involves information that is inadvertently false and is shared without intent to cause harm,” from “disinformation,” which “involves false information knowingly being created and shared to cause harm”).

<sup>13</sup> See Swire-Thompson & Lazer, *supra* note 11, at 438.

<sup>14</sup> *Immunization*, WORLD HEALTH ORG., (Dec. 5, 2019), <https://www.who.int/news-room/facts-in-pictures/detail/immunization>.

<sup>15</sup> See *History of Smallpox*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/smallpox/history/history.html> (Feb. 20, 2021).

<sup>16</sup> See *History of Polio*, GLOB. POLIO ERADICATION INITIATIVE, <https://polioeradication.org/polio-today/history-of-polio/> (last visited July 25, 2021) (noting that, thanks to a global vaccine campaign, “wild poliovirus continues to circulate in only two countries, and global incidence of polio cases has decreased by 99%”).

measles, mumps, and rubella.<sup>17</sup> In all states, specific childhood vaccines are required as a condition of school enrollment, except for children eligible for an exemption.<sup>18</sup>

Despite the proven value of vaccines, a small but vocal minority of the public opposes vaccination, often based on the incorrect belief that vaccines are harmful.<sup>19</sup> Based on these beliefs, some parents seek exemptions from school vaccination requirements, while others avoid the requirements by home-schooling their children.<sup>20</sup> Communities with high levels of unvaccinated children are more likely to experience outbreaks of vaccine-preventable diseases.<sup>21</sup> For example, in 2019, 1,282 cases of measles were confirmed in 31 states, with the majority occurring in communities with groups of unvaccinated people.<sup>22</sup>

While most physicians recognize the value of vaccination,<sup>23</sup> a small minority has fueled anti-vaccination sentiments with

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<sup>17</sup> See Bettina Bankamp et al., *Successes and Challenges for Preventing Measles, Mumps and Rubella by Vaccination*, 34 CURRENT OP. VIROLOGY 110, 110 (2019) (“MMR vaccine has an outstanding safety record, and high coverage with MMR has led to the elimination of endemic measles and rubella in the US and to a substantial reduction in the number of mumps cases compared to the pre-vaccine era.”).

<sup>18</sup> For a state-by-state summary of school immunization requirements and exemptions, see *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT’L CONF. OF STATE LEGISLATURES, (April 30, 2021), <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx#Table1>.

<sup>19</sup> See Cephra McKee & Kristin Bohannon, *Exploring the Reasons Behind Parental Refusal of Vaccines*, 21 J. PEDIATRIC PHARMACOLOGY THERAPEUTICS 104, 107–08 (2016).

<sup>20</sup> See Soumya Karlamangla, *Parents Who Won’t Vaccinate Their Kids Turning to Home-schooling in California, Data Show*, L.A. TIMES (July 23, 2019, 5:00 AM), <https://www.latimes.com/california/story/2019-07-22/california-homeschool-strict-vaccination-laws> (noting a steep rise in unimmunized home-school children after California eliminated personal and philosophical objections to vaccine requirements in 2015).

<sup>21</sup> See Varun K. Phadke et al., *Association Between Vaccine Refusal and Vaccine-Preventable Diseases in the United States: A Review of Measles and Pertussis*, 315 JAMA 1149, 1155 (2016) (discussing studies suggesting “an association between high rates of vaccine exemption and the sustained transmission of vaccine-preventable diseases in the community”).

<sup>22</sup> See *Measles*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/measles/cases-outbreaks.html> (Oct. 21, 2021).

<sup>23</sup> As an example of the support for vaccination within the medical community, most major medical associations have called for the elimination of non-medical exemptions to school vaccination requirements. See *State Exemptions*, IMMUNIZATION ACTION COAL., <https://www.immunize.org/laws/laws-exemptions.asp> (Feb. 24, 2020). In addition, over 96% of physicians are fully vaccinated against COVID-19. See Press Release, Am. Med. Ass’n, *AMA Survey Shows Over 96% of Doctors Fully Vaccinated Against COVID-19* (June 11, 2021), <https://www.ama-assn.org/press-center/press-releases/ama-survey-shows-over-96-doctors-fully-vaccinated-against-covid-19>.

claims that vaccines are dangerous and/or ineffective. For example, YouTube celebrity Dr. Andrew Kaufman has told his followers that vaccines are “syringes full of poison” and that “viruses are not a cause of human disease.”<sup>24</sup> During a 2015 measles outbreak in Arizona, Dr. Jack Wolfson told the *Arizona Republic* that children have a “right” to “get[] measles, mumps, rubella, [and] chicken pox,”<sup>25</sup> and called a reporter a “bad mother” for not recognizing “all the harmful things in these vaccines.”<sup>26</sup>

More recently, some physicians have been spreading misinformation about the vaccines against SARS-CoV-2, the virus that causes COVID-19. For example, Dr. Joseph Mercola, who has purportedly made a fortune selling natural health medicines, has called coronavirus vaccines “a medical fraud” that neither prevent infections nor stop transmission of the virus.<sup>27</sup> In testimony before the Ohio legislature, Dr. Sherri Tenpenny called the coronavirus vaccine a “deadly bioweapon” that could magnetize people,<sup>28</sup> a claim that is “demonstrably false.”<sup>29</sup> Other examples include family physician Dr. Daniel Stock, who told a school board in Indiana that the vaccines were ineffective,<sup>30</sup> and Dr. Rashid Buttar, who shared an article on Twitter alleging that most people who took the COVID vaccine “would be dead by 2025.”<sup>31</sup>

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<sup>24</sup> See Jonathan Jarry, *The Psychiatrist Who Calmly Denies Reality*, MCGILL UNIV. OFF. FOR SCI. AND SOC’Y (Sept. 24, 2020), <https://www.mcgill.ca/oss/article/covid-19-pseudoscience/psychiatrist-who-calmly-denies-reality>.

<sup>25</sup> Elizabeth Stuart, *Arizona Anti-Vaccine Doctor to Keep His License, Medical Board Rules*, PHX. NEW TIMES (July 24, 2015), <https://www.phoenixnewtimes.com/news/arizona-anti-vaccine-doctor-to-keep-his-license-medical-board-rules-7511301>.

<sup>26</sup> See Terrence McCoy, *Amid Measles Outbreak, Anti-Vaccine Doctor Revels in His Notoriety*, WASH. POST (Jan. 30, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/01/30/amid-measles-outbreak-anti-vaccine-doctor-revels-in-his-notoriety/>.

<sup>27</sup> See Sheera Frenkel, *The Most Influential Spreader of Coronavirus Misinformation Online*, N.Y. TIMES, <https://www.nytimes.com/2021/07/24/technology/joseph-mercola-coronavirus-misinformation-online.html> (Oct. 6, 2021).

<sup>28</sup> See Andrea Salcedo, *A Doctor Falsely Told Lawmakers Vaccines Magnetize People: “They Can Put a Key on Their Forehead. It Sticks,”* WASH. POST (June 9, 2021), <https://www.washingtonpost.com/nation/2021/06/09/sherri-tenpenny-magnetized-vaccine-ohio/>.

<sup>29</sup> See Ethan Siegel, *The Unfiltered Truth Behind Human Magnetism, Vaccines, and COVID-19*, FORBES (June 23, 2021), <https://www.forbes.com/sites/startswithabang/2021/06/23/the-unfiltered-truth-behind-human-magnetism-vaccines-and-covid-19/?sh=6cdee2f540c8>.

<sup>30</sup> Davey Alba & Sheera Frenkel, *Calls Grow to Discipline Doctors Spreading Virus Misinformation*, N.Y. TIMES (Aug. 27, 2021) <https://www.nytimes.com/2021/08/27/technology/doctors-virus-misinformation.html>.

<sup>31</sup> Victoria Knight, *Will “Dr. Disinformation” Ever Face the Music?* KHN (Sept. 22, 2021), <https://khn.org/news/article/disinformation-dozen-doctors-covid-misinformation-social-media/>.

*B. Undermining Nonpharmaceutical Measures to Reduce the Spread of COVID-19*

At the beginning of the COVID-19 pandemic, public health messages about the value of nonpharmaceutical interventions like masking and social distancing were sometimes conflicting, due in part to limited understanding of how the virus was transmitted.<sup>32</sup> Within a few months, however, strong epidemiological evidence supporting the benefits of these measures began to emerge. Experts now agree that compelling evidence supports the effectiveness of both masking and social distancing.<sup>33</sup> The World Health Organization<sup>34</sup> and the Centers for Disease Control and Prevention<sup>35</sup> strongly support the use of these measures, as do physician associations like the American Medical Association (AMA).<sup>36</sup>

Despite the medical consensus in favor of masking and social distancing, substantial segments of the population have resisted them.<sup>37</sup> While the reasons for this opposition are complex, at

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<sup>32</sup> See Marie Fazio, *How Mask Guidelines Have Evolved*, N.Y. TIMES (July 9, 2021), <https://www.nytimes.com/2021/04/27/science/face-mask-guidelines-time-line.html>.

<sup>33</sup> See John T. Brooks & Jay C. Butler, *Effectiveness of Mask Wearing to Control Community Spread of SARS-CoV-2*, 325 JAMA 998, 998 (2021) (“Compelling data now demonstrate that community mask wearing is an effective nonpharmacological intervention to reduce the spread of this infection . . . .”); Russell H. Fazio et al., *Social Distancing Decreases an Individual’s Likelihood of Contracting COVID-19*, PNAS, Feb. 2021, at 1, <https://www.pnas.org/content/118/8/e2023131118> (“[R]ecent epidemiological evidence . . . documents the effectiveness of social distancing at the societal level”).

<sup>34</sup> See *Coronavirus Disease (COVID-19): Masks*, WORLD HEALTH ORG. (Dec. 1, 2020), <https://www.who.int/news-room/q-a-detail/coronavirus-disease-covid-19-masks> (“Masks are a key measure to suppress transmission and save lives.”).

<sup>35</sup> Press Release, Ctrs. for Disease Control and Prevention, *CDC Calls on Americans to Wear Masks to Prevent COVID-19 Spread* (July 14, 2020), <https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html> (“[C]loth face coverings are a critical tool in the fight against COVID-19 that could reduce the spread of the disease, particularly when used universally within communities.”).

<sup>36</sup> Press Release, Am. Med. Ass’n, AMA, AHA, ANA Release PSA Urging Masks to Stop COVID-19 Spread (July 31, 2020), <https://www.ama-assn.org/press-center/press-releases/ama-aha-ana-release-psa-urging-masks-stop-covid-19-spread>.

<sup>37</sup> Gavan J. Fitzsimons, *Opinion, To Help More Americans Adopt Social Distancing, Change the Message*, THE HILL (May 16, 2020), <https://thehill.com/opinion/white-house/498038-to-help-more-americans-adopt-social-distancing-change-the-message> (noting that “millions of individual Americans are not following the distancing guidelines designed to contain the coronavirus”); see also Edward D. Vargas & Gabriel R. Sanchez, *American Individualism Is an Obstacle to Wider Mask Wearing in the U.S.*, BROOKINGS (Aug. 31, 2020), <https://www.brookings.edu/blog/up-front/2020/08/31/american-individualism-is-an-obstacle-to-wider-mask-wearing-in->

least some of them are based on the belief that masking and/or social distancing are unnecessary.<sup>38</sup> As with the anti-vaccination movement, a small number of physicians have publicly supported these beliefs. For example, in a December 2020 congressional hearing, Dr. Ramin Oskoui testified that masks and social distancing were ineffective in preventing transmission of the SARS-CoV-2 virus. As support for his claim, he cited a study published in the *New England Journal of Medicine*, but the authors of the study said that his interpretation of their research was either “mistaken” or “deliberately misleading.”<sup>39</sup> Similarly, in November 2020, Oregon physician Dr. Steven LaTulippe gave a speech at a “Stop the Steal” rally for former President Donald Trump in which he urged attendees to “take off the mask of shame.” Criticizing what he called “corona mania,” he boasted that neither he nor his staff ever wore masks when treating patients.<sup>40</sup>

The most prominent example of a physician contesting public health recommendations related to COVID-19 is Dr. Scott Atlas, a neuroradiologist at Stanford University Medical Center, who served as an advisor on the White House Coronavirus Task Force under President Trump. During his tenure on the Task Force, he insisted that face masks and social distancing were not effective in protecting against transmission of the virus, that young people could not transmit the virus, and that allowing the virus to spread naturally would not result in more deaths than

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the-us/ (observing that “a large segment of the American public has been resistant to wearing a mask to reduce the spread of the coronavirus”).

<sup>38</sup> See Steven Taylor & Gordon J.G. Asmundson, *Negative Attitudes about Facemasks During the COVID-19 Pandemic: The Dual Importance of Perceived Ineffectiveness and Psychological Reactance*, PLOS ONE, Feb. 17, 2021, at 3 (“The most common of the assessed reasons for not wearing masks were: Not believing that masks are effective, finding masks uncomfortable, difficulty establishing the habit of mask wearing, and lack of concern about COVID-19.”).

<sup>39</sup> See Linda Qiu, *A Senate Hearing Promoted Unproven Drugs and Dubious Claims about the Coronavirus*, N.Y. TIMES (Dec. 8, 2020), <https://www.nytimes.com/2020/12/08/technology/a-senate-hearing-promoted-unproven-drugs-and-dubious-claims-about-the-coronavirus.html>.

<sup>40</sup> See Minyvonne Burke, *Oregon Doctor and Staff Refuse to Wear Masks During Pandemic, Calling Covid “Common Cold,”* NBC NEWS (Dec. 2, 2020), <https://www.nbcnews.com/news/us-news/oregon-doctor-staff-refuse-wear-masks-during-pandemic-calling-covid-n1249737>; see also Alba & Frenkel, *supra* note 30 (discussing Dr. Daniel Stock’s claim that masks are ineffective and that “[e]verything being recommended by the C.D.C. is actually contrary to the rules of science”).



attempts to contain it.<sup>41</sup> According to a commentary in the *Journal of the American Medical Association*, “[n]early all public health experts were concerned that his recommendations could lead to tens of thousands (or more) of unnecessary deaths in the US alone.”<sup>42</sup>

### *C. Promoting Unproven Medical Products*

Physicians who advertise are subject to federal and state consumer protection laws,<sup>43</sup> as well as restrictions imposed by medical licensing boards.<sup>44</sup> However, these rules do not prevent physicians from promoting medical products in which they have no direct financial interests. In some cases, physicians have taken advantage of this gap to promote medical products that do not meet prevailing standards of care.

For example, early in the COVID-19 pandemic, a group of physicians calling themselves “America’s Frontline Doctors” claimed, without any evidence, that hydroxychloroquine and other interventions were an effective “cure” for the virus.<sup>45</sup> The doctors appeared to be driven primarily by political opposition to public health measures and support for President Trump.<sup>46</sup> Most of the doctors did not even treat COVID-19 patients.<sup>47</sup>

On a larger scale, television personality Dr. Mehmet Oz has “become infamous for promoting diet supplements and weight-

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<sup>41</sup> See Philip A. Pizzo et al., Opinion, *When Physicians Engage in Practices that Threaten the Nation’s Health*, 325 JAMA 723, 723 (Feb. 23, 2021).

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

<sup>43</sup> See Lisa M. Schwartz & Steven Woloshin, *Medical Marketing in the United States, 1997-2016*, 321 JAMA 80, 85–87 (2019) (describing federal and state oversight of medical advertising).

<sup>44</sup> See, e.g., N.Y. EDUC. LAW § 6530(27) (McKinney 2021) (defining professional misconduct to include “advertising or soliciting for patronage that is not in the public interest”).

<sup>45</sup> See Isabel Togoh, *Facebook Takes Down Viral Video Making False Claim that “Hydroxychloroquine Cures Covid,”* FORBES (July 28, 2020), <https://www.forbes.com/sites/isabeltogoh/2020/07/28/facebook-takes-down-viral-video-making-false-claim-that-hydroxychloroquine-cures-covid/?sh=419585305531>.

<sup>46</sup> See Brandy Zadrozny & Ben Collins, *Dark Money and PAC’s Coordinated “Reopen” Push Are Behind Doctors’ Viral Hydroxychloroquine Video*, NBC NEWS (July 28, 2020), <https://www.nbcnews.com/tech/social-media/dark-money-pac-s-coordinated-reopen-push-are-behind-doctors-n1235100>.

<sup>47</sup> See Amanda D’Ambrosio, “America’s Frontline Doctors” Continue to Misinform on COVID, MEDPAGE TODAY (Jan. 5, 2021), <https://www.medpagetoday.com/infectiousdisease/covid19/90536>.

loss programs with no evidence of their effectiveness.”<sup>48</sup> According to the journal *BMJ*, out of 80 medical recommendations made on the *Dr. Oz Show*, nearly half had “either no evidence or [were] contradicted by the best available evidence.”<sup>49</sup> In response to questioning at a congressional hearing, Dr. Oz acknowledged that his recommendations “oftentimes . . . don’t have the scientific muster to present as fact.”<sup>50</sup> Nonetheless, because Dr. Oz does not directly profit from the sale of the products, he has been able to escape legal accountability.<sup>51</sup>

## II. THE ROLE OF PROFESSIONAL DISCIPLINARY BOARDS

Physicians who disseminate medical misinformation have been subject to widespread condemnation within the medical community. Several prominent physicians and bioethicists have argued that these physicians should lose their licenses or be subject to other disciplinary penalties. This Part begins by reviewing the arguments raised by proponents of disciplinary action. It then examines existing professional standards and relevant enforcement activities.

### *A. Calls for Subjecting Physicians Who Disseminate Medical Misinformation to Professional Discipline*

Many commentators have called for licensing boards to take disciplinary action against physicians who disseminate medical misinformation. They emphasize that, even when physicians are speaking outside the clinical context, their statements “will be

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<sup>48</sup> Jeffrey Cole, *Dr. Phil, Dr. Oz and Dr. Drew: Do No Harm (Unless It Is Good for Ratings)*, CTR. FOR THE DIGIT. FUTURE (April 7, 2021), <https://www.digitalcenter.org/columns/doctors-do-no-harm/>.

<sup>49</sup> Christina Korownyk et al., *Televised Medical Talk Shows—What They Recommend and the Evidence to Support Their Recommendations: A Prospective Observational Study*, *BMJ*, December 2014, at 1.

<sup>50</sup> Michael Specter, *Columbia and the Problem of Dr. Oz*, *NEW YORKER* (April 23, 2015), <https://www.newyorker.com/news/daily-comment/columbia-and-the-problem-of-dr-oz>.

<sup>51</sup> In 2020, a California court dismissed a lawsuit seeking to hold Dr. Oz liable for misrepresentation after the plaintiffs conceded that the suit lacked legal merit. See Emily Field, *Suit Dismissed over Dr. Oz’s “Miracle” Diet Pills*, *LAW360* (Jan. 14, 2021), <https://www.law360.com/articles/1087559/suit-dismissed-over-dr-oz-s-miracle-diet-pills>.

reasonably taken by the public as medical advice.”<sup>52</sup> By “us[ing] the language and authority of their profession to promote false medical information,” one commentator argues, “they have crossed the line from free speech to medical practice—or, in this case, something akin to malpractice.”<sup>53</sup> These commentators argue that disseminating medical misinformation in public is even more dangerous than providing the same information in an individual patient encounter, given the number of people potentially at risk.<sup>54</sup>

For example, bioethicist Arthur Caplan argues that medical boards should rescind the licenses of physicians “who purvey views based on anecdote, myth, hearsay, rumor, ideology, fraud or some combination of all of these, particularly during an epidemic.”<sup>55</sup> As an example, he points to physicians who urge parents not to vaccinate their children against measles during an outbreak. According to Caplan, it should not matter whether such physicians are counseling individual patients or speaking on TV. In either case, they “distort what patients need to know to preserve their health or that of their children.”<sup>56</sup>

Some commentators express particular concern about physicians like Dr. Scott Atlas, who disseminate misinformation when carrying out official policy-making roles.<sup>57</sup> “When the voices of physicians are coupled with the power of national leaders and provide support for misguided policies,” one group of commentators argues, “serious public harm can result.”<sup>58</sup> Noting that physicians acting in public roles are not subject to liability for

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<sup>52</sup> Richard A. Friedman, Opinion, *We Must Do More to Stop Dangerous Doctors in a Pandemic*, N.Y. TIMES (Dec. 11, 2020), <https://www.nytimes.com/2020/12/11/opinion/scott-atlas-doctors-misinformation.html>; see also Arthur L. Caplan, Opinion, *Revoke the License of Any Doctor Who Opposes Vaccination*, WASH. POST (Feb. 6, 2015), [https://www.washingtonpost.com/opinions/revoke-the-license-of-any-doctor-who-opposes-vaccination/2015/02/06/11a05e50-ad7f-11e4-9c91-e9d2f9fde644\\_story.html](https://www.washingtonpost.com/opinions/revoke-the-license-of-any-doctor-who-opposes-vaccination/2015/02/06/11a05e50-ad7f-11e4-9c91-e9d2f9fde644_story.html) (“Physicians’ speech invokes medical authority, so when they speak, patients tend to listen.”).

<sup>53</sup> Friedman, *supra* note 52.

<sup>54</sup> *Id.* (“Arguably, the harm done by a doctor who knowingly pushes misleading medical information can be vastly more dangerous than whatever he or she does in a single patient encounter.”); see also Cole, *supra* note 48 (“If anything, the standards to ‘practice’ on television where patients cannot be followed or personally evaluated should be even higher than for those who see patients in hospitals or private practice.”).

<sup>55</sup> Caplan, *supra* note 52.

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

<sup>57</sup> See Pizzo et al., *supra* note 41, at 723.

<sup>58</sup> *Id.* at 724.

professional malpractice, they suggest that professional disciplinary action is one of the only means of holding such physicians accountable for the consequences of their words.

One commentator distinguishes between physicians who advocate for policy positions and those who “address the general public on specific medical matters that implicate care choices.”<sup>59</sup> While policy advocacy is entitled to full First Amendment protection, he argues, physicians who offer “specific medical guidance to the public” should be subject to professional discipline. Disciplinary action is appropriate, he suggests, if the information provided to the public would constitute malpractice if offered to a patient as part of medical care.<sup>60</sup>

### *B. Existing Professional Standards and Enforcement Activity*

In all states, physicians can be subject to professional discipline for activities that occur outside the physician-patient relationship. For example, physicians have been disciplined for criminal conduct such as shoplifting, income tax fraud, and possession of marijuana for personal use.<sup>61</sup> In addition, some medical boards have pursued disciplinary actions against physicians for making false or misleading statements as expert witnesses in malpractice cases.<sup>62</sup> In all of these situations, the basis for discipline is typically a generalized allegation of “unprofessional conduct.”<sup>63</sup>

Laws in some states explicitly authorize disciplinary action against physicians who make false, deceptive, or misleading statements to the public. While many of these statutes are limited to statements made in connection with advertising,<sup>64</sup> some

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<sup>59</sup> Jacob M. Appel, *If It Ducks Like a Quack: Balancing Physician Freedom of Expression and the Public Interest*, J. MED. ETHICS, April 2021, at 1, 3, <https://jme.bmj.com/content/medethics/early/2021/04/27/medethics-2021-107256.full.pdf>.

<sup>60</sup> *Id.* at 2.

<sup>61</sup> See Nadia N. Sawicki, *Character, Competence, and the Principles of Medical Discipline*, 13 J. HEALTH CARE L. & POL'Y 285, 305–06 (2010).

<sup>62</sup> See Aaron S. Kesselheim & David M. Studdert, *Role of Professional Organizations in Regulating Physician Expert Witness Testimony*, 298 JAMA 2907, 2908 (2007).

<sup>63</sup> See Sawicki, *supra* note 61, at 305; see also Kesselheim & Studdert, *supra* note 62, at 2908.

<sup>64</sup> See, e.g., N.Y. EDUC. LAW § 6530(27)(a)(1) (McKinney 2021) (prohibiting “advertising or soliciting” that is “false, fraudulent, deceptive, misleading, sensational, or flamboyant”); see, e.g., CA BUS. & PROF. CODE § 651 (West 2021) (prohibiting licensees from making a “public communication containing a false, fraudulent, misleading, or

are worded broadly enough to cover falsehoods unrelated to the solicitation of patients or customers. For example, Minnesota authorizes disciplinary action against physicians who engage in “conduct likely to deceive or defraud the public.”<sup>65</sup>

Voluntary professional associations have gone further than licensing boards in characterizing the dissemination of medical misinformation to the public as inconsistent with physicians’ professional obligations. For example, the AMA cautions physicians making statements to the media to ensure that the information they provide is “accurate,” “inclusive of known risks and benefits,” “commensurate with their medical expertise,” and “based on valid scientific evidence and insight gained from professional experience.”<sup>66</sup> Recognizing the public’s reliance on physicians for accurate medical information during the COVID-19 pandemic, the AMA issued a statement in April 2020 urging physicians “to be candid about the limits of their own expertise, and to acknowledge when there is lack of consensus within the profession.”<sup>67</sup> Other professional associations have issued similar guidance.<sup>68</sup>

In a few cases, licensing boards have opened disciplinary investigations against physicians thought to be disseminating medical information, but none of these cases has yet resulted in the

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deceptive statement, claim, or image for the purpose of or likely to induce, directly or indirectly, the rendering of professional services or furnishing of products in connection with the professional practice or business for which he or she is licensed”); *see also* Julia Belluz, *Why Dr. Oz Can Say Anything and Keep His Medical License*, VOX (June 24, 2014), <https://www.vox.com/2014/6/24/5838690/why-is-dr-oz-still-a-doctor> (noting that New York State’s definition of professional misconduct “prevents physicians from falsely advertising their own goods and services” but “not from making bogus claims about other people’s goods and services, with no financial interest” (quoting Stephen Latham, a lawyer and director at the Yale Interdisciplinary Center for Bioethics)).

<sup>65</sup> MINN. STAT. § 147.091(g)(1) (2021). Similarly, Kentucky defines unprofessional conduct to include “representations in which grossly improbable or extravagant statements are made which have a tendency to deceive or defraud the public.” KY. REV. STAT. ANN. § 311.597(2) (West 2021). While the examples provided in the statute both relate to statements made in connection with the promotion of services, the statute indicates that these examples are meant to be illustrative only. *See id.*

<sup>66</sup> CODE OF MED. ETHICS OP. 8.12 (AM. MED. ASS’N 2002).

<sup>67</sup> *Physicians in the Media: Responsibilities to the Public and the Profession*, AMA, <https://www.ama-assn.org/delivering-care/ethics/physicians-media-responsibilities-public-and-profession> (April 17, 2020).

<sup>68</sup> *See, e.g.*, Thomas K. Varghese, Jr. et al., *Ethical Standards for Cardiothoracic Surgeons’ Participation in Social Media*, 158 J. THORACIC & CARDIOVASCULAR SURGERY 1139 (2019); *see also* Am. Acad. of Ophthalmology, *Advisory Op.—Social Media and Professionalism* (2018), <https://www.aao.org/ethics-detail/advisory-opinion-social-media-professionalism>.

imposition of penalties.<sup>69</sup> For example, in 2004, the Illinois Department of Professional Regulation filed a complaint against Dr. Joseph Mercola,<sup>70</sup> based in part on his online publication of “false and potentially harmful medical advice,”<sup>71</sup> but the claim was voluntarily dismissed after the doctor modified his website and stopped treating patients.<sup>72</sup> In 2015, the Arizona licensing board closed an investigation against Dr. Jack Wolfson<sup>73</sup> for his anti-vaccine messages on the ground that none of the thirty-eight people who had filed complaints against him had alleged problems with his “actual medical care.”<sup>74</sup>

However, some state licensing boards, as well as the Federation of State Medical Boards (FSMB), which represents state licensing agencies, have warned doctors that spreading medical misinformation could be grounds for disciplinary penalties.<sup>75</sup>

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<sup>69</sup> In 2020, the Oregon licensing board suspended the license of anti-masker Dr. Steven LaTulippe, discussed above at text accompanying note 40, but that decision was based on his failure to comply with masking requirements in the treatment of his patients, not on the statements about masking he made in public settings. See *In re Steven Arthur LaTulippe, M.D.*, Or. Med. Bd., (Dec. 4, 2020), <https://omb.oregon.gov/Clients/ORMB/OrderDocuments/ff970292-5807-41ba-9c1e-c2b81de89cd1.pdf>.

<sup>70</sup> See *supra* text accompanying note 27.

<sup>71</sup> See Complaint at 1, Dep’t of Pro. Reg. v. Mercola, D.O., No. 1:05-cv-04400 (State of Ill. Dep’t of Pro. Regul., June 9, 2004), [https://quackwatch.org/wp-content/uploads/sites/33/quackwatch/casewatch/board/med/mercola/complaint\\_2004.pdf](https://quackwatch.org/wp-content/uploads/sites/33/quackwatch/casewatch/board/med/mercola/complaint_2004.pdf).

The complaint included a mix of claims related to Dr. Mercola’s advertising and promotion, his treatment of patients, and general medical advice to the public, including descriptions of “links between vaccination and death.” *Id.* at 3.

<sup>72</sup> See Stephen Barrett, *Dr. Joseph Mercola’s Battle with His State Licensing Board*, CASEWATCH (Sept. 1, 2015), [https://quackwatch.org/cases/board/med/mercola/board\\_battle/](https://quackwatch.org/cases/board/med/mercola/board_battle/). Similarly, in 2021, Dr. Thomas Cowan, who had posted a viral video stating that 5G networks cause COVID, voluntarily agreed to surrender his medical license. However, it is not clear whether the Medical Board of California had initiated disciplinary action based on Cowan’s statements about COVID, as he was already on probation for an earlier incident involving the prescription of unapproved medications. See Barbara Feder Ostrov, *Conspiracy Theory Doctor Surrenders Medical License*, CALMATTERS (Sept. 28, 2021), <https://calmatters.org/health/2021/02/conspiracy-theory-doctor-surrenders-medical-license/>.

<sup>73</sup> See *supra* text accompanying notes 25–26.

<sup>74</sup> See Stuart, *supra* note 25.

<sup>75</sup> See Michael Hiltzik, *A Warning to Doctors—Spreading COVID Misinformation Could Cost You Your License*, L.A. TIMES (Aug. 16, 2021), <https://www.latimes.com/business/story/2021-08-16/doctors-coronavirus-misinformation-license>. In addition to licensing boards, professional associations have warned physicians that disseminating misinformation about COVID-19 could “put their certification at risk.” See Am. Bd. of Family Med. et al., *Joint Statement from the American Board of Family Medicine, American Board of Internal Medicine, and American Board of Pediatrics on Dissemination of Misinformation by Board Certified Physicians about COVID-19*, CISION PR NEWSWIRE (Sept. 9, 2021), <https://www.prnewswire.com/news-releases/joint-statement-from-the-american-board-of-family-medicine-american-board-of-internal-medicine-and-american->

Moreover, in a January 2021 interview, the president and CEO of the FSMB suggested that the absence of formal disciplinary actions should not be interpreted as a sign of licensing boards' inactivity. He noted that boards have received complaints about "a number of doctors who are using social media and other public platforms to make certain claims" and that "[y]ou don't always hear about the steps that are taken behind the scenes to try to get the doctors to do the right thing."<sup>76</sup> In some cases, he stated, state officials "are warning doctors, with their licensing boards beside them, that if guidelines are not followed, then their license could be at risk."<sup>77</sup>

### III. THE CONSTITUTIONALITY OF PROFESSIONAL DISCIPLINE AS A RESPONSE TO MEDICAL MISINFORMATION: THREE ANALYTICAL FRAMEWORKS

Under existing Supreme Court precedent, speech is not necessarily exempt from First Amendment protection simply because it is untruthful.<sup>78</sup> However, whether a particular restriction on false speech will survive constitutional scrutiny depends on the nature of the restriction and the applicable standard of review. Thus, the constitutionality of disciplinary actions against physicians who disseminate medical misinformation will depend in part on how courts characterize those actions. Are they content-based limits on expression, subject to the highest level of protection? Or are they subject to a more deferential standard, either because they are limitations on speech incidental to the regulation of professional conduct or because they are conditions on

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board-of-pediatrics-on-dissemination-of-misinformation-by-board-certified-physicians-about-covid-19-301372024.html.

<sup>76</sup> John Whyte & Humayun J. Chaudhry, *Should Physicians Face Disciplinary Actions for Misinformation*, MEDSCAPE (Jan. 19, 2021), <https://www.medscape.com/viewarticle/944302>.

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

<sup>78</sup> See *United States v. Alvarez*, 567 U.S. 709, 730 (2012) (plurality opinion) (striking down, on First Amendment grounds, a federal statute imposing criminal penalties on persons who falsely represented that they had been awarded military medals). Falsity is, however, relevant in categories of speech that enjoy reduced constitutional protection, such as commercial speech. See *infra* note 82. As commentators have noted, the Court's current approach to the First Amendment substantially complicates government's ability to regulate misinformation. See, e.g., Richard Hasen, *Cheap Speech and What It Has Done (To American Democracy)*, 16 FIRST AMEND. L. REV. 200, 201 (2018) (arguing that "[t]he Supreme Court's libertarian First Amendment doctrine did not cause the rise of cheap speech, but it may stand in the way of needed reforms").

how the government-provided benefit of a medical license may be used? This Part considers these three frameworks in turn.

*A. Disciplinary Penalties as Content-Based Speech Limitations*

Under the First Amendment, the most straightforward way of conceptualizing disciplinary penalties against physicians who disseminate medical misinformation is to view them as content-based limitations on personal expression. Content-based limitations on speech are presumptively unconstitutional and will be upheld only if they can satisfy “strict scrutiny,” the highest standard of constitutional review. Strict scrutiny requires the government to show that the limitations are “the least restrictive means of achieving a compelling state interest.”<sup>79</sup>

Although the Supreme Court has recognized a few types of content-based speech restrictions that do not trigger strict scrutiny, most medical misinformation does not fit into any of those categories. For example, medical misinformation is not defamatory, as it does not impugn the reputation of an identifiable person.<sup>80</sup> Nor is medical misinformation likely to incite imminent lawless behavior.<sup>81</sup> While medical misinformation might sometimes be subject to regulation under the more lenient standards applicable to the regulation of commercial speech,<sup>82</sup> the commercial speech doctrine is limited to speech “proposing a commercial transaction.”<sup>83</sup> It would therefore not apply to any of the situations described in Part I of this Article, which involve physicians making claims about medical conditions or treatments without offering anything for sale.

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<sup>79</sup> *McCullen v. Coakley*, 573 U.S. 464, 478 (2014).

<sup>80</sup> See RESTATEMENT (SECOND) OF TORTS § 559 (AM. L. INST. 1977) (“A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”). Defamation is one of the “historic and traditional categories” for which the Supreme Court has permitted content-based speech restrictions. See *United States v. Stevens*, 559 U.S. 460, 468 (2010).

<sup>81</sup> See *Stevens*, 559 U.S. at 468 (identifying incitement as another category of speech that can be limited based on its content).

<sup>82</sup> Most restrictions on commercial speech are subject to intermediate scrutiny, which asks whether the restriction “directly advances” a “substantial” governmental interest and is no more restrictive than necessary to achieve that interest. Commercial speech that is misleading or that concerns an unlawful activity is not entitled to any First Amendment protection. See *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563–66 (1980).

<sup>83</sup> See *id.* at 562.



Nonetheless, while strict scrutiny establishes a high burden for licensing boards, it does not necessarily rule out all disciplinary activity. As Cassandra Burke Robertson and Sharona Hoffman suggest, licensing boards might prevail in actions against physicians who disseminate misinformation if they can demonstrate “a strong evidentiary record of the harms caused by the false statements as well as the lack of a narrower way to combat those harms.”<sup>84</sup> They note, however, that the state would have the burden of establishing the falsity of the physician’s statements, which would be complicated by the fact that “professional opinion may differ in areas without scientific consensus.”<sup>85</sup>

The likelihood of satisfying strict scrutiny may depend on how states characterize the nature of the harm that they are seeking to remedy. As discussed in Part II, critics of physicians who disseminate medical misinformation typically emphasize the potential of medically inaccurate messages to harm public health.<sup>86</sup> However, from a constitutional perspective, focusing on the harms that could result from the content of physicians’ statements is not a promising strategy. The problem is that, even if medical misinformation may contribute to risky behavior, disciplinary action is not the only way for states to mitigate this harm. A basic tenet of First Amendment law is that, rather than imposing penalties on persons who communicate potentially dangerous messages, the appropriate response to misinformation is to counter it with messages that are accurate—i.e., to engage in “counterspeech.”<sup>87</sup> Because counterspeech is available as an alternative policy option, courts are unlikely to find that disciplinary action is the least restrictive means of achieving the state’s public health goals.

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<sup>84</sup> Cassandra Burke Robertson & Sharona Hoffman, *Professional Speech at Scale*, 55 U.C. DAVIS L. REV. (forthcoming 2022) (manuscript at 58), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3830555](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3830555).

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

<sup>86</sup> See *supra* text accompanying notes 52–58.

<sup>87</sup> See, e.g., *United States v. Alvarez*, 567 U.S. 709, 727 (2012) (plurality opinion) (“The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth.”). Some commentators have questioned the effectiveness of counterspeech in an age of technological innovation and disinformation. See, e.g., Daniela C. Manzi, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, 87 FORDHAM L. REV. 2623, 2647 (2019) (“The counterspeech doctrine fails to address the ways that technological advancements have affected news consumption and that psychological predispositions cause people to hold onto incorrect beliefs, even when presented with evidence to the contrary.”). Nonetheless, as a matter of First Amendment doctrine, counterspeech is still considered preferable to suppressing expression.

States would be on stronger ground if they limit disciplinary action to physicians who *knowingly* spread medical misinformation or who do so despite having serious doubts as to whether the information is true. Physicians who knowingly or recklessly<sup>88</sup> misrepresent medical information do more than simply encourage people to engage in risky behavior; by demonstrating their lack of concern with the truth, they also cause the additional harm of undermining the public's ability to trust that physicians can be assumed to be honest.<sup>89</sup> As a result, individuals may be less inclined to seek medical care or to take physicians' treatment recommendations seriously. Unlike the harms stemming from the content of physicians' messages, loss of trust is a type of harm that cannot be mitigated through counterspeech. In fact, disseminating corrective messages could simply reinforce the public's perception that physicians have been lying to them. States could therefore make a strong argument that disciplinary action is the only remedy capable of restoring the public's trust.

Disciplinary action based on the knowing or reckless dissemination of falsehoods has long been accepted in the professional regulation of lawyers. All U.S. jurisdictions have adopted some version of the American Bar Association's (ABA) Model Rule of Professional Conduct (MRPC) § 8.4(c), which defines professional misconduct to include "conduct involving dishonesty, fraud, deceit or misrepresentation."<sup>90</sup> Rule 8.4(c) applies to "all of a lawyer's actions—whether they are related to representation or not."<sup>91</sup> The justification for the breadth of the rule is that dishonesty bears on a lawyer's "fitness to practice."<sup>92</sup>

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<sup>88</sup> As explained below, the Supreme Court has defined the concept of recklessness in the context of the First Amendment to require proof that the speaker "entertained serious doubts" as to whether a statement was true. *See infra* note 103.

<sup>89</sup> *Cf. Griffiths v. Superior Court*, 96 Cal. App. 4th 757, 770 (2002) (upholding disciplinary action against physician who had been convicted of two misdemeanors involving the consumption of alcoholic beverages partly on the ground that "[k]nowledge of such repeated conduct by a physician" could "undermine public confidence in and respect for the medical profession").

<sup>90</sup> MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 2016).

<sup>91</sup> *Rule 8.4(c)*, in LEGAL ETHICS & MALPRACTICE REP. 2 (Mike Hoeflich ed., Joseph Hollander & Craft LLC 2021).

<sup>92</sup> Josh Blackman, *Reply: A Pause for State Courts Considering Modle Rule 8.4(g)*, 30 GEO. J.L. ETHICS 241, 251 (2017) (arguing that Rules 8.4(b) and (c) "articulate a standard that a lawyer's actions, even when unconnected with the practice of law, must at all times promote honestly and trustworthiness, so there is no doubt about his or her fitness to practice law.").

Rule 8.4(c) has been applied in a variety of contexts, including a lawyer who submitted a plagiarized thesis as part of an LLM program<sup>93</sup> and a lawyer who made a false statement about a pending case in a letter to a newspaper.<sup>94</sup> In June 2021, the Appellate Division of the New York State Supreme Court relied in part on Rule 8.4(c) in ordering the interim suspension of former New York City Mayor Rudolph Giuliani's license to practice law, after finding that he knowingly made "demonstrably false and misleading statements" in connection with former President Trump's efforts to overturn the results of the 2020 election.<sup>95</sup>

Rule 8.4(c) applies with particular force to lawyers who hold official public positions. According to the MRPC, "[l]awyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers."<sup>96</sup> Citing these "higher obligations," in 2017 a group of legal ethics scholars filed a complaint against Kellyanne Conway, former Senior Counselor to President Trump, alleging that she violated Rule 8.4(c) by making intentional misrepresentations to the public.<sup>97</sup> While some commentators objected to applying Rule 8.4(c) to statements made "in a clearly political context,"<sup>98</sup> the drafters of the complaint argued that "lawyer speech, especially that which is the result of advising or counseling government officials," should be held to a higher standard.<sup>99</sup>

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<sup>93</sup> *In re Lamberis*, 443 N.E.2d 549, 552 (Ill. 1982).

<sup>94</sup> *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Visser*, 629 N.W.2d 376, 378 (Iowa 2001).

<sup>95</sup> While Giuliani's statements were made in connection with the representation of a client, they included public comments that could not plausibly be construed to fall within the definition of the "practice of law," such as statements made to the media unrelated to any pending legal actions. As discussed in Part B, these statements are therefore not subject to the lower level of First Amendment protection applicable to the regulation of "professional practice." See *infra* text accompanying note 124.

<sup>96</sup> MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 7 (AM. BAR ASS'N 2016).

<sup>97</sup> See Brian Sheppard, *The Ethics Resistance*, 32 GEO. J. L. ETHICS 235, 246 (2019).

<sup>98</sup> Steven Lubet, *In Defense of Kellyanne Conway*, SLATE (Feb. 27, 2017, 9:22 AM), <https://slate.com/news-and-politics/2017/02/the-misconduct-complaint-against-kellyanne-conway-is-dangerously-misguided.html>.

<sup>99</sup> Ellen Yaroshefsky, *Regulation of Lawyers in Government Beyond the Client Representation Role*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 151, 172–173 (2019) (arguing that "[a] range of factors will determine whether and to what extent the speech is primarily political or lawyer speech," including "whether the person is readily identified as a lawyer, the extent to which the speech relies upon legal knowledge and judgment, the expectations in the role that the lawyer assumed and the clarity of those expectations, and the significance of the misrepresentation").

The Supreme Court has not yet ruled on the constitutionality of disciplining attorneys who make false statements outside the courtroom. However, several state supreme courts have upheld the constitutionality of MRPC Rule 8.2(a), which prohibits lawyers from making statements that “the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.”<sup>100</sup> Rule 8.2(a) mirrors the standard the Supreme Court adopted in *New York Times v. Sullivan*<sup>101</sup> for defamation claims brought by public officials. In that case, the Court found that criticism of official conduct is entitled to First Amendment protection,<sup>102</sup> but that this protection does not preclude holding speakers accountable for a statement made with “actual malice”—i.e., a statement made “with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>103</sup> *Sullivan*, therefore, provides strong support for disciplining lawyers who criticize judges under MRPC Rule 8.2(a).

While *Sullivan* directly applies only to false statements about public officials (and, as later extended, public figures<sup>104</sup>), the decision also has implications for disciplinary actions based on other types of speech. For example, Erwin Chemerinsky argues that *Sullivan* permits disciplining attorneys for knowingly or recklessly making false statements about pending litigation, despite the fact that statements about pending litigation are entitled to full First Amendment protection.<sup>105</sup> This argument is consistent

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<sup>100</sup> MODEL RULES OF PRO. CONDUCT r. 8.2(a) (AM. BAR ASS'N 1983). For cases rejecting First Amendment challenges to Rule 8.2(a), see, e.g., Lawyer Disciplinary Bd. v. Hall, 765 S.E.2d 187 (W. Va. 2014); Notopoulos v. Statewide Grievance Comm., 890 A.2d 509 (Conn. 2006); Off. of Disciplinary Counsel v. Gardner, 793 N.E.2d 425 (Ohio 2003). Several commentators have criticized some of these decisions for departing from the Rule’s requirement that the lawyer make statements with knowledge they are false or with reckless disregard as to their truth. See, e.g., Jovanna Grant, “Cyberbullying the Judiciary”: Model Rule 8.2 and Its Impact on Attorneys’ Blogging Speech, 29 GEO. J.L. ETHICS 1031, 1045 (2016) (criticizing courts for using “a less deferential, more speech restrictive objective test, which focuses its analysis on what the reasonable attorney, considered in light of all his professional functions, would say in the same circumstance”); Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L.J. 1567, 1587 (2009) (criticizing courts for adopting an “objective reasonableness standard”).

<sup>101</sup> 376 U.S. 254, 280 (1964).

<sup>102</sup> *Id.* at 273 (“[N]either factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct”).

<sup>103</sup> *Id.* at 280. The concept of “reckless disregard” has been interpreted in this context to require proof that the defendant “entertained serious doubts” as to whether her statements were correct. See *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

<sup>104</sup> See *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

<sup>105</sup> See Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech under the First Amendment*, 47 EMORY L.J. 859, 886 (1998).

with Daniel Farber's interpretation of *Sullivan* as an application of strict scrutiny, with the actual malice standard serving to ensure that liability is "sufficiently narrowly tailored" to achieve a compelling governmental goal.<sup>106</sup>

Relying on this logic, boards could argue that disciplining physicians who knowingly or recklessly disseminate medical misinformation is a narrowly tailored means of achieving the compelling interest in preserving trust in the integrity of the medical profession.<sup>107</sup> Whether courts accept this argument will depend in part on how well boards are able to substantiate their claims about trust with empirical support. To strengthen their position, boards would be well advised to work with social scientists to develop data in support of their arguments. Key questions to investigate include whether loss of trust in the medical profession really does deter individuals from seeking medical care or following treatment recommendations and whether physicians who knowingly or recklessly spread falsehoods do in fact contribute to an erosion in trust. In addition, boards should be prepared to demonstrate that disciplinary action is likely to remedy these problems, and that there are no less restrictive ways of achieving this goal.

It is important to recognize that, under the actual malice standard, boards would have the burden of establishing that a physician's statement was objectively untruthful. In many situations, this burden may prove insurmountable. As discussed above, medical misinformation is commonly defined as information that deviates from current medical consensus,<sup>108</sup> but not everything that deviates from professional consensus is indisputably false. For example, a position may lack evidentiary support but be theoretically plausible, or it may be supported by some evidence but not enough to convince the professional community. While such positions might satisfy the definition of medical misinformation, the fact that they remain unproven does not necessarily mean they are objectively wrong.

In fact, many examples of medical misinformation discussed in Part I of this Article could potentially fall into this epistemological grey area. This is particularly true in areas in which the

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<sup>106</sup> See Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 930 (2009).

<sup>107</sup> See *supra* text accompanying note 89.

<sup>108</sup> See *supra* note 11 and accompanying text.

scientific information is less certain or rapidly evolving. For example, although the medical community now agrees that masking is an effective means to prevent the spread of COVID-19, just a few months before that consensus emerged, public health authorities were actively discouraging masking among the general public.<sup>109</sup> Physicians could point to the recent change in position as a sign that the evidence on masking is still in flux. Similarly, it might be difficult for boards to establish objective falsity when physicians make claims about unproven treatments or products unless they can point to evidence establishing that those interventions are ineffective or harmful.

However, some physicians have disseminated information that can readily be refuted. For example, it is quite clear that COVID-19 vaccines do not magnetize the human body.<sup>110</sup> Nor is there any basis for other statements some physicians have made about COVID vaccines, including the claims that they contain microchips or are connected to 5G communications networks.<sup>111</sup>

In addition, there are certain medical positions that, while perhaps plausible at one point, have come to be accepted as objectively erroneous.<sup>112</sup> For example, extensive research has refuted the suggestion that vaccines contribute to autism;<sup>113</sup> no credible physician would now suggest that such a connection exists.<sup>114</sup> Similarly, there is ample evidence to show that viruses

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<sup>109</sup> See Fazio, *supra* note 32.

<sup>110</sup> See *supra* text accompanying notes 28–29.

<sup>111</sup> See Michael Heltzik, *A Warning to Doctors—Spreading COVID Misinformation Could Cost You Your License*, L.A. TIMES (Aug. 16, 2021), <https://www.latimes.com/business/story/2021-08-16/doctors-coronavirus-misinformation-license> (quoting examples provided by the FSMB’s CEO of false information disseminated by physicians).

<sup>112</sup> See Claudia Haupt, *Unprofessional Advice*, 19 U. PA. J. CONST. L. 671, 682 (2017) (characterizing physicians as members of “knowledge communities,” and observing that, “while there is a range of valid professional opinions that members of the knowledge community may disagree on, there is also a universe of advice that is plainly wrong as a matter of expert knowledge”).

<sup>113</sup> See The Coll. of Physicians of Phila., *Do Vaccines Cause Autism?*, HIST. VACCINES, <https://www.historyofvaccines.org/content/articles/do-vaccines-cause-autism> (last visited Nov. 8, 2021) (noting that a possible link between vaccines for measles, mumps and rubella “was studied exhaustively” and that “many well-designed studies” have found that no such link exists”).

<sup>114</sup> See Clyde Haberman, *A Discredited Vaccine Study’s Continuing Impact on Public Health*, N.Y. TIMES (Feb. 1, 2015), <https://www.nytimes.com/2015/02/02/us/a-discredited-vaccine-studys-continuing-impact-on-public-health.html>.

cause disease,<sup>115</sup> even if isolated physicians insist that they do not.<sup>116</sup> Physicians who assert claims that have been disproven through rigorous research can rightly be said to be disseminating positions that are objectively untrue.

As to the physician's mental state, the Supreme Court has made clear that proving actual malice does not require direct evidence of the defendant's intent to deceive. Rather, it can be established by evidence that the statements were "fabricated by the defendant," "the product of his imagination," or "so inherently improbable that only a reckless man would have put them in circulation."<sup>117</sup> A board might therefore be able to satisfy its burden by showing that a physician's statements not only have been disproven through research, but also that they were based on unverifiable sources or on no evidence at all. While it is theoretically possible that a physician might honestly believe unsupported statements that conflict with all available evidence, a board would be entitled to determine that a physician's claims of good faith are not credible under the circumstances.<sup>118</sup>

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<sup>115</sup> See, e.g., MADELINE DREXLER, WHAT YOU NEED TO KNOW ABOUT INFECTIOUS DISEASE 5 (2011) ("Viruses are responsible for a wide range of diseases, including the common cold, measles, chicken pox, genital herpes, and influenza. Many of the emerging infectious diseases, such as AIDS and SARS, are caused by viruses.").

<sup>116</sup> See *supra* text accompanying note 24.

<sup>117</sup> *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968); see also *Hunt v. Liberty Lobby*, 720 F.2d 631, 643 (11th Cir. 1983) (noting that "evidence which shows that the statement was inherently implausible or that there were obvious reasons to doubt the veracity of the informant is relevant to establishing actual malice").

<sup>118</sup> Cf. Lyriisa Barnett Lidsky & RonNell Andersen Jones, *Of Reasonable Readers and Unreasonable Speakers: Libel Law in a Networked World*, 23 VA. J. SOC. POL'Y & L. 155, 177 (2016) (noting the possibility that a libel defendant "suffered from a mental illness that caused her to have irrational, or even delusional, beliefs about the truth of a statement," but concluding that "this problem is likely to be solved by the skepticism of juries, who will rarely accept a defendant's argument that she truly believed her delusional and defamatory statements"). When a physician's statements are truly divorced from reality, the board might conclude that the physician lacks sufficient mental capacity to be entrusted with patients. An example might be one physician's recent claim "that the uterine disorder endometriosis is caused by sex with demons that takes place in dreams." Travis M. Andrews & Danielle Paquette, *Trump Retweeted a Video with False Covid-19 Claims. One Doctor in it Has Said that Demons Cause Illnesses*, WASH. POST (July 29, 2020), <http://washingtonpost.com/technology/2020/07/28/stella-immanuel-hydroxychloroquine-video-trump-americas-frontline-doctors/>. In such cases, the board might pursue disciplinary action on the basis of the physician's mental capacity to practice. Cf. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 n.5 (1968) ("We also note that this case does not present a situation in which a teacher's public statements are so without foundation as to call into question his fitness to perform his duties in the classroom. In such a case, of course, the statements would merely be evidence of the teacher's general competence, or lack thereof, and not an independent basis for dismissal.").

*B. Disciplinary Penalties as the Regulation of Professional Conduct*

Not everyone is likely to be satisfied with limiting disciplinary action to physicians who disseminate medical misinformation with knowledge of its falsity or with reckless disregard of whether it is true. As discussed in Part II, some critics argue that physicians who make public recommendations about medical matters are engaged in a form of professional practice.<sup>119</sup> They claim that these physicians should be subject to discipline if their recommendations deviate from accepted medical standards, just as they would if they provided the same information to a patient under their care.

Supporters of this argument might point to the 2018 case of *National Institutes of Family and Life Advocates (NIFLA) v. Becerra*.<sup>120</sup> That case involved a request for a preliminary injunction against a California statute that regulated so-called “crisis pregnancy centers” (CPCs), which are organizations that provide a limited menu of pregnancy-related services and exist primarily to “discourage and prevent women from seeking abortions.”<sup>121</sup> The California statute required licensed CPCs to notify women that the state provided free and low-cost pregnancy-related services, including abortions, and required unlicensed centers to notify women that the facilities were not licensed to provide medical services. Reversing the lower court’s denial of a preliminary injunction, the Court found that the challengers were likely to succeed on their claim that the statute was an impermissible content-based regulation of speech.<sup>122</sup> However, in reaching that conclusion, it distinguished the statute from laws that directly regulate the conduct of health care professionals, including “regulations of professional conduct that incidentally burden speech.”<sup>123</sup> As an example, it cited the plurality opinion in *Planned Parenthood v. Casey*, which rejected a First Amendment challenge to a Pennsylvania law requiring physicians to make certain disclosures to patients receiving abortions. Although the Pennsylvania law involved speech, the Court noted, it “regulated speech only ‘as part

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<sup>119</sup> See Friedman, *supra* note 52.

<sup>120</sup> 138 S. Ct. 2361 (2018).

<sup>121</sup> *Id.* at 2368.

<sup>122</sup> See *id.* at 2378.

<sup>123</sup> *Id.* at 2373.



of the *practice* of medicine, subject to reasonable licensing and regulation by the State.’”<sup>124</sup>

*NIFLA*, therefore, lends support to the idea that some physician speech can be viewed as an aspect of professional practice, which can be subject to content-based limitations without having to satisfy the strict scrutiny standard. However, the decision provides little guidance on the kinds of speech that can be regulated as an aspect of professional practice. In fact, it is not clear why the California statute itself was not viewed as a regulation of professional practice, at least with respect to those portions of the statute applicable to licensed professionals.<sup>125</sup> The Court distinguished the statute from the Pennsylvania law at issue in *Casey* on the ground that the required notices were not “tied to a [medical] procedure.”<sup>126</sup> However, many speech-related aspects of medical practice are not tied to specific procedures—for example, taking medical histories or counseling patients on health-related behaviors.<sup>127</sup> It would be surprising if the Court intended to exempt those aspects of practice from regulations designed to uphold a professional standard of care.

However, while the concept of medical practice may be broad enough to include speech unrelated to medical procedures, it cannot plausibly be extended to speech entirely unrelated to the practice of medicine, which is typically defined as the provision of diagnosis or treatment to individual patients.<sup>128</sup> The fact that licensing boards sometimes take disciplinary action against physicians for conduct occurring outside the physician-patient relationship<sup>129</sup> does not undermine this conclusion. Those ac-

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<sup>124</sup> *Id.* (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion)).

<sup>125</sup> See Robertson & Hoffman, *supra* note 84, at 11.

<sup>126</sup> *NIFLA*, 138 S. Ct. at 2373.

<sup>127</sup> See Carl H. Coleman, *Regulating Physician Speech*, 97 N.C. L. REV. 843, 860, 857 (2019).

<sup>128</sup> See, e.g., N.Y. EDUC. LAW § 6521 (McKinney 2021) (“The practice of the profession of medicine is defined as diagnosing, treating, operating or prescribing for any human disease, pain, injury, deformity or physical condition.”). While a physician’s public speech does not itself constitute the practice of medicine, in some cases it might be reasonable for a licensing board to rely on a physician’s public statements as evidence that the physician is providing substandard clinical care. For example, a licensing board could reasonably infer that a pediatrician who urges members of the public to reject childhood vaccinations is providing similar advice to parents of children under her care.

<sup>129</sup> See *supra* text accompanying notes 61–63.

tions are based on the theory that the conduct in question is evidence of the licensee's "fitness and qualifications,"<sup>130</sup> not that the conduct is itself an aspect of the practice of medicine.

Characterizing physicians' public speech about medical matters as an aspect of professional practice would also have troubling policy implications. If disciplinary actions based on physicians' public statements were subject to the more deferential standards applicable to the regulation of professional practice, licensing boards would be free to penalize physicians whenever they express opinions that conflict with prevailing professional norms, even if those opinions cannot be shown to be objectively false.<sup>131</sup> Physicians who believe that the existing standard of care is misguided would therefore have no way to express their views publicly without exposing themselves to potential disciplinary action.

If physicians could not question prevailing standards without risking professional discipline, the result would be a substantial chilling effect on potentially valuable speech. The history of medicine contains numerous examples of once-accepted medical standards that were ultimately shown to be ineffective or harmful. For example, in the late 1980s, a large study found that a group of drugs that physicians had widely considered essential in the treatment of heart attack patients in fact increased these patients' risk of dying as compared to a placebo.<sup>132</sup> More recently, research has led to the rejection of once-standard practices like the routine prescription of hormone replacement therapy for postmenopausal women<sup>133</sup> and recommendations for children at high risk of peanut allergy to avoid peanut products in the first years of life.<sup>134</sup> Scholars describe these situations as "medical reversals," defined as practices that are rejected after research shows that they "did not work all along, either failing to achieve [their] intended goal[s] or carrying harms that outweighed the

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<sup>130</sup> *Griffiths v. Superior Court*, 96 Cal. App. 4th 757, 771 (2002).

<sup>131</sup> See Appel, *supra* note 59 (suggesting that disciplinary action would be appropriate if a physician provided information to the public that would constitute malpractice if offered to a patient as part of medical care).

<sup>132</sup> See Vinay Prasad & Adam Cifu, *Medical Reversal: Why We Must Raise the Bar Before Adopting New Technologies*, 84 YALE J. BIOLOGY & MED. 471, 472 (2011).

<sup>133</sup> See D. Ashley Hill et al., *Hormone Therapy and Other Treatments for Symptoms of Menopause*, 94 AM. FAM. PHYSICIAN 884, 884 (2016).

<sup>134</sup> See George du Toit et al., *Effect of Avoidance on Peanut Allergy after Early Peanut Consumption*, 374 NEW ENG. J. MED. 1435, 1435 (2016).

benefits.”<sup>135</sup> One study of over 3,000 randomized clinical trials in prominent medical journals found that approximately 13 percent involved medical reversals.<sup>136</sup>

Of course, as the examples in Part I of this Article show, not all physician statements that deviate from accepted medical standards are well-considered critiques with the potential to lead to medical reversals. However, allowing physicians’ public statements to be regulated as an aspect of medical practice would give licensing boards too much discretion to prevent physicians from questioning prevailing medical views. Treating physicians’ public statements as speech entitled to ordinary First Amendment protections avoids this problem by limiting disciplinary action to cases that are truly egregious—i.e., physicians who disseminate objectively false information with knowledge that it is false or with reckless disregard as to whether it is true.

Limiting the scope of boards’ regulation of medical practice to physician-patient interactions is also consistent with the purpose of the medical licensing system, which is to protect *patients* from harm.<sup>137</sup> Patients are vulnerable to harm because they generally lack the knowledge and training necessary to independently assess the quality of the care they are receiving.<sup>138</sup> This lack of knowledge, combined with the trust patients typically place in their health care providers, explains why some patients may defer to physicians’ recommendations even when they do not personally agree with them.<sup>139</sup> One way the licensing system protects vulnerable patients is by requiring physicians to provide “good advice as determined by the standards of the profession.”<sup>140</sup> Although medical standards are typically broad enough

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<sup>135</sup> Prasad & Cifu, *supra* note 132, at 471–72.

<sup>136</sup> See Diana Herrera-Perez et al., *A Comprehensive Review of Randomized Clinical Trials in Three Medical Journals Reveals 396 Medical Reversals*, in *META-RESEARCH: A COLLECTION OF ARTICLES 2* (Peter A. Rodgers ed., 2019).

<sup>137</sup> See Sawicki, *supra* note 61, at 295 (“As an extension of the state’s police power, the medical board’s disciplinary authority is aimed at protecting medical consumers from the harms they may incur at the hands of incompetent or dishonest physicians.”).

<sup>138</sup> See Claudia Haupt, *Professional Speech*, 125 *YALE L.J.* 1238, 1243 (2016) (“The professional-client relationship is typically characterized by an asymmetry of knowledge. The client seeks the professional’s advice precisely because of this asymmetry.”).

<sup>139</sup> See Andrea D. Gurmankin et al., *The Role of Physicians’ Recommendations in Medical Treatment Decisions*, 22 *MED. DECISION MAKING* 262, 267 (2002) (finding, in a study involving hypothetical medical treatment scenarios, that “[s]ome subjects were strongly influenced by the physicians’ recommendations even when the recommendations clearly went against what maximized health, against what the subject knew was best, and against what the subject otherwise preferred”).

<sup>140</sup> Claudia Haupt, *Licensing Knowledge*, 72 *VAND. L. REV.* 501, 555 (2019).

to give physicians some discretion in their approach with particular patients,<sup>141</sup> physicians must exercise this discretion with the bounds of reasonableness as determined by professional norms.<sup>142</sup>

By contrast, when physicians make public statements about medical matters, they are not speaking to an individual who has entrusted them with providing individually tailored medical guidance. Moreover, while their status as physicians may enhance the credibility of their message, they are likely to be just one of many medical voices competing for the public's attention. Unlike a patient receiving medical recommendations from her treating physician, an individual exposed to multiple, and potentially conflicting, views expressed by physicians in public has no reason to defer to one physician over another. To the extent licensing boards exist to protect vulnerable patients within the context of unequal relationships, there is therefore less justification for giving them broad control over the content of public statements unrelated to the provision of direct patient care.<sup>143</sup>

### *C. Disclaimer Requirements as Conditions on the Use of a Professional License*

As discussed in Part II, one of the main concerns about physicians who disseminate medical misinformation is that they are able to draw on their professional status to lend credibility to their positions.<sup>144</sup> To address this concern, it has been suggested that physicians should be required to issue disclaimers when they provide information that conflicts with an established professional consensus. For example, one commentator proposes that licensing boards should have the option of requiring physicians

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<sup>141</sup> See Philip G. Peters, Jr., *The Quiet Demise of Deference to Custom: Malpractice Law at the Millennium*, 57 WASH. & LEE L. REV. 163, 186 (2000) (arguing that, in medical malpractice cases, “the modern function of the respectable minority instruction is to remind the jury that more than one approach may be reasonable”).

<sup>142</sup> See Haupt, *supra* note 112, at 710 (noting that “the knowledge community—rather than the courts or legislatures—determines what clears the bar of good advice”).

<sup>143</sup> Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1215 (2016) (arguing that, in contrast to speech that takes place within professional-client relationships, “[a]ll persons (or at the very least, all adults) are treated as equally competent and equally able to fend for themselves in the realm of public discourse”).

<sup>144</sup> Cole, *supra* note 48 (observing that celebrity physicians in the media “use their professional credentials in the titles of their programs and rely on that authority for their credibility”); see Caplan, *supra* note 52 (“Physicians’ speech invokes medical authority, so when they speak, patients tend to listen. Especially when they speak on TV.”).

who make statements that conflict with professional standards “to issue a concrete disclaimer stating they are not offering clinical advice” or “to make clear to audiences the absence of medical authority or empirical evidence to justify their position—or even to explain to the public the actual standard of care.”<sup>145</sup> Alternatively, physicians might be required to issue statements similar to those recommended by some professional psychology associations, which call on psychologists “to indicate when they are speaking as a matter of personal opinion as opposed to speaking as experts.”<sup>146</sup>

Supporters of this approach might argue that disclaimer requirements can be justified as a condition on physicians’ use of the benefit conferred by their professional status. A long line of Supreme Court cases recognizes that, while the government may not require individuals to give up their First Amendment rights as a condition of receiving a benefit,<sup>147</sup> it is free to avoid subsidizing speech by imposing restrictions on the manner in which the benefit is used.<sup>148</sup> Based on this distinction, it might be argued that, having granted physicians the benefit of professional status through the mechanism of licensure, licensing boards are entitled to ensure that the benefit is not used in support of positions that conflict with profession norms. Disclaimers achieve this goal because they make clear that the physician’s statements do not reflect the views of the professional community. Moreover, they do this without restricting physicians from expressing themselves freely when speaking in their personal capacity.

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<sup>145</sup> Appel, *supra* note 59.

<sup>146</sup> Randolph B. Pipes et al., *Examining the Personal-Professional Distinction: Ethics Codes and the Difficulty of Drawing a Boundary*, 60 AM. PSYCH. 325, 329 (2005); 5 C.F.R. § 3601.108 (requiring Department of Defense employees who use their military rank, titles, or positions to identify themselves in connection with teaching, speaking, or writing to include a disclaimer stating that “the views presented are those of the speaker or author and do not necessarily represent the views of DoD or its components”); *cf.* 5 C.F.R. § 2635.807(b)(2) (requiring federal employees who publish articles in scientific and professional journals in connection with outside employment or outside activities to include “a reasonably prominent disclaimer . . . stating that the views expressed in the article do not necessarily represent the views of the agency or the United States”).

<sup>147</sup> *See* Bd. of Cnty. Comm’rs v. Umbehr, 518 U.S. 668, 674 (1996) (“[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom . . . of speech even if he has no entitlement to that benefit”); *see also* FCC v. League of Women Voters, 468 U.S. 364, 364–365 (1894).

<sup>148</sup> *See* Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc., 570 U.S. 205, 214–215 (2013) (finding that “the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself”).

However, there are two significant weaknesses with this argument. First, it is not clear that courts would agree that physicians' public speech is being "subsidized" by the government based solely on the benefit of professional licensure. In his plurality opinion in *Matal v. Tam*,<sup>149</sup> Justice Alito argued that the subsidized speech doctrine applies only to speech conditions attached to "cash subsidies or their equivalent."<sup>150</sup> Under this view, the benefit of receiving a professional license would be an insufficient basis for restricting physicians' speech. Second and more importantly, even if the benefit of professional licensure were considered a governmental subsidy, the subsidized speech cases distinguish between conditions on the use of subsidies to express governmental positions and conditions attached to private speakers' expression of their personal views. Specifically, while government may impose content-based restrictions on the use of subsidies in both situations,<sup>151</sup> it may not set conditions based on the *viewpoint* of private speakers unless they are using the subsidy to "convey a governmental message."<sup>152</sup> Thus, as long as physicians are not speaking as part of a government program or purporting to represent government policy, their receipt of a professional license would not entitle the government to impose disclosure requirements based on the messages the physicians convey.

Assuming that disclaimer requirements cannot be justified as a permissible condition of licensure, they would be subject to ordinary First Amendment standards applicable to government-imposed disclosure requirements. Outside the context of commercial speech, disclosure requirements are generally treated as a form of compelled speech subject to strict scrutiny.<sup>153</sup> Therefore, licensing boards would need to show that the required dis-

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<sup>149</sup> 137 S. Ct. 1744 (2017).

<sup>150</sup> *Id.* at 1761.

<sup>151</sup> See *Rosenberger v. Univ. of Virginia*, 515 U.S. 819, 831 (1995) (acknowledging that the government may limit the use of its funds to subsidize a particular "subject matter").

<sup>152</sup> See *id.* at 833, 834 (holding that government "may not discriminate based on the viewpoint of private persons whose speech it facilitates").

<sup>153</sup> See Clay Calvert, *Wither Zauderer, Blossom Heightened Scrutiny? How the Supreme Court's 2018 Rulings in Becerra and Janus Exacerbate Problems with Compelled-Speech Jurisprudence*, 76 WASH. & LEE L. REV. 1395, 1415 (2019) (describing the Supreme Court's opinion in *NIFLA* as standing for the proposition that "strict scrutiny generally applies when the government compels professionals to convey content-based messages").

closures are narrowly tailored to achieve a compelling governmental interest, and that it would not be possible to satisfy that interest through less restrictive means.

It seems unlikely that boards would be able to make such a showing. The rationale for requiring physicians to issue disclaimers when they make statements that deviate from professional consensus would have to be that, without such disclosures, the public might assume that the physician is representing the views of the professional community. It is doubtful, however, that licensing boards could provide empirical evidence to support this concern. Moreover, even if some members of the public might misunderstand the extent to which the physician's views deviate from professional consensus, those misconceptions could be corrected by disseminating accurate information—i.e., through the mechanism of counterspeech—rather than by forcing physicians to issue disclaimers whenever they speak.<sup>154</sup>

### CONCLUSION

The foregoing analysis suggests that disciplinary actions are unlikely to play a major role in responding to physicians who disseminate medical misinformation. Unless a licensing board can establish that a physician disseminated objectively false information with knowledge of its falsity or with reckless disregard of whether it was true, professional sanctions for statements made outside the physician-patient relationship are unlikely to survive a constitutional challenge. It is also unlikely that courts would allow boards to impose disclaimer requirements whenever physicians express views that conflict with professional norms.

Because malpractice lawsuits are also not a viable option in these situations,<sup>155</sup> the limited availability of disciplinary actions means that physicians who disseminate medical information may face no legal repercussions. Efforts to control the dissemination of medical misinformation by physicians will therefore

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<sup>154</sup> See *supra* note 87.

<sup>155</sup> In most cases, malpractice actions require proof of a physician-patient relationship. See, e.g., *Ande v. Rock*, 647 N.W.2d 265 (Wis. Ct. App. 2002). Although some courts have authorized malpractice lawsuits in the absence of a formal physician-patient relationship, those cases generally involve physicians making individualized determinations related to the treatment of specific individuals; see, e.g., *Warren v. Dinter*, 926 N.W.2d 370 (Minn. 2019) (allowing medical malpractice action against a hospitalist who recommended against admitting the plaintiff for in-patient care).

depend on imposing other types of consequences. For example, while licensing boards may be limited in their ability to impose disciplinary penalties, they are free to exercise their own First Amendment rights by issuing statements calling out medical falsehoods and disseminating the truth. Similarly, when physicians who disseminate misinformation are affiliated with universities or other institutions, those institutions can issue public statements condemning the physician's views and explaining why they are wrong.<sup>156</sup> In addition, private entities, which are not bound by the First Amendment, have broad discretion to rely on speech-related criteria in determining eligibility for benefits. For example, medical specialty boards, which certify physicians in fields like internal medicine or surgery,<sup>157</sup> might consider revoking the certification of physicians who spread medical misinformation.<sup>158</sup> Hospitals and other private health care organizations could revoke such physicians' staff privileges or terminate their employment.<sup>159</sup> Under some circumstances even government employers could fire or discipline physician employees based on the content of their speech.<sup>160</sup>

However, while disciplinary action may not be the primary solution, it can play an important role in particularly egregious situations. When physicians make statements that contradict well-established medical facts and lack any evidentiary basis, licensing boards can make a strong argument that the physician knew the statements were false or at least entertained serious

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<sup>156</sup> See Pizzo et al., *supra* note 41, at 724 (calling on universities to “publicly state that the university does not endorse the physician’s claims and finds them contrary to the weight of scientific evidence”).

<sup>157</sup> See *Member Boards*, AM. BD. OF MED. SPECIALTIES, <https://www.abms.org/member-boards/> (last visited Nov. 10, 2021).

<sup>158</sup> See Rita Rubin, *When Physicians Spread Unscientific Information about COVID-19*, 327 JAMA 904, 906 (2022) (reporting the American Board of Emergency Medicine’s position that “making public statements that are directly contrary to prevailing medical evidence can constitute unprofessional conduct and may be subject to review by ABEM”).

<sup>159</sup> See Andrea Salcedo, *Hospital Revokes Houston Doctor’s Privileges for “Spreading Dangerous Misinformation” about Covid on Twitter*, WASH. POST (Nov. 5, 2021), <https://www.washingtonpost.com/nation/2021/11/15/houston-doctor-suspended-hospital-misinformation-covid/> (reporting that Houston Methodist Hospital suspended the privileges of a physician who had used her personal Twitter account to promote the drug ivermectin as a treatment for COVID-19).

<sup>160</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (holding that public employees’ right to speak on matters of public concern must be balanced against “the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees”); see *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (finding that the First Amendment does not protect government employees’ speech if the speech relates to the employee’s official job duties).



doubts as to whether the statements were true. Assuming a board can make such a showing, the First Amendment should not prevent boards from holding physicians accountable for the harm that they cause.

## **RACIALIZED, JUDAIZED, FEMINIZED: IDENTITY-BASED ATTACKS ON THE PRESS**

Lili Levi\*

The press is under a growing and dangerous form of attack through identity-based online harassment of journalists. Armies of online abusers are strategically using a variety of rhetorical tools (including references to lynching, the Holocaust, rape and dismemberment) to intimidate and silence non-white, non-male and non-Christian journalists. Such expressive violence joins the mounting physical dangers faced by reporters both in the United States and around the world. Unsurprisingly, identity-based harassment of reporters has increased at the very moment that news organizations are attempting to enhance the diversity of the professional press.

The psychic and physical harms of such attacks on individual journalists are finally beginning to be publicly discussed. But the scale and intensity of identity-based assaults pose threats that extend far beyond the individual. Simply put, they collectively undermine *all* journalists, the function of journalism as a whole, and the press itself as a democratic institution. This Article seeks to highlight these threats to journalism and center them as key challenges for democracy. It analyzes the factors that most contribute to this growing democratic peril, including the professional self-monitoring and self-censorship inevitable in conditions of harassment, the likely effects of reporter intimidation on news organization diversity, and the inadequate responsive steps undertaken so far by news organizations and social media platforms.

The true nature and scope of the threats is obscured when reporter harassment is viewed in isolation and with insufficient attention to its identity-focused virulence. Zooming out, this Article identifies reporter harassment as one of three reinforcing tactics designed to hobble journalism at critical inflection points in its lifecycle. The Trump administration's refrain of 'fake news' worked to undermine public faith in *press output*. Critiques of libel law then and now seek to roll back press-protective *judicial*

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*outcomes*. And identity-based verbal violence threatens to undercut and paralyze the *journalistic process*. While racial, ethnic and misogynistic vitriol may at least sometimes be generated ‘bottom up’ by members of the audience, it reinforces and extends elite press-delegitimizing strategies by coordinating and leveraging new publics and new targets. One need not be a conspiracist to charge that reporter harassment, by threatening the core work of newsgathering and reporting, closes the circle on the press delegitimization schemes that surfaced during the Trump years.

Finding realistic ways to counteract and stem online identity-based abuse is an imperative next step if the press is to perform its constitutionally-recognized role under current conditions of existential threat. In that spirit, the Article suggests a varied menu of ameliorative moves directed to a spectrum of actors: news organizations, journalists, journalism schools, press-protective organizations, social media platforms, and social science researchers. News organizations must have obligations to protect their reporters from online harassment. Yet traditional legal responses currently seem insufficient to achieve such goals. Even so, business imperatives and professional norms create incentives for fruitful change. Once news organizations recognize and reframe reporter harassment as a systemic attack on journalism and their own institutional authority and vitality (rather than an individual problem for particular reporters), the immediate need to craft more effective responses will become self-evident. Like news organizations, social media platforms should adopt effective protective obligations, if only for their own self-interest. Press allies should provide support particularly for journalists lacking access to the resources of the institutional press. Finally, the success of all these suggested initiatives will rely on deeper, more inclusive and well-funded empirical research by social scientists. Specific recommendations aside, the key point is that collective, rather than individual, solutions across a range of constituencies offer the only realistic counterweights to the tsunami of harassment faced by reporters today.

***Warning:*** Please note that because it discusses identity-based online harassment targeted principally to journalists who identify as African American, Jewish and/or women, this Article contains discussion of white supremacist and misogynist material that readers are likely to find offensive, upsetting, and traumatizing. I include it neither to create

*difficulties for readers nor for sensationalism, but to provide a realistic lens into what journalists—and particularly non-male journalists and journalists from racial, ethnic, and/or religious minority communities—must face online when engaging in their constitutionally-grounded professional activities today.*

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## INTRODUCTION

Invocations of lynching, gas chambers and misogynistic torture have been widely deployed in attacks on American journalists at least since Donald Trump's presidential candidacy in 2016 and continue today. The logo "*Rope. Tree. Journalist. Some assembly required.*"<sup>1</sup>—flaunted on a MAGA supporter's t-shirt at a 2016 Trump rally—was not an accidental and idiosyncratic association destined to fade away with electoral change. In November 2020, an African American television anchor was threatened with lynching after the presidential election.<sup>2</sup> Rioters at the January 6, 2021 attempted coup at the Capitol fashioned a noose out of a journalist's camera cord and hung it on a tree.<sup>3</sup> The online world expands and amplifies such

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<sup>1</sup> The "*Rope. Tree. Journalist. Some Assembly Required.*" logo appeared on a t-shirt worn by a Trump supporter at a pro-Trump rally in Minneapolis, Minnesota in 2016. See Brandy Zadrozny, *The Man Behind 'Journalist, Rope, Tree'*, DAILY BEAST (Apr. 13, 2017), <https://www.thedailybeast.com/the-man-behind-journalist-rope-tree>. Obviously, the logo—in what purports to be a veiled and "humorous" reference—advocates lynching reporters. The image showed an elderly woman and a young girl around him, apparently laughing. *Id.* (reproducing image). On the use of "humor" and "irony" as a cover for spreading hate speech via memetic culture, see discussion *infra* at Section I.B.

Anyone could have bought such a shirt at Walmart until 2017. Walmart, which sold the shirts, only pulled them from the shelves in November of 2017, in response to complaints by the Radio Television Digital News Association (RTDNA). *Walmart Pulls 'Rope. Tree. Journalist.' T-Shirt from Site*, CBS NEWS (Nov. 30, 2017), <https://www.cbsnews.com/news/walmart-pulls-rope-tree-journalist-t-shirt-from-site/>; Kristen Hare, *'Rope. Tree. Journalist' T-Shirt Was on Sale at Walmart.com Until RTDNA Spoke Up*, POYNTER (Nov. 30, 2017), <https://www.poynter.org/reporting-editing/2017/rope-tree-journalist-t-shirt-was-on-sale-at-walmart-com-until-rtdna-spoke-up/>.

A conservative blogger took credit for having originated the meme years before its appearance at the Trump rally. See, e.g., Zadrozny, *supra* (citing Emperor Misha I, Posting to *Fame Delayed is Fame Denied*, THE ANTI-IDIOTARIAN ROTTWEILER (November 8, 2016), <http://nicedoggie.net/?p=12372>). Tellingly, this claim would have dated the meme to President Obama's first term.

<sup>2</sup> Ken Boddie (@kenboddie), TWITTER (Nov. 17, 2020, 5:20 PM), <https://twitter.com/kenboddie/status/1328825483350327296> ("[Y]ou black ugly n\*\*\*\*\*. You need to be wrapped in chains and hung by your . . .") (This Article does not spell out the full "N word" as it appears in the original tweet). The rest of the message does not appear on the Twitter post. See Ken Boddie, *In His Own Words: Ken Boddie Reacts to Racist Letter*, KOIN, <https://www.koin.com/news/in-his-own-words-ken-boddie-reacts-to-racist-letter> (Nov. 18, 2020, 4:56 PM); see also Gary Harki, *When Writing About Race, Abuse Follows. Especially for Journalists of Color and Women*, POYNTER (Mar. 12, 2021), <https://www.poynter.org/ethics-trust/2021/when-writing-about-race-abuse-follows-especially-for-journalists-of-color-and-women/>; *infra* Section I.A.

<sup>3</sup> See, e.g., Tiffany Hsu & Katie Robertson, *Covering Pro-Trump Mobs, the News Media Became a Target*, N.Y. TIMES (Jan. 6, 2021) (citing Paul McLeod (@pdmcleod), TWITTER (Jan. 6, 2021, 5:11 PM), <https://twitter.com/pdmcleod/status/1346942367543091200?s=20>),

racialized attacks. Evidencing its focus on identity, online harassment also reveals chilling patterns of Judaized hate and violent misogyny.<sup>4</sup> Jewish journalists receive messages with photoshopped images of their faces in Nazi gas chambers,<sup>5</sup> while tweeters comment “Why do Jews get so triggered when we mention ovens?”<sup>6</sup> Women journalists fear opening Twitter lest they face leering sexism, misogyny<sup>7</sup> and promises to rape, dismember and kill them.<sup>8</sup> These examples are far from

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<https://www.nytimes.com/2021/01/06/business/media/media-murder-capitol-building.html>.

<sup>4</sup> See discussion *infra* at Section I.A.

With respect to terminology, I follow the AP’s recent decision, following the Anti-Defamation League, to shift from “anti-Semitism” to “antisemitism.” Merrill Perlman, *The AP and the Latest Style*, COLUM. JOURNALISM REV. (Apr. 29, 2021), [https://www.cjr.org/language\\_corner/associated-press-stylebook-2021-changes.php](https://www.cjr.org/language_corner/associated-press-stylebook-2021-changes.php); see *Spelling of Antisemitism vs. Anti-Semitism*, ADL, <https://www.adl.org/spelling> (last visited May 18, 2022). I also typically refer to “African American” or “Black” journalists, rather than journalists or reporters “of color” more generally. I use the term “non-male” to include nonbinary and gender diverse reporters. I refer to journalists who identify as women as “women journalists” or “non-male journalists.”

<sup>5</sup> See, e.g., SAMUEL WOOLLEY & KATIE JOSEFF, ANTI-DEFAMATION LEAGUE CTR FOR SOC’Y & TECH., COMPUTATIONAL PROPAGANDA, JEWISH-AMERICANS AND THE 2018 MIDTERMS: THE AMPLIFICATION OF ANTI-SEMITIC HARASSMENT ONLINE 4 (2018) [hereinafter 2018 ADL Report],

<https://www.adl.org/resources/reports/computational-propaganda-jewish-americans-and-the-2018-midterms-the-amplification>; see also ANTI-DEFAMATION LEAGUE TASK FORCE ON HARASSMENT & JOURNALISM, ADL REPORT: ANTI-SEMITIC TARGETING OF JOURNALISTS DURING THE 2016 PRESIDENTIAL CAMPAIGN, ANTI-DEFAMATION LEAGUE TASK FORCE ON HARASSMENT AND JOURNALISM 8 (2016) [hereinafter 2016 ADL REPORT],

[https://www.adl.org/sites/default/files/documents/assets/pdf/press-center/CR\\_4862\\_Journalism-Task-Force\\_v2.pdf](https://www.adl.org/sites/default/files/documents/assets/pdf/press-center/CR_4862_Journalism-Task-Force_v2.pdf) (similar reports).

<sup>6</sup> Emma Green, *The Tide of Hate Directed Against Jewish Journalists*, THE ATLANTIC (Oct. 19, 2016), <https://www.theatlantic.com/politics/archive/2016/10/what-its-like-to-be-a-jewish-journalist-in-the-age-of-trump/504635/> (“*The Atlantic’s* editor in chief, Jeffrey Goldberg, was one of the handful of most frequently targeted journalists. In June, he wrote about some of the tweets he’s recently received, including a cartoon of the U.S. ‘Jewpreme Court,’ a picture of money coming out of an oven, and a tweet that asked, ‘Why do Jews get so triggered when we mention ovens?’”).

<sup>7</sup> See, e.g., Charlotte Klein, “*I’m Afraid To Open Twitter*”: Next-level Harassment Of Female Journalists Is Putting News Outlets To The Test, VANITY FAIR (Mar. 26, 2021), <https://www.vanityfair.com/news/2021/03/harassment-of-female-journalists-is-putting-news-outlets-to-the-test>.

<sup>8</sup> Recently, Washington Post columnist and former New York Times Public Editor Margaret Sullivan wrote about receiving “viciously misogynistic name-calling and sexualized fantasies about dismembering me.” David Bauder, *Journalists Demanding More Action Against Online Harassment*, ABC NEWS (June 9, 2021), <https://abcnews.go.com/Technology/wireStory/journalists-demanding-action-online-harassment-78173081>; see also Margaret Sullivan, *Online Harassment of Female Journalists is Real, and It’s Increasingly Hard to Endure*, WASH. POST (Mar. 14, 2021), [https://www.washingtonpost.com/lifestyle/media/online-harassment-female-journalists/2021/03/13/ed24b0aa-82aa-11eb-ac37-4383f7709abe\\_story.html](https://www.washingtonpost.com/lifestyle/media/online-harassment-female-journalists/2021/03/13/ed24b0aa-82aa-11eb-ac37-4383f7709abe_story.html). See

exceptional. They reflect the traditional preoccupations and political agendas of white supremacist groups—hatred principally focused on African Americans, Jews, and assertive women<sup>9</sup>—as expressed against the “enemy” of the American people.<sup>10</sup> Online attacks today thus embrace identity-focused vitriol with two goals: to terrify and silence the targeted reporters

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generally Sarah Eberspacher, Note, *‘Delete Your Account’ or Deal With It? How News Organizations are Failing to Support Female Reporters Against Online Harassment*, 21 GEO. J. OF GENDER & L. 143 (2019).

<sup>9</sup> I focus on Black, women and Jewish reporters because both social science studies and anecdotal reports from journalists and media analysts indicate that these groups comprise the vast majority of the reporters facing abuse online. A 2018 study by the Anti-Defamation League (ADL) underscores that the two key subjects of white supremacist hate are Blacks and Jews. ANTI-DEFAMATION LEAGUE CTR. ON EXTREMISM, *NEW HATE AND OLD: THE CHANGING FACE OF AMERICAN WHITE SUPREMACY* 14 (2018), <https://www.adl.org/new-hate-and-old-the-changing-face-of-american-white-supremacy-report> (describing white supremacy’s focus on Blacks and Jews); see also ANTI-DEFAMATION LEAGUE CTR. ON EXTREMISM, *WHEN WOMEN ARE THE ENEMY: THE INTERSECTION OF MISOGYNY AND WHITE SUPREMACY* 15 (2018), <https://www.adl.org/resources/reports/when-women-are-the-enemy-the-intersection-of-misogyny-and-white-supremacy>; ANTI-DEFAMATION LEAGUE CTR. FOR TECHNOLOGY & SOCIETY, *ONLINE HATE AND HARASSMENT: THE AMERICAN EXPERIENCE 2021* (2021) [hereinafter ADL, *ONLINE HATE*], <https://www.adl.org/online-hate-2021> (reporting that African American respondents experienced a “sharp rise in race-based harassment, from 42% last year to 59% this year.”); *U.S. White Supremacist Propaganda Remained at Historic Levels in 2021, With 27 Percent Rise in Antisemitic Messaging*, ADL, <https://www.adl.org/resources/reports/us-white-supremacist-propaganda-2021> (last visited Mar. 28, 2022); see *infra* Section I.A.

This focus is in no way intended to sideline other identities or to minimize or discount the identity-focused online harassment also experienced by reporters who are, *inter alia*, LGBTQ+, nonbinary, Muslim, Latinx, Asian American and/or have disabilities. In fact, ADL has recently reported that the “levels of online harassment based on identity remain disturbingly high” across the range of marginalized groups. ADL, *ONLINE HATE*, *supra* at 7. For example, significant anti-Asian harassment was reported last year. See, e.g., Rebecca Sun, *Asian Americans in Media: ‘You Can’t Extricate the Humanity of Yourself From the Journalist,’* HOLLYWOOD REP. (Apr. 15, 2021), <https://www.hollywoodreporter.com/lifestyle/lifestyle-news/asian-americans-in-media-you-cant-extricate-the-humanity-of-yourself-from-the-journalist-4158009/>. Fifty-seven percent of the Muslim respondents to ADL’s *ONLINE HATE AND HARASSMENT* survey, see *supra* at 7, reported religion-based harassment. Sixty-four percent of the LGBTQ+ respondents reported online abuse. *Id.* at 13.

Despite differences, the otherization of Black, Jewish and women journalists (particularly if such reporters also have other, intersectional identities) is illustrative of, and useful in thinking about, abuse expressed against reporters whose identities are linked to other marginalized groups. It is also likely that the racist, antisemitic and misogynistic attacks on Black, Jewish and women reporters are intended to—and do—send strong signals of intimidation and silencing to reporters with other marginalized identities.

<sup>10</sup> See, e.g., Michael Grynbaum, *Trump Calls the News Media the ‘Enemy of the American People,’* N.Y. TIMES (Feb. 17, 2017), <https://www.nytimes.com/2017/02/17/business/trump-calls-the-news-media-the-enemy-of-the-people.html>; see also Matt Carlson et al., *Digital Press Criticism: The Symbolic Dimensions of Donald Trump’s Assault on U.S. Journalists as the ‘Enemy of the People,’* 9 DIGIT. JOURNALISM 737, 739 (2020).



(while sending a chilling message to journalists from other marginalized groups), and to undermine the press as a whole.<sup>11</sup> Such racialized, Judaized and misogynistic online harassment has particularly harmful effects, not only for the targeted journalists but also for the press as an institution with a critical role in democracy. This issue deserves a central place in democratic discourse both because of its human toll and its socio-political consequences.

Unsurprisingly, identity-based attacks on the press are happening at the very moment when news organizations are beginning to focus on their own discriminatory pasts, attempting to diversify the newsroom, and responding to modern calls for increased self-consciousness about the racial impacts of the structures and processes of their profession.<sup>12</sup> The goals of these techniques of press harassment are obviously to terrify and silence the reporters, influence the content of press coverage, deter diverse voices in journalism, chill newsgathering, and exacerbate doubts about the press in the public mind.

Online harassment has been weaponized by the ease of collective action online, Internet virality strategies, “humorous” presidential invitations to do violence to the media,<sup>13</sup> the memetic turn that makes “ironic racism” hard to identify<sup>14</sup> and

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<sup>11</sup> See, e.g., *Troll Patrol Findings: Using Crowdsourcing, Data Science & Machine Learning to Measure Violence and Abuse Against Women on Twitter*, AMNESTY INT’L [hereinafter *Troll Patrol Findings*], [https://decoders.amnesty.org/projects/troll-patrol/findings#what\\_did\\_we\\_find\\_container](https://decoders.amnesty.org/projects/troll-patrol/findings#what_did_we_find_container) (last visited March 12, 2022); J. Clara Chan, *Washington Post Defends Reporter Seung Min Kim After ‘Racist and Sexist Attacks’ by ‘Vicious’ Online Trolls*, THE WRAP (Feb. 25, 2021), <https://www.thewrap.com/washington-post-defends-reporter-seung-min-kim-after-racist-and-sexist-attacks-by-vicious-online-trolls/>; Gina Masullo Chen, et. al., *You Really Have to Have a Thick Skin’: A Cross-cultural Perspective on How Online Harassment Influences Female Journalists*, 21 JOURNALISM 877 (2020); Laura E. Adkins, *Israeli Reporter Interrupted with Anti-Semitic Slurs During Broadcast at Capitol*, TIMES OF ISR. (Jan. 7, 2021), <https://www.timesofisrael.com/israeli-reporter-interrupted-with-anti-semitic-slurs-during-broadcast-at-capitol/>; Green, *supra* note 6; Mathew Ingram, *Every 30 Seconds, A Female Journalist or Politician is Harassed on Twitter*, COLUM. JOURNALISM REV. (Dec. 19, 2018), [https://www.cjr.org/the\\_media\\_today/female-journalists-harassed-twitter.php](https://www.cjr.org/the_media_today/female-journalists-harassed-twitter.php); Anne Helen Petersen, *The Cost of Reporting While Female*, COLUM. JOURNALISM REV. (2018), [https://www.cjr.org/special\\_report/reporting-female-harassment-journalism.php](https://www.cjr.org/special_report/reporting-female-harassment-journalism.php).

<sup>12</sup> See discussion *infra* Section II.B.

<sup>13</sup> See, e.g., Michael M. Grynbaum, *Trump Tweets a Video of Him Wrestling ‘CNN’ to the Ground*, N.Y. TIMES (July 2, 2017), <https://www.nytimes.com/2017/07/02/business/media/trump-wrestling-video-cnn-twitter.html> (“President Trump posted a short video to his Twitter account on Sunday in which he is portrayed wrestling and punching a figure whose head has been replaced by the logo for CNN.”).

<sup>14</sup> See discussion *infra* Section I.B.

news organizations' affirmative requirement of online engagement by reporters.<sup>15</sup> But the threat of online harassment is also amplified by the worldwide increase in physical danger for reporters.<sup>16</sup> Today, journalists must fear not only the onslaught of online attacks, but increased threats of physical violence—even by police charged with protecting them. Journalists identifying as racial or ethnic minorities and non-male journalists in particular are faced daily with the recognition that they are neither psychologically nor physically safe.

Confronting the combination of online and physical violence has doubtless alarmed reporters, affected their personal and professional routines, hampered them in the practice of journalism, generated problems and division in the newsroom—and has even led to departure from the profession.<sup>17</sup>

But the impact goes beyond individual self-censorship. Identity-based online harassment of reporters otherizes not only the individual recipients but is designed to sideline and undermine the entire press project.<sup>18</sup> *Inter alia*, talent drain from the profession, a negative effect on news organizations' attempts to improve their own diversity, and self-censorship in coverage are all likely to increase existing public distrust in the press. The predictable self-censorship in response to harassment will influence, at least to some degree, what is covered, by whom, and how. To the extent that this self-censorship principally affects reporting seeking to diversify coverage and make up for news organization failures in the past, it portends a particularly regressive effect on the evolution of the press into the future.

The type of otherization based on entrenched biases may be particularly difficult to dislodge, both for its individual targets and for public perceptions of the press. This may be especially likely at times of political polarization. Identity-based harassment can end up normalizing abuse as it increases in scale. It can also invite new adherents to white supremacist ideas. When the terms of attack associate the press with otherwise socially embedded biases, they may be more subconsciously effective at least for some publics than merely abstract critiques

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<sup>15</sup> See discussion *infra* Section I.C.

<sup>16</sup> See discussion *infra* Section III.

<sup>17</sup> See discussion *infra* Section I.A.

<sup>18</sup> See, e.g., Silvio Waisbord, *Mob Censorship: Online Harassment of US Journalists in Times of Digital Hate and Populism*, 8 DIGIT. JOURNALISM 1030, 1037 (2020) [hereinafter Waisbord, *Mob Censorship*]; see also discussion *infra* Section I.A.

of the “fake news” media. Therefore, the associations may be more difficult to counteract and uproot through traditional methods of building institutional trust.

This suggests that the rise of identity-focused attacks on journalists should also be assessed in its broader political context. The Trump administration and its allies sought to undermine the effectiveness, credibility and legitimacy of the press in a number of ways. First came presidential candidate Donald Trump’s promises to reduce legal protections for journalistic activity.<sup>19</sup> Then came former President Trump’s attack on the “fake news” mainstream press during his term.<sup>20</sup> Finally, the repeated characterization of the media as the “enemy” of the American public<sup>21</sup> foreseeably invited targeted attacks on journalists engaging in newsgathering and reporting.

The overall strategy appeared designed to hobble journalism at critical inflection points in its entire lifecycle. Thus, the ceaseless refrain of “fake news” would undermine public faith in *press output*—what the press publishes. Critiques of libel law would seek to roll back press-protective *judicial outcomes*. And identity-based verbal violence would seek to intimidate press workers in order to undercut and paralyze the *journalistic process* (therefore also casting doubt on the credibility of media *output*.) From this vantage point, online harassment can be seen as the third leg of a three-pronged delegitimization program targeting different temporal moments in the journalistic process. Success in this tripartite strategy could undermine the press’s

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<sup>19</sup> From former President Trump’s calls to shut down press protections in defamation law to recommendations by Justices Gorsuch and Thomas to reconsider the protections of *New York Times v. Sullivan*, stability in press law has been challenged in both the court of public opinion and in the courts themselves. See, e.g., Berisha v. Lawson, 141 S. Ct. 2424, 2424–30 (2021) (Gorsuch, J. & Thomas, J., dissenting from denial of certiorari); see also AMY GAJDA, THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS 3 (2015) (describing reduction in press-protective judicial decisions).

<sup>20</sup> The media’s output was attacked as “fake news” and press institutions (perhaps other than Fox) were demonized as the “enemy” of the American people. See, e.g., Grynbaum, *supra* note 10. Scholarly as well as conversational attention has rightly been paid to the obvious Trumpian strategy of delegitimizing the mainstream press. See, e.g., RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L.J. 1301, 1303 (2017); Lili Levi, *Real “Fake News” and Fake “Fake News,”* 16 FIRST AMEND. L. REV. 232, 234 (2018).

<sup>21</sup> See, e.g., Grynbaum, *supra* note 10 (describing Trump’s “enemy” rhetoric); Daniel Politi, *Trump Cheers Supporters Who Harassed Reporter at Anti-Lockdown Protest: “Great People,”* SLATE (May 16, 2020), <https://slate.com/news-and-politics/2020/05/trump-cheers-supporters-harassed-reporter-lockdown-protest-great-people.html>.

constitutional function and further diminish the public's belief in the legitimacy of the mainstream institutional media.

When seen holistically—as a long-range strategy of undermining and decentering the press—there is reason to believe that the three-pronged approach has had some troubling success. Doctrinally, courts are beginning to question the stability of press-protective precedents.<sup>22</sup> The ceaseless drumbeat of Trump's "fake news" claims appears to have reinforced previously-declining public faith in the press. And even though the election of President Biden put the brakes on official Executive branch press-bashing for purposes of delegitimization, it did not put a stop to the parallel (albeit sometimes more decentralized) strategies of journalist harassment. If the journalists gathering the news to tell the mainstream media's stories are threatened and silenced, or even if campaigns of harassment trigger responsive changes to the press' traditional routines and practices, the goal of hamstringing the press will have been significantly advanced.

Having identified harassment of journalists as a particularly disruptive strategy then raises the question of what should be done in response. This Article makes recommendations aimed at news organizations, journalism schools, reporters and journalist-representative organizations, scholars, and social media companies. It does so because each can play an important and interlocking positive role. It should become clear to *all* participants that campaigns of online intimidation and harassment against one reporter are actually campaigns against all reporters and require a united front in response.

The Article recognizes that at least five contextual complexities attend any attempts to craft corrective recommendations.<sup>23</sup> Mindful of those concerns, the Article first argues that news organizations must have obligations to their employees to protect them both from physical violence and

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<sup>22</sup> See discussion *infra* Section IV.

<sup>23</sup> Specifically, recommendations must be made with full awareness of the following: the dangers of seeking to micro-manage the press; reportorial ambivalence in light of the professional capital offered by social media engagement; the variety in the new media landscape and the evolution of online harassment; concerns about amplifying harasser voices; the many players involved in the process of news dissemination and the differences among their content-management practices; and concerns about recommending evidence-based changes in light of lacunae in existing empirical research. See discussion *infra* Section V.A.

online abuse.<sup>24</sup> Racial, ethnic, religious and misogynistic harassment online is violence of a different sort and calling for reportorial “grit” or a “thick skin” does not satisfy the news organizations’ obligations—which should be recognized, if not yet wholly and extensively in law, then in professional practice.<sup>25</sup> There are existing legal protections against workplace harassment and discrimination, anti-cyberbullying statutes, privacy-protecting torts and good arguments for extending fiduciary duties to employees, but formal interpretations, limited footprints, and the possibility of contracting around certain obligations may make the existing legal tools insufficiently robust protections. While we await further reporter-protective developments in legal doctrine, professional norms and institutional self-interest can and should be read to impose such obligations.

Without presuming to be overly directive, the Article recommends well-designed protocols applicable across the board for surfacing and analyzing such expressive violence, appropriate abuse-report processes, changes made to the organizations’ social media presence policies, attention paid to security training, resources devoted to mental health in the newsroom, and newsroom diversification and culture change. News organizations must also recognize, as they engage in their expressed goals of expanding diversity in their ranks, that merely hiring reporters who add to newsroom racial, ethnic or gender diversity is not enough. Resources must be spent on creating collaborative and inclusive newsrooms in which all reporters feel supported in responding in a variety of ways to the various forms of intimidation to which they are now subjected. And without giving white supremacists another platform, information about these campaigns of intimidation and harassment should be publicized, shared with scholars for study, brought to the attention of the social media platforms on which they occur (and the public), and serve as the subject of government lobbying.

As for journalism schools, the Article recommends that specific attention be paid to the phenomenon of online harassment of reporters as a distinct tool in the contemporary attacks on the legitimacy of the press globally. Reporters as well—and those who represent them, such as unions, press organizations, media lawyers and law school-based media law

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<sup>24</sup> See discussion *infra* Section V.B.

<sup>25</sup> See discussion *infra* Section V.B.

clinics—should create networks to share information about these attempts to intimidate, assess legal options, offer mentorship, and provide resources to freelancers and news organizations too financially challenged to respond adequately to the current landscape of threat.<sup>26</sup> This is particularly important for freelance news workers who do not have other access to institutional resources.

Social media as well—over which much online harassment is generated and transmitted—must consider ameliorative suggestions as to tech tools, algorithmic and user-facing design, reporting processes, terms of service enforcement, and data transparency.<sup>27</sup> In light of public disapproval and activist calls for regulation, effective attention by the platforms themselves is now a matter of self-preservation.

In addition, much empirical and analytic work by researchers still needs to be done to help direct reform efforts.<sup>28</sup> The Article therefore offers a research agenda for scholars. For example, researchers should correct the paucity of empirical studies focusing on the experiences of African American journalists. They should also study further the impacts of public exposure to identity-based attacks on reporters. The Article also reinforces the need for independent researcher access to social media platform information to aid in advancing empirical study of online harassment.

The Article proceeds in five sections. Section I describes the current picture of identity-based online harassment against the press, focusing on African American journalists, women, and journalists perceived to be Jewish; sketches the memetic turn designed to avoid criticism; and explains both the institutional push to engage online and the institutional failures in addressing the harassing results. Section II explores the consequences of online attacks on journalists personally, on their professional routines, and on the journalistic function writ large. The Section argues that those expressive threats familiar to white supremacy have not only hurt and minimized non-white, non-male and non-Christian reporters but also have delegitimized the press and

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<sup>26</sup> See discussion *infra* Section V.C.

<sup>27</sup> For pragmatic reasons, I call for negotiated steps on all those fronts rather than relying principally on formal legal change, although negotiating in the shadow of likely regulation can offer significant negotiating advantages. See discussion *infra* Section V.D.

<sup>28</sup> See discussion *infra* Section V.E.

undermined journalism as a whole. Section II also situates the harassment dynamic in the context of news organizations' developing attempts to increase diversity in the newroom. Section III outlines the rise in physical violence and threats of violence against the press, especially by law enforcement during political protests and in politically-incited attacks by private parties. The Section argues that online threats must be seen as only one part of a mosaic of threats facing journalists in their work. Section IV situates the expressive and physical violence described in the previous Sections in what amounts to a broader, multifactorial approach to the delegitimization of the mainstream press. The Section contends that while this strategy was emblematic of the Trump administration, it has not disappeared with the election of President Biden. Finally, while recognizing the complexity of the issues and the response-related ambivalence of many reporters themselves, Section V considers ways forward, including recommendations for news organizations, journalism schools, scholars, press-representing organizations, reporters themselves and the social media platforms on which online harassment of journalists diffuses.

## I. ONLINE HARASSMENT OF JOURNALISTS

One of the most notable realities of current journalistic life is reporters' exposure to systematic online harassment and intimidation.<sup>29</sup> Although online attacks on reporters predated

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<sup>29</sup> Online harassment is an umbrella idea which covers a variety of ways in which individuals are attacked. *See, e.g.*, EMILY A. VOGELS, PEW RSCH. CENTER, THE STATE OF ONLINE HARASSMENT 5 (2021), <https://www.pewresearch.org/internet/2021/01/13/the-state-of-online-harassment/> (describing various forms of online attack); *see also* Avery E. Holton, Valerie Belair-Gagnon, Diana Bossio & Logan Monyneux, "Not Their Fault, but Their Problem": Organizational Responses to the Online Harassment of Journalists, JOURNALISM PRAC., July 2021, at 7 (describing three distinct forms and degrees of harassment); Kaitlin C. Miller, *Hostility Toward the Press: A Synthesis of Terms, Research, and Future Directions in Examining Harassment of Journalists*, DIGIT. JOURNALISM, Oct. 2021, at 2–4 [hereinafter Miller, *Hostility Toward the Press*] (describing lack of consensus in the literature on defining harassment, suggesting "unwanted abusive behaviors" as an option, and focusing on the perception of the receiver rather than the intent of the speaker in defining harassment).

Because this Article focuses on racist, antisemitic and misogynistic attacks experienced by journalists online—what might be considered "*res ipsa*" harassment—it need not attempt to map the entire landscape of online harassment. In any event, while not every caustic expression of political disagreement should be classed as the sort of online harassment that threatens journalism and democracy, personal attacks or threats using a reporter's identity as a weapon to undermine the work of journalism easily fit the category.

the Trump presidency, journalists have reported increased virulence in online attacks and criticism since the start of the Trump administration.<sup>30</sup> Recent studies indicate that while journalists across the board have been subjected to online attacks,<sup>31</sup> Black, Jewish and women journalists are particularly

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While there are numerous newspaper articles and social science studies on online harassment of reporters, I am particularly indebted to Professor Silvio Waisbord's excellent scholarship on this issue in the field of media studies. See generally Waisbord, *Mob Censorship*, *supra* note 18; Silvio Waisbord, *Trolling Journalists and the Risks of Digital Publicity*, *JOURNALISM PRAC.*, Sept. 2020 [hereinafter Waisbord, *Trolling Journalists*]. I agree entirely with Professor Waisbord's argument that online harassment should not be seen as a safety problem, but rather as "a speech issue with huge implications for journalism." Waisbord, *Mob Censorship*, *supra* note 18, at 1041. In sympathy with Waisbord's analysis, this Article argues that contemporary mob censorship's particular focus on racial and ethnic minority and women journalists leads to particularly harmful consequences for both reporters and the press as a whole.

<sup>30</sup> Eberspacher, *supra* note 8, at 152–53; see, e.g., Mark Follman, *Trump's "Enemy of the People" Rhetoric Is Endangering Journalists' Lives*, *MOTHER JONES* (Sept. 13, 2018), <https://www.motherjones.com/politics/2018/09/trump-enemy-of-the-people-media-threats/>.

<sup>31</sup> In light of former President Trump's attacks on the mainstream media, it might be assumed that online harassment, particularly by politically conservative commentators, would be both evenly distributed against all presumably "liberal" reporters and focused on (and responsive to) substantive political controversies. As noted in text, however, African American, Jewish and women reporters were more actively and virulently attacked, and race, ethnicity and gender were a distinct part of attacks on journalists in general as well.

The "learn to code" controversy in 2019 is an example. In that episode, journalists who had been fired in a series of mass layoffs were subjected to online harassment, nastiness and partisan attacks on Twitter and told that they should "learn to code." See *Learn to Code*, *KNOW YOUR MEME*, <https://knowyourmeme.com/memes/learn-to-code> (last visited Nov. 26, 2021) (explaining the "learn-to-code" meme and how 4chan users coordinated attacks in which they would continuously tweet "learn to code" to any laid-off journalist). Fox's Tucker Carlson reportedly chided the laid-off journalists for having failed to see the humor in the comments but said nothing about their context as part of a brigading pile-on attack:

[T]he "learn to code" suggestions were interspersed with memes of journalists being beheaded and hanged. Reporters who were Jewish, women, or people of color also received violently anti-Semitic, misogynist, and racist replies and messages. For some, the messages numbered in the hundreds and included death threats. Far from being mocking but ultimately innocuous advice, "learn to code" was part of a campaign originating on an anonymous message board to harass journalists widely disliked by the far right.

"There's this patina of plausible deniability where if people object to the harassment, you can call them a snowflake or say they're overreacting to a simple suggestion," Talia Lavin, the writer who first traced the campaign to its origin, tells CJR. "But it's not that I'm 'triggered' by the simple phrase 'learn to code,' it's that it's coming from so many people, and alongside overt hate speech, which is clearly not a coincidence."



and viciously targeted. There is jaw-dropping anti-Black racism, antisemitism and misogyny against the press online.<sup>32</sup> These online comments—whether in newspaper comments sections, or email, or (most frequently) on social media such as Twitter—all too often demonstrate extreme disinhibition in their identity-based attacks on the targeted journalists themselves (rather than on the content of their published stories).

Terror hatched online can all-too-easily cross boundaries into the physical world.<sup>33</sup> Recent empirical study links online

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Zoe Beery, *The Troll Brigade Berates Laid Off Journalists*, COLUM. JOURNALISM REV. (Jan. 30, 2019), <https://www.cjr.org/analysis/learn-to-code.php>. When Twitter sought to control the use of the phrase “as part of a targeted harassment campaign,” conservative commentators “including Ben Shapiro, Donald Trump, Jr. and David Duke referenced the meme with one-off tweets, signaling to their followers to keep the pressure up, often adding that this was yet another example of a social media platform censoring conservatives.” *Id.*

<sup>32</sup> See, e.g., Eberspacher, *supra* note 8, at 150; Emma Marshak, *Online Harassment: A Legislative Solution*, 54 HARV. J. ON LEGIS. 501, 503 (2017); Waisbord, *Mob Censorship*, *supra* note 18 and sources cited therein.

Recent studies show that a vast number of Americans are subjected to online harassment. See, e.g., PEW RSCH. CTR., THE STATE OF ONLINE HARASSMENT (2021), <https://www.pewresearch.org/internet/2021/01/13/the-state-of-online-harassment/> (reporting that “41% of Americans have personally experienced some form of online harassment” and that online harassment has intensified since 2017 as “growing shares have faced more severe and multiple forms of harassment. For example, in 2014, 15% of Americans said they had been subjected to more severe forms of online harassment. That share is now 25%. There has also been a double-digit increase in those experiencing multiple types of online abuse—rising from 16% to 28% since 2014. This number is also up since 2017, when 19% of Americans had experienced multiple forms of harassing behaviors online.”) So why limit the focus and remedial suggestions here to journalists?

Without minimizing the impacts of online harassment on anyone targeted by it and the social harm of such widespread harassment, this Article focuses on the harassment of journalists because journalism provides a critical social benefit—one with constitutional recognition and significance. See Kaitlin C. Miller, *Harassment’s Toll on Democracy: The Effects of Harassment Toward US Journalists*, JOURNALISM PRAC., Dec. 2021, at 2 [hereinafter Miller, *Harassment’s Toll*] (arguing that because of journalists’ “unique position,” harassment of journalists threatens democracy). Identifiably negative effects of harassment on journalists constitute a threat to a fundamental democratic function—one beyond the general social harm of online harassment of individuals. Moreover, some media researchers have argued that journalists “face a unique level of oppression *because* they are journalists.” Miller, *Hostility Toward the Press*, *supra* note 29, at 13. On this view, harassment operates on journalists’ intersecting identities, with “journalist” as an aversive role that exacerbates the overall harassment grounded on other identity markers. *Id.* In addition, as a practical matter, it is easier to imagine concrete institutional steps to control or reduce online harassment of journalists than to solve for the online population as a whole.

<sup>33</sup> See, e.g., *47 Journalists Killed in 2017 / Motive Confirmed*, COMM. TO PROTECT JOURNALISTS, [https://cpj.org/data/killed/2017/?status=Killed&motiveConfirmed%5B%5D=Confirmed&type%5B%5D=Journalist&start\\_year=2017&end\\_year=2017&group\\_by=loc](https://cpj.org/data/killed/2017/?status=Killed&motiveConfirmed%5B%5D=Confirmed&type%5B%5D=Journalist&start_year=2017&end_year=2017&group_by=loc)

attacks to physical attacks on female journalists.<sup>34</sup> Inciting physical threats, the recent past has seen a rise in “doxxing” online<sup>35</sup> and “swatting,” sometimes with tragic results.<sup>36</sup> The deployment of expressive white supremacy (including classic antisemitic and racist tropes) and the language of gender bias against the press on the Internet can also have unprecedented global reach and reinforce worldwide threats to journalist safety.<sup>37</sup> It is critical to take these developments seriously, and to address the underlying otherization which they reveal.

*A. Identity-Based Online Attacks On African American, Jewish And Women Journalists*

Studies of online expression as well as journalist self-reporting establish that online harassment and criticism are

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ation (last visited Oct. 11, 2021) (reporting that a significant percentage of murdered journalists had previously been subjected to online harassment and abuse); Julie Posetti, Jackie Harrison, & Silvio Waisbord, *Online Attacks On Female Journalists Are Increasingly Spilling Into The ‘Real World’—New Research*, THE CONVERSATION (Nov. 25, 2020) <https://theconversation.com/online-attacks-on-female-journalists-are-increasingly-spilling-into-the-real-world-new-research-150791>; see also Matthew Haag & Maya Salam, *Gunman in ‘Pizzagate’ Shooting is Sentenced to 4 Years in Prison*, N.Y. TIMES (June 22, 2017), <https://www.nytimes.com/2017/06/22/us/pizzagate-attack-sentence.html> (describing gunman who fired assault rifle in Washington DC pizzeria in response to online conspiracy-inspired belief that he was saving children from sex-trafficking).

<sup>34</sup> See, e.g., Eberspacher, *supra* note 8, at 149; see JULIE POSETTI ET AL., UNESCO, THE CHILLING: GLOBAL TRENDS IN ONLINE VIOLENCE AGAINST WOMEN JOURNALISTS (2021) [hereinafter UNESCO, THE CHILLING], <https://unesdoc.unesco.org/ark:/48223/pf0000377223>; see MICHELLE FERRIER, TROLLBUSTERS, ATTACKS AND HARASSMENT: THE IMPACT ON FEMALE JOURNALISTS AND THEIR REPORTING 40–44 (Elisa Lees Munoz ed., Int’l Women’s Media Found. 2018) [hereinafter TROLLBUSTERS REPORT], <https://www.iwmf.org/wp-content/uploads/2018/09/Attacks-and-Harassment.pdf>.

<sup>35</sup> Doxxing refers to commenters online publicly sharing personal information about reporters (including home addresses, phone numbers and family information). See, e.g., Follman, *supra* note 30; Rose Eveleth, *How to Deter Doxxing*, NIEMAN REPS. (July 17, 2015), <https://niemanreports.org/articles/how-to-deter-doxxing>.

<sup>36</sup> “Swatting” refers to commenters falsely reporting criminal activity by journalists to law enforcement. Such swatting incidents can lead to tragedy. Tonya Mosley, *‘The Caller Told Them I Was Going To Open Fire On The Police’: A Black Writer Discusses Swatting*, WBUR (Aug. 21, 2019), <https://www.wbur.org/hereandnow/2019/08/21/swatting-police-unaware-victim> (discussing swatting of African American Miami Herald columnist Leonard Pitts, Jr. and another swatting situation in which a man was killed); Rachel Weiner, *Member of Neo-Nazi Group Pleads Guilty to ‘Swatting’ Conspiracy Against Journalists, Minorities*, WASH. POST (July 14, 2020), [https://www.washingtonpost.com/local/public-safety/member-of-neo-nazi-group-pleads-guilty-to-swatting-conspiracy-of-journalists-minorities/2020/07/14/695f0e52-c5d4-11ea-8ffe-372be8d82298\\_story.html](https://www.washingtonpost.com/local/public-safety/member-of-neo-nazi-group-pleads-guilty-to-swatting-conspiracy-of-journalists-minorities/2020/07/14/695f0e52-c5d4-11ea-8ffe-372be8d82298_story.html).

<sup>37</sup> For example, 2.6 million explicitly antisemitic tweets appeared and could have been seen an estimated total of 10 billion times. See 2016 ADL REPORT, *supra* note 5, at 5.

particularly virulent, identity-based, biased, and threatening when directed at journalists who are identified as Black, women, and/or Jewish. Some abuse is explicit in its racism, antisemitism, and misogyny, and some is more coded (often labeled as “dog whistles.”)<sup>38</sup> Intersectional identity—for example, journalistic identity as Black women or Latinx Jews—leads to even more egregious expressive violence.<sup>39</sup> Regardless of the substantive context, online harassment using the language of white supremacy, misogyny and antisemitism<sup>40</sup>—familiar expressive techniques to harass, terrify, destabilize and silence—in order to terrorize and put targets on the backs of non-white, non-male, non-Christian reporters.<sup>41</sup>

Online comments of this type hark back to well-established discriminatory tropes and white supremacist preoccupations.<sup>42</sup> A 2018 report by the Anti-Defamation League which maps the terrain of white supremacist groups today—from

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<sup>38</sup> There has been much discussion of racist dog whistles against African Americans and Latinx, non-European people and Jews in former President Trump’s statements. See, e.g., Dean Obeidallah, *Trump is Trafficking in Anti-Semitic Tropes. It Must Stop*, CNN (Dec. 8, 2019), <https://www.cnn.com/2019/12/08/opinions/donald-trump-dangerous-anti-semitic-tropes-obeidallah/index.html>; Ian Olsav, *Offensive Political Dog-whistles: You Know Them When You Hear Them. Or Do You?*, VOX (Nov. 7, 2016), <https://www.vox.com/the-big-idea/2016/11/7/13549154/dog-whistles-campaign-racism>; Adam R. Shapiro, *The Racist Roots of the Dog Whistle*, WASH. POST (Aug. 21, 2020), <https://www.washingtonpost.com/outlook/2020/08/21/racist-roots-dog-whistle/>. Recently, dog-whistling has been evident in the context of online attacks on Jewish reporters, with the use of the three parentheses “echo” reference, with three parentheses placed around Jewish names. 2018 ADL REPORT, *supra* note 5, at 6–7; see also Marc Tuters & Sal Hagen, *(((They))) Rule: Memetic Antagonism and Nebulous Othering on Achan*, 22 NEW MEDIA & SOC’Y 2218 (2019).

<sup>39</sup> See Caroline Sindors & Vandinika Shukla, *Some Very Simple Ways Platforms Could Better Protect Journalists From Harassment*, SLATE (May 5, 2021), <https://slate.com/technology/2021/05/twitter-facebook-reddit-harassment-journalists.html> (noting Amnesty report finding that “Black women experience the most harassment online.”); see also 2018 ADL REPORT, *supra* note 5, at 7, 12 (discussing, in part, the online harassment of Jewish women).

<sup>40</sup> 2018 ADL REPORT, *supra* note 5, at 12 (“Following his election, anti-Semitism has become normalized and harassment is a daily occurrence. The harassment, deeply rooted in age-old conspiracies such as the New World Order, which alleges that an evil cabal of Jewish people have taken autocratic control of the globe, and Holocaust imagery—faces placed inside Nazi concentration camp ovens or stretched on lampshades—shows no signs of abating. Unfortunately, the more minority or vulnerable groups one identifies with (e.g. Jewish Latina), the more targeted one becomes. . . . The platforms are key facilitators of this anti-Semitic harassment.”)

<sup>41</sup> See discussion *infra* Section I.A (describing race-based anti-Black attacks, threats of sexual violence, and a persistent thread of rabid anti-Jewish hostility (whether or not the targeted reporters were actually Jewish)).

<sup>42</sup> 2018 ADL REPORT, *supra* note 5, at 7.

the so-called alt-right<sup>43</sup> to neo-Nazis—establishes that their main concern is what they call “white genocide” and their main targets are Jews and African Americans. It is important to note as well that many of the harassing messages to racial and ethnic minority and women reporters contain not just discriminatory tropes, but actual threats of violence and harm directed to the journalists themselves and their families.<sup>44</sup>

Harassment *is* a threat to journalists, especially journalists of color, women, and nonbinary people. Reporters receive repeated onslaughts of abuse, death threats, and rape threats. This harassment harms people in real, tangible ways, and journalists routinely face all different kinds of harassment related to their jobs. Journalists have been killed all over the world for what they report.<sup>45</sup>

A 2019 survey by the Committee to Protect Journalists (CPJ) reported that over 70 percent of respondents had “faced safety issues while working as a journalist” and 90 percent of the U.S. journalist respondents saw online harassment as the top threat to journalist safety.<sup>46</sup>

Consider some specific accounts of online expressive abuse directed toward women reporters, Black reporters and Jewish reporters.

The most sustained and broadest empirical studies of online harassment have focused on reporters identified as

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<sup>43</sup> The term “alt-right” was coined by white supremacist Richard Spencer to refer to a bloc of different white nationalist groups and to try to bring white supremacy to the mainstream. To resist that move, I refer to the alt-right as the “so-called alt-right” in this Article. See Adrian Florido, *The White Nationalist Origins Of The Term 'Alt-Right'—And The Debate Around It*, NPR (Nov. 27, 2016), <https://www.npr.org/2016/11/27/503520811/the-white-nationalist-origins-of-the-term-alt-right-and-the-debate-around-it>; Shaya Tayefe Mohajer, *It is Time to Stop Using the Term Alt-right*, COLUM. JOURNALISM REV. (Aug. 14, 2017), <https://www.cjr.org/criticism/alt-right-trump-charlottesville.php>; see also Stephanie L. Hartzell, *Alt-White: Conceptualizing the “Alt-Right” as a Rhetorical Bridge Between White Nationalism and Mainstream Public Discourse*, 8 J. CONTEMP. RHETORIC 6, 6–25 (2018).

<sup>44</sup> 2016 ADL REPORT, *supra* note 5, at 3–8 (giving examples of threats to families and children of Jewish journalists Ben Shapiro and Bethany Mandel).

<sup>45</sup> Sindera & Shukla, *supra* note 39.

<sup>46</sup> *Journalist Safety in the U.S., Canada*, COMM. TO PROTECT JOURNALISTS, <https://infogram.com/cpj-safety-survey-sept-2019-1h0n25jdd3zo6pe?live> (last visited Nov. 26, 2021); see also Sindera & Shukla, *supra* note 39.

women. Various worldwide organizations have been documenting the digital harassment of women journalists.<sup>47</sup> Their findings are staggering and sobering. Women reporters worldwide are exposed to a relentless barrage of gendered attacks and threats of violence. A case in point is the story of the vicious harassment of Filipino-American journalist Maria Ressa, a winner of the 2021 Nobel peace prize, former CNN war correspondent, laureate of the 2021 UNESCO World Press Freedom Prize, and founder of Manila-based news site Rappler. Since the Philippines' 2016 election, Ressa reports receiving more than 90 hate messages *an hour* on Facebook—described in a recent report as “Death threats. Rape threats. Doxxing. Racist, sexist and misogynistic abuse. In text, image and memes.”<sup>48</sup> From constant comments on and vituperative attacks over their

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<sup>47</sup> For example, Amnesty International supported a study called the Troll Report Findings. *Troll Patrol Findings*, *supra* note 11. UNESCO as well undertook a global empirical study of the subject. See UNESCO, *THE CHILLING*, *supra* note 34. See also UNESCO, *JOURNALISM IS A PUBLIC GOOD, WORLD TRENDS IN FREEDOM OF EXPRESSION AND MEDIA DEVELOPMENT GLOBAL REPORT (2021/2022)* (describing worldwide threats to journalists and specifically to women and those affected by multiple and intersecting forms of discrimination). The Organization for Security and Co-operation in Europe (OSCE) has specifically front-burnered the safety of female journalists online and provided responsive resources. See *Safety of Female Journalists Online*, OSCE, <https://www.osce.org/fom/safety-female-journalists-online> (last visited Oct. 11, 2021). The UN Special Rapporteur launched a collection of essays under the title #JournalistsToo documenting personal stories of harassment by women journalists. See *UN Special Rapporteur Irene Khan Launches Essay Collection “#Journaliststoo”*, UNESCO (Nov. 25, 2021), <https://en.unesco.org/news/special-rapporteur-irene-khan-launches-essay-collection-journaliststoo-personal-stories>.

Studies also show gender segregation in coverage, as well as systemic bias that cuts against representation at the highest levels of management. See WOMEN'S MEDIA CTR., *WHAT ONLINE HARASSMENT TELLS US ABOUT OUR NEWSROOMS: FROM INDIVIDUALS TO INSTITUTIONS (2020)* [hereinafter WOMEN'S MEDIA CTR. REPORT] [<https://womensmediacenter.com/reports/what-online-harassment-tells-us-about-our-newsrooms-from-individuals-to-institutions-a-womens-media-center-report>].

<sup>48</sup> UNESCO, *THE CHILLING*, *supra* note 34, at 45. Ressa received the Nobel Peace Prize in 2021 for “efforts to safeguard freedom of expression, which is a precondition for democracy and lasting peace.” *The Nobel Peace Prize 2021—Maria Ressa*, THE NOBEL PRIZE, <https://www.nobelprize.org/prizes/peace/2021/ressa/facts/> (last visited Nov. 26, 2021).

appearance<sup>49</sup> to highly sexualized name-calling<sup>50</sup> to abominable promises of rape and torture,<sup>51</sup> female and gender nonconforming journalists are particular targets of abuse and intimidation online.

The attacks often appear to be coordinated in order to achieve maximal intimidation.<sup>52</sup> Social media platforms such as 4Chan are fertile grounds for such coordinated activity.<sup>53</sup> Political actors often fuel and instigate pile-on attacks.<sup>54</sup> The April 2021 UNESCO Research Discussion Paper found that online violence against women journalists “is designed to: belittle, humiliate, and shame; induce fear, silence, and retreat; discredit them professionally, undermining accountability journalism and trust in facts,; and chill their active participation (along with that of their sources, colleagues and audiences) in public debate.”<sup>55</sup>

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<sup>49</sup> See, e.g., Alex Gangitano & Julia Manchester, *Online Harassment is Ugly and Routine for Women in Journalism*, THE HILL (Mar. 24, 2021), <https://thehill.com/homenews/media/544628-online-harassment-is-ugly-and-routine-for-women-in-journalism>; Kaitlin C. Miller & Seth C. Lewis, *Journalists, Harassment and Emotional Labor: The Case of Women in On-air Roles at US Local Television Stations*, 23 JOURNALISM 79 (2022); Helen Ubiñas, *The Hate We Get: Why Journalists Need to Stop Accepting Threats as Part of the Job*, PHILA. INQUIRER (July 3, 2018), [https://www.inquirer.com/philly/columnists/helen\\_ubinas/capital-gazette-shooting-online-threats-hate-mail-helen-ubinas-20180703.html](https://www.inquirer.com/philly/columnists/helen_ubinas/capital-gazette-shooting-online-threats-hate-mail-helen-ubinas-20180703.html).

<sup>50</sup> See Gangitano & Manchester, *supra* note 49. (“Female reporters who spoke to The Hill say that being called a c--- is not an uncommon insult. Messages calling women other sexist slurs like whore and slut, remarks about their appearances and emails from men making sexual remarks are harassments that border on the routine.”).

<sup>51</sup> See, e.g., Sullivan, *supra* note 8; Gangitano & Manchester, *supra* note 49; UNESCO, THE CHILLING, *supra* note 34.

<sup>52</sup> See, e.g., Gangitano & Manchester, *supra* note 49 (“Online harassment of female journalists often resembles pack attacks. In many instances, a woman will receive the same email, direct message or tweet from hundreds of accounts.”).

<sup>53</sup> Eveleth, *supra* note 35 (“4chan has become ground zero for many coordinated harassment campaigns, in defiance of an official policy against doxxing. Doxxers obtain personal information from public records, data collection services, and security breaches or through hacking into e-mails and other personal accounts. Doxxing is almost always followed by a call to action, often in the form of coordinated harassment that ranges from threatening phone calls and unwanted food deliveries to more dangerous things like swatting or posting a claim on Craigslist that the resident has rape fantasies and encouraging men to visit.”)

<sup>54</sup> See UNESCO, THE CHILLING, *supra* note 34, at 27.

<sup>55</sup> *Id.* at 6. Similarly, a prior report by Amnesty International surveying the treatment of women reporters from the US and abroad on social media found that “[t]he aim of violence and abuse is to create a hostile online environment for women with the goal of shaming, intimidating, degrading, belittling or silencing women. *Troll Patrol Findings*, *supra* note 11; *Toxic Twitter – Women’s Experience of Violence and Abuse on Twitter*, Chapter 3, AMNESTY INT’L, <https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-3/> (last visited March 11, 2022). More broadly, the effort is to

Studies show, unsurprisingly, that the threats and abuse are *significantly* greater for Black female journalists. A 2018 report by Amnesty International found, for example, that while female journalists and politicians were subjected to some type of abuse online every 30 seconds or so, women of color were 84 percent more likely to be mentioned in abusive or harassing tweets.<sup>56</sup> The Amnesty Troll Patrol Findings synthesized information from millions of tweets to arrive at this conclusion.<sup>57</sup>

The Miami Herald's first Black and female executive editor, Monica Richardson, recently wrote an open letter to the paper's readers reproducing the racist screed she received in response to an editorial in the paper.<sup>58</sup> The email capped off its vitriolic litany of offense by calling Ms. Richardson a "racist b---".<sup>59</sup> In her open letter, she said:

I will never forget the first time as a reporter that I was called a "n-----." Like other moments of coming face to face with racism, it will sit with me for life. ... Brutal and evil were the words that came to mind after I read [the email] over a few times. . . You might tell me to just chalk it up to

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silence news organizations as a whole and to control public discourse. See Waisbord, *Mob Censorship*, *supra* note 18, at 1031.

<sup>56</sup> *Troll Patrol Findings*, *supra* note 11; see also Ingram, *supra* note 11.

<sup>57</sup> See *Troll Patrol Findings*, *supra* note 11 (on scope and methodology).

<sup>58</sup> Monica R. Richardson, Editorial, *I received a Racist Email After a Protest Blocked an Expressway. Let's Talk About It*, *Miami, MIA. HERALD* (July 16, 2021), <https://www.miamiherald.com/news/local/news-columns-blogs/from-the-editor/article252802303.html>. The editorial in the Herald had questioned why then-recently-passed anti-protest legislation had not been enforced against demonstrators who blocked highways in support of an uprising against the government in Cuba over the summer.

<sup>59</sup> The abusive and sickening character of the email can best be captured by reproducing it, which the Herald did:

"Cubans don't attack non cubans and don't threaten to kill white people..like your people do when they go on a rampage. Cubans don't assault non cubans eating a meal at a sidewalk Cafe..cubans don't rob and beat up 88 year old white men in the streets. Next time your people riot in Miami dade if I were de santis..I would bring about 500 hard core colombian paramilitaries to teach your people a lesson.. You and your people turn the country into south africa..you not going to be allowed to murder non blacks with machetes nor will you rape..sodomize and then disembowl non black women. Keep writing your anti white and anti cuban exile drivel..you racist bitch."

*Id.* (reproduced with all grammatical errors but paragraph separations removed); see also Eberspacher, *supra* note 8, at 150 (quoting racist tweets received by African American reporter Jemele Hill).

ignorance and anger. But it's not just about this one man and this one email. It's bigger than that.

I was raised humble, raised to turn the other cheek and be the bigger person, to move on and get over it. That's a smart lesson and a smart way to move through life at times. This isn't one of those times. As a Black woman, I refuse to oblige the various ways that some people seem to demand that I simply take what they give. To the contrary, hate can't be solved with silence. The reality is that the silence is as loud as the injustice of racism itself.<sup>60</sup>

UNESCO reports that “[r]acism, religious bigotry, sectarianism, ableism, homophobia and transphobia intersect with misogyny and sexism to produce significantly heightened exposure and deeper impacts for women experiencing multiple forms of discrimination concurrently, as evidenced by our survey respondents and interviewees.”<sup>61</sup> As put by a spokesman of the Committee to Protect Journalists, “If you’re a woman and another identity . . . the intersectionality is a whole other dimension to all of that[.]”<sup>62</sup> Female Latinx columnist Helen Ubinas bears witness to this in an article quoting part of a troll’s message in which he says “make sure you don’t get that big Rican caboose like JLo” and “[m]y right hand would thank you very much” if Ubinas were to publish a full-figure photo.<sup>63</sup> While this is less directly hostile and physically threatening than other threats of rape, death, and dismemberment received by other intersectional women journalists, Ubinas’ accompanying tweet, “Just when I think my inbox can’t get any worse,” indicates how (justifiably) unnerving she found it. Seung Min Kim, a Washington Post White House reporter of Korean heritage, was subjected to vicious sexist and racist online attacks when a photo of her interviewing Alaska Senator Lisa Murkowski about a tweet by the Biden Administration’s embattled Office of

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<sup>60</sup> See Richardson, *supra* note 58; see also Juan Thompson, *Online, Black Writers Confront Racist Backlash*, THE INTERCEPT (May 7, 2015), <https://theintercept.com/2015/05/07/black-writers-confront-online-racism/> (recounting, *inter alia*, attacks on Salon contributing writer Brittney Cooper as “[b]lack c\*\*\*bag, . . . savage, she-gorilla, bitch, and professor in quote marks—a passive aggressive way of questioning her academic credentials.”).

<sup>61</sup> UNESCO, THE CHILLING, *supra* note 34, at 12.

<sup>62</sup> See Gangitano & Manchester, *supra* note 49 (quoting Courtney Radsch, advocacy director of CPJ).

<sup>63</sup> Ubiñas, *supra* note 49.



Management and Budget (OMB) nominee began to circulate online.<sup>64</sup>

What adds to the difficulties faced by these gender-targeted journalists is that many report being (or at least feeling) unable to the harassment within their own organizations.<sup>65</sup> Recent studies indicate that, worldwide, the sexism of newsrooms creates significant disincentives to the frank reporting of online harassment.<sup>66</sup> Even when they do report abuse, women journalists report that their employers are not particularly sympathetic and do not provide appropriate responsive resources.<sup>67</sup>

While a number of women reporters have spoken publicly of their harassment, others have said that reporting the harassment publicly typically leads to enhanced harassment.<sup>68</sup> In one much-publicized example, New York Times tech reporter Taylor Lorenz tweeted that a “harassment and smear campaign” last year had “destroyed her life” and, in honor of International Women’s Day, asked her followers to consider supporting women subject to online harassment.<sup>69</sup> In response, Fox News

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<sup>64</sup> J. Clara Chan, *Washington Post Defends Reporter Seung Min Kim After ‘Racist and Sexist Attacks’ by ‘Vicious’ Online Trolls*, THE WRAP (Feb. 25, 2021), <https://www.thewrap.com/washington-post-defends-reporter-seung-min-kim-after-racist-and-sexist-attacks-by-vicious-online-trolls/>; see Waisbord, *Mob Censorship*, *supra* note 18, at 1034 (quoting Thera Vargas on typical misogynistic online trolling).

<sup>65</sup> See, e.g., Eberspacher, *supra* note 8, at 158; JACOB L. NELSON, TOW CTR. FOR DIGITAL JOURNALISM, A TWITTER TIGHTROPE WITHOUT A NET: JOURNALISTS’ REACTIONS TO NEWSROOM SOCIAL MEDIA POLICIES (2021), [https://www.cjr.org/tow\\_center\\_reports/newsroom-social-media-policies.php](https://www.cjr.org/tow_center_reports/newsroom-social-media-policies.php). This is the case reported by Black journalists as well. See, e.g., Mattie Khan, *8 Journalists on Reporting While Black, With the Weight of History on Their Shoulders*, GLAMOUR (June 3, 2020), <https://www.glamour.com/story/8-black-women-journalists-on-reporting-police-brutality>; see also *infra* Section I.C.

<sup>66</sup> UNESCO, THE CHILLING, *supra* note 34, at 40–42; see also WOMEN’S MEDIA CTR. REPORT., *supra* note 47, at 9 (noting “newsroom managers not taking online threats seriously, minimizing harms, and gaslighting staff who experience stress or fears as a result of being targeted.”)

<sup>67</sup> See WOMEN’S MEDIA CTR. REPORT., *supra* note 47, at 9.

<sup>68</sup> See, e.g., Gangitano & Manchester, *supra* note 49. This is seen not only with respect to women in political reporting, as is evident in the harassment of women reporters in connection with the Gamergate controversy in 2014. See, e.g., Aja Romano, *What We Still Haven’t Learned from Gamergate*, VOX (Jan. 7, 2021), <https://www.vox.com/culture/2020/1/20/20808875/gamergate-lessons-cultural-impact-changes-harassment-laws> (describing massive sexual harassment campaigns against women in gaming industry).

<sup>69</sup> See, e.g., Gangitano & Manchester, *supra* note 49; Teo Armus, *Tucker Carlson Keeps Attacking a New York Times Reporter After the Paper Calls His Tactics ‘Calculated and Cruel’*, WASH. POST (Mar. 11, 2021),

host Tucker Carlson mocked Lorenz for much of his show one evening:

“Destroyed her life, really? By most people’s standards, Taylor Lorenz would seem to have a pretty good life, one of the best lives in the country, in fact,” he said. “Lots of people are suffering right now, but no one is suffering quite as much as Taylor Lorenz is suffering.”<sup>70</sup>

When criticized for his attack on a journalist, Fox News defended Carlson, saying that “no public figure or journalist is immune to legitimate criticism of their reporting, claims or journalistic tactics.”<sup>71</sup> Carlson himself kept the pressure on, continuing to lambast Lorenz on a subsequent program and calling her a “deeply unhappy narcissist.”<sup>72</sup>

The notable point here is not only a conservative media outlet’s hyper-focus on a tweet by a single “liberal” newspaper’s reporter, but that this kind of publicity is effectively a call to arms for further harassment by members of Carlson’s audience. As Lorenz herself put it, “I hope people see this and recognize it for what it is, an attempt to mobilize an army of followers to memorize my name and instigate harassment.”<sup>73</sup> The New York Times further elaborated on this point, issuing a sharp statement that: “In a now familiar move, Tucker Carlson opened his show last night by attacking a journalist. It was a calculated and cruel tactic, which he regularly deploys to unleash a wave of harassment and vitriol at his intended target.”<sup>74</sup> Reportedly, Lorenz followed up the incident by tweeting “a screenshot of a

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<https://www.washingtonpost.com/nation/2021/03/11/tucker-carlson-taylor-lorenz-fox/>; (@TaylorLorenz), TWITTER (Mar. 9, 2021) (“I’m slightly open abt some of what I deal w/ but the scope of attacks has been unimaginable. There’s no escape. It has taken everything from me. The only mild solace I’ve found is w/ other women who have had their lives destroyed in the same way. We’ve developed deep trauma bonds”).

<sup>70</sup> Armus, *supra* note 69.

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

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* This shows that even if online harassment today is a “bottom-up” example of “anti-press revolts by citizens[,]” it can be “justified and promoted by elite propagandists, such as politicians, religious leaders, and intellectuals.” Waisbord, *Mob Censorship*, *supra* note 18, at 1032.

<sup>74</sup> Armus, *supra* note 69; (@NYTimesPR), TWITTER (Mar. 10, 2021, 3:30 PM), <https://twitter.com/NYTimesPR/status/1369747504565256193>; *see also* Sullivan, *supra* note 8 (arguing that Carlson’s “disproportionate” focus on Lorenz “before his audience of millions has unleashed even more troll attacks”).

violent email threat she had received.”<sup>75</sup> Without minimizing the differences between this and the kinds of online harassment which presage rapes and murders of women journalists, the Lorenz story points to the routinization and normalization of gendered online attacks and how attempts to engage public discussion on the subject generate a boomerang effect, placing an even larger target on the complaining journalist’s back.

Online harassment campaigns against reporters also often focus on reporters who are Jewish (or presumed to be Jewish).<sup>76</sup> Two studies by the Anti-Defamation League—one in 2016 and the next during the midterm elections in 2018—demonstrated extensive and explicitly identity-based/antisemitic online harassment against Jewish reporters.<sup>77</sup> The 2016 ADL Report included a sample of Holocaust-referencing tweets the antisemitism of which could not be more obvious.<sup>78</sup> The 2016 Report found that “at least 800 journalists received anti-Semitic tweets with an estimated reach of 45 million impressions.”<sup>79</sup> In

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<sup>75</sup> Armus, *supra* note 69 (containing the tweet which is currently unavailable on Twitter). Former President Trump has been consistently accused of weaponizing online harassment of reporters by his supporters through his anti-press rhetoric. One female reporter, for example, observed from her own experience that “[i]n the couple of instances where Trump had gone after a story that I had written specifically, that definitely escalated the rhetoric and the volume of emails you were getting[.]” Gangitano & Manchester, *supra* note 49.

<sup>76</sup> See 2016 ADL REPORT, *supra* note 5. The ADL Report also noted that even non-Jewish journalists received antisemitic tweets following criticism of Trump, characterizing this finding as presumably indicating an intention “to be either an insult or threat.” *Id.* at 2. The Report concluded that “this is likely connected to the anti-Semitic tropes related to Jews ‘controlling’ the media, and the media ‘controlling’ the government.” *Id.* Arab-American and Muslim reporters have been targeted as well. Waisbord, *Mob Censorship*, *supra* note 18, at 1033 and sources cited therein.

<sup>77</sup> See 2018 ADL REPORT, *supra* note 5; see 2016 ADL REPORT, *supra* note 5.

<sup>78</sup> One of the telling things about the attacks on Jewish reporters prior to the 2016 presidential election is that whatever the complaint of the poster—and usually the complaints seemed political and grounded on criticism of Donald Trump and his family—the attacks were entirely antisemitic. See 2016 ADL REPORT, *supra* note 5, at 8. From “Adolph Oven Services” to images of freelance Jewish female reporter Bethany Mandel’s face photoshopped onto an extermination oven and a mass grave of Jews during the Holocaust (with a red circle around one corpse’s face) to a picture of the gates to Auschwitz with the motto “Machen Amerika Great,” the visual attack memes were explicitly antisemitic. *Id.* at 11–14.

More generally, the 2016 ADL Report found that the 2.6 million tweets containing antisemitic language appeared an estimated 10 billion times, indicating that such language was potentially seen 10 billion times by large populations: “a juggernaut of bigotry [which] we believe, reinforces and normalizes anti-Semitic language and tropes on a massive scale.” *Id.* at 5. According to the 2016 Report, the five words which appeared most frequently in the account bios of the reporter-harassers included “Trump,” “conservative,” “white,” “nationalist” and “American.” *Id.* at 6.

<sup>79</sup> *Id.* at 1.

other words, almost 20,000 overtly antisemitic tweets mentioning 800 journalists were seen approximately 45 million times. Eighty-three percent of the tweets at the time were received by 10 Jewish journalists.<sup>80</sup> According to the ADL 2016 Report, “a considerable number” of the antisemitic tweets targeting journalists, “self-identified as Trump supporters and conservatives,”<sup>81</sup> with white nationalists “stepp[ing] up “online propaganda offensives” in the runup to the upcoming midterm elections to attack and try to intimidate Jews and especially Jewish journalists.<sup>82</sup> ADL was apparently able to identify “individuals and websites in the white supremacist world that have played a role in encouraging these attacks.”<sup>83</sup> In addition, the 2018 Report also notably found that the vast majority of these (about two-thirds) originated from real accounts, not bots.<sup>84</sup>

The social media platforms which are often the site of racist, antisemitic and misogynistic abuse have not been terribly successful at stemming the tide of online harassment. The 2018 ADL Report concludes that social media platforms are “key facilitators of this anti-Semitic harassment.”<sup>85</sup> However, although 1600 Twitter accounts generated 68% of the antisemitic tweets targeted at journalists, only 21% had been suspended by Twitter during the study period.<sup>86</sup> That so many of the attacks originate from actual accounts, and not bots, apparently makes platform control more difficult.

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

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

<sup>82</sup> See 2018 ADL REPORT, *supra* note 5, at 3–4 (finding a “marked rise in the number of online attacks” against the Jewish community ahead of Election Day); see, e.g., Press Release, Anti-Defamation League (ADL), Anti-Semitic Incidents Remained at Near-historic Levels in 2018; Assaults against Jews More than Doubled (Apr. 30, 2019) [hereinafter 2019 ADL Press Release], <http://www.adl.org/news/press-releases/anti-semitic-incidents-remained-at-near-historic-levels-in-2018-assaults>.

<sup>83</sup> 2016 ADL REPORT, *supra* note 5, at 9.

<sup>84</sup> See 2018 ADL REPORT, *supra* note 5, at 8 (“The interview subjects stated that, while they were familiar with the use of bots in spreading online propaganda, they were more concerned—and had more frequently experienced—human-based attacks on social media.”). This is significant, at a minimum because the use of technological resources to identify and cut off bots would not be effective.

<sup>85</sup> *Id.* at 16. The authors also concluded that the themes of the online harassment “have been carried from the 2016 U.S. presidential election to the 2018 midterm contest.” *Id.* at 5. See also VIKTORIYA VILK, ELODIE VIALLE & MATT BAILEY, PEN AMERICA, NO EXCUSE FOR ABUSE: WHAT SOCIAL MEDIA COMPANIES CAN DO NOW TO COMBAT ONLINE HARASSMENT AND EMPOWER USERS (2021), <https://pen.org/report/no-excuse-for-abuse/> (describing platform failures to address online abuse more generally).

<sup>86</sup> 2016 ADL REPORT, *supra* note 5, at 1. On complaints that social media platforms do not respond adequately to online threats, see, e.g., ADL, ONLINE HATE, *supra* note 9, at 15.

Two factors make these identity-based online attacks particularly worrisome these days. First is the amplifying character of online expression. Platforms such as Twitter and Facebook have global reach. The online environment invites and enables virality. Virality is relatively easy to achieve online on social media today.<sup>87</sup> Material can remain online and accessible indefinitely; stories and comments may get downgraded in search, but they do not die. Platform incentives favor sensationalist expression. Algorithms can “systematically move White supremacist talking points into the mainstream....”<sup>88</sup> Bots’ instantaneous, widespread but obscure activities can amplify and weaponize expressive abuse.<sup>89</sup> One recent report characterizes this as synchronized censorship.<sup>90</sup> Discussion boards such as 4Chan and 8Chan enable anonymous communities of people who coordinate attacks. And the anonymity of the online abusers gives them cover. Social media tools—such as Twitter’s curated lists function—can be used by online harassers to create easy targets.<sup>91</sup>

The second significant factor is the ease of collective action in the online world—the relative effortlessness of coordinating swarms online. The online attacks on racial minority and women journalists can be both individualized or undertaken as groups or in coordinated “pile-on” tactics. Targeted journalists report that they receive overwhelming numbers of communications designed to operate like DDoS

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<sup>87</sup> See, e.g., REPORTERS WITHOUT BORDERS, ONLINE HARASSMENT OF JOURNALISTS: ATTACK OF THE TROLLS 13–16 (2018) [hereinafter REPORTERS WITHOUT BORDERS REPORT], [https://rsf.org/sites/default/files/rsf\\_report\\_on\\_online\\_harassment.pdf](https://rsf.org/sites/default/files/rsf_report_on_online_harassment.pdf) (explaining ways in which the Internet’s virality easily disseminates hate); see also Waisbord, *Mob Censorship*, *supra* note 18, at 1032, 1037 (arguing that all types of speech can easily flow into the public sphere and that online harassment of reporters reflects “easy public access to journalists, the presence of toxic Internet right-wing and far-right cultures, and populist demonization of the mainstream press.”)

<sup>88</sup> Jessie Daniels, *The Algorithmic Rise of the “Alt-right,”* 17 CONTEXTS 60, 62 (2018).

<sup>89</sup> See, e.g., Julia Angwin, *Cheap Tricks: The Low Cost of Internet Harassment*, PROPUBLICA (Nov. 9, 2017), <https://www.propublica.org/article/cheap-tricks-the-low-cost-of-internet-harassment> (describing, *inter alia*, massive retweeting campaigns of offensive tweets to expand circulation).

<sup>90</sup> REPORTERS WITHOUT BORDERS REPORT, *supra* note 87, at 13.

<sup>91</sup> See Lauren Feiner, *Trolls Use a Little-known Twitter Feature to Swarm Others with Abuse, and Their Targets say Twitter Hasn’t Done Much to Stop It*, CNBC (June 9, 2019), <https://www.cnbc.com/2019/06/07/how-trolls-use-twitter-lists-to-target-and-harass-other-users.html>.

attacks.<sup>92</sup> Organized attempts to identify and target Jewish journalists have been documented.<sup>93</sup> When attacks are undertaken as groups or coordinated to achieve effect a ‘pile-on’ effect, the result is overwhelming for the reporter,<sup>94</sup> both personally and professionally. At a minimum, these sorts of coordinated attacks cause annoyance, expense, expenditures of time, and technical problems. Psychically, they cause anxiety, anger, and feelings of isolation. And when such disputes catch the attention of partisan mainstream media, multi-platform amplification and reporter-harassment often follow.<sup>95</sup>

Identity-based attacks—whether directly expressed or coded in familiar discriminatory tropes—will likely have significant and particularly powerful impacts on targeted reporters. Online identity-based ‘othering’ tactics trade on the full history and social reality of discrimination.<sup>96</sup> They inevitably bring with them the echoes of racial, ethnic and gender violence, domination, exclusion and discrimination both past and present.

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<sup>92</sup> For example, third parties can subscribe journalists to huge numbers of websites and email lists, including porn sites, to embarrass them and to make it impossible for them to manage their emails. See Angwin, *supra* note 89 (documenting email or subscription bombing targeting 3 reporters and ProPublica itself in response to investigative piece). These activities are human versions of distributed denial of service attacks, whereby “every channel for digital communication is flooded to the point where it becomes unusable.” Eveleth, *supra* note 35.

<sup>93</sup> A 2018 Report by the Anti-Defamation League reports that two days after a Trump rally in Cleveland during which attendees “chanted ‘Lügenpresse,’ the German Nazi slur for ‘lying press’ . . . Trump supporters began #TheList on Twitter—a compilation of journalists who ‘speak out against Donald Trump, for Hillary Clinton, or other forms of ‘Kikery’. Journalists were tweeted images with large, red X’s on their faces, alerting them that they had been placed on #TheList due to ‘their crimes against the American people.’” Connecting this with antisemitism, one user on 8chan, where the #TheList was created, wrote: “‘Name ‘em and shame ‘em. I look forward to seeing plenty of echoed names’.” 2018 ADL REPORT, *supra* note 5, at 6 (citing Cooper Fleishman, #TheList: Alt-right Donald Trump Trolls Have Found a New Way to Attack Journalists, MIC (Oct. 24, 2016), <https://www.mic.com/articles/157543/the-list-alt-right-donald-trump-trolls-harass-jewish-journalists-8chan-raid>).

<sup>94</sup> With respect to Jewish journalists for example, the 2016 ADL Report refers to freelance reporter Bethany Mandel, a Jewish freelance reporter, who “was also viciously harassed on Twitter. One user tweeted about her for 19 hours straight, and she received messages containing incendiary language about her family, and images with her face superimposed on photos of Nazi concentration camps.” 2016 ADL REPORT, *supra* note 5, at 8. While she has received antisemitic attacks before, “these attacks stood out . . . for their ‘volume and the imagery. It also seemed coordinated—they would come in waves and 50 percent of the time I couldn’t identify the source.’” *Id.*; see also Waisbord, *Mob Censorship*, *supra* note 18, at 1035 (describing loose coordination evident in brigading, swatting and multiple doxing).

<sup>95</sup> See Waisbord, *Mob Censorship*, *supra* note 18 (describing the coordinated “learn to code” attacks on unemployed journalists).

<sup>96</sup> See Matthew Costello, et al., *Social Group Identity and Perceptions of Online Hate*, 89 SOCIO. INQUIRY 427, 428–29 (2019).

They also doubtless raise worrisome portents for the future. While an exploration of cultural and racial trauma and collective memory are beyond the scope of this Article, it stands to reason that references to lynchings and racial attacks are particularly salient for African American reporters in light of America's history of slavery and continuing racism, systemic and otherwise.<sup>97</sup> Images of a reporter superimposed on a crematorium in Auschwitz are likely to have a particularly strong emotional impact on a Jewish reporter in light of the genocide of some six million Jews by the Nazis during the Holocaust. And sexualized online harassment is doubtless particularly threatening for women reporters in light of systemic worldwide sexism and the use of rape as a weapon of subjugation and disempowerment. Researchers are increasingly describing a spectrum of psychic effects on targeted journalists.<sup>98</sup>

Moreover, in addition to its impact on the targeted reporters, it is hard to believe that such trolling does not also impact other members of the public who are exposed to it. Repetition and ubiquity can normalize identity-based abuse and ironically lead people to expect journalists to take it in stride as part of business as usual. This minimizes the harms of harassment and shifts the burden of justification to the complaining journalists. Human nature suggests that reports of harassment can engender schadenfreude in some observers. For some, exposure to the harassment can also recruit new adherents to white nationalist views, further amplifying the likelihood of enhanced harassment in the future. Some audiences' distrust of the mainstream press as an institution can also be subconsciously validated by racist, misogynistic or antisemitic characterizations

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<sup>97</sup> For an expansion of the concept of cultural trauma in the context of African American experience, see Angela Onwuachi-Willig, *The Trauma of the Routine: Lessons on Cultural Trauma from the Emmett Till Verdict*, 34 SOCIO. THEORY 335 (2016). Cf. TERRIE M. WILLIAMS, BLACK PAIN: IT JUST LOOKS LIKE WE'RE NOT HURTING 37 (2009) (explaining that African Americans who hold onto the "violence of racist images" experience double the risk for deep depression).

Analogously, many Black journalists covering Black Lives Matter protests felt their assignments to be deeply personal. See, e.g., Elahe Izadi & Paul Farhi, *The Terror of Wearing Both a Press Badge and Black Skin': Black Journalists are Carrying Unique Burdens*, WASH. POST (June 1, 2020), [https://www.washingtonpost.com/lifestyle/media/the-terror-of-wearing-both-a-press-badge-and-black-skin-black-journalists-are-carrying-unique-burdens-right-now/2020/06/01/2266a258-a414-11ea-b473-04905b1af82b\\_story.html](https://www.washingtonpost.com/lifestyle/media/the-terror-of-wearing-both-a-press-badge-and-black-skin-black-journalists-are-carrying-unique-burdens-right-now/2020/06/01/2266a258-a414-11ea-b473-04905b1af82b_story.html). (quoting African American reporter Wes Lowery: "'You watch those videos [of police killings] and you think it could be your brother, your father, your daughter or yourself . . .'").

<sup>98</sup> See *infra* Section II.

of particular journalists.<sup>99</sup> To the extent that online harassment trades on and reinforces socially embedded biases, it is likely to be even more difficult to uproot with traditional media education techniques than political assertions about the “fake news” press. Even for those who do not consider themselves racist, sexist or antisemitic, the familiarity of established rhetorics of racism, antisemitism or sexism may circumvent a critical stance—especially if such expression is characterized as nothing more than humor or irony or political disagreement.

*B. The Memetic Turn and the Ease of Collective Action Online*

Perhaps one of the most dangerous aspects of the online harassment story has to do with the ways in which the modern stance of irony, humor and meaning evolution on the Internet has been used by white supremacists in order to preach their racist, misogynistic, and antisemitic messages in relatively more or less coded ways.<sup>100</sup> The so-called alt-right has developed a strategy of attracting young people to its sites and ideas through the clever deployment of memes which are deliberately ambiguous in their meanings,<sup>101</sup> and through an attempt to

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<sup>99</sup> Social scientists have been exploring the phenomenon of unconscious bias. With respect to journalism, as one respondent to a recent report on journalists and social media put it, “[w]hite male reporters are given the benefit of the doubt more often...If you’re a person of color, a woman, a member of any kind of minority group, there’s automatically judgments made based on how objective or fair you can be.” NELSON, *supra* note 65. To the extent that online harassment reinforces such differential assumptions, it is likely to boost distrust of the news organizations as well as the targeted reporters.

<sup>100</sup> See generally HEATHER SUZANNE WOODS & LESLIE A. HAHNER, MAKE AMERICA MEME AGAIN: THE RHETORIC OF THE ALT-RIGHT (2019); see, e.g., Julia Rose DeCook, *Trust Me, I’m Trolling: Irony and the Alt-right’s Political Aesthetic*, MEDIA CULTURE J. (2020), <https://journal.media-culture.org.au/index.php/mcjournal/article/view/1655> (“Creating a kind of unreality where it is difficult to parse out truth from lies, fiction from non-fiction, the troll creates cultural products, and by hiding behind irony and humor confuses onlookers and is removed from any kind of reasonable blame for their actions . . . [F]or our current socio-political landscape, trolling is a political strategy that infuses irony into politics and identity.”); Derek Stanovsky, *Remix Racism: The Visual Politics of the “Alt-Right,”* 7 J. CONTEMP. RHETORIC 130, 130–138 (2017).

<sup>101</sup> See, e.g., Marc Fisher, *From Memes to Race War: How Extremists Use Popular Culture to Lure Recruits*, WASH. POST (Apr. 30, 2021), [https://www.washingtonpost.com/nation/2021/04/30/extremists-recruiting-culture-community/?tid=usw\\_paywall&case=fms&](https://www.washingtonpost.com/nation/2021/04/30/extremists-recruiting-culture-community/?tid=usw_paywall&case=fms&); Rachel Hatzipanagos, *How Online Hate Turns into Real-life Violence*, WASH. POST (Nov. 30, 2018), <https://www.washingtonpost.com/nation/2018/11/30/how-online-hate-speech-is-fueling-real-life-violence/>; Joshua Zitser, *Neo-Nazi Groups are Using Instagram to Recruit Young Teenagers, Experts Warn. Memes are Being Used to Entice Them.*, INSIDER (Mar. 27, 2021), <https://www.businessinsider.com/instagram-memes-used-recruit->



deliver a “Brooks Brothers version of white nationalism.”<sup>102</sup> The effectiveness of this memetic turn in white supremacy depends on the online ability to create community. The anonymous discussion boards 4chan and 8chan have been very effective platforms from which to launch ambiguous memes for extensive circulation, including through algorithmic amplification.<sup>103</sup> Indeed, 4chan’s design, in which posts are deleted after a certain amount of user engagement, functions as a “powerful selection machine” for attention-grabbing memes online.<sup>104</sup> Even reporting on white supremacists has “bought into the idea of ironic racism” and allowed white reporters to “hold the material at arm’s length,” and dismiss it as “just trolling,” or “just the [I]nternet.”<sup>105</sup> By creating confusion, uncertainty and in-group identification via memes, trolling techniques are given more mainstream attention and centrality as people seek to decode them and therefore further disseminate their reach.<sup>106</sup>

All this in turn enhances the manipulative power of online trolling in a variety of ways. First, it allows the outrage of racial and ethnic minority and women journalists to be attributed to their humorlessness; they are just “snowflakes”<sup>107</sup> who don’t understand the *lingua franca* and rough humor and irony of the Internet. Triggering outrage on purpose—which can then be characterized as liberal overreaction in the service of

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young-people-to-nazi-groups-experts-2021-3; see also Maxime Dafaure, *The “Great Meme War:” the Alt-Right and its Multifarious Enemies*, ANGLES [ONLINE] (Apr. 2020), <https://journals.openedition.org/angles/369> (discussing meme culture use for harassment as associated with Trump election).

<sup>102</sup> Amanda Darrach, *Should We Cover Right Wing Extremism?*, COLUM. JOURNALISM REV. (Aug. 9, 2018), [https://www.cjr.org/first\\_person/should-we-cover-right-wing-extremism.php](https://www.cjr.org/first_person/should-we-cover-right-wing-extremism.php).

<sup>103</sup> On the complexity of meanings of Pepe the Frog, a visual often used in racist and antisemitic memes, but whose origin is described as not racist, see, e.g., *Pepe the Frog*, ADL, <https://www.adl.org/education/references/hate-symbols/pepe-the-frog> (last visited March 11, 2022); see also Stanovsky, *supra* note 100; Tuters & Hagen, *supra* note 38.

<sup>104</sup> See Tuters & Hagen, *supra* note 38, at 2219.

<sup>105</sup> See Darrach, *supra* note 102 (describing attitude of young, white, mostly upper middle class and mostly male tech and Internet culture reporters); see also Jon Allsop, *With Poway Synagogue Shooting, Online Hate Comes Alive Again*, COLUM. JOURNALISM REV. (Apr. 29, 2019), [https://www.cjr.org/the\\_media\\_today/chabad\\_poway\\_synagogue\\_shooting.php](https://www.cjr.org/the_media_today/chabad_poway_synagogue_shooting.php) (“Sites like 8Chan double the difficulty because the ‘toxic in-jokes’ they traffic in are intended, in part, to hoodwink and humiliate journalists.”).

<sup>106</sup> See DeCook, *supra* note 100.

<sup>107</sup> See, e.g., Merrill Perlman, *Bill O’Reilly and the snowflakes*, COLUM. JOURNALISM REV. (Apr. 10, 2017), [https://www.cjr.org/language\\_corner/bill-oreilly-snowflakes-history-election.php](https://www.cjr.org/language_corner/bill-oreilly-snowflakes-history-election.php) (“Today, a ‘snowflake’ can be any progressive or liberal, in the view of many conservatives, or anyone seen as weak or unresisting.”).

“political correctness”—can put targeted journalists in a double bind and enhance circulation of memes for far-right political ends without taking responsibility. Second, and relatedly, memes and trolling can be used as a way of creating community,<sup>108</sup> contributing to social identity, and policing the boundaries of the in- and out-groups. Third, memes as coded forms can be used to communicate messages and trigger action by members of the in-group; they can serve as rallying points to promote and ease collective action. Each of these strategic consequences is deeply problematic for journalists and the press today.

### *C. The Institutional Context*

Ironically, one of the reasons why this kind of harassment and intimidation has become endemic—other than the anti-press culture of the Trump days—may have to do with attempts by news organizations to evolve in response to technological change. For all the many benefits of the open digital door both for news organizations and for reporters themselves, it is important to recognize the distinct threats it poses to journalists.

In light of the move to digital, the rise of social networks, and the need for legacy news organizations whose funding model had collapsed to find new “relevance,” many news outfits made the institutional decision to engage more with the public than had been the typical practice for legacy news organizations in the past.<sup>109</sup> For some papers, for example, this involved adopting online comment sections and requiring reporters to have social media presences and to engage in conversations with

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<sup>108</sup> See, e.g., Tuters & Hagen, *supra* note 38 (describing how “online anonymous communities use memetic literacy, memetic abstraction, and memetic antagonism to constitute themselves as [a] political collective[.]”); see also Allsop, *supra* note 105 (on communal character of white nationalists.).

<sup>109</sup> See, e.g., Kathryn Bowd, *Social Media and News Media: Building New Publics or Fragmenting Audiences?*, in *MAKING PUBLICS, MAKING PLACES* (Mary Griffiths & Kim Barbour eds., 2016) (ebook), [www.jstor.org/stable/10.20851/j.ctt1t304qd.13](http://www.jstor.org/stable/10.20851/j.ctt1t304qd.13); Chen et al., *supra* note 11, at 878 (“For women journalists [the expectation to engage with the public online] may foment a particularly potent combination: a digital sphere that invites harassment along with a requirement that they engage in this space as part of their jobs.”); Eberspacher, *supra* note 8; Teri Finneman et al., “*I Always Watched Eyewitness News Just to See Your Beautiful Smile*”: *Ethical Implications of US Women TV Anchors’ Personal Branding on Social Media*, 34 *J. MEDIA ETHICS* 146 (2019); Waisbord, *Trolling Journalists*, *supra* note 29, at 4, 6 and sources cited therein; NELSON, *supra* note 65.

their readers.<sup>110</sup> Those were the very openings needed for troll armies to harass racial and ethnic minority and women journalists.

Although the various social media platforms do not reflect the same level of journalist harassment,<sup>111</sup> the requirement that reporters engage with the audience online necessarily opens the door to the kind of strategic harassment discussed in *Section I.A* above. Furthermore, Twitter has become an important platform for journalists in developing stories, finding sources, and engaging in the activities of traditional journalism.<sup>112</sup> It is also one of the worst culprits in online trolling.

The situation is obviously much more problematic for freelancers or reporters who work with small and underfunded news organizations. Small local news organizations and freelance journalists have had no or few resources on which to fall back in response to the ocean of intimidating and threatening attacks on them online.<sup>113</sup>

Even in the better-funded news organizations, however, the story is not reassuring. Although some mainstream news organizations have attempted to train journalists in how to deal with social media and its dangers, reporters have consistently argued that the steps have been insufficient.<sup>114</sup> Reporters—and particularly women reporters and African American reporters—often hesitate to report online harassment to their editors and publishers for a variety of reasons. Whether because of the news organization’s expressed commitment to open engagement with the audience, or because of concern that they will be taken off good stories and not be given desirable assignments in the future,

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<sup>110</sup> See, e.g., Becky Gardiner et al., *The Dark Side of Guardian Comments*, THE GUARDIAN (Apr. 12, 2016), <https://www.theguardian.com/technology/2016/apr/12/the-dark-side-of-guardian-comments>.

<sup>111</sup> See, e.g., 2016 ADL REPORT, *supra* note 5, at 5–6.

<sup>112</sup> See, e.g., Ingrid Dahlen Rogstad, *Political News Journalists in Social Media*, 8 JOURNALISM PRAC. 688 (2014); Genevieve Chacon, Thierry Giasson, & Colette Brin, “That’s What I’m Talking About”: Twitter as a Promotional Tool for Political Journalists, 16 POPULAR COMM’N 276 (2018).

<sup>113</sup> That has been changing somewhat, with press representative organizations stepping up to help journalists cope with online harassment. See *infra* note 256.

<sup>114</sup> See, e.g., NELSON, *supra* note 65; see also Bauder, *supra* note 8; *Troll Patrol Findings*, *supra* note 11; UNESCO, THE CHILLING, *supra* note 34; Lucy Westcott & James W. Foley, *Why Newsrooms Need a Solution to End Online Harassment of Reporters*, COMM. TO PROTECT JOURNALISTS (Sept. 4, 2019), <https://cpj.org/2019/09/newsrooms-solution-online-harassment-canada-usa/>; Klein, *supra* note 7.

or because of a newsroom culture that values “grit” and a “thick skin,”<sup>115</sup> or a sense that the newsroom neither truly values diversity nor will actually listen and respond to the complaints, many journalists do not report the online harassment, intimidation, threats and expressive violence to which they are subject online.<sup>116</sup> Black reporters say that the racism of their newsrooms<sup>117</sup>—or at least the whiteness and maleness of the newsroom culture—creates strong incentives to avoid discussing the impact of harassment and online abuse on them. Women reporters as well talk about the silencing effect of gendered disempowerment in their newsrooms.

News management responses have reportedly been anemic in many news organizations even when such harassment has been reported in-house.<sup>118</sup> While some organizations appear to take online harassment seriously, questions can be raised about the sophistication of their security systems and the extent of their commitment of resources to online engagement

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<sup>115</sup> See Chen et al., *supra* note 11; see also Lucy Westcott, ‘*The Threats Follow Us Home*’: Survey Details Risks for Female Journalists in U.S., Canada, COMM. TO PROTECT JOURNALISTS (Sept. 4, 2019), <https://cpj.org/2019/09/canada-usa-female-journalist-safety-online-harassment-survey/> (detailing “fear of being thought of as weak, sensitive, or unable to handle their job.”); TROLLBUSTERS REPORT, *supra* note 34, at 40–44 (explaining fear of retaliation or being taken off their beats or losing future work).

<sup>116</sup> See Chen, *supra* note 11; see also Letrell Deshan Crittenden, *The Pittsburgh Problem: Race, Media and Everyday Life in the Steel City*, TOW CTR. DIGIT. JOURNALISM (Oct. 25, 2019), [https://www.cjr.org/tow\\_center\\_reports/racism-black-burnout-in-pittsburgh-journalism.php](https://www.cjr.org/tow_center_reports/racism-black-burnout-in-pittsburgh-journalism.php).

<sup>117</sup> See Mathew Ingram, *Black Journalists Face Challenges That Stem from Systemic Racism*, COLUM. JOURNALISM REV. (July 9, 2020), [https://www.cjr.org/the\\_media\\_today/black-journalists-systemic-racism.php](https://www.cjr.org/the_media_today/black-journalists-systemic-racism.php); Clark Merrefield, *Race and the Newsroom: What Seven Research Studies Say*, NIEMANLAB (July 22, 2020), <https://www.niemanlab.org/2020/07/race-and-the-newsroom-what-seven-research-studies-say/> (“The message is clear: whether national outlets or hyper-local brands, journalism has a race problem.”); Laura Hazard Owen, “*I Continue to Have Nightmares That I Still Work There*”: Many, Many Journalists Speak Out About Racism in Newsrooms Across the Country, NIEMANLAB (June 11, 2020), <https://www.niemanlab.org/2020/06/i-continue-to-have-nightmares-that-i-still-work-there-many-many-journalists-speak-out-about-racism-in-newsrooms-across-the-country/>; Sam Sanders, et al., *Reckoning with Race and Journalism*, NPR (July 14, 2020), <https://www.npr.org/2020/07/10/889773113/reckoning-with-race-in-journalism> (“But very often when [Black journalists] tell the truth about racism, when they tell the truth about white supremacy, they’re labeled as activists because they have dared to bring their Blackness across the newsroom threshold”); see also *infra* notes 120, 125, 134, 135, 161, 162.

<sup>118</sup> See, e.g., TROLLBUSTERS REPORT, *supra* note 34, at 12 (reporting that one third of the journalists who complained to management of online harassment were “not satisfied with management’s response.”); Holton, *supra* note 29; NELSON, *supra* note 65; WOMEN’S MEDIA CTR. REPORT, *supra* note 47; Eberspacher, *supra* note 8, at 153 and sources cited therein.

controls.<sup>119</sup> Critics also mention that non-minority management do not understand the nature and severity online abuse suffered by African American and women reporters.<sup>120</sup> Perhaps most critically, news organization management often treats online harassment as an individual problem involving a particular reporter, rather than a systemic problem addressed to and plaguing the profession as a whole.<sup>121</sup>

## II. CONSEQUENCES OF THE DUAL THREATS ON JOURNALISTS AND THE JOURNALISTIC FUNCTION

The online attacks on the press, and particularly the otherization attacks on non-male, non-white and non-Christian reporters, have had significant effects both on the journalists themselves and on the journalistic function. Journalists personally have experienced exhaustion, mental health effects, pressures to self-censor—the full range of chilling effects. News organizations have changed professional routines. And there has been an impact on important institutional activity directed to enhancing diversity and making up for a history of racism in the news media. In sum, there is strong support for the intuition that “the threats of violence and deluges of anti-Semitism had become part of [the reporters’] internal equations.”<sup>122</sup>

### *A. Effects On Journalists, On Journalism Itself, And On Democratic Discourse*

The kind of constant white supremacist and misogynistic campaigns of harassment sketched out in *Section I* above are

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<sup>119</sup> See, e.g., JENNIFER R. HENRICHSEN, TOW CTR. FOR DIGIT. JOURNALISM, COLUM. JOURNALISM REVIEW, *THE RISE OF THE SECURITY CHAMPION: BETA-TESTING NEWSROOM SECURITY CULTURES* (2020),

[https://www.cjr.org/tow\\_center\\_reports/security-cultures-champions.php](https://www.cjr.org/tow_center_reports/security-cultures-champions.php) (on information security in the newsroom). Moreover, although this has not yet been addressed (at least in the legal literature), there are questions about whether, in what ways, and to what extent a security focus might end up affecting journalistic norms. I plan to address this in future work.

<sup>120</sup> See, e.g., NELSON, *supra* note 65.

<sup>121</sup> See Chen et al., *supra* note 11; Holton et al., *supra* note 29; see also WOMEN’S MEDIA CTR. REPORT, *supra* note 47 (arguing that undermining credibility of woman reporter also undermines her news organization and freedom of the press as a whole).

<sup>122</sup> 2018 ADL REPORT, *supra* note 5, at 8 (“For some, it drove them to speak out louder and more vigorously, defying the trolls; for others, often citing concern over the harassment of family members, friends and romantic partners, sought to make adjustments.”).

doubtless overwhelming, demoralizing, and terrifying to reporters. At least some journalists report symptoms akin to PTSD.<sup>123</sup> Once the impact of the verbal abuse is amplified and weaponized by the fear of actual physical attacks and violence against the targeted reporters and their families, a heightened response of fear would be natural. Given the persistence of racial discrimination and white supremacy in the United States, it would not be surprising for African American reporters to feel fundamentally at risk from the online harassment sketched out above.<sup>124</sup> African American reporters already operate under difficult conditions in their own newsrooms and feel the brunt of discriminatory treatment.<sup>125</sup> Especially considering the increase in recent antisemitic violence in the US,<sup>126</sup> it would not be irrational for Jewish reporters brigaded by white supremacist threats to feel terrorized. Similarly, if women reporters are barraged by threats that they will be raped and killed, believing in that possibility is far from irrational; fear of retaliation is realistic given the extent and demographic realities of physical violence against women journalists worldwide.<sup>127</sup> It seems beyond cavil that campaigns of online abuse against journalists on the basis of markers of social identity such as race, gender,

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<sup>123</sup> River Smith, et al. *Covering Trauma: Impact on Journalists*, DART CTR. FOR JOURNALISM (July 1, 2015), <https://dartcenter.org/content/covering-trauma-impact-on-journalists>; Gangitano & Manchester, *supra* note 49. As noted above, empirical studies find this to be an intention of such harassment. See, e.g., UNESCO, *THE CHILLING*, *supra* note 34; see also Eberspacher, *supra* note 8, at 154 (describing “secondary harm” to family and friends of the reporters as well).

<sup>124</sup> See, e.g., Avi Ascher-Schapiro, *Journalists Covering US White Supremacists Must Weigh Risk to Selves and Families*, COMM. TO PROTECT JOURNALISTS (Mar. 15, 2018, 11:04 AM), <https://cpj.org/?p=32153>.

<sup>125</sup> See, e.g., Wesley Lowery, Opinion, *A Reckoning Over Objectivity, Led by Black Journalists*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/23/opinion/objectivity-black-journalists-coronavirus.html>; see also sources cited *supra* note 117, 120. In addition to “refus[ing] to promote qualified Black reporters, dismiss[ing] their story ideas, pigeon-hol[ing] them as only fit to report so-called ‘Black’ stories, and compound[ing] marginalization for Black women or Black queer communities,” Ingram, *supra* note 117 (quoting Allissa Richardson), Black journalists describe the additional work they are required to do to “educate their colleagues about racism and its effects” with “very little appreciation of the real labor involved in being every person in the newsroom’s ‘black friend.’” *Id.* (quoting Wesley Lowery).

<sup>126</sup> See, e.g., 2019 ADL Press Release, *supra* note 82; Press Release, Anti-Defamation League, Preliminary ADL Data Reveals Uptick in Antisemitic Incidents Linked to Recent Mideast Violence (May 20, 2021) [hereinafter 2021 ADL Press Release], <https://www.adl.org/news/press-releases/preliminary-adl-data-reveals-uptick-in-antisemitic-incidents-linked-to-recent>.

<sup>127</sup> See Eberspacher, *supra* note 8, at 148–149; see also UNESCO, *THE CHILLING*, *supra* note 34 (20% of female respondents reported offline attacks in connection with online abuse); TROLLBUSTERS REPORT, *supra* note 34, at 44–46 (describing physical and psychological reactions of harassed female reporters).

ethnicity, sexuality and religion upend the lives and psyches of the reporters themselves.

To be sure, journalist reactions to online harassment will doubtless differ—for example, at least as a result of factors such as individual temperament and personality, family obligations, age and experience, status in the profession, and technological savvy. Some reporters will attempt to control their exposure to this material and try to ignore it, often with the help of technical guidance. Others will seek to respond, publicize, and fight. Yet others have reported plans to (or at least the desire to) leave the profession entirely.<sup>128</sup> Studies report that this reaction may be more common among women journalists—and especially young women journalists may have this latter reaction.<sup>129</sup> There is increasing recognition of the negative mental health effects of online harassment.<sup>130</sup>

Even those journalists who are not driven out of the field by constant online attacks are likely to have some reaction to the barrage of white supremacy and misogyny. At a minimum, the constant awareness of being monitored by malign forces is likely to have an impact, as is the amount of time necessary to devote to safety issues in response.<sup>131</sup> However, there are good reasons

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<sup>128</sup> See, e.g., Bauder, *supra* note 8; REPORTERS WITHOUT BORDERS REPORT, *supra* note 87; Dalia Faheid, *Online Harassment New Frontline for Journalists, Report Says*, VOA NEWS (Dec. 17, 2020, 12:25 PM), <https://www.voanews.com/press-freedom/online-harassment-new-frontline-journalists-report-says>; Holton et al., *supra* note 29, at 2, 12 and sources cited therein; Miller, *Harassment's Toll*, *supra* note 32, at 11, 17 and sources cited therein; Autumn Slaughter & Elana Newman, *Journalists and Online Harassment*, DART CTR. FOR JOURNALISM & TRAUMA (Jan. 14, 2020), <https://dartcenter.org/resources/journalists-and-online-harassment> (noting that journalists reported coping with online harassment by: turning off Twitter notifications, deleting unread messages of known harassers, disguising their identity when publishing, reducing the amount of media content they create, and leaving journalism.” (citations omitted)).

<sup>129</sup> Scott Reinardy, *Female Journalists More Likely To Leave Newspapers*, NEWSPAPER RSCH. J., Summer 2009, at 53; see also TROLLBUSTERS REPORT, *supra* note 34.

<sup>130</sup> See, e.g., *Toxic Twitter — The Psychological Harms of Violence and Abuse Against Women Online, Chapter 1*, AMNESTY INT’L, <https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-1/> (last visited Nov. 29, 2021); see also Miller, *Harassment's Toll*, *supra* note 32 at 3–5; VILK, *supra* note 85 and sources cited therein.

<sup>131</sup> See, e.g., Chen et al., *supra* note 11 at 877 (finding that study respondents “face rampant online gendered harassment that influences how they do their jobs.”); Eberspacher, *supra* note 8, at 155 (discussing time drain and negative effects on workflow); Waisbord, *Mob Censorship*, *supra* note 18, at 1037 (discussing trolls’ desire to “get in journalists’ heads to remind them that they should be cautious because they are being monitored”) and 1038 (noting reports of self-censorship and “strategic retreat”). See also Miller, *Hostility Toward the Press*, *supra* note 29, at 8 (citing to

for which these reactions are difficult to establish. There is a significant amount of anecdotal evidence in studies and reports that reporters who are subject to these kinds of harassment engage in self-censorship.<sup>132</sup> There is also the cultural assumption that reporters have thick skins and are undeterred by threats or favor.

Even if reporters will not admit to specific instances of self-censorship (perhaps because of professional reluctance to admit to concrete instances of self-censorship), there is still a possibility that exposure to terrifying online harassment will (even subconsciously) affect the reporter's professional routines. Admittedly, as with the claim of self-censorship, the concern about responsive change to the reporters' professional routines is hard to unearth and document. But in general terms, significant numbers of women journalists have admitted to professional effects.<sup>133</sup>

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studies that show impact of harassment on reporter routines and how it "forces many women journalists to produce unpaid emotional labor.")

<sup>132</sup> See, e.g., TROLLBUSTERS REPORT, *supra* note 34; WOMEN'S MEDIA CTR. REPORT, *supra* note 47; see also Eberspacher, *supra* note 8, at 154; Dan Escalona, *Research: A Review of Studies Shows Increasing Online Threats to Female Journalists*, INVESTIGATIVE JOURNALISM EDUC. CONSORTIUM (Aug. 1, 2018), <https://ijec.org/2018/08/01/research-a-review-of-studies-shows-increasing-online-threats-to-female-journalists/> (quoting executive director of International Women's Media Foundation: "Journalists often second-guess and question what they will write and report on if a particular issue or statement will generate harassment. Often journalists will not cover certain topics because of the potential for threats and abuse in response . . ."); Pete Vernon, *The Media Today: Press Challenges Beyond Trump and Finances*, COLUM. JOURNALISM REV. (July 31, 2017), [https://www.cjr.org/the\\_media\\_today/the-media-today-press-challenges-beyond-trump-and-finances.php](https://www.cjr.org/the_media_today/the-media-today-press-challenges-beyond-trump-and-finances.php). The security expert at BuzzFeed was quoted as saying "I've seen reporters paralyzed with self-censorship." Ascher-Schapiro, *supra* note 124; Miller, *Hostility Toward the Press*, *supra* note 29 and sources cited therein; Miller, *Harassment's Toll*, *supra* note 32 and sources cited therein. There can be institutional self-censorship as well. See, e.g., Harki, *supra* note 2 (noting Virginian-Pilot decision to print article on Poynter rather than newspaper). A Pew research study published in 2000 documents extensive self-censorship by reporters, but the analysis does not address online threats as an expressed reason. PEW RSCH. CTR., SELF-CENSORSHIP: HOW OFTEN AND WHY (2000), <https://www.pewresearch.org/politics/2000/04/30/self-censorship-how-often-and-why/>.

<sup>133</sup> See UNESCO, *THE CHILLING*, *supra* note 34, at 13 ("30% of the women journalists surveyed answered that they self-censored on social media."); TROLLBUSTERS REPORT, *supra* note 34, at 7 (approximately 40% of respondents who had been harassed online at least once "said they avoided reporting certain stories as a result . . ."); see also Sullivan, *supra* note 8 (asserting chilling effect). On the challenges of attempting to assess the level and depth of self-censorship, see, for example, Waisbord, *Mob Censorship*, *supra* note 18, at 1038. See also Miller, *Harassment's Toll*, *supra* note 32, at 3-4 (offering citations to studies about effects of harassment on journalistic work).



Moreover, for many Black journalists, the newsroom experience has been far from safe and inclusive even absent online harassment.<sup>134</sup> Many African American journalists report lack of diversity, widespread professional distrust, constraints on their ability to report, career path limits grounded on racism, and racial pigeonholing for assignments.<sup>135</sup> Such circumstances enhance the likelihood of a chilling effect.

The bottom line is that there is good anecdotal evidence that online campaigns of harassment which are targeted to particular non-white, non-male and non-Christian journalists—and which use traditional rhetorics and images of otherization, discrimination and dehumanization—will have significant negative effects on the targeted journalists themselves (and their families).

Furthermore, a recent study finds that “[d]isinformation purveyors operationalise misogynistic abuse, harassment and threats against women journalists to undercut public trust in critical journalism and facts in general.”<sup>136</sup> The weaponization of disinformation and the relentless abuse will inevitably erode the reporters’ own credibility, but it will also predictably damage trust in the news organizations which employ them.<sup>137</sup>

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<sup>134</sup> See, e.g., Owen, *supra* note 117; Lowery, *supra* note 125; see also sources cited *supra* notes 117 and 120; see also *infra* Section II.B.

<sup>135</sup> See, e.g., Katti Gray, *The Racial Divide on News Coverage, and Why Representation Matters*, KNIGHT FOUND. (Sept. 25, 2020), <https://knightfoundation.org/articles/the-racial-divide-on-news-coverage-and-why-representation-matters/>; KNIGHT FOUND., *AMERICAN VIEWS 2020: TRUST, MEDIA AND DEMOCRACY* (2020), <https://knightfoundation.org/wp-content/uploads/2020/08/American-Views-2020-Trust-Media-and-Democracy.pdf>; DANIELLE K. KILGO, ET. AL., UNIV. OF TEX. CTR. FOR MEDIA ENGAGEMENT, *NEWS DISTRUST AMONG BLACK AMERICANS IS A FIXABLE PROBLEM* (2020), <https://mediaengagement.org/wp-content/uploads/2020/11/CME-Report-News-Distrust-Among-Black-Americans-is-a-Fixable-Problem.pdf>; Ivan Natividad, *How Did Trump Change American Journalism?*, BERKELEY NEWS (Jan. 27, 2021), <https://news.berkeley.edu/2021/01/27/how-did-trump-change-american-journalism/>.

<sup>136</sup> UNESCO, *THE CHILLING*, *supra* note 34, at 7.

<sup>137</sup> See, e.g., Janet Coats, *Disinformation Fuels Online Violence Against Women Journalists*, UNIV. OF FLA. CONSORTIUM ON TRUST IN MEDIA AND TECH. (May 21, 2021), <https://trust.jou.ufl.edu/blog/insights/may-21-2021-disinformation-fuels-online-violence-against-women-journalists/>.

*B. Effects On The Media's Reckoning With Race*

Threats to reporters who are women and/or members of racial, ethnic or religious minority groups must also be read against the fact that at this moment, press organizations are themselves beginning to take stock of their racial pasts and talking about making broader commitments to diversity. While correlation is of course not causation, this uptick in harassment at the very moment of racial reckoning is suggestive. Does this type of press self-examination trigger a defensive response expressed through online harassment? Does the fact that the modern newsroom is being pushed by its Black reporters to address the immanence of race<sup>138</sup> figure in the intensity of attacks? Is there an implicit message to Black journalists and their employers—a strategy of warning designed to derail efforts to diversify? To the extent that online harassment works to undermine the media industry's fledgling success in diversifying its newsroom and practices, such an impact is particularly institutionally harmful.

Newsrooms in the US are still overwhelmingly white and male.<sup>139</sup> Black reporters report a variety of minimizations as a result, both in their own treatment and in the media's approach to coverage.<sup>140</sup> However, whether because of the COVID-19 pandemic or in response to the nationwide protests for racial justice in 2020 or because Black reporters are pushing the

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<sup>138</sup> The non-profit media watchdog Free Press recently released a 100-page report diagnosing a history of racism in the American media in association with the organization's Media 2070 project, which is geared to the exploration of media reparations for past racism. See FREE PRESS, *MEDIA 2070: AN INVITATION TO DREAM UP MEDIA REPARATIONS* 15 (2020), <https://mediareparations.org/wp-content/uploads/2020/10/media-2070.pdf>.

<sup>139</sup> See, e.g., Elizabeth Grieco, *Newsroom Employees are Less Diverse Than U.S. Workers Overall*, PEW RSCH. CTR. (Nov. 2, 2018), <https://www.pewresearch.org/fact-tank/2018/11/02/newsroom-employees-are-less-diverse-than-u-s-workers-overall/>; Darren Walker, *Five Decades After Kerner Report, Representation Still Remains an Issue in Media*, COLUM. JOURNALISM REV. (Mar. 5, 2018), <https://www.cjr.org/analysis/race-media.php>; WOMEN'S MEDIA CTR. REPORT, *supra* note 47.

<sup>140</sup> See, e.g., Paul Farhi & Sarah Ellison, *Ignited by Public Protests, American Newsrooms are Having their Own Racial Reckoning*, WASH. POST (June 13, 2020), [https://www.washingtonpost.com/lifestyle/media/ignited-by-public-protests-american-newsrooms-are-having-their-own-racial-reckoning/2020/06/12/be622bce-a995-11ea-94d2-d7bc43b26bf9\\_story.html](https://www.washingtonpost.com/lifestyle/media/ignited-by-public-protests-american-newsrooms-are-having-their-own-racial-reckoning/2020/06/12/be622bce-a995-11ea-94d2-d7bc43b26bf9_story.html); Ingram, *supra* note 117; (quoting Allissa Richardson, *inter alia*, "Newsrooms can re-create some of the most objectionable forms of racism when they refuse to promote qualified Black reporters, dismiss their story ideas, pigeon-hole them as only fit to report so-called 'Black' stories, and compound marginalization for Black women or Black queer communities.").

conversation or because press organizations are calling for sustained study, news organizations have begun to focus on the issue of race and the media.

This is not the first time that media coverage of race and the racial makeup of the news industry have been addressed. For example, the National Advisory Commission on Civil Disorders (typically referred to as the Kerner Commission) was empaneled by President Lyndon Johnson to examine the underlying reasons for widespread racial protests that had occurred in American cities in the summer of 1967 and to answer, *inter alia*, the question “What effect do the mass media have on the riots?” the times suggest a more effective reckoning.<sup>141</sup> With respect to the media, the Kerner Commission Report found that the media had “failed to report adequately on ... the underlying problems of race relations[,]”<sup>142</sup> and that “[t]he journalistic profession has been shockingly backward in seeking out, hiring, training, and promoting”<sup>143</sup> African Americans. The Kerner Report concluded that “[a]long with the country as a whole, the press has too long basked in a white world, looking out of it, if at all, with white men's eyes and a white perspective. That is no longer good enough.”<sup>144</sup>

Despite these strong words, the news industry took to change slowly. Although the American Society of Newspaper Editors (ASNE) set out the goal in 1978 of a journalism workforce reflective of the US population's racial make-up by

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<sup>141</sup> REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS I (1968) [hereinafter KERNER COMMISSION REPORT].

<sup>142</sup> *Id.* at 201, 203 (“By and large, news organizations have failed to communicate to both their black and white audiences a sense of the problems America faces . . . . The media report and write from the standpoint of a white man's world.”).

<sup>143</sup> *Id.* at 211 (“News organizations must employ enough [African Americans] ... in positions of significant responsibility to establish an effective link to [African American] ... actions and ideas and to meet legitimate employment expectations. Tokenism—the hiring of one [African American] ... reporter, or even two or three—is no longer enough. [African American] ... reporters are essential, but so are [African Americans] ... editors, writers and commentators . . . .”)

<sup>144</sup> *Id.* at 213; see also Dorothy Gilliam, *What Do Black Journalists Want?*, COLUM. JOURNALISM REV. (1972), reprinted in COLUM. JOURNALISM REV.: CJR AT 60 (Dec. 20, 2021), <https://www.cjr.org/60th/what-do-black-journalists-want-dorothy-gilliam-kerner-commission.php/> (as part of Columbia Journalism Review's 60<sup>th</sup> anniversary, reprinting May/June 1972 article describing the panoply of media failures with respect both to Black reporters and to reporting on race).

2000,<sup>145</sup> it became clear that this goal would not be met.<sup>146</sup> In one analyst's words, newspapers have "failed spectacularly" to achieve ASNE's 1978 goal of population parity.<sup>147</sup> And while a 2018 ASNE report of some increased diversity in the newsroom is encouraging, the industry's low survey response rate that year means that we cannot generalize from the data obtained.<sup>148</sup> Black journalists report significant continuing roadblocks.<sup>149</sup>

Still, recent studies indicate that seventy-nine percent of the American public believes that news organizations should increase the diversity of their staff (although, admittedly, these respondents differ on the type of diversity they would prefer.)<sup>150</sup> And at least as a matter of rhetorical commitment, many news organizations have been articulating commitments to diversity

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<sup>145</sup> See *ASNE Diversity History*, NEWS LEADERS ASS'N, <https://members.newsleaders.org/content.asp?contentid=57> (last visited Nov. 29, 2021) (recounting that ASNE leadership pledged to "to try to achieve the minority percentage in newsrooms equal to the minority proportion of the total population before the year 2000 suggested in the committee report.").

<sup>146</sup> *Id.* (recognizing that "the industry will fall far short of the 2000 goal, the ASNE board in October adopts a new goal. The new goal seeks parity by 2025 or sooner and calls for creating a series of three-year benchmarks to help the industry better track its progress.").

<sup>147</sup> Gabriel Arana, *Decades of Failure*, COLUM. JOURNALISM REV. (Fall 2018) [https://www.cjr.org/special\\_report/race-ethnicity-newsrooms-data.php](https://www.cjr.org/special_report/race-ethnicity-newsrooms-data.php).

<sup>148</sup> ASNE's 2018 diversity survey results reflect low participation but some increase in newsroom diversity. *2018 Survey: ASNE's 2018 Diversity Survey Results Reflect Low Participation But Encouraging Shifts*, NEWS LEADERS ASS'N (2018); see also WOMEN'S MEDIA CTR. REPORT, *supra* note 47, at 6. The News Leaders Association's 2019 results indicate that "[j]ournalists of color make up nearly a third of the full-time workforce among online-only news organizations...[,]" *2019 Diversity Survey: Digital-Only Platforms Drive Race And Gender Inclusion Among Newsrooms In 2019 ASNE Newsroom Diversity Survey*, NEWS LEADERS ASS'N (Sept. 10, 2019), <https://www.newsleaders.org/2019-diversity-survey-results>, although the study is still marked by a very low (22.8%) response rate. ASNE and Google offer an interactive tool called *How Diverse Are US Newsrooms* to address the gender and racial breakdown of US news organizations. See *How Diverse are US News Rooms?*, AM. SOC'Y OF NEWS EDS. & GOOGLE NEWS INITIATIVE, <https://gogetrends.github.io/asne/> (last visited March 25, 2022).

<sup>149</sup> See, e.g., David Folkenflik, *Rancor Erupts In 'LA Times' Newsroom Over Race, Equity And Protest Coverage*, NPR (June 15, 2020), <https://www.npr.org/2020/06/15/874530954/rancor-erupts-in-la-times-newsroom-over-race-equity-and-protest-coverage>; see also sources cited *supra* notes 117, 125, 140; NELSON, *supra* note 65; Rasmus Kleis Nielsen et al., *Race and Leadership in the News Media 2020: Evidence from Five Markets*, REUTERS INST., OXFORD UNIV. (July 16, 2020), <https://reutersinstitute.politics.ox.ac.uk/race-and-leadership-news-media-2020-evidence-five-markets>.

<sup>150</sup> See, e.g., Hanaa' Tameez, *Two New Studies About Media and Diversity Can Help Newsrooms Through Their Reckoning with Racism*, NIEMANLAB (June 26, 2020), <https://www.niemanlab.org/2020/06/two-new-studies-about-media-and-diversity-can-help-newsrooms-through-their-reckoning-with-racism/> (describing Pew and Knight study results).

in their media workers.<sup>151</sup> Media organizations have publicly begun taking stock of their own lack of diversity.<sup>152</sup> Newspapers have been engaging in a public reckoning with respect to their participation in historic racist practices and racist reporting of news, with several issuing apologies for their past racism in coverage, advertising policy and lack of newsroom diversity.<sup>153</sup> They have also sought to expand and diversify their coverage of issues relating to race by, for example, creating the “race beat,”<sup>154</sup> the protest beat and the white supremacy beat.<sup>155</sup>

This focus on media diversity has engaged scholars and media non-profits as well. For example, the relationship of the press and issues of race has received recent attention (in the press and through Fress Press Media’s Media 2070 project).<sup>156</sup> Scholarly colloquia are aiming to further that discussion.<sup>157</sup> Although some argue that only a small percentage of American

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<sup>151</sup> See, e.g., Nathan Bomay, *USA Today Owner Gannett Commits to Make Workforce as Diverse as America, Add New Beats on Race and Social Justice*, USA TODAY (Aug. 20, 2020 6:01 AM), <https://www.usatoday.com/story/money/2020/08/20/gannett-usa-today-diversity-commitment-journalism/5604473002/>; Rebecca Frank, *Why Diverse Newsrooms are Important*, NEWS MEDIA ALL. (Feb. 9, 2018), <https://www.newsmediaalliance.org/diverse-newsroom-study/>; Ahiza Garcia-Hodges, *News Organizations Struggle to Meet Diversity Pledges Despite Key Hires*, NBC NEWS (Feb. 19, 2021), <https://www.nbcnews.com/news/all/news-organizations-struggle-meet-diversity-pledges-despite-key-hires-n1258264>.

<sup>152</sup> See, e.g., Arana, *supra* note 147.

<sup>153</sup> See, e.g., Alexandria Neason, *On Atonement*, COLUM. JOURNALISM REV. (Jan. 28, 2021), [https://www.cjr.org/special\\_report/apologies-news-racism-atonement.php](https://www.cjr.org/special_report/apologies-news-racism-atonement.php); FREE PRESS, *supra* note 138, at 31–37; Mike Fannin, *The Truth in Black and White: An Apology from The Kansas City Star*, KAN. CITY STAR (Dec. 20, 2020, 3:50 PM), <https://www.kansascity.com/news/local/article247928045.html>; Opinion, *Our Reckoning with Racism*, L.A. TIMES (Sept. 27, 2020), <https://www.latimes.com/opinion/story/2020-09-27/los-angeles-times-reckoning-with-racism>; Editorial, *To The Community and The Families of the Groveland Four: We’re sorry*, ORLANDO SENT. (Jan. 10, 2019), <https://www.orlandosentinel.com/opinion/editorials/os-op-orlando-sentinel-apologizes-groveland-four-20190109-story.html>; Editorial, *Anti-Black Racism and the Press*, COLUM. JOURNALISM REV. (June 18, 2021), [https://www.cjr.org/the\\_media\\_today/anti-black-racism-and-the-press.php](https://www.cjr.org/the_media_today/anti-black-racism-and-the-press.php).

<sup>154</sup> See, e.g., Errin Haines Whack, *My Life on the Race Beat*, COLUM. JOURNALISM REV. (Fall 2018), [https://www.cjr.org/special\\_report/race-beat.php](https://www.cjr.org/special_report/race-beat.php).

<sup>155</sup> See, e.g., Bomay, *supra* note 151; Christiana Mbakwe, *White-supremacy Threat Demands its Own Beat Reporters*, COLUM. JOURNALISM REV. (Aug. 21, 2017), <https://www.cjr.org/criticism/white-supremacy-beat.php>.

<sup>156</sup> FREE PRESS, *supra* note 138.

<sup>157</sup> The University of Houston Law Center and Georgetown Law School hosted a colloquium on Race, Racism and American Media in early 2022. *Race, Racism, and American Media*, UNIV. HOUS. L. CTR., <https://www.law.uh.edu/RaceMedia/> (last visited Mar. 3, 2022).

newspapers have faced the racism of their past practices,<sup>158</sup> there appears to be growing public recognition that the American press is looking more intentionally than in the past at its own complicity in racism.

Of course, there are questions about whether the promised diversity is sufficiently “real” and whether the news organizations’ staffing and coverage plans going forward will adequately address the suffusive effects of race. There are reminders that true diversity doesn’t come from simply hiring a few journalists of color. Moreover, for some Black journalists and media scholars, the degree of reckoning discussed thus far does not sufficiently surface or address implicit racial tilts in foundational journalistic norms. Some progressives criticize journalistic norms and the profession as grounded on whiteness and maleness and therefore insufficiently responsive to the public.<sup>159</sup> Scholars have criticized American journalism for failing adequately to recognize the assumptions of whiteness in fundamental professional norms.<sup>160</sup> They have suggested that racism is baked into many of the traditional journalistic values—especially that of objectivity.<sup>161</sup> Arguing that objectivity as understood in practice (if not in theory) unquestioningly assumes the white gaze, these journalists and theorists are calling for a reevaluation by news organizations of their journalistic commitments and practices.<sup>162</sup>

Even without addressing the debate over fundamental journalistic norms, however, online journalist harassment could pose a serious threat to the institutional efforts to enhance the diversity of news institutions. Effective campaigns of online

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<sup>158</sup> See, e.g., Neason, *supra* note 153; Channing Gerard Joseph, *American Journalism’s Role in Promoting Racist Terror*, THE NATION (Apr. 19, 2021), <https://www.thenation.com/article/society/media-journalism-racism-reparations/>.

<sup>159</sup> Tameez, *supra* note 150.

<sup>160</sup> See, e.g., Carlos Alamo-Pastrana & William Hoynes, *Racialization of News: Constructing and Challenging Professional Journalism As “White Media,”* 44 HUMAN. & SOC’Y, 67 (2018); Sue Robinson & Kathleen Bartzen Culver, *When White Reporters Cover Race: News Media, Objectivity and Community (Dis)trust*, 20 JOURNALISM 375 (2019); see also Merrefield, *supra* note 117 and sources cited therein.

<sup>161</sup> See generally Mathew Ingram, *What Comes After We Get Rid of Objectivity in Journalism?*, COLUM. JOURNALISM REV. (July 2, 2020), [https://www.cjr.org/the\\_media\\_today/what-comes-after-we-get-rid-of-objectivity-in-journalism.php](https://www.cjr.org/the_media_today/what-comes-after-we-get-rid-of-objectivity-in-journalism.php); Ari Shapiro, *Black Journalists Weigh In on a Newsroom Reckoning*, NPR (July 2, 2020), <https://www.npr.org/2020/07/02/886845421/black-journalists-weigh-in-on-a-newsroom-reckoning>. For a recent report making this point in the context of journalist engagement with Twitter, see NELSON, *supra* note 65.

<sup>162</sup> See, e.g., Lowery, *supra* note 125.

harassment on reporters who add to newsroom diversity will at least threaten to slow down the newsroom diversification efforts in which today's news organizations are beginning to engage (however tentatively). If non-white and non-male reporters are effectively hounded out of the newsroom as a result of online identity-based abuse, then the goal of diversifying the newsroom and its news coverage could be dealt a severe blow.

### III. REPORTING IN THE SHADOW OF PHYSICAL THREATS, VIOLENCE AND DANGER

The targeted online harassment and intimidation against journalists—and particularly African American journalists and women—cannot be assessed by itself, as an independent and singular phenomenon. Journalism takes place against a backdrop of danger and violence in the “real world” as well. Journalists cannot help but be aware that they do their work in the shadow of both expressive violence and physical danger. It is inconceivable to suppose that this recognition does not and will not have consequences for the press.

A 2017 study on murdered journalists indicated that “[i]n at least forty percent of cases,” those journalists reported that they had received threats prior to their deaths,<sup>163</sup> leading researchers to conclude that “online violence against journalists is jumping offline.”<sup>164</sup> This reality doubtless adds to the perceived weight of the online threats for journalists.

The political and social environment of the Trump years offered a fruitful climate for enhancements of physical danger for journalists. While the previous Sections have sketched online attempts to intimidate reporters with words and pictures, it is important to look also at the real-world follow-through of expressive attempts to silence reporters. The online intimidation has carried over into doxing journalists and revealing information about them and their families.<sup>165</sup> What, other than

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<sup>163</sup> See Elisabeth Witchel, *Getting Away With Murder*, COMM. TO PROTECT JOURNALISTS (Oct. 31, 2017), <https://cpj.org/reports/2017/10/impunity-index-getting-away-with-murder-killed-justice-2/>; Posetti, Harrison & Waisbord, *supra* note 33; see also *Journalists Killed in 2017*, COMM. TO PROTECT JOURNALISTS, <https://cpj.org/data/killed/2017/> (last visited Oct. 14, 2021); see, e.g., *Joaquin Briones*, COMM. TO PROTECT JOURNALISTS, <https://cpj.org/data/people/joaquin-briones/>.

<sup>164</sup> Posetti, Harrison & Waisbord, *supra* note 33.

<sup>165</sup> See Follman, *supra* note 30.

inciting in-person harassment or even physical violence could possibly have been the goal of such doxxing?? Former President Trump's characterization of the press as an "enemy" doubtless weaponized press harassment even offline. It predictably invited physical attacks on journalists at Trump rallies.<sup>166</sup> Some Trump supporters saw in his attacks on the press an implicit permission to treat reporters as he suggested they deserved.<sup>167</sup> His refusal to condemn white supremacy—such as, for example, in his response to the violence of the so-called "Unite the Right" rally in Charlottesville that there were "very fine people" on both sides<sup>168</sup>—emboldened the alt-right's attempts to bring white supremacy and its ideas mainstream.<sup>169</sup> At a minimum, the then-President's language was taken by some Trump champions to

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<sup>166</sup> See e.g., Eric Neugeboren, *US Journalists Suffer Attacks During Capitol Riot, Protests*, VOA (Jan. 14, 2021 10:29 AM), <https://www.voanews.com/press-freedom/us-journalists-suffer-attacks-during-capitol-riot-protests>; *Cameraman, Other Reporters Attacked at Trump Rally*, U.S. FREEDOM PRESS TRACKER (Feb. 11, 2019), <https://pressfreedomtracker.us/all-incidents/cameraman-other-reporters-attacked-trump-rally/>; Asher Stockler, *Trump Supporter Charged With Assault on Orlando Sentinel Journalist Covering President's 2020 Rally*, NEWSWEEK (June 19, 2019 2:37 PM), <https://www.newsweek.com/trump-supporter-arrested-assault-journalist-rally-1444834>; *Minnesota Journalist Attacked by Trump Supporter at Rally*, AP NEWS (Oct. 1, 2020), <https://apnews.com/article/election-2020-joe-biden-donald-trump-journalists-minnesota-546e102d48ef79cb460857115ddee695>.

<sup>167</sup> Libby Cathey & Meghan Keneally, *A Look Back at Trump Comments Perceived by Some as Inciting Violence*, ABC NEWS (May 30, 2020 5:00 AM), <https://abcnews.go.com/Politics/back-trump-comments-perceived-encouraging-violence/story?id=48415766>; Meagan Flynn, *Trump Inciting 'Violence': More than 200 Retired Journalists Condemn President's 'Un-American' Attacks on Press*, WASH. POST (Oct. 25, 2018), <https://www.washingtonpost.com/nation/2018/10/25/trump-inciting-violence-nearly-retired-journalists-condemn-presidents-un-american-attacks-press/>; Andrew Solender, *Trump Says Police Violence Against Journalists is 'Actually A Beautiful Sight'*, FORBES (Sept. 22, 2020 9:46 PM), <https://www.forbes.com/sites/andrewsolender/2020/09/22/trump-says-police-violence-against-journalists-is-actually-a-beautiful-sight/?sh=39b9a04c57d6>; see also Kyong Mazzaro, *Anti-Media Discourse and Violence Against Journalists: Evidence from Chavez's Venezuela*, INT'L J. OF PRESS/POLITICS, Nov. 8, 2021, and sources cited therein (asserting that "[g]overnment-sponsored anti-media rhetoric has increasingly become a reason for concern for media freedom monitoring organizations, policymakers, and scholars who caution about how politicians' rhetoric can normalize and even lead to non-state anti-media violence in democracies[,]" noting the limited amount of empirical study, and using Venezuela to develop a predictive model of when government-sponsored anti-media discourse can be expected to lead to non-state violence).

<sup>168</sup> Glenn Kessler, *The 'Very Fine People' at Charlottesville: Who Were They?*, WASH. POST (May 8, 2020), <https://www.washingtonpost.com/politics/2020/05/08/very-fine-people-charlottesville-who-were-they-2/> ("You had some very bad people in that group, but you also had people that were very fine people, on both sides.").

<sup>169</sup> See, e.g., John Haltiwanger, *Trump has Repeatedly been Endorsed by White Supremacist Groups and Other Far-Right Extremists, and They've Looked to Him as a Source of Encouragement*, INSIDER (Sept. 30, 2020 3:59 PM), <https://www.businessinsider.com/trumps-history-of-support-from-white-supremacist-far-right-groups-2020-9>.



justify and normalize violent activity toward the press. Reports support the conclusion that journalists were targeted for violence by the mob during the January 6, 2021 insurrection at the Capitol.<sup>170</sup> All this made more real the shadow of violence against which reporters had to do their jobs.

Physical violence of every sort against the press is pervasive and globalized, according to the CPJ's tracker. 2,003 journalists have been assassinated since 1992.<sup>171</sup> Whether these murders of journalists are state-approved murder in autocratic regimes,<sup>172</sup> or engineered by criminal enterprises or corrupt government officials,<sup>173</sup> or associated with war and terrorism,<sup>174</sup>

<sup>170</sup> See, e.g., Hsu & Robertson, *supra* note 3; Joseph Choi, *Videos Show Protesters Outside Capitol Destroying Journalists' Equipment*, THE HILL (Jan. 6, 2021 7:04 PM), <https://thehill.com/homenews/news/533022-videos-show-protesters-outside-capitol-destroying-journalists-equipment>; Erin Doherty, *FBI Begins Arresting Individuals Who Attacked Journalists on Jan. 6*, AXIOS (July 3, 2021), <https://www.axios.com/fbi-arrests-attacks-journalists-capitol-riot-9cd908f3-e222-4df3-93de-4ca1e2b5aa28.html>; Neugeboren, *supra* at note 166; Jordan Williams, *Journalist Accounts, Footage Suggest They Were Targeted in Capitol Riot*, THE HILL (Jan. 8, 2021 12:19 PM), <https://thehill.com/homenews/media/533330-journalist-accounts-suggests-they-were-targeted-in-capitol-riot>.

<sup>171</sup> See *Journalists Killed Between 1992 and 2021*, COMM. TO PROTECT JOURNALISTS, [https://cpj.org/data/killed/?status=Killed&motiveConfirmed%5B%5D=Confirmed&motiveUnconfirmed%5B%5D=Unconfirmed&type%5B%5D=Journalist&start\\_year=1992&end\\_year=2021&group\\_by=year](https://cpj.org/data/killed/?status=Killed&motiveConfirmed%5B%5D=Confirmed&motiveUnconfirmed%5B%5D=Unconfirmed&type%5B%5D=Journalist&start_year=1992&end_year=2021&group_by=year) (last visited Feb 14, 2022). For 2020 data, see COMM. TO PROTECT JOURNALISTS, *MURDERS OF JOURNALISTS MORE THAN DOUBLE WORLDWIDE (2020)* [hereinafter *MURDERS OF JOURNALISTS*], <https://cpj.org/reports/2020/12/murders-journalists-more-than-doubled-killed/>.

<sup>172</sup> For example, there is little doubt that the murder of journalist Jamal Ahmad Khashoggi had the nod of Saudi Arabia. See, e.g., Greg Myre, et al., *U.S. Intelligence: Saudi Crown Prince Approved Operation to Kill Jamal Khashoggi*, NPR (Feb. 26, 2021, 1:49 PM), <https://www.npr.org/2021/02/25/971215788/biden-administration-poised-to-release-report-on-killing-of-jamal-khashoggi>; Julian E. Barnes & David E. Sanger, *Saudi Crown Prince Is Held Responsible for Khashoggi Killing in U.S. Report*, N.Y. TIMES, <https://www.nytimes.com/2021/02/26/us/politics/jamal-khashoggi-killing-cia-report.html> (July 17, 2021); see also Martin Kibaba, *Journalism—One of the Most Dangerous Professions in the World*, WORLD PRESS INST. (Sept. 18, 2019), <https://worldpressinstitute.org/journalism-one-of-the-most-dangerous-professions-in-the-world/>; Melanie Pineda, *We Need to Talk About the Dangers of Journalism*, WASH. SQUARE NEWS (Oct. 15, 2018), <https://nyunews.com/2018/10/15/10-16-ops-pineda/>.

<sup>173</sup> See, e.g., Azam Ahmed, *In Mexico, 'It's Easy to Kill a Journalist'*, N.Y. TIMES (Apr. 29, 2017), <https://www.nytimes.com/2017/04/29/world/americas/veracruz-mexico-reporters-killed.html>; Nina Lakhani, et. al., *Murder in Mexico: Journalists Caught in the Crosshairs*, THE GUARDIAN (Dec. 6, 2020), <https://www.theguardian.com/world/2020/dec/06/murder-in-mexico-journalists-caught-in-the-crosshairs-regina-martinez-cartel-project>.

<sup>174</sup> See, e.g., *MURDERS OF JOURNALISTS*, *supra* note 171; *Reporting Safely and Ethically*, SOC'Y OF PRO. JOURNALISTS, <https://www.spj.org/safety.asp> (last visited May 11, 2021); see also Lindsay R. Grossman, *All the News That's Worth the Risk: Improving Protection for Freelance Journalists in War Zones*, 40 B.C. INT'L & COMPAR. L. REV. 141 (2017).

or otherwise associated with their journalistic work, what is clear is that being a reporter these days is a very dangerous enterprisingly.<sup>175</sup>

There is of course no indication that the Trump administration approved the murder of journalists. But there has been quite a bit of private, non-state violence against the press. Reporters and newsrooms have been the subject of violent attacks or threats of mass shooting. One example is the mass shooting at the Capital Gazette in 2018, in which a gunman killed all the reporters in the newsroom.<sup>176</sup> While some other planned attacks have been foiled, the anti-press language of the Trump years can be heard in some of the justifications offered by would-be attackers in support of their threats. In one such instance, the FBI arrested a man for threatening to commit a mass shooting at the offices of the Boston Globe.<sup>177</sup> He was heard to say in anonymous calls to the Globe: “[y]ou’re the enemy of the people, and we’re going to kill every fucking one of you” and

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<sup>175</sup> See, e.g., MURDER OF JOURNALISTS, *supra* note 171 (collecting reports of violence against reporters); see also Jon Allsop, *Dark Clouds Gather Over Press Freedom in Europe*, COLUM. JOURN. REV. (July 13, 2021), [https://www.cjr.org/the\\_media\\_today/press\\_freedom\\_europe\\_de\\_vries.php](https://www.cjr.org/the_media_today/press_freedom_europe_de_vries.php). Global violence against the press is beyond the scope of this paper, but American journalists operate in a global theater and cannot but be aware of the increasing physical dangers to reporters from both state and non-state actors. Stories of physical threats to journalists from state actors are becoming more common: just last summer, it was reported that the government of Iran planned a kidnapping of an Iranian American journalist whose work was critical of the regime. See, e.g., Benjamin Weiser, *Iranian Operatives Planned to Kidnap a Brooklyn Author, Prosecutors Say*, N.Y. TIMES (July 13, 2021), [https://www.nytimes.com/2021/07/13/nyregion/iran-masih-alinejad-kidnapping.html?campaign\\_id=60&emc=edit\\_na\\_20210713&instance\\_id=0&nl=breaking-news&ref=cta&regi\\_id=6024790&segment\\_id=63358&user\\_id=db1a3d75d18a265e5f9d679f0f226fa3](https://www.nytimes.com/2021/07/13/nyregion/iran-masih-alinejad-kidnapping.html?campaign_id=60&emc=edit_na_20210713&instance_id=0&nl=breaking-news&ref=cta&regi_id=6024790&segment_id=63358&user_id=db1a3d75d18a265e5f9d679f0f226fa3). As of December 2021, there were 293 journalists imprisoned as a result of their work. *Attacks on the Press in 2021*, COMM. TO PROTECT JOURNALISTS, <https://cpj.org/2021/12/attacks-on-the-press-in-2021/> (last visited Mar. 25, 2022). At least 27 reporters were killed in 2021 as a result of their work. *Id.* (This count does not address 2022 or the dangers faced by reporters covering the Russia/Ukraine war.)

<sup>176</sup> On June 28, 2018, Jarrod Ramos shot and killed five newsroom employees and injured two others at The Capital Gazette, a newspaper serving Annapolis, Maryland. See Alex Mann and Lilly Price, *‘This is a really bittersweet day’: Jury finds Capital Gazette gunman criminally responsible in Annapolis newsroom shooting*, CAP. GAZETTE (July 15, 2021), <https://www.capitalgazette.com/news/crime/ac-cn-capital-gazette-trial-verdict-20210715-c2kgmf64hjfoho6ekarjuxjuv4-story.html>; Kristen Hare, *At the Capital Gazette, We’re Still Mourning. We’re Gonna Need Help. But We’re Still Here*, POYNTER (July 25, 2018), <https://www.poynter.org/reporting-editing/2018/at-the-capital-gazette-%C2%91we-%C2%92re-still-mourning-we-%C2%92re-gonna-need-help-but-we-%C2%92re-still-here-%C2%92/>.

<sup>177</sup> Follman, *supra* note 30.

“[w]e are going to shoot you motherfuckers in the head.”<sup>178</sup> From reports of explanations these attackers provide, it is possible to find connections to the conspiracy theories fanned by former President Trump and his supporters.<sup>179</sup> Echoes of Trump’s inflammatory anti-press rhetoric could be heard during the mob takeover of the Capitol on January 6, 2021.<sup>180</sup> All told, private party physical attacks on the press seem to have expanded domestically.<sup>181</sup> To the extent that Trump supporters continue to believe that the 2020 election was “stolen” with the help of the mainstream media,<sup>182</sup> continuing attacks on the press and reporters based on such conspiracy theories can be expected.<sup>183</sup>

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<sup>178</sup> *Id.*

<sup>179</sup> Other examples suggest the same. For example, some of the language used by the insurrectionists at the January 6, 2021 takeover of the Capitol carried echoes of language used by the former president. “Murder the Media” was etched into a door in the Capitol. *See, e.g.,* Hsu & Robertson, *supra* note 3; *see also* Peter Baker & Michael D. Shear, *El Paso Shooting Suspect’s Manifesto Echoes Trump’s Language*, N.Y. TIMES (Aug. 4, 2019), <https://www.nytimes.com/2019/08/04/us/politics/trump-mass-shootings.html>; Mehdi Hasan, *After El Paso, We Can No Longer Ignore Trump’s Role in Inspiring Mass Shootings*, THE INTERCEPT (Aug. 4, 2019), <https://theintercept.com/2019/08/04/el-paso-dayton-mass-shootings-donald-trump/>.

<sup>180</sup> *See, e.g.,* Shomari Stone (@shomaristone), TWITTER (Jan. 6, 2021, 5:08 PM), <https://twitter.com/i/status/1346941715895250949> (“Mob of Trump supporters swarm the media near the US Capitol. They yell what Trump frequently says, ‘the media is the enemy of the people.’ They destroy equipment and chased out reporters. I’ve never seen anything like this in my 20 year career: @nbcwashington @MSNBC.”).

<sup>181</sup> REPORTERS COMM. FOR FREEDOM OF THE PRESS, PRESS FREEDOMS IN THE UNITED STATES 2020, at 8 (2021) [hereinafter RCFP PRESS FREEDOM TRACKER], [https://www.rcfp.org/wp-content/uploads/2021/05/Press-Freedom-Tracker-2020\\_FINAL.pdf](https://www.rcfp.org/wp-content/uploads/2021/05/Press-Freedom-Tracker-2020_FINAL.pdf) (“As of press time, the Tracker documented 438 physical attacks on journalists in 2020. This is more than three times as many attacks as it recorded over the previous three years combined. Of those attacks, which affected 416 journalists, more than 91% occurred during the Black Lives Matter protests. Sixteen assaults occurred at protests related to the 2020 election.”); *see also Trump Supporter Attacks BBC Cameraman at El Paso Rally*, BBC (Feb. 12, 2019), <https://www.bbc.com/news/world-us-canada-47208909>.

<sup>182</sup> *See* Todd J. Gillman, *CPAC: Donald Trump Spins Tales of Rigged Election, Papers Over Jan. 6 Riot, Hints at 2024 Comeback*, DALL. MORNING NEWS (July 11, 2021), <https://www.dallasnews.com/news/politics/2021/07/11/cpac-donald-trump-spins-tales-of-rigged-election-papers-over-jan-6-riot-thrills-conservatives/>; Amanda Seitz & David Klepper, *Dangerously Viral: How Trump, Supporters Spread False Claims*, AP NEWS (Dec. 4, 2020), <https://apnews.com/article/how-trump-supporters-spread-false-claims-8cf62c15893c4e8878a471e99ee81459/> (citing survey findings that “almost one-third of Americans, and more than 75% of Trump supporters, believe Biden only won because of fraud. Falsehoods around the election have continued to reach a large audience . . .”).

<sup>183</sup> After journalists covering the 2021 Capitol riot experienced violent attacks from Trump supporters who believed the 2020 election was stolen, the Committee to Protect Journalists “warned that there may be ‘escalating attacks on the media’ in the future and urged reporters to take precautions.” Angela Fu, *Reporters Covering the Capitol Attack Were Used to Harassment and Heckling. But Wednesday was Different*,

Journalists are not just exposed to a barrage of in-person verbal violence with a white supremacist cast. They have also faced more direct instances of police threats and private violence not adequately controlled by police.<sup>184</sup> It is notable that the then-President of the United States characterized manhandling of the press as “a beautiful sight.”<sup>185</sup> Troublingly, reports indicate that law enforcement has often failed to protect reporters during the exercise of their journalistic functions.<sup>186</sup> Indeed, reporters have also been at risk from police themselves, especially during their coverage of protests.

Reports of incidents suggest that police have been affirmatively targeting reporters and photojournalists; “[l]aw enforcement officers were responsible for 321 - or 80% - of the 400 total assaults on journalists during Black Lives Matter protests in 2020, affecting 324 journalists.”<sup>187</sup> The visibility of press credentials and reporters’ oral assurances that they are

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POYNTER (Jan. 13, 2021), <https://www.poynter.org/reporting-editing/2021/reporters-covering-the-capitol-attack-were-used-to-harassment-and-heckling-but-wednesday-was-different/>.

<sup>184</sup> See, e.g., Lynn Walsh, *Meet the Victims of Violence Against Journalists*, QUILL (June 12, 2018), <https://www.quillmag.com/2018/06/12/meet-the-victims-of-violence-against-journalists/> (describing extensive beating of freelance journalist David Minsky by protesters, with police aid coming only after the attack).

<sup>185</sup> See, e.g., Solender, *supra* note 167 (quoting Trump’s comments at a Pittsburgh rally that “you don’t want to do that,” meaning throwing a reporter “aside like he was a little bag of popcorn[,]” but then noted such instances as “actually a beautiful sight.”), <https://www.forbes.com/sites/andrewsolender/2020/09/22/trump-says-police-violence-against-journalists-is-actually-a-beautiful-sight/?sh=3282a54057d6>.

<sup>186</sup> See RCFP PRESS FREEDOM TRACKER, *supra* note 181, at 8; see also Hsu & Robertson, *supra* note 3 (“He [CBS reporter Chip Reid] described ‘a scary moment’ on Wednesday when a protester had told him that law enforcement officers would not protect journalists. ‘There were no police around us—we were on our own,’ Mr. Reid said. ‘We high-tailed it out of there.’ He described the pro-Trump agitators as ‘absolutely, ferociously angry at the media.’”).

<sup>187</sup> See RCFP PRESS FREEDOM TRACKER, *supra* note 181, at 8; see also Jon Allsop, *The Police Abuse the Press. Again.*, COLUM. JOURNALISM REV. (June 1, 2020), [https://www.cjr.org/the\\_media\\_today/the-police-abuses-the-press-again.php](https://www.cjr.org/the_media_today/the-police-abuses-the-press-again.php); Katelyn Burns, *Police Targeted Journalists Covering the George Floyd Protests*, VOX (May 31, 2020, 1:10 PM), <https://www.vox.com/identities/2020/5/31/21276013/police-targeted-journalists-covering-george-floyd-protests>; Trevor Timm, *We Crunched the Numbers: Police—Not Protesters—Are Overwhelmingly Responsible for Attacking Journalists*, THE INTERCEPT (June 4, 2020, 4:00 PM), <https://theintercept.com/2020/06/04/journalists-attacked-police-george-floyd-protests/>; Marc Tracy & Rachel Abrams, *Police Target Journalists as Trump Blames ‘Lamestream Media’ for Protests*, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2020/06/01/business/media/reporters-protests-george-floyd.html>.

press do not seem to have deterred police action against them.<sup>188</sup> A Buffalo police officer reportedly told a freelance photojournalist “[f]\*ck your First Amendment” “as officers pointed guns at his head.”<sup>189</sup> Reporters have been hit with rubber bullets, tear gassed, tackled, pepper-sprayed, threatened and intimidated, disbelieved as to their press status and credentials, strong-armed and arrested as they were attempting to do their journalistic jobs.<sup>190</sup> Some—such as Linda Tirado, who lost her sight in one eye—have suffered permanent physical injuries, while others have narrowly escaped harm through sheer luck.<sup>191</sup> Even teenage journalists working on their high school newspapers have been subjected to tear gas.<sup>192</sup> One photojournalist “forcefully loaded into a van by police while covering a protest” recounted, “I was sitting there, choking. I couldn’t breathe.”<sup>193</sup> The Press Freedom Tracker also tracked a number of incidents in which police searched or seized journalists’ equipment.<sup>194</sup>

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<sup>188</sup> See, e.g., RCFP PRESS FREEDOM TRACKER, *supra* note 181, at 8; Tracy & Abrams, *supra* note 187; Timm, *supra* note 187; Allsop, *supra* note note 187 (listing many specific attacks by police on reporters); see also Angela Rulfes, *The First Amendment in Times of Crisis: An Analysis of Free Press Issues in Ferguson, Missouri*, 68 SYRACUSE L. REV. 607 (2018) (discussing journalist mistreatment during coverage of prior protests in Ferguson after the police killing of Michael Brown).

<sup>189</sup> RCFP PRESS FREEDOM TRACKER, *supra* note 181, at 4.

<sup>190</sup> See, e.g., April Knight, *Under Attack: How Enhanced Anti-Protest Laws Impede and Endanger the Free Press*, 58 AM. CRIM. L. REV. ONLINE 84 (2021); Ahiza Garcia & Brain Stelter, *CBS Reporter Arrested at Trump Rally: ‘I’ve Never Seen Anything Like What I’m Witnessing,’* CNN (Mar. 12, 2016, 6:16 PM), <https://money.cnn.com/2016/03/12/media/cbs-sopan-deb-arrest-trump-rally/>; Burns, *supra* note 187.

<sup>191</sup> See, e.g., Tala Doumani & Jamil Dakwar, *Rubber Bullets and the Black Lives Matter Protests*, 24 HUM. RTS. BRIEF 77, 77 (2020) (describing freelance photojournalist Linda Tirado’s loss of vision due to a rubber bullet fired at her by police at a protest and noting 13 other instances of permanent loss of vision due to rubber bullet use at BLM protests); Courtney Douglas, *Amid Black Lives Matter Protests, A Crushing Moment for Journalists Facing Record Attacks, Arrests at the Hands of Law Enforcement*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Sept. 4, 2020), <https://www.rcfp.org/black-lives-matter-press-freedom/> (describing Tirado injuries and police officer shoving photojournalist Barbara Davidson to the ground, causing her to hit her head on a fire hydrant).

<sup>192</sup> See Douglas, *supra* note 191.

<sup>193</sup> See Walsh, *supra* note 184 (“‘We assumed it was obvious we were journalists . . . . They (police) would go after the rioters, not let them run away and leave us alone.’ Instead . . . an officer grabbed him and threw him against a wall where there were three other journalists forced into the same position. ‘I was wearing a helmet and a gas mask, and the police tried to rip it off, but the strap was choking me,’ he said. ‘Another journalist saw what was happening and told the cops I couldn’t breathe. But all he said was, ‘Shut the f--- up,’ and then walked away.’”).

<sup>194</sup> Douglas, *supra* note 191.

Many more reporters have also been arrested or charged than has typically been the case in the past.<sup>195</sup> And while many of the arrested reporters are subsequently released without charges, that is not always the case.<sup>196</sup>

Most notably, police actions against the press revealed a distinctly racialized character during the COVID-19 pandemic and especially during protests over the murders of Black men and women by police.<sup>197</sup> Especially during their coverage of protests<sup>198</sup> after George Floyd's murder, Black journalists and other journalists of color were disproportionately questioned, harassed, arrested or hurt while doing their jobs.<sup>199</sup> One female Latinx freelance photojournalist suffered permanent injury to her eye from a rubber bullet.<sup>200</sup> African American Wall Street Journal reporter Tyler Blint-Welsh was hit in the face and pushed to the ground, despite visible press credentials issued by the NYPD.<sup>201</sup> CNN's Omar Jimenez and his crew covering protests

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<sup>195</sup> RCFP PRESS FREEDOM Tracker, *supra* note 181, at 12 (reporting that “[j]ournalists were arrested or charged with a crime at least 139 times in 2020, more than a 15-fold increase over the previous year.”) In addition, the period 2017–2020 saw a dramatic increase in subpoenas apparently designed to harass or retaliate against journalists.

*Id.*; Douglas, *supra* note 191.

<sup>196</sup> RCFP PRESS FREEDOM TRACKER, *supra* note 181, at 5. This is so even with respect to prior protests. For example, it took two years for charges to be dropped against Wesley Lowery of the Washington Post and Ryan Reilly of Huffington Post in connection with their reporting of protests in Ferguson, Missouri after the fatal shooting of Michael Brown by police. *See, e.g.*, Niraj Chokshi, *Ferguson-related Charges Dropped Against Washington Post and Huffington Post Reporters*, WASH. POST (May 19, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/05/19/ferguson-related-charges-dropped-against-washington-post-and-huffington-post-reporters/>.

<sup>197</sup> *See, e.g.*, *A Black Latino CNN Reporter was Arrested. A White CNN Reporter was Not.*, CNN (May 29, 2020, 9:29 AM), [https://www.cnn.com/us/live-news/george-floyd-protest-updates-05-28-20/h\\_9023ffd063def0b1af22cb3ecdc72a06](https://www.cnn.com/us/live-news/george-floyd-protest-updates-05-28-20/h_9023ffd063def0b1af22cb3ecdc72a06); Douglas, *supra* note 191; Timm, *supra* note 187.

<sup>198</sup> *See* Burns, *supra* note 187; Douglas, *supra* note 191; LZ Granderson, *George Floyd and the Special Hell Reserved for Black Journalists Covering His Killing*, L.A. TIMES (May 30, 2020, 11:06 PM), <https://www.latimes.com/world-nation/story/george-floyd-and-the-special-hell-reserved-for-black-journalists-covering-his-killing>; Adriana Morga Oregel, *Journalists Face Increasing Attacks from Law Enforcement While Covering Racial Justice Protests*, LATINO REP. (Aug. 7, 2020), <http://latinoreporter.org/2020/journalists-across-the-country-face-attacks-while-reporting-on-racial-justice-protests/>.

<sup>199</sup> *See* Kimberly Harris, *Journalists Under Attack While Reporting on Protests*, UNIV. OF OR. SCH. OF JOURNALISM & COMM’N, <https://journalism.uoregon.edu/journalists-under-attack-while-reporting-protests> (last visited Aug. 6, 2021); Harki, *supra* note 2; Patrice Peck, *Opinion, Black Journalists Are Exhausted*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/opinion/coronavirus-black-people-media.html?searchResultPosition=1>.

<sup>200</sup> Doumani & Dakwar, *supra* note 191, at 77; Douglas, *supra* note 191.

<sup>201</sup> Douglas, *supra* note 191.

in Minneapolis were handcuffed by police on-air.<sup>202</sup> Josh Campbell, a white reporter, was a few blocks away from Jimenez and said:

I was treated much differently than [Omar Jimenez] was. I'm sitting here talking to the National Guard, talking to the police. They're asking politely to move here and there. A couple times, I've moved closer than they would like. They asked politely to move back. They didn't pull out the handcuffs. Lot different here than what Omar experienced.<sup>203</sup>

This police violence against Black reporters added to the already-fraught context of reporting on racial justice protests: “[w]e’re not just covering protests and policy—we are also reporting on issues that reflect our lived experiences.”<sup>204</sup>

When the threat of police action (or private violence not curtailed by the state) joins the impacts of expressive harassment, it is clear that non-white journalists are particularly at risk. Surely the double whammy of psychic and physical violence affects reporters and the work of the press.

#### IV. ZOOMING OUT: SITUATING ONLINE HARASSMENT IN A TRIAD OF PRESS-DELEGITIMATING POLITICAL TACTICS

When viewed from the broader political perspective, identity-focused attacks on journalists reveal themselves to be one leg of a three-pronged political strategy to undermine the effectiveness, credibility and legitimacy of the mainstream press.

The strategy for weakening press authority centers on public trust, judicial protection, and press function. While the goal of the whole process is to doubtless to undermine the press's oversight function, each element of the strategy targets a different temporal moment in journalistic activity.

Public trust can be eroded by doubts cast on the veracity of press reports and the trustworthiness of the news institutions.

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<sup>202</sup> Oregel, *supra* note 198.

<sup>203</sup> Harris, *supra* note 199; *see also* sources cited *supra* notes 197–202.

<sup>204</sup> Tracie Potts, *Journalists of Color are Part of the Story of Racism in America. That Raises Tough Questions on the Job*, USC CTR. FOR HEALTH JOURNALISM (June 22, 2020), <https://centerforhealthjournalism.org/2020/06/19/journalists-color-are-part-story-racism-america-raises-tough-questions-job>.

Press attacks designed to undermine public trust in the press as an institution generally focus on the news organization's published output and reputation. Former President Trump's attack on the "fake news" mainstream press during his term<sup>205</sup> and his characterization of the media as the "enemy" of the American public<sup>206</sup> spurred distrust in the mainstream media and laid the groundwork for targeted attacks on journalists.

A second prong of the press-diminishment strategy consists of attempts to destabilize what had been thought to be well-settled and relatively press-protective legal doctrines. From former President Trump's calls to "open up" libel law and reduce press protections,<sup>207</sup> to recommendations by Justices Gorsuch and Thomas that the Court reconsider the press protections afforded by the actual malice standard of *New York Times v. Sullivan*,<sup>208</sup> to the adoption of anti-protest laws and other limits on retaliatory speech claims,<sup>209</sup> stability in press law has been challenged recently in both the court of public opinion and in the courts themselves. Attacks on the press under this umbrella generally focus on reducing the legal protections under which the press operates.

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<sup>205</sup> The media's output was attacked as "fake news" and press institutions (perhaps other than Fox) were demonized as the "enemy" of the American people. *See, e.g.*, Grynbaum, *supra* note 10. Scholarly as well as conversational attention has rightly been paid to the obvious Trumpian strategy of delegitimizing the mainstream press. *See, e.g.*, Jones & Sun, *supra* note 20, at 1303; *Levi*, *supra* note 20.

<sup>206</sup> *See*, Grynbaum, *supra* note 10.

<sup>207</sup> *See* Hadas Gold, *Donald Trump: We're Going to 'Open Up' Libel Laws*, POLITICO (Feb. 26, 2016), <https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866>; Michael Grynbaum, *Trump Renews Pledge to 'Take a Strong Look' at Libel Laws*, N.Y. TIMES (Jan. 10, 2018), <https://www.nytimes.com/2018/01/10/business/media/trump-libel-laws.html>; *see also* Jane Kirtley, "Uncommon Law: The Past, Present and Future of Libel Law in a Time of 'Fake News' and 'Enemies of the American People'", 2020 U. CHI. LEGAL F. 117 (2020), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1665&context=uclf>.

<sup>208</sup> *See, e.g.*, *Berisha v. Lawson*, 141 S.Ct. 2424 (2021) (Gorsuch J. and Thomas J., dissenting from denial of certiorari). Justice Thomas had previously argued for a repeal of the *New York Times v. Sullivan* actual malice standard in defamation cases in his concurrence in the denial of certiorari in *McKee v. Cosby*, 139 S.Ct. 675 (2019). *See also* GAJDA, *supra* note 19 (describing reduction in press-protective judicial decisions). Scholars too have recently joined the anti-*Sullivan* bandwagon. *See, e.g.*, David Logan, *Rescuing Our Democracy by Rethinking New York Times v. Sullivan*, 81 OHIO ST. L.J. 759 (2020).

<sup>209</sup> *See, e.g.*, John S. Clayton, *Policing the Press: Retaliatory Arrests of Newsgatherers after Nieves v. Bartlett*, 120 COLUM. L. REV. 2275 (2020); April Knight, *Under Attack: How Enhanced Anti-Protest Laws Impede and Endanger the Free Press*, 58 AM. CRIM. L. REV. ONLINE 84, 84-85 (2021); Michael G. Mills, *The Death of Retaliatory Arrest Claims: The Supreme Court's Attempt to Kill Retaliatory Arrest Claims in Nieves v. Bartlett*, 105 CORNELL L. REV. 2059 (2020).



This Article contends that the rise of harassment of reporters—and particularly of identity-focused attacks—should be framed as a third significant element in an overall strategy of press-delegitimization launched during the Trump presidency. Identity-based personal attacks attempt to intimidate press workers in order to fracture *the reporting process* and the discovery of news and information.

The three prongs of the attack on the press reinforce each other and address different moments in the journalistic lifecycle. On the legal front, challenging what was thought to be a relatively stable set of doctrinal protections of the press opens the door to imagining an alternative—and much less press-protective—legal balance. It is hard to believe that enhanced liability for defamation, privacy and newsgathering torts would not, in turn, lead to a more timorous press both in gathering and publishing news. On the public trust front, the ceaseless “fake news” claim works to undermine public faith in the credibility of the *output* and the trustworthiness of the *institution* of the press. On the journalistic process front, identity-based verbal violence against reporters seeks to undercut the journalistic *function* (in addition to casting doubt on the credibility of media *output*). From traumatizing targeted reporters and leading to self-censorship, newsroom disfunction, and backsliding on diversity, virulent identity-based harassment undercuts news organizations’ ability to engage in fearless accountability journalism. It is important to recognize here that this strategy, while associated with the Trump presidency, does not require Trump to be President to continue gaining support and effectiveness over the long term.<sup>210</sup>

When seen holistically—as a long-range strategy of undermining and decentering the press<sup>211</sup>—there is reason to

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<sup>210</sup> Some suggest that harassment of journalists occurs “for three interconnected reasons: (1) political motivation [associated with the global rise of populism], (2) accessibility to the press [due to the requirement of visibility on social media], and (3) identity of journalists [with “Black, Indigenous, Jewish, Arab and lesbian women journalists . . . experienc[ing] both the highest rates and most severe impacts of online violence”]. Miller, *Hostility Toward the Press*, *supra* note 34, at 10–11. This Article identifies the political motivation as disempowering the press in its oversight role, and claims that this this goal has been operationalized through a tri-partite strategy that takes aim at newsgathering, reporting, and the legal protection for those activities.

<sup>211</sup> If online harassment is an independent, bottom up development, why does this Article identify it as part of a press-debilitating strategy deployed by high government

believe that the institution-hobbling approach has been troublingly effective.<sup>212</sup> Doctrinally, courts are beginning to question the stability of press-protective precedents.<sup>213</sup> The ceaseless drumbeat of Trump's "fake news" claims appear to have reinforced previously-declining public faith in the press. And even if the election of President Biden put the brakes on official press-bashing designed to delegitimize the press, it did not put a stop to the parallel (albeit sometimes apparently more decentralized) strategies of journalist harassment. If the journalists gathering the news to tell the mainstream media's stories are threatened and silenced, or even if campaigns of harassment trigger responsive changes to the press' traditional routines and practices, the goal of hamstringing journalism and undermining press authority will have been significantly advanced.

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officials and elites? It is not necessary to assert a conspiratorially-designed and self-consciously strategic master plan to observe that elite attacks on the role and trustworthiness of the press invite bottom up confrontations, which then work as part of a multi-pronged method to sideline the press. It is striking to see how cleanly the different prongs of the attacks on the press fit together to undermine the key inflection points in journalistic practice. Moreover, empirical data cast some doubt on the notion that much online abuse is individual, self-directed, random, and 'bottom up' harassment. *See, e.g.*, News Release, UNESCO, UNESCO Releases Pioneering Discussion Paper On Online Violence Against Women Journalists (March 9, 2022), <https://www.unesco.org/en/articles/unesco-releases-pioneering-discussion-paper-online-violence-against-women-journalists> (asserting that online attacks against women journalists are "organised[] and inextricably linked with disinformation and populist politics.")

<sup>212</sup> It is true that the American public had already begun to lose faith in its institutions, including the press, for some years prior to the election of Donald Trump to the Presidency. But the constant refrain of the mainstream media as "fake news" greatly enhanced that distrust and effectively turned it into a partisan issue. *See, e.g.*, MARK JURKOWITZ ET AL., PEW RSCH. CENTER, U.S. MEDIA POLARIZATION AND THE 2020 ELECTION: A NATION DIVIDED (2020), <https://www.journalism.org/2020/01/24/u-s-media-polarization-and-the-2020-election-a-nation-divided/>; Jeffrey Gottfried, *Republicans Less Likely To Trust Their Main News Source If They See It As 'Mainstream'; Democrats More Likely*, PEW RSCH. CTR. (July 1, 2021), <https://www.pewresearch.org/fact-tank/2021/07/01/republicans-less-likely-to-trust-their-main-news-source-if-they-see-it-as-mainstream-democrats-more-likely/>. A recent Pew Research Center study happily suggests that the American public "express[es] open-mindedness about the possibility that their trust in the industry could improve." JEFFREY GOTTFRIED ET AL., PEW RSCH. CTR., AMERICANS SEE SKEPTICISM OF NEWS MEDIA AS HEALTHY, SAY PUBLIC TRUST IN THE INSTITUTION CAN IMPROVE (2020), <https://www.journalism.org/2020/08/31/americans-see-skepticism-of-news-media-as-healthy-say-public-trust-in-the-institution-can-improve/>. Still, a significant percentage of the public continues to be deeply skeptical of the press.

<sup>213</sup> *See, e.g.*, GAJDA, *supra* note 19.

## V. WAYS FORWARD?

Having identified harassment of journalists as an important element in a press-disruptive strategy<sup>214</sup> and a major threat to public discourse then raises the question of what should be done in response. The key point: all participants should recognize clearly that campaigns of online intimidation and harassment against one reporter are actually campaigns against *all* reporters and the press as a whole. They require a united front and a collective response. While individual reporter safety is extremely important, the issue is far bigger than any one reporter. A multi-player approach targeted to the various participants (and looking to a combination of legal obligation, culture change, institutional self-interest, tech work, and cross-industry cooperation) is more likely to bear fruit than, say, a purely legalistic or single-focus approach. Realistically, there is no easy fix or complete “solution” to the problem of online harassment of journalists. Still, the ultimate intractability of the problem as a whole is no excuse for avoiding the many small steps that are likely to help.

### *A. Contextual Challenges And The Need For Care*

The task of crafting ameliorative recommendations faces at least five challenges. First, and especially when focusing on recommendations to news organizations and reporters, it is important to recognize the dangers of micro-managing their functions and decision-making processes. This is not only because the category “news organization” or “media” includes many different kinds of entities, but also because of the significance of the press’s role and the need for its independence.

Second, there is some complexity generated by reportorial ambivalence. These days, reporters rely on social media such as Twitter as part of their professional portfolios, relationships with sources, identities/brands.<sup>215</sup> Simply put, their social media presences are part of their professional capital.

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<sup>214</sup> To be sure, some minimize the threat of online attacks on journalists. *See, e.g.*, Cathy Young, *How Bad is Online Harassment? And How Dangerous is it for the Future of Free Speech?*, REASON (April 2020), <https://reason.com/2020/03/22/how-bad-is-online-harassment>. Such assessments are both empirical and normative, and Ms. Young’s article does not support its claims on either front.

<sup>215</sup> *See, e.g.*, TROLLBUSTERS REPORT, *supra* note 34; NELSON, *supra* note 65.

Indeed, some of them may see their personal brands as bulwarks against the public's loss of trust in the media as an institution.<sup>216</sup> A visible and desirable, publicly-recognizable brand indubitably also enhances the journalist's employment status and bargaining position.<sup>217</sup> Some scholarship also supports the proposition that engagement with journalists on Twitter reduced public perceptions of media bias.<sup>218</sup> And while most Americans think news coverage is "one-sided," they "fault media organizations themselves much more than the journalists who work for them."<sup>219</sup> This, along with the uncertainty of journalism jobs since the beginning of the 21st C.,<sup>220</sup> creates incentives for individual reporter branding and audience engagement. Social media is also widely seen as "a democratizing force within journalism."<sup>221</sup> In light of this, at least some journalists might be ambivalent about heavily proscriptive (and prescriptive) recommendations. This is of course likely to be the case for those reporters who are active on social media and do not receive the amount and virulence of the online harassment directed at non-male, Black and/or Jewish reporters and those identifying with other marginalized communities. The dangers of audience engagement and social media presence are not equally distributed within the news worker cohort. Tolerance for audience engagement may thus raise conflicts of interest among journalists and may ossify professional inequalities. But it's also not inconceivable that the ability to establish a public brand may empower some otherwise disempowered journalists. It's

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<sup>216</sup> LEE RAINIE ET AL., PEW RSCH. CTR., TRUST AND DISTRUST IN AMERICA (2019), <https://www.pewresearch.org/politics/2019/07/22/trust-and-distrust-in-america/>. They also provide job opportunities in uncertain professional times. NELSON, *supra* note 65.

<sup>217</sup> See, e.g., Ken Doctor, *The Newsonomics Of David Pogue and the Pujols Effect*, NIEMANLAB (Oct. 24, 2013), <https://www.Niemanlab.Org/2013/10/The-newsonomics-of-david-pogue-and-the-pujols-effect/>; NELSON, *supra* note 65 ("In short, social media platforms have become the means by which journalists establish their professional identities, promote their work, improve their relationship with the public, find job opportunities, and advocate for changes to industry norms and labor practices.")

<sup>218</sup> See Trevor Diehl et al., *How Engagement With Journalists on Twitter Reduces Public Perceptions of Media Bias*, 13 JOURNALISM PRAC. 971, 971 (2019).

<sup>219</sup> Mason Walker & Jeffrey Gottfried, *Americans Blame Unfair News Coverage on Media Outlets, Not The Journalists Who Work For Them*, PEW RSCH. CTR. (Oct. 28, 2020), <https://www.pewresearch.org/fact-tank/2020/10/28/americans-blame-unfair-news-coverage-on-media-outlets-not-the-journalists-who-work-for-them/>.

<sup>220</sup> For a recent report on the decline of newsroom employment since 2008, see Mason Walker, *U.S. Newsroom Employment Has Fallen 26% Since 2008*, PEW RSCH. CTR. (July 13, 2021), <https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/>.

<sup>221</sup> NELSON, *supra* note 65.

complicated, and we don't have enough empirical evidence yet to support generalizations.

Third, recommendations to news organizations are of little relevance for freelancers and other journalists unaffiliated with traditional and economically stable news organizations.<sup>222</sup> Even with respect to the mainstream press institutions, the reality is one of significant economic difficulties at least since the early 2000s. So, and without uncritical acceptance of claims of corporate poverty, exactly how much by way of resources news organizations will be able to summon to fight online harassment consequences will be an open question (probably largely dependent on the organization at issue).

Fourth, arguments for legal obligations—and particularly recommendations aimed at social media entities—must take into account the uncertainties of the regulatory environment. Although much has been made of the arguments to revise or eliminate § 230 immunity for the social media platforms,<sup>223</sup> and although the Biden administration, through the Federal Trade Commission and otherwise, has expressed the desire to regulate social media companies,<sup>224</sup> the type and degree of regulation, how new regulations will fare in the courts, how long change is likely to take, and what the social media companies will do in response are all open questions.

Fifth, the range of material that constitutes the umbrella concept of online harassment is broad, suggesting not only the need to address relative severity (as some studies have

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<sup>222</sup> See, TROLLBUSTERS REPORT, *supra* note 34, at 48.

<sup>223</sup> See, e.g., Matthew Ingram, *Section 230 Critics are Forgetting About the First Amendment*, COLUM. JOURNALISM REV. (July 29, 2021), [https://www.cjr.org/the\\_media\\_today/section-230-critics-are-forgetting-about-the-first-amendment.php](https://www.cjr.org/the_media_today/section-230-critics-are-forgetting-about-the-first-amendment.php); Daisuke Wakabayashi, *Legal Shield For Social Media Is Targeted By Lawmakers*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/05/28/business/section-230-internet-speech.html>. Section 230 of the Communications Decency Act provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c). It thus grants interactive computer services a safe harbor from liability for claims based on the speech of third parties. See also *infra* note 280.

<sup>224</sup> See Andrea Vittorio, *Biden's Executive Order Links Data Collection To Competition*, BLOOMBERG LAW (July 9, 2021), <https://news.bloomberglaw.com/tech-and-telecom-law/bidens-executive-order-links-data-collection-to-competition>; see also Kevin Breuninger & Lauren Feiner, *Biden Signs Order to Crack Down on Big Tech, Boost Competition 'Across the Board'*, CNBC (July 9, 2021), <https://www.cnbc.com/2021/07/09/biden-to-sign-executive-order-aimed-at-cracking-down-on-big-tech-business-practices.html>.

imperfectly attempted to do),<sup>225</sup> but also that recommended solutions might have to be tailored rather than across-the-board.<sup>226</sup> Relatedly, both online harassment and technology are quickly evolving, with lack of transparency and the pace of change challenging research and threatening staleness for concrete and directive recommendations.

Recognizing these challenges, this Article suggests that ameliorative recommendations be directed to the many different players involved in the problem of online harassment. Thus, it addresses news organizations, journalism schools, journalist-representative organizations (*inter alia* unions, journalist trade associations, media lawyers and media law clinics in law schools), reporters themselves, social media platforms, and researchers working in media-affiliated fields. It does so, however, in a spirit of modesty.

### *B. Obligations Of News Organizations*

News organizations must have obligations to their employees to protect them both from physical violence and online abuse. Calling for reportorial “grit” or a “thick skin”<sup>227</sup> in this kind of situation cannot satisfy the news organizations’ obligations. They must have duties of care toward their employees and paying close attention to online harassment of vulnerable reporters must be a key element in those duties. Further, imposing responsibility solely on the harassed journalists for the responses to the harassment—an individualizing tactic—does not sufficiently address the collective character of the effects.

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<sup>225</sup> See, e.g., *infra* text accompanying notes 286 and 287 (suggesting the need for researchers to address cumulative effects of even less severe online harassment). See also note 29 *supra* (on the obvious characterization of the kinds of attacks discussed in this Article as online harassment).

<sup>226</sup> For a PEN America report recognizing the complexities of making recommendations to counter abuse while protecting free expression, see VILK, *supra* note 85 (“It is important to bear in mind that both proactive and reactive measures are themselves susceptible to gaming and weaponization.”) Agreeing with PEN America’s recognition that “the difference between an effective strategy and an ineffective or overly restrictive one depends not only on policies but also on the specifics of how tools and features are designed and whom they prioritize and serve[.]” *id.*, this Article commends the issue to the participants closest to the issues.

<sup>227</sup> Chen, et al., *supra* note 11; UNESCO, THE CHILLING, *supra* note 34, at 40.

What I suggest here is not a matter of explicit and clearly defined legal doctrine. Of course, a variety of state, local and federal laws, *inter alia* from cyberstalking to privacy to defamation to intentional infliction of emotional distress to copyright infringement to employment discrimination and beyond, can be the bases for prosecutions or civil actions over harassment.<sup>228</sup> Prosecutors have brought actions against white supremacists who were targeting journalists, among others, and reporters have brought discrimination actions.<sup>229</sup> On the employment discrimination side, anti-discrimination laws impose liability on employers for workplace harassment. Employers must guard against workplace harassment and hostile workplace environments, and can be liable for non-employee discrimination so long as they knew or reasonably should have known of the harassment and failed to take appropriate corrective action.<sup>230</sup> Some scholars have also recently argued for legal recognition of fiduciary duty on the part of employers to employees, while admitting that such duties (while immanent in other existing doctrines) have not yet been adopted by courts as explicit fiduciary duties.<sup>231</sup>

Current legal responses appear limited. There are complexities with respect to application of those existing legal obligations when the harassment is ‘only’ online (since applicable laws vary, when the employer does not know of it and the employee is deemed not to have notified the employer adequately), and when the employer has taken some (even if

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<sup>228</sup> See, e.g., Mary Catherine Young, *Online Harassment of Journalists and Uncertain Paths to Recourse Under the Law*, WAKE FOREST L. REV. CURRENT ISSUES BLOG (Feb. 16, 2021), <http://www.wakeforestlawreview.com/2021/02/online-harassment-of-journalists-and-uncertain-paths-to-recourse-under-the-law/>; Marshak, *supra* note 32 (describing a variety of state cyberharassment laws); Eberspacher, *supra* note 8 (on federal law of workplace harassment).

<sup>229</sup> See, e.g., *Neo-Nazi Pleads Guilty in Journalist Threat Case*, AP (Apr. 7, 2021), <https://apnews.com/article/conspiracy-journalists-seattle-1e5606dab4b7be262c491c50272576a7> (describing cyberstalking case against neo-Nazi Cameron Shea); Matthew Barakat, *Neo-Nazi Leaders Face Conspiracy Charges on Both Coasts*, NBC MIA. (Feb. 26, 2020), <https://www.nbcmiami.com/news/national-international/ex-neo-nazi-leader-charged-with-swatting-cabinet-official-alexandria-church/2197330/>. See *infra* note 233 (describing reporter suit against Washington Post).

<sup>230</sup> 29 C.F.R. § 1604.11(e) (2019) (EEOC guidelines); see also Eberspacher, *supra* note 8, at 162 and sources cited therein; Dallan F. Flake, *Employer Liability for Non-Employee Discrimination*, 58 B.C. L. REV. 1169 (2017). For an early, influential argument on varieties of legal recourse against online mobs, see generally Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009).

<sup>231</sup> See, e.g., Matthew Bodie, *Employment as Fiduciary Relationship*, 105 GEO. L. J. 819 (2017).

minimal and only minimally effective) steps with respect to the issue.<sup>232</sup> In light of questions about the news organizations' control over external sources of harassment and the need to demonstrate severity of harm, reporters may face uphill litigation battles. As for an expanded notion of employer fiduciary duty, the applicability of such putative fiduciary duties in the kinds of situations addressed in this Article has not yet been explored or established; the relational duties proposed by scholars addressing fiduciary duties of boards to employees do not reflect the relationships between editors and reporters in the newsroom. Finally, the possibility of contractual waivers, arbitration clauses, and other procedural ways of protecting employers might undermine direct liability for news organizations as a practical matter.

Lest this be too pessimistic a reading, the issue of news organization obligations to reporters has already been presented in a recent lawsuit by breaking political news reporter Felicia Sonmez against the Washington Post and a number of its editors.<sup>233</sup> Despite the recent dismissal of the Sonmez lawsuit on

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<sup>232</sup> See generally Marshak, *supra* note 32 (discussing statutory variation, prosecutorial discretion); Eberspacher, *supra* note 8, at 143, 156–60 (on low level “basic trainings and policies” required by courts to satisfy workplace harassment compliance and therefore likely limits legal recourse for online harassment); see also Rosario-Mendez v. Hewlett Packard Caribe BV, 573 F. Supp. 2d 558 (D.P.R. 2008) (finding employer not liable because the employee failed to properly notify the employer of the harassment). For an example of the hurdles likely to face women reporters who sue their employers on a disparate impact theory, see Eberspacher, *supra* note 8, at 161.

<sup>233</sup> See Jeremy Barr, *Washington Post Reporter Felicia Sonmez Files Suit Against the Newspaper and Top Editors, Alleging Discrimination Over Past Coverage Ban*, WASH. POST (July 22, 2021), <https://www.washingtonpost.com/media/2021/07/22/felicia-sonmez-lawsuit/>; Orion Rummel, *Newsrooms are Failing to Protect Women Journalists. Survivors Hope Felicia Sonmez's Lawsuit Will Change That*, NIEMANLAB (Aug. 10, 2021, 7:33 AM), <https://www.niemanlab.org/2021/08/newsrooms-are-failing-to-protect-women-journalists-survivors-hope-felicia-sonmezs-lawsuit-will-change-that/> (linking to Sonmez's complaint). Ms. Sonmez' lawsuit claims both that the Post discriminated against her by banning her from covering sexual harassment and assault stories after she had publicly discussed having been a victim of sexual assault herself, and also that the paper did nothing to protect her from online harassment in response to her tweets shortly after Kobe Bryant's death about his prior criminal charges. She was given no special security when she reported the abuse, in contrast to a male reporter who had made a similar report. Over three hundred Washington Post staffers had sent the paper an open letter supporting Sonmez, objecting to her having been placed on administrative leave after the Bryant tweet, and asking for safety and protection for her. *Id.*

The *Sonmez* suit was recently dismissed on the ground that she had not proved discrimination on the basis of the paper's assignment decisions. Order, *Sonmez v. WP Co.*, No. 2021 CA 002497 B (D.C. Super. Ct. Mar. 25, 2022). The court did not specifically opine on Sonmez's claims about the Post's inadequate efforts to protect her from harassment, although it did reject her claim for negligent



other grounds, the filing of actions like this should indicate to news organizations that how they deal with online harassment against their journalists will be a matter discussed both in the court of public opinion and in courthouses as well.

In any event, regardless of the extent of formal legal obligations, professional norms, public concern, labor realities and sheer self-interest should counsel news organizations to adopt effective plans to address online harassment of their journalists. Journalist unions can play a role in reminding the news organizations of their duties to their employees. Unlike many other industries, there appears to have been a significant uptick in unionization in the news media sector.<sup>234</sup> How news organizations deal with the harassment of reporters should be a very important element of the union negotiation platform.

At a minimum, the news organizations should support their reporters' legal actions against police and other state actors who have caused them physical injury.<sup>235</sup> But this is only the first

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infliction of emotional distress on the basis of the Post's reporting bans and performance evaluation. In doing so, the court asserted that "[t]he relationship between a newspaper and a reporter is not the kind of special relationship that necessarily implicates the plaintiff's emotional well-being, nor is there an especially likely risk that the newspaper's negligence would cause serious emotional distress to its reporters." *Id.* at 22. Sonmez reportedly will appeal the dismissal. Charlotte Klein, *Judge Tosses Reporter Felicia Sonmez's Discrimination Case Against The Washington Post*, VANITY FAIR (Mar. 28, 2022) <https://www.vanityfair.com/news/2022/03/judge-tosses-reporter-felicia-sonmezs-discrimination-case-against-the-washington-post>. Admittedly, even a successful appeal in the *Sonmez* case might have limited broader impact since the claims in the complaint were based on provisions of the Washington D.C. Human Rights Act and negligent infliction of emotional distress. However, even a partially successful appeal would send a clear signal to other news organizations not subject to the DC legislation at issue in *Sonmez*.

<sup>234</sup> Angela Fu, *Not Just a Aave, But a Movement: Journalists Unionize at Record Numbers*, POYNTER (July 12, 2021), [https://www.poynter.org/business-work/2021/not-just-a-wave-but-a-movement-journalists-unionize-at-record-numbers/?utm\\_source=Daily+Lab+email+list&utm\\_campaign=3ba641a280-dailylabemail3&utm\\_medium=email&utm\\_term=0\\_d68264fd5e-3ba641a280-396145757](https://www.poynter.org/business-work/2021/not-just-a-wave-but-a-movement-journalists-unionize-at-record-numbers/?utm_source=Daily+Lab+email+list&utm_campaign=3ba641a280-dailylabemail3&utm_medium=email&utm_term=0_d68264fd5e-3ba641a280-396145757) ("In the past decade, workers at news publications have launched more than 200 union drives, and over 90% of them have been successful. . . . Diversity in hiring and coverage remains a key priority among many media unions, and more and more journalists see unionizing as a way of effecting change.").

<sup>235</sup> See *supra* Section II, on physical threats and injury to reporters from police and other law enforcement; see also Eberspacher, *supra* note 8, at 163 (recommending that news organizations bring suit or support the journalist's suit "[w]here the conduct rises to a legally actionable level.") With respect to physical threats and violence, reporters have brought various actions under Section 1983 for their treatment during coverage of the nationwide demonstrations following the police murder of George Floyd and have been largely successful. In one of these cases, the court dubbed this

step, as it addresses physical harms offline. This Article recommends close attention by news organizations to the scale of the problem<sup>236</sup> and the types of structural mechanisms that they should put in place in response to online harassment. One of the most damaging critiques of the news organizations' responses to online harassment is that news management has typically ignored the problem or treated it as simply an individual issue to be dealt with by the affected reporter.<sup>237</sup> Recognition of the type of threat posed by online harassment to the press as a whole should lead to a far more proactive attitude<sup>238</sup>—one which would address the organization's social media policies, its response protocols when reporters are targeted for harassment, and its newsroom culture.

News management should ensure that the company's social media policies are clear, up to date, and well understood by the reporters.<sup>239</sup> They should also eliminate blanket contractual requirements requiring engagement with social media as a precondition of employment.<sup>240</sup> To the extent that they wish to create incentives for online audience engagement, they should put protective mechanisms in place to respond nimbly to attacks on their reporters. For example, there should be consideration of whether and when comments sections should be disabled or monitored by other news organization

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jurisprudence the “Floyd Case Law.” See *Alsaada v. City of Columbus*, 536 F. Supp. 3d 216 (S.D. Ohio 2021); see also Clayton, *supra* note 209.

<sup>236</sup> See, e.g., Waisbord, *Mob Censorship*, *supra* note 18, at 1041 (“[i]t is hard to tell whether news organizations know the scale of the problem . . .”).

<sup>237</sup> See, e.g., NELSON, *supra* note 65.

<sup>238</sup> A recent report by the Tow Center for Digital Journalism also recommends a proactive approach to harassment by newsroom managers. In addition, it makes recommendations focused on social media policies and calls for increased diversity in both the reporter and manager ranks. *Id.*

<sup>239</sup> This is also one of the recommendations in the Tow Center report. *Id.* See also Miller, *Harassment's Toll*, *supra* note 29, at 13–16 (on need for organizational and supervisor support). Reporters also complain that social media policies are sometimes enforced in unfair ways “tending to fall along racial and gender lines.” NELSON, *supra* note 65. This too requires sustained attention and evaluation by the news organizations.

<sup>240</sup> See Chen et al., *supra* note 11 (explaining news organization expectations of digital engagement by reporters with the public); see Eberspacher, *supra* note 8, at 164 (on the need to refine anti-harassment training programs).

Some ameliorative steps are already being taken. For example, the AP is creating a new response plan and training program akin to the preparation its provides its reporters for reporters going into conflict zones. See Patrick Maks, *AP's Top Editor: We Must Protect Journalists Online*, AP (Nov. 23, 2021) <https://blog.ap.org/industry-insights/aps-top-editor-we-must-protect-journalists-online>.

personnel.<sup>241</sup> Consideration could be given to a dedicated social media team to relieve the pressure on targeted reporters.<sup>242</sup>

Once harassment occurs, the news organizations should have well-designed and appropriate responses. They should prioritize their reporters' mental health and physical safety even outside of conflict zones: they should devote material resources to mental health in the newsroom and should consider security training for their professional staffs.<sup>243</sup> News managers should be trained to deal appropriately with online harassment and there should be structures in place to manage harassing messages. Moreover, both reporters and managers would benefit from clear and user-friendly reporting processes for harassment.<sup>244</sup> News managers should adopt a presumption of public

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<sup>241</sup> Admittedly, “[s]o-called trolls no longer live only in the comments section at the bottom of an article or in hate mail. The nature of online abuse has evolved along with online media itself.” Klein, *supra* note 7. This means that disabling the comments section might be ineffective to quell abuse while eliminating a site where true critical discourse might take place. This is why the Article suggests that news organizations consider this option in the particular contexts they face.

Similar thought should be given to whether to discontinue anonymity in online commenting. See Mathew Ingram, *Why Ending Anonymity Would Not Make Social Media Better*, COLUM. JOURNALISM REV. (Feb. 4, 2021) [https://www.cjr.org/the\\_media\\_today/why-ending-anonymity-would-not-make-social-media-better.php](https://www.cjr.org/the_media_today/why-ending-anonymity-would-not-make-social-media-better.php) (reporting findings that identified commenters were harsher than anonymous ones).

<sup>242</sup> The Tow report recommends that “the news industry as a whole should consider normalizing *not* using Twitter.” NELSON, *supra* note 65. Alternatively, the Report recommends that “if newsroom managers are going to push their reporters to be on social media, they should be on it, too, setting an example and getting their backs.” *Id.* The blanket boycott of Twitter by all news organizations at this point is rather unrealistic. With respect to the alternative, perhaps an official and well-curated social media presence might be more effective than individual news manager engagement on Twitter.

<sup>243</sup> This is consistent with the Tow Center report’s recommendation that “[a] proactive approach should privilege the mental health of journalists facing abuse” and that “newsroom managers should undergo training so they know how to deal with online harassment from the moment it begins.” NELSON, *supra* note 65. A recent study shows the “connective practices that involve joint action with peers and editors” that are “particularly effective in addressing the emotional effects of harassment. Anu Kantola & Anu A. Harju, *Tackling The Emotional Toll Together: How Journalists Address Harassment With Connective Practices*, JOURNALISM, Dec. 9, 2021.

<sup>244</sup> This is consistent with the Tow Center report’s recommendation that “[a] proactive approach should privilege the mental health of journalists facing abuse” and that “newsroom managers should undergo training so they know how to deal with online harassment from the moment it begins.” NELSON, *supra* note 65.

This would at a minimum require efficient, effective and probably confidential systems for such reporting. See, e.g., Elana Newman et al., *Online Abuse of Women Journalists: Towards and Evidence Based Approach to Prevention and Intervention*, in OSCE REPORT, NEW CHALLENGES TO FREEDOM OF EXPRESSION: COUNTERING ONLINE ABUSE OF FEMALE 50 (2016), <https://www.osce.org/files/f/documents/c/3/220411.pdf>.

institutional support of the reporters under fire. The institutional press also needs to develop sophisticated responses to accounts of reporter harassment. Taking a reporter off her beat because she has reported online harassment is not an acceptable response, either legally or as a matter of professional norms.<sup>245</sup>

With respect to newsroom culture, the organization should pay particular attention to the experiences of African American reporters and women reporters both with online harassment and with their experience of their workplaces.<sup>246</sup> News media should attend quickly to diversifying their professional staffs.<sup>247</sup> And they must recognize, as they engage in their expressed goals of expanding diversity in their ranks, that merely hiring diverse reporters is not enough. Black journalists in news organizations today report that their newsrooms are not inclusive and protective spaces.<sup>248</sup> Resources must also be spent on creating collaborative and inclusive newsrooms—emphasizing the recognition that if one newsroom staffer is subjected to online harassment, all of the rest of them in effect are as well.

Further, without giving white supremacists another platform, information about these campaigns of intimidation and harassment should be publicized, shared with scholars, brought to the attention of the social media platforms on which they occur (and the public), and perhaps serve as the subject of government lobbying. The news organizations themselves are in a much better position to engage in this public commenting function than the reporters who have been subjected to the

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<sup>245</sup> See *supra* note 233 (discussing Felicia Sonmez's claims against the Washington Post).

One of the particularly problematic responses of news companies wishing to avoid conflict is to refuse to employ women who are being targeted online. As one reporter put it, "they get thrown under the bus." Sullivan, *supra* note 8. This sort of discrimination should not be tolerated.

<sup>246</sup> The Tow report suggests that news organizations should also consider rejecting 20<sup>th</sup> Century norms of reportorial objectivity in favor of a transparency-based approach. See NELSON, *supra* note 65 ("Newsrooms should consider embracing transparency over objectivity when it comes to social media policies, as well as when it comes to their efforts to earn audience trust more generally. ... That transparency should extend to the enforcement of social media policies. ... With that in mind, newsrooms might consider distinguishing between their journalists' views and their organization's view. ... Newsrooms should have larger conversations about the guiding values that inform their approaches to everything else, including social media policies....")

<sup>247</sup> See also NELSON, *supra* note 65.

<sup>248</sup> See *supra* notes 120, 125, 134, 135, 140, 161, 162 and accompanying text.

harassment.<sup>249</sup> Collective reporting can enhance pressure on social media platforms to respond.

Finally, the news organizations should publicize—and put pressure on government to regulate—companies whose business it is to sell social network followers and retweets to individuals or organizations or that assist with “email bombing.”<sup>250</sup> To the extent that there are existing regulatory regimes and that the companies are subject to U.S. law, enforcement should be a priority.

These sorts of initiatives are supported by both moral considerations and business exigencies. As for the latter, news organizations must recognize that if they do not take adequate steps, they are likely to lose many of the very reporters they wish to attract in order to diversify their newsrooms and promote increased trust in the press.<sup>251</sup>

### *C. Recommendations For Journalism Schools, Reporters, Press-Representative Organizations And Media Law Clinics*

Both public and professional education about online harassment of reporters might help. Reports suggest that journalism schools are not arming their graduates adequately to deal with online harassment.<sup>252</sup> This is particularly problematic,

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<sup>249</sup> See, e.g., REPORTERS WITHOUT BORDERS REPORT, *supra* note 87 (recommending that media organizations “make online harassment of journalists a big issue.”); see also Eberspacher, *supra* note 8, at 167–68 (arguing for collaboration among news organizations).

<sup>250</sup> REPS. WITHOUT BORDERS REPORT, *supra* note 87, at 14. (“One of these firms, Followers and Likes, did not hesitate to sell retweets to *ProPublica*’s undercover reporters, who had created two fake Twitter accounts. The reporters were able to buy 10,000 retweets for their fake pro-Russian account for just 45 dollars and 5,000 retweets for 28 dollars for their fake English-language account.”); see also Julia Angwin, *How Journalists Fought Back Against Crippling Email Bombs*, WIRED (Nov. 9, 2017), <https://www.wired.com/story/how-journalists-fought-back-against-crippling-email-bombs/> (discussing email bombs).

<sup>251</sup> See, e.g., Hanaa Tameez, *Here’s How the News Media Can Repair its Trust Problem with Black Americans*, NIEMANLAB (Nov. 19, 2020), <https://www.niemanlab.org/2020/11/heres-how-the-news-media-can-repair-its-trust-problem-with-black-americans/>.

<sup>252</sup> See, e.g., Carolyn Copeland, *Are Journalism Programs Properly Training Students to Navigate Harassment?*, PRISM (July 19, 2021), <https://prismreports.org/2021/07/19/are-journalism-programs-properly-training-students-to-navigate-harassment/>; FERRIER, *supra* note 126, at 32 (quoting study subject); see also Anne Wen, *Student Journalists Say Online Harassment Is a Major Issue*, TEENVOGUE (Oct. 18, 2021) <https://www.teenvogue.com/story/journalist-harassment-students>.

as the majority of new journalism school graduates are women.<sup>253</sup> In addition, to the extent that many stories are being reported by journalism students,<sup>254</sup> they are themselves likely to be subject to harassment even prior to full-time, professional employment as journalists. This Article therefore recommends that specific attention be paid by journalism schools (and universities generally) to the phenomenon of online harassment of reporters as a distinct weapon in the contemporary attacks on the legitimacy of the press globally. Such attention might include sophisticated security training in coordination with university computer engineering departments, as well as information from law school colleagues on the state of the relevant law.

With respect to professional reporters, the anecdotal reports of the traumatizing effects of much online harassment seem to relate to have to do with feelings of isolation that arise from discomfort with reporting the harassment and being left alone to deal with it.<sup>255</sup> Reporters should be open to the training and reporting opportunities offered by news organizations (as suggested in *Section V.B* above). Reporters should both push for and take advantage of employer- or trade association-offered training in protective techniques online.<sup>256</sup> This is particularly

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<sup>253</sup> WOMEN'S MEDIA CTR. REPORT, *supra* note 47, at 4; Catherine York, *Women Dominate Journalism Schools, But Newsrooms Are Still A Different Story*, POYNTER (Sept. 18, 2017), <https://www.poynter.org/business-work/2017/women-dominate-journalism-schools-but-newsrooms-are-still-a-different-story/>; see Escalona, *supra* note 132 (discussing journalism becoming a majority female profession).

<sup>254</sup> See Elahe Izadi, *College Newspaper Reporters are the Journalism Heroes for the Pandemic Era*, WASH. POST (Sept. 19, 2020), <https://www.washingtonpost.com/media/2020/09/19/coronavirus-college-newspapers/>.

<sup>255</sup> See generally WOMEN'S MEDIA CTR. REPORT, *supra* note 47, at 10.

<sup>256</sup> An increasing number of resources are being made available for reporters. For example, UNESCO and the Thomson Reuters Foundation, in collaboration with the International Women's Media Foundation, launched two guides—GENDER-SENSITIVE SAFETY POLICIES FOR NEWSROOMS (2021), <https://unesdoc.unesco.org/ark:/48223/pf0000379907>, and PRACTICAL GUIDE FOR WOMEN JOURNALISTS ON HOW TO RESPOND TO ONLINE HARASSMENT (2021), [https://news.trust.org/dA/f6f7b0dad9/file/TRF+Practical+Guide+JUL+2021+V15.pdf?language\\_id=1](https://news.trust.org/dA/f6f7b0dad9/file/TRF+Practical+Guide+JUL+2021+V15.pdf?language_id=1). The Thomson Reuters Foundation, the International News Safety Institute and UNESCO also launched the ONLINE ATTACKS AGAINST JOURNALISTS: KNOW YOUR RIGHTS GUIDE (2021), <https://safetyofjournalists.trust.org/#knowyourrightsguide>. The Knight Center for Journalism in the Americas, the International Women's Media Foundation and UNESCO created a massive open online course called How to Report Safely: Strategies for Women Journalists and Their Allies. See *New Free Online Course for Women Journalists and Allies: Learn How to Plan for Reporting Safely*, KNIGHT CTR. BLOG (Apr. 19, 2021), <https://knightcenter.utexas.edu/new-free-online-course-for-women->

important for freelance journalists who cannot rely on institutional resources of their employers. Reporters should also engage with others outside of their own organizations (including professional journalist organizations—trade associations—such as the Committee to Protect Journalists, the National Association of Black Journalists, the Reporters Committee for Freedom of the Press, the International Women’s Media Association etc.) to create networks to share information about these attempts to intimidate.<sup>257</sup> They should cooperate with researchers and scholars by providing all requisite information to enable further study and exploration. In addition, with commitment from the editorial/management side, non-minority, non-women reporters in the nation’s newsrooms should become allies with their targeted colleagues, take a close look at the culture of their workplaces, and commit to developing more inclusive work practices. This would, at a minimum, provide harassed reporters some feeling of safety in reporting the facts and their reactions to the attacks. If all the reporters—whether or not singled out for attack—present a united front to news management, logic suggests that it would be more difficult to dismiss the complainers as just a few hyper-sensitive souls. Reporters should also connect with scholars and others who are studying the phenomena of online harassment and provide as much information as possible for scholarly analysis.

Trade associations, media law clinics at law schools, and media lawyers representing reporters (including on a *pro bono* basis) can also help reporters—especially those who do not have access to major news organizations’ legal teams—to assess legal

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journalists-and-allies-learn-how-to-plan-for-reporting-safely/. Harvard’s Nieman Foundation for Journalism has published a recommended list of tools. Elisa Lees Munoz, *How Newsrooms, Journalists, and their Peers Can Combat Online Violence*, NIEMAN REPORTS (Apr. 12, 2021), <https://niemanreports.org/articles/how-newsrooms-journalists-and-their-peers-can-combat-online-violence/>. PEN America provides a harassment field manual. *Online Harassment Field Manual*, PEN AM., <https://onlineharassmentfieldmanual.pen.org/> (last visited Mar. 28, 2022); *see also* *Safety of Journalists*, FREE PRESS UNLIMITED RES. SPACE, <https://kq.freepressunlimited.org/themes/safety-of-journalists/> (last accessed Mar. 28, 2022).

<sup>257</sup> Some of this industry-wide self-help is already taking place. The International Women’s Media Foundation, the Committee to Protect Journalists, the International Center for Journalists, and PEN America, the Associated Press, among others, are providing digital security information and launching initiatives to provide support and resources to journalists facing harassment online. *See* Eberspacher, *supra* note 8, at 155 (discussing PEN America’s Online Harassment Field Manual); *see also* Florence le Cam, *Journalistic Organizations: Arenas for Professional and Symbolic Struggles*, COMM’N, Jan. 30, 2020 (discussing the history of journalist trade associations).

options as well as offering mentorship.<sup>258</sup> They can provide resources to freelancers and news organizations too financially challenged to respond adequately to the current landscape of threat. They can also play a role in continuing to publicize the expressive (and real world) violence to which African American journalists, those identified with other marginalized communities, and women reporters are particularly subject. In addition to continuing to use publicity on behalf of journalists and the important work of the press, these organizations should expand their fields of advocacy for the press. They should make connections with other affinity groups concerned about civil rights in order to amplify public understanding of the threats to journalists working today.

These recommendations are not meant to suggest that we should focus on online harassment as only a safety issue for journalists. We must recognize, though, that promoting reporter safety also shores up the role of the press as a whole. Especially for news workers who are not affiliated with established and relatively resource-rich news organizations, help in fulfilling the journalistic function must come from other sources.

#### *D. Suggestions For Social Media Platforms*

Obviously, social media platforms are an important part of the delivery of online harassment to journalists who identify as members of racial, ethnic and religious minorities and/or as women or gender diverse persons. Some headway could be made against online harassment of journalists through: 1) attention to design—both of tech tools and user interaction/complaint procedures, 2) terms of service enforcement, and 3) greater algorithmic and informational transparency.<sup>259</sup>

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<sup>258</sup> In addition, the Legal Network for Journalists at Risk was inaugurated to expand legal assistance available for journalists internationally. See *UNESCO And Thomson Reuters Foundation Launched Practical Guides On The Safety Of Women Journalists*, UNESCO (Nov. 22, 2021), <https://en.unesco.org/news/unesco-and-thomson-reuters-foundation-launched-practical-guides-safety-women-journalists>. UNESCO also administers the Global Media Defence Fund. Munoz, *supra* note 256.

<sup>259</sup> A recent Pew poll reports that “[a]round half of Americans say permanently suspending users if they bully or harass others (51%) or requiring users of these platforms to disclose their real identities (48%) would be very effective in helping to reduce harassment or bullying on social media.” VOGELS, *supra* note 29. Permanent bans bring their own dangers, not the least of which are controversy and inevitable



On the tools and design front, I concur with the various recommendations to harassment response efforts suggested in the 2018 ADL Report on online harassment, including “allow[ing] users more nuanced control over who can see their tweets . . . allow[ing] for greater ease in filtering notifications and direct messages from unfamiliar accounts . . . [and block[ing] accounts that actively facilitate trolling.”<sup>260</sup> In addition to providing new tech tools to help journalists stem their exposure to online attacks, the platforms should pay close attention to the designs of their tools and the consequences of such designs.<sup>261</sup> At a minimum, the social media platforms could prioritize their attempts to label and control manipulative bots.<sup>262</sup> They should work harder to develop more effective automated tools for sniffing out harassment.<sup>263</sup> Furthermore, “[p]latforms need

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inconsistency over when and how they should be applied in practice. As for prohibiting anonymity, the Pew report itself recognizes the controversial character of this proposal and other work raises questions as to the effectiveness of requiring identification. See Ingram, *supra* note 241. Still, there is much to recommend PEN America’s recent recommendations directed to social media platforms, including the suggestion to “[c]reate a transparent system of escalating penalties for abusive behavior—including warnings, strikes, nudges, temporary functionality limitations, and suspensions, as well as content takedowns and account bans—and spell out these penalties for users every step of the way.” VILK, *supra* note 85.

<sup>260</sup> Unfortunately, the fact that many antisemitic tweets come from human accounts rather than bots means that just blocking bots will not be a full solution. 2018 ADL REPORT, *supra* note 5, at 12.

<sup>261</sup> Caroline Sindors, et al., *Trust through Trickery*, COMMONPLACE (Jan. 5, 2021), <https://commonplace.knowledgefutures.org/pub/trust-through-trickery/release/1#recommendations>. For example, Sindors et al. demonstrate the number of steps and complexities involved in abuse reporting for individual reporters.

<sup>262</sup> See 2018 ADL REPORT, *supra* note 5, at 14 (recommending development of “labeling system for accounts that demonstrate high-levels of automation . . .”).

<sup>263</sup> One recent positive development of this kind is Google’s release of the source code for its Harassment Manager tool with a specific hope for its use to help female journalists facing harassment online. See *Technology To Help Women Journalists Document And Manage Online Abuse*, MEDIUM (March 8, 2022), <https://medium.com/jigsaw/technology-to-help-women-journalists-document-and-manage-online-abuse-5edcac127872>. The Harassment Manager was built by Google’s Jigsaw unit in partnership with Twitter. The tool “helps users easily identify and harmful posts, mute or block perpetrators of harassment and hide harassing replies to their own tweets. Individuals can review tweets based on hashtag, username, keyword or date, and leverage our Perspective API to detect comments that are most likely to be toxic.” *Id.* Harassment Manager is not a downloadable app. Its code must be integrated into other software used by news organizations to evaluate tweets. Google announced that it will be launched by Thomson Reuters. *Id.*; see also *Harassment Manager*, GITHUB, <https://github.com/conversationai/harassment-manager> (last visited May 19, 2022). See also Adi Robertson, *Google Is Releasing An Open Source Harassment Filter For Journalists*, THE VERGE (Mar. 8, 2022, 5:00am EST),

clearer mechanisms, that involve human facilitators and not just automated or online complaint systems, for identifying serious harassment and trolling.”<sup>264</sup>

Platforms could also improve their processes once complaints of harassment have been made.<sup>265</sup> Typically, their current workflow processes do not allow for conversation and appeal. Once a journalist has reported harassment to the platform, she is in the dark about the outcome and has no opportunity to appeal or contest a platform decision not to take down posts or deplatform her harassers.<sup>266</sup> Each platform should review its terms of service to ensure that they preclude the kinds of harassing attacks described in this Article, and ensure that such terms of service are rigorously and equally enforced.<sup>267</sup> To be sure, the so-called “alt-right” has developed ways of making

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<https://www.theverge.com/2022/3/8/22966204/google-jigsaw-perspective-ai-twitter-moderation-harassment-manager-journalists> (explaining that “unlike AI-powered moderation on services like Twitter and Instagram, ... Harassment Manager isn’t a platform-side moderation feature. It’s apparently a sorting tool for helping manage the sometimes overwhelming scale of social media feedback...”)

For more platform-side suggestions, see, e.g., Sindors & Shukla, *supra* note 39.

<sup>264</sup> 2018 ADL REPORT, *supra* note 5, at 13 (quoting female Jewish reporter that “there needs to be a chain of command that we can go to counteract trolling during a deluge.”).

<sup>265</sup> In October 2021, Facebook stated that it would begin treating journalists as involuntary public figures, thereby offering them increased protection against harassment. See *Facebook Rule Protects Journalists And Activists As ‘Involuntary’ Public Figures*, GUARDIAN (Oct. 13, 2021),

<https://www.theguardian.com/technology/2021/oct/13/facebook-involuntary-public-figures-journalists-harassment-bullying>; Brian Flood, *Facebook Will Treat Journalists, Activists As Public Figures To Limit Harassment And Bullying*, FOXNEWS (Oct. 13, 2021), <https://www.foxnews.com/media/facebook-journalists-activists-public-figures-harassment-bullying>.

It has also been reported that journalists have received more rapid protection from harassment on Twitter through its Project Guardian automated tool. See, e.g., Kurt Wagner, *Twitter’s Highest-Profile Users Get VIP Treatment When Trolls Strike*, BLOOMBERG (Dec. 8, 2021),

<https://www.bloomberg.com/news/articles/2021-12-08/twitter-s-highest-profile-users-get-vip-treatment-when-trolls-strike>.

<sup>266</sup> The platforms do not police harassment themselves; they rely on reports by users. Those user complaints are addressed by moderation teams “that are often poorly supported, remotely managed, and paid considerably less than most other tech workers. Decisions about content are made quickly, and erroneous takedowns of flagged content or accounts are fairly common.” Danny O’Brien & Dia Kayyali, *Facing the Challenge of Online Harassment*, EFF (Jan. 8, 2015), <https://www.eff.org/deeplinks/2015/01/facing-challenge-online-harassment>. I would suggest that erroneous failures to take down are also common.

<sup>267</sup> Social media platforms have adopted terms of service, although they are not all the same and what they consider harassment may differ.

Although studies such as the 2018 ADL Report indicate that social media platforms have sometimes blocked harassing accounts, see 2018 ADL REPORT, *supra* note 5, at 13, there is a sense that “they are neither consistent nor prompt in taking action.” Eberspacher, *supra* note 8, at 168.

its messages appear less explicitly Nazified in order to appeal to the conservative mainstream and cultivate a broader possible audience for conversion. At a minimum, they can do so through the appropriation of memes reflecting an ironic pose<sup>268</sup> or through the use of language whose ambiguity could circumvent harassment response filters. Still, the perfect is the enemy of the good, and the platforms should commit to increased enforcement of their terms of service against this kind of targeted and identity-based harassment even despite foreknowledge that their efforts will yield imperfect results.

Furthermore, the social media platforms should compile information and share with scholars as much as possible of what they know and understand about the evolving phenomenon of journalist harassment. Another locus of transparency should be educating reporters on the proactive measures available on the platforms and making their tools more intuitive and user-friendly.<sup>269</sup> The platforms are in the best position to be able to provide data for independent researcher analysis. (Doing so can even outsource predictable critiques to the researchers rather than the platforms themselves.) Although strongly criticized for the inadequacy of their public disclosures, some of the platforms have already begun to offer some more transparency about online harassment.<sup>270</sup> Others, like Facebook, have been resisting access by researchers, as noted in *Section V.D* above, largely on the ground that user privacy might be compromised. While

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<sup>268</sup> See, e.g., Emiliano De Cristofaro, *Memes are Taking the Alt-right's Message of Hate Mainstream*, THE CONVERSATION (Dec. 12, 2018, 8:45 AM), <https://theconversation.com/memes-are-taking-the-alt-rights-message-of-hate-mainstream-108196>; see also *supra* Section I.B.

<sup>269</sup> This recommendation echoes PEN America's suggestion that "[s]ocial media companies should design and build stronger proactive measures, make them more accessible and user-friendly, and educate users about them[]" since "[m]any of the writers and journalists PEN America works with, including those interviewed for this report, were unaware of existing features and tools and found themselves scrambling to deal with online harassment only after it had been unleashed." VILK, *supra* note 85.

<sup>270</sup> Twitter, for example, released an online transparency report in Dec. 2018. *Transparency*, TWITTER (Dec. 2018), <https://transparency.twitter.com/> (last visited May 19, 2022). While Amnesty International suggests a number of aspects in which the Twitter report was insufficiently transparent with respect to online harassment on the platform, company personnel did make public commitments to transparency. See *Troll Patrol Findings*, *supra* note 11. How seriously they will be taken is a matter of doubt and debate. ADL points out, however, that access to Twitter's Firehose API is "prohibitively expensive for many groups" and "still provides an incomplete view of Twitter." ADL CTR. FOR TECHNOLOGY & SOCIETY, *HOW PLATFORMS RATE ON HATE: MEASURING ANTISEMITISM AND ADEQUACY OF ENFORCEMENT ACTIONS ACROSS REDDIT AND TWITTER 9* (2022) [hereinafter ADL, *HOW PLATFORMS RATE ON HATE*], <https://www.adl.org/how-platforms-rate-on-hate>.

concern about user privacy is commendable, surely Facebook and independent researchers could reach accommodations on criteria for access and use that would address such concerns. To the extent that the concern is the desire to protect the platform's competitive position, the problem of online harassment is serious enough that scholars and Facebook could negotiate confidentiality boundaries. The fact that the law in other contexts (such as trade secrets) recognizes competition-related confidentiality is not to the contrary. In any event, according to one report, harassment has been worse on Twitter than on Facebook.<sup>271</sup> Since Twitter now appears to be a more critical tool in the modern reporter's professional arsenal, perhaps Twitter should be the first principal focus of attempts to enhance transparency of information regarding online harassment.

There are reasons to be hopeful about the possibility of culture change at least at some of the platforms. As the 2018 ADL REPORT on online harassment points out, there are tech workers at the platforms who would be disposed to agree with commitments to greater accountability.<sup>272</sup> Admittedly, however, we need to be realistic about expecting change largely through the agency of social media tech employees—in light of the non-disclosure agreements they sign and work cultures perceived as retaliatory.<sup>273</sup> Scholars and analysts have also noted

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<sup>271</sup> See 2018 ADL REPORT, *supra* note 5, at 12. See also Holton et al., *supra* note 29 (characterizing Twitter as locus of more, and more offensive, harassment). Other studies appear to suggest that Facebook has been the major culprit. See UNESCO, THE CHILLING, *supra* note 34. What is clear is that the designs of the two platforms differ in the harassment methodologies they enable.

On Twitter, “many interviewees spoke of massive, coordinated, attacks by trolls—sometimes at the behest of white nationalist or hate-group leaders such as Andrew Anglin and David Duke—that were impossible to filter or staunch. . . . As one interviewee remarked: “Twitter does an awful job. An awful, awful, awful job policing discourse on the site.” 2018 ADL REPORT, *supra* note 5, at 12. (“The ease of attack was highlighted several times—with minimal effort, an anonymous harasser could mention one in a tweet or comment on a post, and without forewarning or consent, the target will receive an automatic notification and be subjected to disturbing imagery or threats.”).

<sup>272</sup> See 2018 ADL REPORT, *supra* note 5, at 13. Facebook employees have publicly dissented from Mark Zuckerberg's apparently libertarian views on speech. See, e.g., Craig Timberg & Elizabeth Dwoskin, *Another Facebook Worker Quits in Disgust, Saying the Company 'Is on the Wrong Side of History'*, WALL ST. J. (Sept. 8, 2020), <https://www.washingtonpost.com/technology/2020/09/08/facebook-employee-quit-racism/>.

<sup>273</sup> 2018 ADL REPORT, *supra* note 5, at 13 (“Groups like Coworker.org, Tech Solidarity, the Tech Workers Coalition, and the Center for Human Technology are working to organize and give voice to tech workers, but they face challenges in connecting with employees due to strict non-disclosure agreements and company cultures that penalize and isolate those that speak out.”).

that the business models of social media platforms do not create incentives to control or eliminate sensationalist content that drives engagement.<sup>274</sup>

Still, the social media platforms have some economic self-interest in doing better on this front (as Twitter itself has shown.) There are likely to be significant reputational benefits for social media platforms which seek to identify and limit online harassment. Recent polling shows that 55% of Americans consider online harassment to be a “major problem” and that the vast majority of respondents believe the social media platforms are doing only a fair to poor job of addressing online harassment.<sup>275</sup> African Americans and women are significant demographics whose participation in the social networks advances the platforms’ economic and social vision. MySpace is an object lesson on how—and how fast—the mighty can fall in the digital world; Twitter presumably has an interest in remaining relevant in its fast-changing environment. While Twitter is an important tool for journalists, according to the 2018 ADL Report, “journalists are also integral to the fabric of Twitter and produce much of the high-quality content on that platform. Journalists are under constant harassment on Twitter, but they are also extremely valuable to the Twitter landscape. This unique position provides opportunity for organization and negotiation.”<sup>276</sup> Most broadly, it might be expected that the many calls to regulate the social media platforms<sup>277</sup> would create

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<sup>274</sup> *See id.* (“Our interviewees suggested that the business models of many social media platforms incentivize the companies to allow disinformation and harassment.”).

<sup>275</sup> VOGELS, *supra* note 29 (reporting the 55% figure and that “roughly eight in ten” Americans think the social media companies are doing a fair to poor job” in handling online harassment).

<sup>276</sup> *Id.* at 14. As I argue below, *see infra* note 278, I would expect that political conservatives would be just as appalled by the type of harassment detailed in this Article as political liberals might be. In any event, I am not proposing an empirical comparison of reputational impact on conservative and liberal user communities. The point is solely to indicate that a “business reason” can support attempts to control online harassment even if the overarching business model of the social media platforms pushes user engagement via sensationalism and outrage.

<sup>277</sup> Criticisms and arguments in support of further regulation are by now legion, both in the United States and abroad. *See, e.g.*, VILK, *supra* note 85 and sources cited therein. Doubtless the revelations of the Facebook whistleblower Frances Haugen added recently to public outrage about the platform and calls for legislative reform. *See, e.g.*, Cat Zakrzewski, et al., *Facebook Whistleblower Frances Haugen Tells Lawmakers That Meaningful Reform Is Necessary ‘For Our Common Good’*, WASH. POST (Oct. 5, 2021), <https://www.washingtonpost.com/technology/2021/10/05/facebook-senate-hearing-frances-haugen/>.

business incentives for these companies to do more to address the public's concerns about online harassment.

Without overstating the case, there is some reason for optimism that pragmatic negotiation designed to convince the platforms that they would stand to benefit from more effective control of vitriolic and identity-based harassment of reporters might be fruitful.<sup>278</sup> By contrast, some might claim that government regulation could be a surer and better bet. But that prospect raises complex issues under U.S. law, history and practice.<sup>279</sup> Although many have called for the diminution or elimination of the Communications Decency Act's § 230 protections for interactive computer services, the statute currently remains in place.<sup>280</sup> At a minimum, and given the many different approaches suggested for immunity reform, change is likely to take time, with uncertainty as to the details of the ultimate result. The possible impact of reform on social media treatment of online harassment is therefore, at a

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<sup>278</sup> Last year, Facebook adopted new rules for internal political discussions, requiring professional and respectful dialogue and seeking to ensure that all employees, and particularly the Black community, "feel supported at work." Salvador Rodriguez, *Facebook Issues New Rules on Internal Employee Communication*, CNBC (Sept. 17, 2020), <https://www.cnbc.com/2020/09/17/facebook-issues-new-rules-on-internal-employee-communication-.html>.

To be sure, those who complain, for example, about Facebook's supposed bias against conservative views, *see, e.g.*, Bobby Allyn, *Facebook Keeps Data Secret, Letting Conservative Bias Claims Persist*, NPR (Oct. 5, 2020), <https://www.npr.org/2020/10/05/918520692/facebook-keeps-data-secret-letting-conservative-bias-claims-persist>, might argue that shutting down purveyors of identity-based online harassment of journalists would unduly interfere with conservative political speech. Without addressing the accuracy of such claims substantively, at least one simple response to this is that the kind of online abuse discussed here is precisely *not* political; the journalists are attacked with respect to their identities, and not their politics. In any event, even if there could be disagreements on the margins, attacks deploying inflammatory references to lynchings, the Holocaust, rape and murder should warrant bipartisan condemnation.

<sup>279</sup> The degree of public support for legal responses to address harassment is unclear. *See* VOGELS, *supra* note 29 (reporting that 63% of Americans (and more whites than Blacks) believe that targets of online abuse should not be able to bring legal action against social media sites.)

<sup>280</sup> Communications Decency Act, 47 U.S.C. § 230(c); *see supra* note 223; David Anderson, *Second Thoughts: A Response to David A. Logan's Rescuing Our Democracy by Rethinking New York Times v. Sullivan*, 82 OHIO ST. L.J. ONLINE 23 (2020) (supporting Section 230 reform); Agnieszka McPeak, *Platform Immunity Redefined*, 62 WM. & MARY L. REV. 1557, 1570–84 (2021) (describing § 230 and various reform proposals). On May 14, 2021, President Biden issued an executive order revoking former President Donald Trump's action directing the executive branch to "clarify certain provisions under § 230 of the Communications Decency Act." Jeffrey D. Neuberger, *The President Revokes Prior Administration's Executive Order on CDA Section 230*, NAT'L L. REV. (May 17, 2021) (citing Exec. Order No. 14029, 86 Fed. Reg. 27025 (May 14, 2021)), <https://www.natlawreview.com/article/president-revokes-prior-administration-s-executive-order-cda-section-230>.

minimum, unknown. While § 230 immunity can block court orders to take down content, one of the advantages of § 230 is that it allows, and indeed encourages, social media companies to engage in content moderation.<sup>281</sup> Proposed legislation such as the Stop the Censorship Act, on the other hand, would have barred § 230 immunity if the platforms removed “objectionable” content.<sup>282</sup> Even if it passed judicial muster, what incentives might such legislation create for social media platform discussion of anything political or controversial? As for the possibility of tort liability without the § 230 immunity, a company like Facebook or Twitter might well continue to avoid liability under a classic tort standard for liability. For example, a social media platform could satisfy a reasonable care standard if it had put in place some formal procedures (such as terms of service and the ability to report abuse) and made reasonable compliance efforts. It’s far from clear that this would be sufficient to put a dent in the online harassment sketched in this Article. Still, the prospect that the negotiations recommended here would be taking place in the shadow of possible § 230 reform might provide a nice tactical advantage for the press.

#### *E. Research Agendas For Scholars*

With respect to scholars—whether communications studies or media scholars, law professors, sociologists, cognitive psychology scholars, computer engineers, social media studies researchers etc.<sup>283</sup>—further inquiry fleshing out the origins, nature and threats of online harassment, the self-censorship it triggers, and possible technological solutions are strongly recommended.

One of the striking aspects of researching this Article was the discovery that while large-scale research has been funded and undertaken with respect to online harassment of women journalists (including Black women journalists), and some with respect to Jewish journalists, no such studies appear to have been published concerning the online harassment of African

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<sup>281</sup> See, e.g., McPeak, *supra* note 280, at 1576.

<sup>282</sup> Stop the Censorship Act, H.R. 4027, 116th Cong. (2019).

<sup>283</sup> Professor Waisbord convincingly discusses communication studies as a “post-discipline.” See generally SILVIO WAISBORD, COMMUNICATION: A POST-DISCIPLINE (2019).

American journalists as a whole in the United States.<sup>284</sup> This lacuna in the empirical research must be remedied. Large-scale empirical and anecdotal studies should be funded and undertaken with respect to the working conditions of African American reporters generally.<sup>285</sup>

In addition, much of the research about online harassment has sought to distinguish between less and more severe forms of online harassment.<sup>286</sup> But does exposure to the types of harassment that have been categorized in prior studies as “less severe” have an amplifying effect when constant, leading journalists to experience the totality of such attacks as notably severe?<sup>287</sup>

More broadly, in light of the particular type of racist, antisemitic and misogynist rhetoric embedded in the online harassment of minority and women reporters, it would be important to explore further whether and how the rhetoric of white supremacy and misogyny enable and enhance actual violence against the press.

Independent research into relevant technological aspects, including the use of artificial intelligence in identifying online harassment,<sup>288</sup> would also be particularly helpful for those trying to develop effective responses. Further, research could focus on the variety of origins of online harassment—from white

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<sup>284</sup> Admittedly, the studies of harassment of women journalists worldwide do specify the particular intensity of the attacks on Black women journalists. See *supra* Section I.A. But those studies do not address the specific harassment of Black male journalists. And they have a worldwide focus, rather than specifically focusing on the experiences of Black women journalists in the United States.

<sup>285</sup> While the National Association of Black Journalists has been seeking information from its membership, I am not aware of a broad-scale empirical study that has been published thus far. See also Miller, *Hostility Toward the Press*, *supra* note 29, at 15 (also recently noting the dearth of studies focusing on Black reporters.).

<sup>286</sup> See, e.g., VOGELS, *supra* note 29, at 5 (describing definitions of online harassment used by the report’s authors).

<sup>287</sup> We should not make assumptions about such effects without further empirical study. After all, it is not clear that a barrage of nasty and offensive name-calling that is neither violent nor identity-based would necessarily have the same impact as doxxing or sexual harassment or distinctly identity-based attacks designed to trigger reporter fears. But distinctions between less and more severe characterizations of online harassment also focuses on individual statements rather than assessing their potentially cumulative effects. Further granular study might enable finer analysis that addresses matters of intensity and strategic effects, in addition to the existing content-focused studies.

<sup>288</sup> *Troll Patrol Findings*, *supra* note 11. One of Amnesty International’s main arguments in its attack on Twitter and other social media companies is the platforms’ assertedly uncritical reliance on automated AI tools.



supremacists on 4chan to sophisticated and government-funded troll armies.<sup>289</sup> And in a bookend to the study of harassment, researchers should further examine the type, extent and intensity of journalist- and institutional self-censorship in response to online harassment.<sup>290</sup>

It would also be useful for researchers to engage in further study of professional branding by journalists, its impact on professional status, and whether decisions by reporters to retreat from being public persons on social media reifies existing status discrimination in the newsroom.

These areas of focus are, of course, just a few examples in what should be a rich and broad vein of future empirical research. Policy implementations are most likely to be effective if based on rigorous and reliable data subject to analysis and assessment by independent scholars.<sup>291</sup> Particularly with respect to technological solutions focused on social media platforms, such research is hobbled by the reluctance of some of the platforms to provide access to their data.<sup>292</sup> This can also lead to some study skews: social media studies research has focused extensively on Twitter, perhaps because of the “relative openness of the platform’s APIs.”<sup>293</sup> Attempts to address researcher access issues will therefore be critical, especially with respect to solution-focused studies of social media harassment.

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<sup>289</sup> See, e.g., REPORTERS WITHOUT BORDERS REPORT, *supra* note 87 (describing state-affiliated troll armies).

<sup>290</sup> For another recommendation of further research, see Waisbord, *Mob Censorship*, *supra* note 18, at 1042.

<sup>291</sup> For an example of a critical assessment of social media studies research more generally, see Ariadna Matamoros-Fernandez & Johan Farkas, *Racism, Hate Speech, and Social Media: A Systematic Review and Critique*, 22 TELEVISION AND NEWS MEDIA 205 (2021). For a recommendation that social media companies provide more transparent access to their data and submit to “regular and comprehensive third party audits, see ADL, HOW PLATFORMS RATE ON HATE, *supra* note 270, at 22.

<sup>292</sup> Facebook, for example, has restricted researcher access to data on grounds of user privacy. See, e.g., Laura Edelson & Damon McCoy, *We Research Misinformation on Facebook. It Just Disabled Our Accounts.*, N.Y. TIMES (Aug. 10, 2021), <https://www.nytimes.com/2021/08/10/opinion/facebook-misinformation.html?referringSource=articleShare>; see also Lili Levi, *Media Literacy Beyond the National Security Frame*, 2020 UTAH L. REV. 941, 965 n.110 (2020) and sources cited therein.

<sup>293</sup> Matamoros-Fernandez & Farkas, *supra* note 291.

## CONCLUSION

Increasingly, journalists who identify as Black, women, Jewish, Muslim, Latinx, Asian American, LGBTQ+ and/or whose identities are intersectional are arguing for an enhanced and visible presence and an increased role in the ways in which news media define and portray the world and their communities. They are charging that, historically, mainstream news organizations have reported principally from the vantage point of the white male gaze—and have therefore alienated and failed to speak to other communities. They are calling for more inclusive journalism, and news organizations are beginning to attend to the benefits of diversity in the newsroom.

At the same time, however, journalists are facing unprecedented attacks in performing their press functions. Social scientists and media scholars are documenting the endemic reality of identity-based online harassment experienced by the vast majority of journalists who identify as non-male or as members of racial, ethnic or religious minority groups. Analysts are showing also the degree to which such harassment is based on identity bias and often uses the most hateful white supremacist and misogynistic language and images to achieve its widespread intimidating effects. It is also important to see this psychic landscape in its broader context: one of increasing physical danger to journalists globally. Identity-based harassment of journalists is neither accidental nor limited to a few, isolated individuals. All too frequently, it is part of organized and strategic campaigns. Overall—whether individual and decentralized or systematic and collective—such harassment is an attempt by some publics to silence diverse voices and undermine the democratic role of the press.

This pattern of online harassment harms journalists themselves individually (at a minimum in job satisfaction and mental health), likely leads to responsive changes in their news practices and to self-censorship in their work, and threatens news organization attempts to enhance the diversity of the professional press. To the extent that it leads journalists who identify as non-white, non-male and non-Christian to leave the profession, it undermines recent attempts to make the press more inclusive, diverse, and responsive to the entirety of the public. These chilling effects thus harm not only the targeted individual journalists, but all journalists and the function, legitimacy and

credibility of the press as a whole. Further, to the extent that the press is an agent of the public, then harms to the press' ability to perform its democratic role harm the overarching public interest.

Until now, journalists charge that most news organizations have treated reporter harassment as a personal issue for particular reporters, to be dealt with by the reporters themselves or, at best, by Human Resources departments or company Security staff. This Article has argued instead that harassment of reporters should be seen as a broad-based press problem and therefore a democracy problem.<sup>294</sup>

When observed most broadly, online harassment takes its place as one of the three press-delegitimizing tactics weaponized during the Trump administration. These tactics consist of challenging settled press-protective legal doctrine, attacking the press's published output and its claims to institutional credibility, and undermining the reporting function by intimidating the reporters in their work. Despite electoral change, the echoes of these tactics remain and may even be increasing in their reverberations.

Finding realistic ways to restrict the flow and counteract the harms of online expressive attacks on reporters is an imperative next step if the press is to perform its constitutionally recognized role under current conditions of existential threat. This Article has argued for a variety of ameliorative steps directed to news organizations, journalism schools, press-protective organizations, social media platforms, social science researchers and journalists themselves. News organizations and their allies should recognize that obligations to protect reporters against expressive violence are morally required, likely to be legally expected, and simply a matter of good business today. As a matter of self-preservation, social media platforms too must accept the part they play in the environment of online harassment. This involves attending to the design of their tech tools, complaint procedures, terms of service enforcement and needs for informational transparency. In turn, researchers should systematically provide the empirical data to guide these steps, including by remedying the insufficiency of current research into the experiences of African American journalists. All the recommendations in this Article are grounded in the

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<sup>294</sup> See Miller, *Harassment's Toll*, *supra* note 34, at 2 and sources cited therein (agreeing on characterization of online harassment of journalists as a democracy problem).

realization that reporter harassment is best seen as a collective social problem undermining the democratic benefits of a robust, vibrant and inclusive press. Consequently, collective and coordinated solutions—rather than individual and isolated approaches—offer the most realistic hope of stemming this tide.

# CRITICAL RACE THEORY THROUGH THE LENS OF *GARCETTI V. CEBALLOS*

Hannah Daigle\*

## INTRODUCTION

The First Amendment states no law shall be made “abridging the freedom of speech.”<sup>1</sup> The Supreme Court has repeatedly protected contentious forms of speech and expression including allowing flag burning,<sup>2</sup> brandishing offensive signs during the picketing of a funeral for a deceased veteran,<sup>3</sup> and the burning of a cross on an African American family’s lawn.<sup>4</sup> Despite each of these controversial decisions, all of which broadly protect free speech and expression, the Court has taken issue with an area that on its face, appears far less controversial. In *Garcetti v. Ceballos*,<sup>5</sup> the Court held the First Amendment does not shield a government employee’s speech and expression made pursuant to their professional duties from employer discipline.<sup>6</sup> This ruling drastically narrowed the scope of First Amendment protections that public employees had previously enjoyed.<sup>7</sup>

To be considered a public employee or a public sector employee, one must work for the government of the United States, a state, a territory in possession of the United States, a city, a municipality, a county, or a similar government.<sup>8</sup> The broad category of public employee encompasses many professions, including police officers, public health care workers, bus drivers, and teachers.<sup>9</sup> Because the category of “public employee” is extremely broad, *Garcetti* implicated thousands of workers. Among the many fields of public employees, public school teachers stood out as a special category to the Court.<sup>10</sup>

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<sup>1</sup> U.S. CONST. amend. I.

<sup>2</sup> See *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>3</sup> See *Snyder v. Phelps*, 562 U.S. 443 (2011).

<sup>4</sup> See *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

<sup>5</sup> 547 U.S. 410 (2006).

<sup>6</sup> See *id.* at 426.

<sup>7</sup> Ruben J. Garcia, *Against Legislation: Garcetti v. Ceballos and the Paradox of Statutory Protection for Public Employees*, 7 FIRST AMEND. L. REV. 22, 24 (2008).

<sup>8</sup> *I Am a Public Sector Employee*, U.S. DEP’T OF LAB.,

<https://www.dol.gov/agencies/whd/ffcra/benefits-eligibility-webtool/employee/employee-4> (last visited Apr. 28, 2022).

<sup>9</sup> Elizabeth McNichol, *Some Basic Facts on State and Local Government Workers*, CTR. ON BUDGET AND POL’Y PRIORITIES (June 15, 2012),

<https://www.cbpp.org/sites/default/files/atoms/files/2-24-11sfp.pdf>.

<sup>10</sup> See *Garcetti*, 547 U.S. at 425.

Notably, the majority points to additional factors they believe to be relevant in a school setting which could potentially carve out an exception to teachers' speech being controlled by public employers.<sup>11</sup>

However, the Court does not individually discuss these additional factors; instead, it refers to the Court's previous acknowledgement that teachers possess increasingly informed and definite opinions in an academic environment specifically regarding school expenditures compared to other members of the population.<sup>12</sup> Despite the Court singling out teachers in the majority opinion, the Court falls short of actually providing this differentiated class with any individualized protection.<sup>13</sup> Instead, the *Garcetti* Court declined to decide if the *Garcetti* analysis would apply to issues involving teaching in a classroom, presumably leaving this determination to the discretion of lower courts.<sup>14</sup>

Schools are often the first place young students learn about race, America's racial history, and their own racial identity. Research indicates that teachers have a very important role to play in educating their students: "[e]arly childhood educators can support the unlearning of racism—and minimize later breathing in of racism—by intentionally teaching about race and related issues."<sup>15</sup> In addition, "[t]eachers who intentionally plan curricula that affirm children's racial identities have seen the benefits this produces in supporting children's growth and learning across many domains of development."<sup>16</sup>

One way teachers may aim to educate their students about race and racial history in the United States is through incorporating elements of Critical Race Theory (CRT) in the

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<sup>11</sup> *See id.* ("There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence.")

<sup>12</sup> *See id.* at 417 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968)).

<sup>13</sup> *See id.* at 425.

<sup>14</sup> *See id.* ("[T]oday's decision may have important ramifications for academic freedom, at least as a constitutional value. . . . We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.")

<sup>15</sup> Kirsten Cole & Diandra Verwayne, *Becoming Upended: Teaching and Learning about Race and Racism with Young Children and Their Families*, YOUNG CHILD. (May 2018), <https://www.naeyc.org/resources/pubs/yc/may2018/teaching-learning-race-and-racism>.

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

classroom.<sup>17</sup> CRT emphasizes the systemic and enduring nature of racism in the United States.<sup>18</sup> The theory “argues that historical patterns of racism are ingrained in law and other modern institutions, and that the legacies of slavery, segregation and Jim Crow still create an uneven playing field for Black people and other people of color.”<sup>19</sup> As racial issues remain a topic of public concern and receive media attention, schools have been incorporating information about systemic racism and equitability, concepts that fall in line with CRT’s teachings, within classroom settings.<sup>20</sup> However, this has recently received strong pushback, particularly from conservative states.

Since January 2021, 42 states have introduced bills or taken other steps to restrict or limit the ability of teachers to discuss racism and sexism, particularly through the lens of CRT.<sup>21</sup> At least 17 of these states have imposed restrictions limiting or banning CRT itself;<sup>22</sup> though it is worth noting that these conservative states often use CRT as an “all-encompassing umbrella term that covers seemingly any racial issue[.]”<sup>23</sup> These laws target the discussion and orientation that the U.S. is inherently racist and any conversations “about conscious and unconscious bias, privilege, discrimination, and oppression.”<sup>24</sup>

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<sup>17</sup> *But see* Lauren Jackson, *What is Critical Race Theory?*, N.Y. TIMES (Aug. 18, 2021), [https://www.nytimes.com/2021/07/09/podcasts/the-daily-newsletter-critical-race-theory.html?.mc=aud\\_dev&ad-keywords=auddevgate&gclid=CjwKCAjwndCKBhAkEiwAgSDKQZ9-JeooqxQv-wPgvldbbGIJ48XYxg\\_apDjUuSoJo3sRi8qFiboghoCJfYQAvD\\_BwE&gclsrc=aw.ds](https://www.nytimes.com/2021/07/09/podcasts/the-daily-newsletter-critical-race-theory.html?.mc=aud_dev&ad-keywords=auddevgate&gclid=CjwKCAjwndCKBhAkEiwAgSDKQZ9-JeooqxQv-wPgvldbbGIJ48XYxg_apDjUuSoJo3sRi8qFiboghoCJfYQAvD_BwE&gclsrc=aw.ds) (“You’d have to look long and hard to find any K-12 classroom where the term ‘critical race theory’ comes up. Instead, what critics tend to target is the influence of concepts derived from C.R.T. that infuse the equity training field . . . . This kind of training has been offered by various school districts to teachers in the name of combating implicit bias.”).

<sup>18</sup> *See* Janel George, *A Lesson on Critical Race Theory*, A.B.A. (Jan. 11, 2021), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/).

<sup>19</sup> Jackson, *supra* note 17.

<sup>20</sup> *See* Marisa Iati, *What is Critical Race Theory, and Why do Republicans Want to Ban it in Schools?*, WASH. POST (May 29, 2021, 8:00 AM), <https://www.washingtonpost.com/education/2021/05/29/critical-race-theory-bans-schools/>.

<sup>21</sup> *See* Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WEEK, <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> (May 9, 2022).

<sup>22</sup> *See id.*

<sup>23</sup> Brian Hiro, *Ask the Expert: The Rise and Meaning of Critical Race Theory*, CSUSM (Sept. 16, 2021), <https://news.csusm.edu/ask-the-expert-the-rise-and-meaning-of-critical-race-theory/>.

<sup>24</sup> Rashawn Ray & Alexandra Gibbons, *Why are States Banning Critical Race Theory?*, BROOKINGS (Nov. 2021),

The Heritage Foundation, an outspoken critic of CRT, believes it should not be taught in schools because it “demoralizes K through 12 students, polarizes higher ed students, guilts on working Americans, and condones cancel culture. [CRT] stokes grievances with the purpose of creating victims.”<sup>25</sup> With this perspective in mind, notable conservatives have made it abundantly clear that CRT is unwelcome in public school classrooms.<sup>26</sup> For example, Republican Governor of Florida, Ron DeSantis stated: “In Florida we are taking a stand against the state-sanctioned racism that is [C]ritical [R]ace [T]heory. . . . We won’t allow Florida tax dollars to be spent teaching kids to hate our country or to hate each other.”<sup>27</sup>

These targeted aims at CRT in schools by conservative states and politicians are an indirect result of the *Garcetti* decision and its explicit failure to take a stance on the First Amendment’s freedom of speech rights for public school educators.<sup>28</sup> If the Court had carved out an exception for school teachers, distinguishing their First Amendment rights from other government employees, there would be less room for ambiguity and debate on the issue of incorporating elements of CRT into lesson plans. There are dangerous implications of *Garcetti*’s failure to explicitly protect teachers’ speech in the classroom: the holding allows politicians to whitewash American history and impose ignorance on a new generation. These implications indicate at the very least, the *Garcetti* framework must be altered

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<https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/>.

<sup>25</sup> *Combatting Critical Race Theory* THE HERITAGE FOUND. (May 21, 2021),

<https://www.heritage.org/civil-society/commentary/combating-critical-race-theory>.

<sup>26</sup> See Jackson, *supra* note 17; see also Stephanie Saul, *Energizing Conservative Voters, One School Board Election at a Time*, N.Y. TIMES (Nov. 8, 2021),

<https://www.nytimes.com/2021/10/21/us/republicans-schools-critical-race-theory.html> (“Glenn Youngkin, [as a Republican nominee for Governor of Virginia] . . . promised to abolish critical race theory on ‘Day 1’ in office.”).

<sup>27</sup> See News Release, Ron DeSantis, Governor of Florida, Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations (Dec. 15, 2021),

<https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/>.

<sup>28</sup> Mark Walsh, *If Critical Race Theory is Banned, Are Teachers Protected by the First Amendment?*, EDUC. WEEK (June 10, 2021), <https://www.edweek.org/policy-politics/does-academic-freedom-shield-teachers-as-states-take-aim-at-critical-race-theory/2021/06> (stating the *Garcetti* decision “has been really hostile to the view that K-12 teachers have any control over the curriculum or even their teaching style.”).



or replaced altogether in the educational context to protect the freedom of speech rights of K-12 public school teachers and their ability to educate students about the issues of race and racism in America.

### I. ANALYSIS OF *GARCETTI V. CEBALLOS* AND SIMILAR CASES

In *Garcetti v. Ceballos*, the plaintiff, Richard Ceballos, had been employed as a deputy district attorney for over a decade at the Los Angeles County District Attorney's Office.<sup>29</sup> While on the job, Ceballos determined that an affidavit used to obtain a search warrant contained serious misrepresentations.<sup>30</sup> He spoke with a deputy sheriff from the local Sheriff's Department but ultimately felt unsatisfied with the answers he received regarding the perceived inaccuracies.<sup>31</sup> Despite Ceballos writing a disposition memo which included the recommendation to dismiss the case due to the alleged false statements in the affidavit, his supervisors determined they would proceed with the prosecution.<sup>32</sup> During the trial, the defense called Ceballos to testify about the misrepresentations on the affidavit.<sup>33</sup> After this testimony, Ceballos claimed he was "subjected to a series of retaliatory employment actions."<sup>34</sup> These retaliatory actions included "reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion."<sup>35</sup> Ceballos sued in federal district court, alleging that petitioners had violated his First and Fourteenth Amendment rights guaranteed by the Constitution by retaliating against him based on his memo.<sup>36</sup>

The Court relied on *Pickering v. Board of Education*<sup>37</sup> to formulate a two-part test to analyze a public employee's speech protections.<sup>38</sup> First, courts must determine whether the employee

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<sup>29</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006).

<sup>30</sup> *Id.* at 414.

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

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

<sup>33</sup> *Id.* at 414–15.

<sup>34</sup> *Id.* at 415.

<sup>35</sup> *Id.*

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

<sup>37</sup> 391 U.S. 563 (1968). In *Pickering*, the Supreme Court held that a high school teacher had a right under the First Amendment to send a letter to a local newspaper editor. *Id.* at 574. The Court stated: "[i]n these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.* at 573.

<sup>38</sup> See *Garcetti*, 547 U.S. at 418.

spoke as a citizen on a matter of public concern.<sup>39</sup> If not, “the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech.”<sup>40</sup> If the employee did speak on a matter of public concern, the second question should become “whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.”<sup>41</sup>

The Court concluded the “controlling factor in Ceballos’s case is that his expressions were made pursuant to his duties as a calendar deputy.”<sup>42</sup> It was ultimately held that when public employees make statements pursuant to their official duties, they do not speak as citizens for First Amendment purposes, and there is not constitutional protection against employer discipline.<sup>43</sup> Accordingly, Ceballos’s claim was unsuccessful.<sup>44</sup>

The dissent disagreed that there was a categorical difference “between speaking as a citizen and speaking in the course of one’s employment[.]”<sup>45</sup> Instead, the dissent would have held that “private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government’s stake in the efficient implementation of policy[.]”<sup>46</sup> The dissent expressed grave concerns about *Garcetti*’s far-reaching implications, noting there are significant issues with this new standard’s breadth of coverage.<sup>47</sup> In particular, the dissent was concerned about how the majority handled teachers’ academic freedoms and free speech rights within the classroom.<sup>48</sup> These concerns are valid as the majority explicitly denied

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

<sup>40</sup> *Id.* See *Connick v. Myers*, 461 U.S. 138, 147 (1983) (“We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior.”).

<sup>41</sup> *Garcetti*, 547 U.S. at 418.

<sup>42</sup> *Id.* at 421.

<sup>43</sup> *See id.*

<sup>44</sup> *See id.*

<sup>45</sup> *Id.* at 427.

<sup>46</sup> *Id.* at 428.

<sup>47</sup> *See id.* at 448.

<sup>48</sup> *See id.* at 438 (“This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor . . .”).

deciding whether public school teachers should have the same First Amendment protections as other government employees.<sup>49</sup>

Decisions involving teachers' freedom of speech in their academic capacity have thus been left for lower courts to decide. Just as the dissenters in *Garcetti* feared, "[w]hen *Garcetti* is applied to public education, the teachers generally lose."<sup>50</sup> Examples of teachers losing out on First Amendment protections include a 2010 Sixth Circuit decision in which a high school teacher was allegedly fired for teaching books that included information on LGBTQ+ issues and spirituality.<sup>51</sup> The court reasoned the teacher "[could not] overcome *Garcetti*"<sup>52</sup> because "she made her curricular and pedagogical choices in connection with her official duties as a teacher."<sup>53</sup> Further, the Sixth Circuit stated in light of *Garcetti*, "it is clear that the First Amendment does not generally 'insulate' [the teacher] 'from employer discipline,' even discipline prompted by her curricular and pedagogical choices and even if it otherwise appears . . . that the school administrators treated her shabbily."<sup>54</sup> The Court reasoned that "[o]nly the school board has ultimate responsibility for what goes on in the classroom, legitimately giving it a say over what teachers may (or may not) teach in the classroom."<sup>55</sup>

Similarly, a plaintiff in a Second Circuit case claimed she was fired for teaching her students about race and law enforcement.<sup>56</sup> The teacher, Jeena Lee-Walker, was observed by an assistant principal as she taught a lesson about the Central Park Five<sup>57</sup> and the trend in the United States to rush to judge

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<sup>49</sup> See *id.* at 425 ("We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.").

<sup>50</sup> Nathaniel Levy, *Garcetti's Impact on Teachers*, ONLABOR (June 3, 2019), <https://onlabor.org/garcettis-impact-on-teachers/>.

<sup>51</sup> See *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 335 (6th Cir. 2010) (stating Evans-Marshall distributed a book list that included the books *Fahrenheit 451*, *Heather Has Two Mommies*, and *Siddhartha*).

<sup>52</sup> *Id.* at 340.

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

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

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

<sup>56</sup> Levy, *supra* note 50.

<sup>57</sup> Aisha Harris, *The Central Park Five: 'We Were Just Baby Boys'*, N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/arts/television/when-they-see-us.html> ("In 1989 [five teenagers] were arrested in connection with the rape and assault of a white female jogger, and eventually convicted in a case that came to symbolize the stark injustices black and brown people experience within the legal system and in media coverage. They were convicted based partly on police-coerced

Black men.<sup>58</sup> The assistant principal told the teacher she should present a more balanced viewpoint and her lesson “would rile up Black boys in the class.”<sup>59</sup> The Court noted *Garcetti*’s lack of guidance regarding public school teachers: “there was no clearly established law premised on *Garcetti* under which the defendants would understand that Lee-Walker’s speech was protected by the First Amendment, and the defendants could have reasonably believed that *Garcetti* stripped her of those protections.”<sup>60</sup> The Court sided with the defendants and dismissed the case on qualified immunity grounds.<sup>61</sup> This holding clearly demonstrates the failure to recognize a teacher’s free speech rights in a classroom due to the notable ambiguity provided by *Garcetti*.

In these two cases, it did not matter that the teachers were trying to educate students on LGBTQ+ and racial issues within the United States: “[a]s sympathetic as these plaintiffs are, the cases are easily decided under *Garcetti*.”<sup>62</sup> Furthermore, these two cases demonstrate instances in which courts, through *Garcetti*, have prevented teachers from engaging in their First Amendment rights while teaching in the classroom. It follows that the *Garcetti* decision has and continues to negatively impact young students and their ability to learn about modern and important issues, thereby hindering their ability to become increasingly well-rounded and informed citizens.

In contrast, educators in college or university settings are more likely to succeed in exercising their freedom of speech in the classroom. Several circuits have noted their concern that “if *Garcetti* applied to college professors, universities could compel uniformity of thought.”<sup>63</sup> The Supreme Court has granted considerable leeway to institutions of higher education when compared to other schools. The Court has noted the importance

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confessions, and each spent between six and 13-plus years in prison for charges including attempted murder, rape and assault. The men maintained their innocence throughout the case, trial and prison terms, and all were exonerated after Matias Reyes, a convicted murderer and serial rapist, confessed to the crime in 2002.”).

<sup>58</sup> Levy, *supra* note 50.

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

<sup>60</sup> Lee-Walker v. N.Y. City Dep’t of Educ., 712 F. App’x 43, 45 (2d Cir. 2017).

<sup>61</sup> Levy, *supra* note 50.

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

<sup>63</sup> David L. Hudson, Jr., *Sixth Circuit Rejects Garcetti in Context of University Professor’s Classroom Speech*, FIRST AMEND. WATCH (Apr. 6, 2021), <https://firstamendmentwatch.org/sixth-circuit-rejects-garcetti-in-context-of-university-professors-classroom-speech/>.

of a college classroom, calling it a “marketplace of ideas,”<sup>64</sup> and explaining that “[t]he Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”<sup>65</sup>

Multiple cases demonstrate courts’ commitment to upholding the integrity of the collegiate atmosphere and the marketplace of ideas in the higher education realm through the preservation of professors’ speech rights. For example, in *Meriwether v. Hartop*,<sup>66</sup> Nicholas Meriwether, a philosophy professor at Shawnee State University, became concerned after reading a university policy that required professors to refer to students by their “preferred pronoun[s] . . . regardless of the professor’s convictions or views on the subject.”<sup>67</sup> After Meriwether misgendered a student and was corrected, Meriwether expressed doubt about whether he could refer to the student by their preferred pronouns due to his long-held religious beliefs.<sup>68</sup> Meriwether continued to misgender the student,<sup>69</sup> and after multiple complaints from the student and an investigation, the University reprimanded Meriwether and directed him to change the way he addressed transgender students.<sup>70</sup> If he refused to comply, he was told he would be subject to disciplinary and punitive actions.<sup>71</sup>

The University argued that *Garcetti* barred Meriwether’s free-speech claim because his actions in the classroom as a public university professor fell within the realm of government job-duty speech.<sup>72</sup> However, the Sixth Circuit disagreed,<sup>73</sup> and honed in on *Garcetti*’s explicit silence when it came to scholarship or teaching.<sup>74</sup> In the absence of instruction from the Supreme Court in *Garcetti*, the Sixth Circuit turned to prior decisions by the Supreme Court for guidance.<sup>75</sup> “Those decisions have ‘long recognized that, given the important purpose of public education

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<sup>64</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

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

<sup>66</sup> 992 F.3d 492 (6th Cir. 2021).

<sup>67</sup> *Id.* at 498.

<sup>68</sup> *See id.* at 499.

<sup>69</sup> *See id.*

<sup>70</sup> *Id.* at 501.

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

<sup>72</sup> *See Hudson, supra note 63.*

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

<sup>74</sup> *See Meriwether*, 992 F.3d at 504.

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

and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”<sup>76</sup> Based on its analysis of two previous Supreme Court cases, the Sixth Circuit concluded “that the First Amendment protects the free-speech rights of professors when they are teaching.”<sup>77</sup> The Sixth Circuit emphasized its concern that controlling speech in a higher education environment can lead to and “compel ideological conformity.”<sup>78</sup> The Fourth, Fifth, and Ninth Circuits have reached similar conclusions regarding public university professors’ freedom of speech rights.<sup>79</sup> Some legal analysts found these decisions to be encouraging, stating that “[a]cademic freedom should be the rule, not the exception.”<sup>80</sup>

While these decisions have far-reaching and positive implications for higher educational settings, they do not appear to address public elementary, middle, or high school educational facilities. In collegiate settings, federal judges have granted professors increased protection to teach without fear of employment consequences because college professors are meant to “explore edgy topics that push the boundaries of students’ comfort zones.”<sup>81</sup> Conversely, curriculum decisions are more standardized in public K-12 schools when compared to college settings, and federal judges have refrained from granting the

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<sup>76</sup> *Id.* (citing *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003)).

<sup>77</sup> *Id.* at 505 (stating that *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), and *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967), establish this principle).

<sup>78</sup> *Id.* at 506.

<sup>79</sup> *Id.* at 505 (“In *Adams v. Trustees of the University of North Carolina–Wilmington*, the Fourth Circuit held that *Garcetti* left open the question whether professors retained academic-freedom rights under the First Amendment. It concluded that the rule announced in *Garcetti* does not apply ‘in the academic context of a public university.’ The Fifth Circuit has also held that the speech of public university professors is constitutionally protected, reasoning that ‘academic freedom is a special concern of the First Amendment.’ Likewise, the Ninth Circuit has recognized that ‘if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court.” (first citing *Adams*, 640 F.3d 550 (4th Cir. 2011); then citing *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007); then citing *Buchanan v. Alexander*, 919 F.3d 847, 852–53 (5th Cir. 2019); and then citing *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014))).

<sup>80</sup> See Hudson, *supra* note 63.

<sup>81</sup> Frank LoMonte, *Lawsuits Over Bans on Teaching Critical Race Theory are Coming—Here’s What Won’t Work, and What Might*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV. (July 26, 2021), <https://www.mtsu.edu/first-amendment/post/2006/lawsuits-over-bans-on-teaching-critical-race-theory-are-coming-here-s-what-won-t-work-and-what-might>.

same autonomy to public K-12 teachers.<sup>82</sup> This indicates that K-12 educators who aim to instruct their students about racism and CRT are likely banned from doing so due to *Garcetti's* ambiguities and courts' failure to recognize an exception for public school teachers as they have for college-level professors.

Clearly, there are notable differences between collegiate environments and K-12 classrooms, including parental involvement, tuition, and a differing emphasis on the marketplace of ideas. However, these differences do not excuse *Garcetti's* distinction between the two educational spheres which can shield K-12 students from receiving a well-rounded education through the teachings of a variety of different perspectives. Furthermore, the distinction between the two educational contexts could create an exclusionary problem in which only students who are able to attain higher education may be exposed to perspectives like CRT.

## II. WHAT IS CRITICAL RACE THEORY?

CRT began in the 1970s, after a group of activists, lawyers, and scholars realized the advances of the 1960s civil rights movement had begun to lose momentum and progress began rolling back.<sup>83</sup> The movement continued to gain traction in the 1980s and 1990s.<sup>84</sup> CRT is a theory that “recognizes that racism is not a bygone relic of the past. Instead, it acknowledges that the legacy of slavery, segregation, and the imposition of second-class citizenship on Black Americans and other people of color continue to permeate the social fabric of this nation.”<sup>85</sup> Despite proponents of CRT stating that in and of itself, the theory is not divisive, the theory “becomes divisive when people use it for particular kinds of political ends.”<sup>86</sup> This has proven to be true, whether it be an executive order signed by President

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<sup>82</sup> *Id.*; see also Walsh, *supra* note 28 (“While K-12 teachers retain some protections for their comments on issues of public concern, they don’t have much in the way of academic freedom to veer from the curriculum or infuse their own experiences and views into the classroom.”).

<sup>83</sup> RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 4 (3d ed. 2017).

<sup>84</sup> George, *supra* note 18.

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

<sup>86</sup> Edirin Oputu, *Untangling the Controversy Around Critical Race Theory*, TEMPLE UNIV., (Aug. 5, 2021), <https://news.temple.edu/news/2021-08-05/untangling-controversy-around-critical-race-theory>.

Donald Trump or a state-wide school ban, CRT has faced its fair share of political criticism and backlash in recent years.<sup>87</sup>

In many ways, CRT builds on and gains insight from two previous movements, Critical Legal Studies and radical feminism.<sup>88</sup> Critical Legal Studies rejects the idea that the law is a neutral practice dissociated from social and political ideas.<sup>89</sup> This movement is where CRT derived the idea that “the law could be complicit in maintaining an unjust social order.”<sup>90</sup> However, CRT departs from Critical Legal Studies because the movement acknowledges the answer to the enduring issues of racism is not necessarily destabilizing the law; rather, “critical race theorists recognized that, while the law could be used to deepen racial inequality, it also held potential as a tool for emancipation and for securing racial equality.”<sup>91</sup> CRT built on ideas surrounding power and the construction of social roles from radical feminism, CRT acknowledges the largely invisible patterns of historical domination in the United States, such as the patriarchy.<sup>92</sup> CRT also incorporates ideas from conventional civil rights thought, including the instinct to correct historical wrongs and an understanding for community empowerment.<sup>93</sup>

An early description of CRT, coauthored by four of the theory’s foundational figures, included six defining elements of the theory,<sup>94</sup> including:

1. CRT recognizes that racism is endemic to American life.
2. CRT expresses skepticism toward dominant legal claims of neutrality, objectivity, colour-blindness, and meritocracy.

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<sup>87</sup> See George, *supra* note 18 (“In September 2020, President Trump issued an executive order excluding from federal contracts any diversity and inclusion training interpreted as containing ‘Divisive Concepts,’ ‘Race or Sex Stereotyping,’ and ‘Race or Sex Scapegoating.’ Among the content considered ‘divisive’ is Critical Race Theory (CRT).”).

<sup>88</sup> DELGADO & STEFANCIC, *supra* note 83, at 5.

<sup>89</sup> George, *supra* note 18.

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

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

<sup>92</sup> DELGADO & STEFANCIC, *supra* note 83, at 5.

<sup>93</sup> *Id.* at 6.

<sup>94</sup> DAVID GILLBORN & GLORIA LADSON-BILLINGS, CRITICAL RACE THEORY 3 (Paul Atkinson et al. eds., 2019).



3. CRT challenges ahistoricism and insights on a contextual/historical analysis of the law.
4. CRT insists on recognition of the experiential knowledge of people of colour.
5. CRT is interdisciplinary and eclectic.
6. CRT works toward the end of eliminating racial oppression as a part of the broader goal of ending all forms of oppression.<sup>95</sup>

CRT does more than simply examine the Black/white racial binary; it recognizes “racism has impacted the experiences of various people of color.”<sup>96</sup> To this effect, CRT now encompasses branches that have evolved to focus on the experiences of many minorities in the United States, including Indigenous, Latino, and Black individuals and communities.<sup>97</sup> CRT’s continued expansion signifies its strength as a living and evolving theory.<sup>98</sup>

Criticism of CRT has grown as the theory has matured,<sup>99</sup> it can be divided into two camps – internal and external criticism.<sup>100</sup> Randall Kennedy is an external critic of CRT.<sup>101</sup> Kennedy states that legal scholarship can be compared to a marketplace, good work is acknowledged by recognition; therefore, “pointing out that certain texts have fallen into a void does not, by itself, prove discrimination.”<sup>102</sup> Instead, it must be proven that the works were “of high quality and deserved recognition.”<sup>103</sup> Additionally, Daniel Farber and Suzanna Sherry are external CRT critics, they cite to other minorities and how they have achieved great levels of success despite their disadvantages.<sup>104</sup>

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

<sup>96</sup> George, *supra* note 18.

<sup>97</sup> Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/article/what-is-critical-race-theory.html>.

<sup>98</sup> *See id.*

<sup>99</sup> *See* DELGADO & STEFANCIC, *supra* note 83, at 102 (“During the movement’s early years, the media treated [CRT] relatively gently. As it matured, however, critics felt freer to speak out.”).

<sup>100</sup> *See id.* at 102–08.

<sup>101</sup> *Id.* at 102.

<sup>102</sup> *Id.* at 103.

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

<sup>104</sup> *Id.* (“Citing the example of Jews and Asians—two minority groups that have achieved high levels of success by conventional standards—they argued against the idea that the game is rigged against minorities. If conventional tests and standards are unfair and biased against minorities, as the critics assert, how can one account for the success of these two groups?”).

In response, advocates of CRT believe Kennedy entirely misses the idea of the theory.<sup>105</sup> Ironically, Kennedy approached the theory through conventional criteria, meaning he wholly avoided the opportunity to engage in the analysis that CRT supports.<sup>106</sup> Perhaps the work of minorities is not best analyzed under a lens that has overwhelmingly benefitted those in the majority. As for Farber and Sherry, CRT advocates responded by saying the two had “confused criticism of a standard with criticism of individuals who performed well under that standard.”<sup>107</sup>

Internal criticisms of CRT include criticisms within the community of those who contribute to the theory and are often outside of the public’s view. One such criticism is that CRT does not take enough of an activist stance and that its value is minimized if it simply points out issues without providing solutions.<sup>108</sup> To this point, most advocates agree the theory and practice should work together and are currently developing ways to implement it.<sup>109</sup> Another internal critique argues the theory strays from its roots and dwells on concerns that only pertain to middle-class minorities such as “microaggressions, racial insults, unconscious discrimination, and affirmative action in higher education.”<sup>110</sup>

### III. DESCRIPTIONS OF CONSERVATIVE BACKED BILLS BANNING CRITICAL RACE THEORY

From local to federal government, many conservative politicians have made a concerted effort to prevent public school educators from incorporating CRT into their lessons. “These campaigns are not just based on ignorance of how critical race theory developed and is now applied, but also represent an attempt to stoke a reactionary resistance, rather than a broader understanding.”<sup>111</sup> Conservative efforts against CRT began as

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<sup>105</sup> *See id.* at 103–04.

<sup>106</sup> *See id.*

<sup>107</sup> *Id.* at 104.

<sup>108</sup> *See id.* at 105.

<sup>109</sup> *See id.* at 106 (discussing “Derrick Bell’s theories of cultural and educational self-help[.]” and “Lani Guinier’s efforts to reform electoral democracy . . .”).

<sup>110</sup> *Id.* at 106–07.

<sup>111</sup> *What Is Critical Race Theory, and Why is Everyone Talking About It?*, COLUM. NEWS (July 1, 2021), <https://news.columbia.edu/news/what-critical-race-theory-and-why-everyone-talking-about-it-0>.

racial justice and Black Lives Matter protests occurred throughout the summer of 2020.<sup>112</sup> During this time, Fox News featured segments with conservative activist, Christopher F. Rufo.<sup>113</sup> Rufo disparaged CRT on air on multiple occasions.<sup>114</sup> In August of 2020, Rufo tweeted: “My goal is simple; to persuade the President of the United States to issue an executive order abolishing critical race theory in the federal government.”<sup>115</sup>

Rufo found quick success with his goal. A month after Rufo’s statement, the Trump administration became one of the first to attack CRT.<sup>116</sup> The September 2020 Office of Management and Budget memorandum details M-20-34, a memorandum issued at President Trump’s direction.<sup>117</sup> The memo states that agencies are permitted and guided to search “for terms including, but not limited to: ‘critical race theory,’ ‘white privilege’ . . . and ‘unconscious bias.’ When used in the context of diversity training, these terms may help to identify the type of training prohibited by the E.O. [executive order][.]”<sup>118</sup> These federal memorandums sent a message to conservative lawmakers—CRT is dangerous and should not be taught.<sup>119</sup> Furthermore, Donald Trump’s “exit from office didn’t put an end to the assault on critical race theory . . . it only amplified it.”<sup>120</sup>

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<sup>112</sup> Fabiola Cineas, *What the Hysteria Over Critical Race Theory is Really All About*, VOX (June 24, 2021, 10:50 AM), <https://www.vox.com/22443822/critical-race-theory-controversy>.

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

<sup>114</sup> *See id.* (stating that in mid-August, “[Rufo] told Tucker Carlson that he was ‘declaring a one-man war against critical race theory in the federal government, and I’m not going to stop these investigations until we can abolish it within our public institutions.’”).

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

<sup>116</sup> Stephen Kears, *GOP Lawmakers Intensify Effort to Ban Critical Race Theory in Schools*, PEW (June 14, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/06/14/gop-lawmakers-intensify-effort-to-ban-critical-race-theory-in-schools>.

<sup>117</sup> Memorandum from Russell T. Vought on Ending Employee Trainings that Use Divisive Propaganda to Undermine the Principle of Fair and Equal Treatment for the Heads of Executive Departments and Agencies 1 (Sept. 28, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-37.pdf>.

<sup>118</sup> *Id.* at 2.

<sup>119</sup> *See* Char Adams, *Republicans Announce Federal Bills to “Restrict the Spread” of Critical Race Theory*, NBC NEWS (May 12, 2021, 4:54 PM), <https://www.nbcnews.com/news/nbcblk/republicans-announce-federal-bills-restrict-spread-critical-race-theory-n1267161> (“Conservative leaders began focusing on critical race theory after Trump used the decades-old academic term in a September 2020 memo . . .”).

<sup>120</sup> Cineas, *supra* note 112.

Despite President Joe Biden's rescission of the order, "Republican state legislators have renewed the charge [ ]" when it comes to the banning of CRT.<sup>121</sup> Multiple conservative state representatives have made public comments criticizing CRT and promising their constituents that they will work to keep it out of public schools.<sup>122</sup> Though not all of the bills specifically name CRT, many of the bills mirror each other in their effort to stop schools from teaching about the country's history of racism, sexism, and other "divisive concepts."<sup>123</sup> 17 states have passed legislation to that effect,<sup>124</sup> and at least 12 additional states have introduced similar legislation.<sup>125</sup>

Beyond the outright ban on teaching CRT that some of these bills propose, many of them also penalize teachers and schools that allow CRT to be taught.<sup>126</sup> For example, in Michigan, if schools teach students that the Declaration of Independence or the United States Constitution are "fundamentally racist[,] up to 5% of their funding will be withheld.<sup>127</sup> West Virginia's bill is particularly harsh, as it declares that a "teacher may be dismissed or not reemployed for teaching, instructing or training any student to believe any of the divisive concepts."<sup>128</sup>

According to critics, many of these proposed laws make one thing clear – the conservative politicians instituting these bills do not understand CRT. "The critical race theory cited by Republican lawmakers and conservative pundits is often nebulous, comprising equity and diversity initiatives, workplace trainings, school curricula, reading lists and selectively edited quotations of critical race theorists."<sup>129</sup> Rather than taking issue with specific texts or pillars of the theory, critics of the bills argue

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<sup>121</sup> Kears, *supra* note 116.

<sup>122</sup> *See id.* ("Missouri state Rep. Brian Seitz, a Republican, said in a phone interview that teaching critical race theory in schools would create 'another great divide in America.' He introduced a bill that would ban critical race theory from all publicly funded schools, including universities . . . Tennessee state Sen. Brian Kelsey also argued that critical race theory will split Americans. 'Critical Race Theory creates divisions within classrooms and will cause irreversible damage to our children who hold the future of our great country . . .').

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

<sup>124</sup> *See* Schwartz, *supra* note 21.

<sup>125</sup> *See id.*

<sup>126</sup> *See* Kears, *supra* note 116.

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

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

<sup>129</sup> *Id.*

that “critical race theory has seized the attention of legislators because it’s ‘a provocative term’ that evokes a sense of challenge, especially to people unfamiliar with it.”<sup>130</sup> Rather than receiving attention for the actual content of the theory, CRT “is just now receiving widespread attention because it has morphed into a catchall category, one used by Republicans who want to ban anti-racist teachings and trainings in classrooms and workplaces across the country.”<sup>131</sup>

This misunderstanding is demonstrated by various state laws’ definitions of CRT. For example, the Florida law defines CRT as any “theory that racism is not merely the product of prejudice.”<sup>132</sup> Idaho defines CRT as a “teaching that treats people as ‘inherently responsible for actions committed in the past by other members of the same . . . race.’”<sup>133</sup> These laws do not offer clear guidance on what it means to ban CRT, and when “taken literally, some of the definitions also extend absurdly far.”<sup>134</sup> The Florida and Idaho bills are similar in that they both “target suggestions that someone should be responsible for disadvantages now faced by Blacks and other minorities, beyond a narrowly defined coterie of ‘bad’ discriminators.”<sup>135</sup>

Beyond the limitation of teachers’ speech rights implicated by each of these bills, they also act as a censor to an entire emerging school of thought. “The idea that audience discomfort provides a justification for censorship, that is, is at profound odds with our free speech tradition.”<sup>136</sup> With a new standard or outright overruling of *Garcetti*, this would be a completely different conversation.

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<sup>130</sup> *Id.*

<sup>131</sup> Cineas, *supra* note 112.

<sup>132</sup> Aziz Huq, *The Conservative Case Against Banning Critical Race Theory*, TIME (July 13, 2021, 7:00 AM), <https://time.com/6079716/conservative-case-against-banning-critical-race-theory/>.

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

<sup>134</sup> *Id.* (“Florida’s [law] could prohibit Nobel Prize-winning University of Chicago economist Gary Becker’s work on discrimination, because Becker identifies market concentration and education (not ‘merely’ prejudice) as causal predicates of discrimination.”).

<sup>135</sup> *Id.*

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

#### IV. SCHOOLS AND CRITICAL RACE THEORY IN THE CONTEXT OF *GARCETTI V. CEBALLOS* AND FUTURE IMPLICATIONS

As discussed above, *Garcetti* has dangerous implications for teachers generally, but more specifically, in relation to the teachings of CRT. A real-life example involves Tennessee public high school teacher, Matt Hawn.<sup>137</sup> Hawn was teaching his contemporary issues class in August 2020 when he faced major consequences.<sup>138</sup> Hawn was discussing recent events in Kenosha, Wisconsin in which protests began as a result of a police officer shooting a young black man in the back.<sup>139</sup> The teacher went on to discuss Kyle Rittenhouse, the white 17-year old accused of shooting and killing two of the protestors.<sup>140</sup> Hawn asked his students: “What are we going to do about racism in the U.S.?”<sup>141</sup> He faced criticism for this lesson from parents and a county official.<sup>142</sup> Later on, Hawn ran into additional issues after he assigned an *Atlantic* article by Ta- Nehisi Coates after the January 6<sup>th</sup> insurrection.<sup>143</sup> The article, titled *The First White President*, argued that President Trump was elected on “the strength of white grievances.”<sup>144</sup> After another parent complained, Hawn was issued an official reprimand.<sup>145</sup> Finally, after showing his students a poem performance entitled *White Privilege*, Hawn received notice that he was being fired.<sup>146</sup>

Hawn’s firing took place shortly after Tennessee passed anti-Critical Race Theory legislation; this is likely to have shaped the environment around Hawn’s firing.<sup>147</sup> He expressed concern over the silencing of this type of material. Hawn stated:

I just want [the students] to be able to understand and develop those critical-thinking skills that they

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<sup>137</sup> Emma Green, *He Taught a Ta-Nehisi Coates Essay. Then He Was Fired*, THE ATLANTIC (Aug. 17, 2021), <https://www.theatlantic.com/politics/archive/2021/08/matt-hawn-tennessee-teacher-fired-white-privilege/619770/>.

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

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

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

<sup>143</sup> *See id.*

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

<sup>145</sup> *Id.*

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

<sup>147</sup> *See id.*

can take out into the world . . . I've never graded a student based on their attachment to an idea that we discuss in class . . . [m]y goal as a teacher is to have them be able to evaluate a claim, think critically about it, and then articulate how they feel about that claim.<sup>148</sup>

Hawn's story demonstrates that even in a class about contemporary issues, which one would assume regularly involves difficult conversations, a teacher can be fired for providing his students with relevant information to critically analyze for themselves. Not only can this discourage great teachers from bringing up important topics, but it can also discourage passionate individuals from pursuing the teaching profession altogether.<sup>149</sup> Furthermore, there have been documented instances of teachers quitting specifically due to the debate regarding CRT.<sup>150</sup>

Alternatively, some argue *Garcetti* should be explicitly applied to classrooms because "it is in students' best interests to vest ultimate power over the classroom with democratically accountable school boards[.]"<sup>151</sup> This argument places a great amount of blind trust in school boards. With the recent efforts from conservative lawmakers to regulate what teachers can and cannot teach their students, trusting that school boards will protect students' rights to well-rounded educations cannot be considered an automatic luxury. Treating teachers' First Amendment rights differently than other government employees would allow for extra protection to ensure that students'

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

<sup>149</sup> See *id.*; Tony Mauro, *Perspective: Can The First Amendment Protect Educators From Being Fired For Teaching About Race?*, FREEDOM F. (Aug. 18, 2021), <https://www.freedomforum.org/2021/08/18/perspective-can-the-first-amendment-protect-educators-from-being-fired-for-teaching-about-race/>.

<sup>150</sup> See Shani Saxon, *Critical Race Theory Battles are Driving Black Educators Out of Their Jobs*, COLORLINES (July 13, 2021, 10:31 AM), <https://www.colorlines.com/articles/critical-race-theory-battles-are-driving-black-educators-out-their-jobs> ("Rydell Harrison, southwestern Connecticut's first Black school superintendent, resigned from his job in June after parents started to complain that he was an 'activist' and that the district's newly implemented diversity efforts represented Harrison's 'agenda.'"); Gabriela Miranda, *Connecticut Elementary School Teacher Resigns Over Critical Race Theory Curriculum*, USA TODAY (Sept. 2, 2021, 11:25 AM), <https://www.usatoday.com/story/news/education/2021/09/02/teacher-quits-over-critical-race-theory/5693550001/> ("Jennifer Tafuto, a Manchester Public School teacher for six years, resigned over the district's critical race theory curriculum. Tafuto said the curriculum pinned students against one another[.]").

<sup>151</sup> Paul Forster, *Teaching in a Democracy: Why the Garcetti Rule Should Apply to Teaching in Public Schools*, 46 GONZ. L. REV. 687, 688–89 (2011).

exposure to various concepts are not being limited solely due to the political demographics within the state in which they reside. Another argument for *Garcetti*'s rightful application to teachers highlights the idea that "students are a captive audience[.]"<sup>152</sup> The response to this argument begs the question: would allowing teachers the ability to discuss CRT potentially expose students and their parents to topics they may disagree with? Perhaps, but the alternative is far more dangerous: state-imposed, politically motivated censorship.

This state-imposed censorship goes beyond CRT and will likely remain a topic of conversation as various bills make their way through state governments. For example, Florida House Bill 1557, dubbed the "Don't Say Gay" bill, limits discussions about sexual orientation or gender identity in public school classrooms.<sup>153</sup> This is not an isolated problem as other states are taking similar steps. In early March of 2022, Georgia introduced a strikingly similar bill that took aim at discussions of sexual orientation and CRT in public schools.<sup>154</sup> These bills undoubtedly rely upon the limitations imposed on teachers by *Garcetti* and could have the effect of both silencing teachers and isolating young students.

Granting public school teachers an exception under *Garcetti* comes with valid concerns. If we grant teachers the ability to discuss CRT in their classrooms under the First Amendment, what happens when a teacher does not agree with CRT and refuses to discuss it? The answer to this question is quite simple: granting teachers a First Amendment exception under *Garcetti* would not present a compelled speech issue, as the First Amendment would also guarantee teachers the right not to speak.<sup>155</sup>

## V. POSSIBLE REMEDIES BEYOND *GARCETTI V. CEBALLOS*

Even with *Garcetti*'s current shadow cast over any litigation regarding educators' ability to teach CRT in public

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<sup>152</sup> *Id.* at 697.

<sup>153</sup> See H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022).

<sup>154</sup> See Brooke Migdon, 'Don't Say Gay' Bill is Introduced in Georgia, THE HILL (Mar. 9, 2022), <https://thehill.com/changing-america/respect/equality/597533-dont-say-gay-bill-is-introduced-in-georgia>.

<sup>155</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977).



schools, other avenues may be available to fight the newly implemented conservative bills. One potential argument involves the Fourteenth Amendment's Due Process Clause.<sup>156</sup> The Fourteenth Amendment does not allow the government to arbitrarily revoke citizens' privileges or benefits, including a public school job.<sup>157</sup> Arguably, many of the newly instituted CRT laws are unclear, leaving educators to guess what they can and cannot teach.<sup>158</sup> If teachers have to guess what lessons may or may not result in their firing, it not only creates a potential due process claim, but it also instills fear among a class of people tasked with educating a new generation. The vagueness of many of these new laws may present a legitimate due process claim and could be a strong argument for teachers in the context of incorporating CRT in public schools as these newly instituted anti-CRT laws are challenged in court.<sup>159</sup>

However, emphasizing students' and not teachers' rights may be the most promising legal strategy that allows for the teaching of CRT in schools.<sup>160</sup> "Students . . . could challenge these broader laws by arguing they have a First Amendment right to take in lessons and information from schools."<sup>161</sup> This strategy invokes an interesting question – do students have more First Amendment protections than teachers?<sup>162</sup> In *Tinker v. Des Moines*, the 1969 Supreme Court implied equality between the two: "students (n)or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>163</sup> However, *Garcetti* shifted the balance.<sup>164</sup> One expert pointed out that after *Garcetti*, if a teacher and a student wore identical political t-shirts to class, the teacher could be asked to change while the student could not.<sup>165</sup>

This strategy's potential is demonstrated in *González v. Douglas*, in which a student successfully challenged broad laws prohibiting educators from teaching divisive race issues.<sup>166</sup> In this

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<sup>156</sup> See Mauro, *supra* note 149.

<sup>157</sup> LoMonte, *supra* note 81.

<sup>158</sup> Mauro, *supra* note 149.

<sup>159</sup> See LoMonte, *supra* note 81.

<sup>160</sup> Mauro, *supra* note 149.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

<sup>164</sup> See *id.*

<sup>165</sup> See *id.*

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

case, an Arizona law banned classes “designed primarily for pupils of a particular ethnic group[.]”<sup>167</sup> The district court held the First Amendment protects rights to receive information and ideas.<sup>168</sup> More specifically, the court found this right applies in the context of school curriculum design.<sup>169</sup> “The right is infringed if the state ‘remove[s] materials otherwise available in a local classroom unless [that] action[ ] [is] reasonably related to legitimate pedagogical concerns.’”<sup>170</sup> The court found evidence that the defendants were pursuing the discriminatory ends of the law in order to make political gains.<sup>171</sup> The court concluded “decisions regarding the [program at issue] were motivated by a desire to advance a political agenda by capitalizing on race-based fears.”<sup>172</sup> This case demonstrates while “[i]t wasn’t clear that teachers or administrators had a constitutional right to offer particular courses[,] . . . it was clear that students had a right to receive information, which couldn’t be taken away for a discriminatory reason.”<sup>173</sup>

The idea that students have a right to receive information is rooted in Supreme Court precedent. In the 1982 case, *Board of Education v. Pico*,<sup>174</sup> the Court found the First Amendment bars public schools from intentionally depriving students of educational access to ideas the school does not agree with.<sup>175</sup> The Court held the school board “rightly possess[ed] significant discretion to determine the content of their school libraries. But that discretion [could] not be exercised in a narrowly partisan or political manner.”<sup>176</sup> Whether or not the students’ rights were violated turned on the motivation behind the petitioners’ actions.<sup>177</sup> “If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners’ decision, then petitioners ha[d] exercised their discretion in

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<sup>167</sup> *González v. Douglas*, 269 F. Supp. 3d 948, 957 (D. Ariz. 2017).

<sup>168</sup> *Id.* at 972.

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

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

<sup>171</sup> *Id.* at 973.

<sup>172</sup> *Id.* at 974.

<sup>173</sup> LoMonte, *supra* note 81.

<sup>174</sup> 457 U.S. 853 (1982).

<sup>175</sup> *See id.* at 871 (“Our Constitution does not permit the official suppression of *ideas*.”).

<sup>176</sup> *Id.* at 870.

<sup>177</sup> *Id.* at 871.

violation of the Constitution.”<sup>178</sup> Impermissible motivations included racial animus.<sup>179</sup> The Court further clarified its decision had no impact on a school board’s choice to *add* books, but rather only implicated a school board’s decision to *remove* books.<sup>180</sup>

Both *González* and *Pico* are clearly applicable to public educators’ dilemma when it comes to teaching CRT. It seems unlikely states will have a legitimate, non-discriminatory reason for banning teachings of CRT that will pass a court’s scrutiny, just as the school board failed to possess in *González*.<sup>181</sup> Furthermore, as in *González*, it does not seem particularly challenging for plaintiffs to establish that school boards and states are instituting bans on CRT for political gain. Each of these laws followed from a staunchly conservative executive’s declaration, and each of these laws have been enacted by conservative lawmakers.<sup>182</sup> This is no coincidence; this issue is political.

*Pico* appears even more relevant for students who seek to challenge the bans on CRT. *Pico* holds students may not be deprived of access to information simply because school boards disagree with the material.<sup>183</sup> Therefore, just because a state or school board disagrees with the fundamental teachings of CRT does not mean it can outright ban educational access to it. Furthermore, the defendants in a CRT case would clearly meet the test laid out in *Pico* – the states/school boards that are implementing CRT bans are putting them in place (1) with the clear *intention* of depriving students with access to information about CRT and, (2) this intent was a driving factor, if not, *the* driving factor behind the bans themselves. Furthermore, the

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 871–72.

<sup>181</sup> See *González v. Douglas*, 269 F. Supp. 3d 948, 974 (D. Ariz. 2017).

<sup>182</sup> See Jennifer Schuessler, *Bans on Critical Race Theory Threaten Free Speech, Advocacy Group Says*, N.Y. TIMES, <https://www.nytimes.com/2021/11/08/arts/critical-race-theory-bans.html> (Nov. 9, 2021) (“Republican legislatures have rushed to introduce bills banning [CRT] . . . [b]ut the measures have been widely assailed by Democrats[.]”); see also Adams, *supra* note 119 (“Some 30 GOP representatives have signed on to . . . the Stop CRT Act.”). Those who have authored or sponsored legislation in their state include Kentucky GOP state Rep. Lynn Bechler, Republican Idaho state Rep. Wendy Horman, Republican state Rep. John Ragan of Tennessee, and Republican Missouri state Rep. Brian Seitz. See Allan Smith, *Republicans Newly Alarmed by Critical Race Theory See Bans as ‘More of a Preventative’*, NBC NEWS (July 23, 2021, 6:55 PM), <https://www.nbcnews.com/politics/politics-news/republicans-newly-alarmed-critical-race-theory-see-bans-more-preventative-n1271024>.

<sup>183</sup> *Pico*, 457 U.S. at 871.

context of *Pico* should not make a difference to CRT. Just as a library may not *remove* books with concepts the school board disagrees with as demonstrated by *Pico*, it follows a principal should not be allowed to *remove* a lesson plan from a teacher's schedule or an assigned reading on a syllabus.

These cases demonstrate how a student may be able to sue for the right to learn about CRT in public schools. This idea, coupled with potential for a Fourteenth Amendment Due Process claim by a teacher, demonstrate two alternative avenues that may allow for the teaching of CRT in public schools to continue. While these secondary avenues demonstrate hope for the future of CRT, they also highlight significant frustration. The right to teach CRT and other "divisive concepts" should not be at the mercy of creative litigation and legal loopholes. The problem would be made far simpler, and in fact be no problem at all, if *Garcetti* did not leave teachers' free speech rights at the mercy of legal loopholes. This concept is far too important to be left to creative lawyering.

### CONCLUSION

Critical Race Theory is a decades-old school of thought rooted in important and widely recognized historical movements and philosophies. The public school system has a distinct duty to equip its students with access to information so they can develop and shape their own personal opinions. This duty includes access to subject matter like CRT. Beyond a distinct failure in their responsibility to their students, when officials and school boards decide to ban students from accessing information or ideas with which the school board disagrees, they act unconstitutionally. Despite this act being described as unconstitutional by decades-old cases such as *Board of Education v. Pico*, K-12 teachers may still face serious consequences, such as losing their job, if they choose to teach, or even mention CRT in their classrooms. Given the subject matter of CRT, and those who have been disciplined for teaching it, this issue has and will continue to have a disproportionate effect on students and teachers of color.

This point of contention between long-standing Supreme Court case precedent and modern conservative legislation is in large part due to *Garcetti's* failure to carve out a needed exception for public school teachers. Ironically, in *Garcetti*, the Court

specifically recognized teachers and their unique situations in comparison to other government employees. Even so, the Court skirted the responsibility of resolving this predicament, instead deciding that simply pointing out the problem would be sufficient.

Until the Supreme Court decides to remedy the discrepancy it created, students and teachers are left to the mercy of creative lawyering and legal loopholes. Two promising remedies stand out. First, a teacher may succeed against one of the newly instituted anti-CRT laws with a potential claim of unconstitutional vagueness under the Due Process Clause. Second, students may succeed in a suit against anti-CRT legislation by relying on their First Amendment right to have access to information. Lawsuits using these techniques may become more commonplace as conservative lawmakers continue to pass anti-CRT laws. Even so, without a change to K-12 teachers' First Amendment rights under *Garcetti*, the ability to teach students about CRT in public K-12 schools remains in serious danger.

**FAITH BY CHOICE:  
AN ARGUMENT FOR EXPANDING MATURE  
MINOR PROVISIONS IN NORTH CAROLINA**

Lauren V. Engle\*

**ABSTRACT**

In response to the public health crisis created by Covid-19, North Carolina granted certain “mature minors” the right to consent to vaccination over the objections of their parents. But these same minors are still barred from making independent healthcare decisions in other contexts. As studies continue to reveal the potential for minors to fully participate in their own healthcare, the legal system must decide how much “personal liberty” to grant minors. Although the law in North Carolina has yet to answer that question, SL 2021-110 indicates a higher degree of trust which could open the way for more consistent legal treatment of minor rights. The proposal in this note provides a legislative option which would secure the personal integrity of capable minors while still providing a legal outlet for parents to retain their constitutional control over their children.

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## INTRODUCTION

In the eyes of the law, a child transforms into a fully functioning adult at the stroke of midnight on their eighteenth birthday.<sup>1</sup> Until this moment, the law assumes an individual lacks the “maturity, experience, and capacity for judgment required for making life’s difficult decisions.”<sup>2</sup> This divide is even more pronounced in the medical setting, where minors are “assumed to lack sufficient cognitive and conative maturity to craft autonomous health care choices” and therefore, are incapable of giving legally binding consent.<sup>3</sup> Although the Supreme Court has declared that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,”<sup>4</sup> the constitutional rights of minors are clearly much more limited than those of adults.<sup>5</sup> This legal ambiguity has led state courts to widely disparate results regarding a minor’s right to choose their own medical treatment.<sup>6</sup>

Questions about the medical decisional capacity of minors are further complicated by differing religious beliefs. Religious exceptions to certain medical procedures are frequently upheld under the free exercise clause of the First Amendment.<sup>7</sup> But in cases involving minors, courts generally conflate the religious beliefs of parents with those of their minor children.<sup>8</sup> Failing to address either the personal maturity or religious integrity of

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<sup>1</sup> Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 557–58 (2000) (noting that various rights accrue at different ages, but the age of majority is the baseline at which “presumptive adult legal status is attained”).

<sup>2</sup> *Parham v. J. R.*, 442 U.S. 584, 602 (1979).

<sup>3</sup> Martin T. Harvey, *Adolescent Competency and the Refusal of Medical Treatment*, 13 HEALTH MATRIX 297, 299 (2003); see also *Parham*, 442 U.S. at 603.

<sup>4</sup> *In re Gault*, 387 U.S. 1, 13 (1967).

<sup>5</sup> See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 649 (1979) (restricting access to abortions for minors); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); *In re Gault*, 387 U.S. at 33–55.

<sup>6</sup> See, e.g., *Novak v. Cobb Cnty. Kennestone Hosp. Auth.*, 849 F. Supp. 1559 (N.D. Ga. 1994).

<sup>7</sup> U.S. CONST. amend. I.; see e.g., *Pub. Health Trust v. Wons*, 541 So. 2d 96, 97 (Fla. 1989); *St. Mary's Hosp. v. Ramsey*, 465 So. 2d 666, 669 (Fla. Dist. Ct. App. 1985); *In re Brown*, 689 N.E.2d 397, 405 (Ill. App. Ct. 1997).

<sup>8</sup> See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *In re Sampson*, 278 N.E.2d 918 (N.Y. 1972). But see *In re Green*, 307 A.2d 279, 280 (Pa. 1973) (finding that the case should be remanded for a determination of the child’s wishes); *Wisconsin v. Yoder*, 406 U.S. 205, 241–42 (Douglas, J., dissenting) (indicating that when children’s rights and interests were at stake, they should be given more consideration).



individual minors creates the possibility that children may “die for beliefs that are not truly their own.”<sup>9</sup>

The potential social costs of equating the beliefs of minors and their parents have become more pronounced in the age of Covid-19. In 2019, before the outbreak of the pandemic, the CDC named “vaccine hesitancy” among its top global health threats and indicated an additional 1.5 million lives could be saved if vaccination rates improved.<sup>10</sup> The lifesaving potential of vaccines has only increased with the onset of Covid-19. In response, many states, including North Carolina have passed laws allowing mature minors to override the objections of parents to receive the Covid-19 vaccine.<sup>11</sup> These laws indicate that North Carolina may be more amenable to granting minors greater autonomy in other healthcare decisions as well.

This note will argue that the passage of North Carolina SL 2021-110 demonstrates a greater openness to recognizing the medical rights of minors. As such, it should be used to further the statutory and common law provisions for minors in the medical setting. Part I will examine the legal background which historically gives parents the right to determine the medical treatment of their children. It will also provide a brief overview of the caselaw surrounding religious exemptions to medical treatments. Part II provides a survey of the legal doctrine of the “mature minor.” Part III examines the mature minor exception in connection with medical treatment decisions based on religious beliefs. Parts IV and V turn to the Covid-19 minor vaccination statute in North Carolina and argue for an extension of minor rights based on maturity beyond the context of “communicable diseases” like Covid-19. Part V concludes with a brief restatement of the suggested solution and an acknowledgement of future issues.

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<sup>9</sup> Jonathan F. Will, *My God My Choice: The Mature Minor Doctrine and Adolescent Refusal of Life-Saving or Sustaining Medical Treatment Based Upon Religious Beliefs*, 22 J. CONTEMP. HEALTH L. & POL'Y, 233, 237 (2006).

<sup>10</sup> Brett Molina, *People Choosing Not to Vaccinate Now a Global Health Threat, Says the WHO*, USA TODAY (Jan. 17, 2019, 3:08 PM), <https://www.usatoday.com/story/news/health/2019/01/17/not-vaccinating-children-global-health-threat-says-who/2601140002/>.

<sup>11</sup> See N.C. GEN. STAT. § 90-21.5 (2021).

## I. LEGAL BACKGROUND

### A. Common Law Informed Consent Doctrine

One of the hallmarks of civilized society is the idea that private individuals may not violate each other's bodily integrity without valid consent.<sup>12</sup> In the health care setting, this principle requires practitioners to obtain a patient's "informed consent" before performing medical procedures.<sup>13</sup> If a physician administers treatment without first obtaining effective consent, that physician may be liable to the patient for battery.<sup>14</sup> To obtain legally binding informed consent, a physician must disclose material information regarding: "(1) the nature of the procedure, (2) the risks and benefits and the procedure, (3) reasonable alternatives, [and] (4) risks and benefits of alternatives."<sup>15</sup>

The physician must also assess the patient's understanding of each disclosure to determine whether they have decision-making capacity.<sup>16</sup> Capacity for healthcare is generally expressed in terms of four criteria: "(a) Understanding, (b) Appreciation, (c) Reasoning, and (d) Expression of a Choice."<sup>17</sup> A patient demonstrates understanding and appreciation when they clearly comprehend the information disclosed by their physician and can apply this information to their own situation.<sup>18</sup> A patient meets "reasoning" criteria if their "decisions reflect the presence of a reasoning process."<sup>19</sup> The fourth criteria is more complex.

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<sup>12</sup> See *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.").

<sup>13</sup> See *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (1914) (stating for the first time that a physician could be held liable for not getting a patient's "informed consent").

<sup>14</sup> See *id.*

<sup>15</sup> Parth Shah et al., *Informed Consent*, STATPEARLS, Jun. 14, 2021, at 1, <https://www.ncbi.nlm.nih.gov/books/NBK430827/>.

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

<sup>17</sup> Barton W. Palmer, & Alexandra L. Harmell, *Assessment of Healthcare Decision-making Capacity*, 31 ARCHIVES OF CLINICAL NEUROPSYCHOLOGY 530, 531 (2016) (citation omitted).

<sup>18</sup> *Id.* ("'Understanding' refers to the ability of the individual to comprehend the information being disclosed in regard to his/her condition as well as the nature and potential risks and benefits of the proposed treatment and alternatives (including no treatment). . . . The 'Appreciation' component of decision-making capacity involves the ability to apply the relevant information to one's self and own situation.").

<sup>19</sup> *Id.* (describing the reasoning component as the "ability to engage in consequential and comparative reasoning and to manipulate information rationally.").

Generally, a patient must be able to communicate a decision to the physician to meet the “expression of choice” requirement.<sup>20</sup> But some courts require physicians to go a step further and look for evidence that the patient’s choice is “clear and consistent.”<sup>21</sup> This capacity requirement is founded on the idea that “competent individuals are better judges of their own good than are others.”<sup>22</sup> As Justice Cardozo famously stated, “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.”<sup>23</sup>

But as Justice Cardozo noted, only adults can give legally binding informed consent.<sup>24</sup> The law presumes that all adults have medical decision-making capacity, and only inquiries into individual competency in specific circumstances.<sup>25</sup> For patients under the age of seventeen, however, physicians must obtain “informed permission” from the patient’s parents before administering treatment.<sup>26</sup> The rationale for requiring parental consent is rooted in two ideas about childhood development: “(1) that minors need to be protected from the dangers of uninformed, immature decisions; and (2) who better to decide for children than parents who are presumed to act in their best interests.”<sup>27</sup>

### *B. Family Privacy and Parental Decision-Making Authority*

Almost one hundred years ago, the Supreme Court established in *Meyer v. Nebraska*<sup>28</sup> that parents have a fundamental

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

<sup>21</sup> *Id.* (“[Some patients] are able to speak but seem unable to choose—to make up their mind. Thus patients might be considered unable to Express a Choice if, during several consecutive days, they are so ambivalent that they can neither commit to a choice nor assign the decision to someone else. In other cases, patients may vacillate between consent and refusal for medical procedures, thereby producing a clinical stalemate.” (quoting THOMAS GRISSO & PAUL .S. APPELBAUM, *ASSESSING COMPETENCE TO CONSENT TO TREATMENT: A GUIDE FOR PHYSICIANS AND OTHER HEALTH PROFESSIONALS* 36 (1998))).

<sup>22</sup> ALLEN E. BUCHANAN & DAN W. BROCK, *DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING* 29 (1990).

<sup>23</sup> *Schloendorff v. Soc’y of New York Hosp.*, 105 N.E. 92, 93 (1914).

<sup>24</sup> *See id.*

<sup>25</sup> *See id.*; *see also* Shah et al., *supra* note 15, at 2.

<sup>26</sup> Shah et al., *supra* note 15, at 2.

<sup>27</sup> *Will*, *supra* note 9, at 246. *See e.g.*, *Parham v. J. R.*, 442 U.S. 584, 602 (1979) (“The law’s concept of the family rests on the presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.”).

<sup>28</sup> 262 U.S. 390 (1923).

right to make child-rearing decisions.<sup>29</sup> According to the Court, the Fourteenth Amendment guarantees parents the right to “establish a home and bring up children[.]”<sup>30</sup> Since then, the Court has limited state interference in parental decisions related to the association, religion, education, and healthcare of their children.<sup>31</sup> But these parental rights are not all inclusive. The Court carved out a thin exception in *Prince v. Massachusetts*,<sup>32</sup> where a nine-year-old girl was caught selling religious literature in violation of a state child labor law.<sup>33</sup> There, the Court weighed the conflicting interests of the free exercise rights of the girl’s guardian with the state’s interest in preventing “the crippling effects of child employment[.]”<sup>34</sup> Although the girl’s aunt stood as her representative in this case, the Court nonetheless limited the extent of any guardian’s control, noting that: “Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”<sup>35</sup> Thus, state protection for parental rights ends where parents attempt to force martyr-like choices on to their children—especially in cases where a child’s life is imminently at risk.<sup>36</sup> Where the risk to a child’s life is more remote, the Court will limit parental power “if it appears that parental decisions will

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<sup>29</sup> *See id.* at 403 (overturning a state law which prohibited teaching in any other language than English on substantive due process grounds).

<sup>30</sup> *Id.* at 399.

<sup>31</sup> *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205, 205–13 (1972) (holding that society highly values “parental direction of the religious upbringing and education of their children”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (stating that parents have the liberty “to direct the upbringing and education of children under their control”); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents[.]”); *Troxel v. Granville*, 530 U.S. 57, 67–68 (holding it unconstitutional for a state judge to determine the appropriateness of grandparent visitation over the objections of parents).

<sup>32</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>33</sup> *See id.* at 162.

<sup>34</sup> *Id.* at 168–69. (“[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare; and that this includes, to some extent, matters of conscience and religious conviction.”).

<sup>35</sup> *Id.* at 170.

<sup>36</sup> *Id.* at 158; *see e.g., In re Hudson*, 126 P.2d 765 (Wash. 1942); *In re Seiferth*, 127 N.E.2d 820 (N.Y. 1955).

jeopardize the health or safety of the child, or have a potential for significant social burdens.”<sup>37</sup>

Thirty years after the *Prince* decision, the Court again considered the tension between the free exercise rights of parents and the state’s concern for the well-being of minors.<sup>38</sup> In *Wisconsin v. Yoder*,<sup>39</sup> the Court considered whether the state had the power to compel Amish teenagers to continue attending school after eighth grade.<sup>40</sup> Similar to the Court’s approach in *Prince*, the majority only examined the free exercise interests of the parents.<sup>41</sup> The Court ultimately upheld the parent’s traditional interest in controlling the religious upbringing of their children.<sup>42</sup> This focus on the fundamental rights of parents indicates the Court’s consistent belief that the interests of children are protected best when represented by their parents.<sup>43</sup>

Neglecting to directly consider the preferences of minors also implies that a minor has no separate interests apart from those of their parents. Justice Douglas addressed this issue in his dissent, arguing that “where a child is mature enough to express potentially conflicting desires, it would be an invasion of the child’s rights to permit such an imposition without canvassing his views.”<sup>44</sup> In Justice Douglas’ view, agreement between parents and children was an irrelevant question.<sup>45</sup> Instead, Douglas insisted the Court should look first to maturity, arguing that a child who has reached a certain level of maturity should receive constitutional protections regardless of their parents’ wishes.<sup>46</sup> In doing so, he reminded the Court that it had “held over and over again” that minors are entitled to the same constitutional protections as adults, including free exercise

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<sup>37</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

<sup>38</sup> *Id.* at 205 (deciding whether the state’s interest in compelling continued secondary education outweighed the parents’ free exercise rights).

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

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

<sup>41</sup> *Id.* at 213–14.

<sup>42</sup> *Id.* at 231–32.

<sup>43</sup> See Jennifer E. Chen, *Family Conflicts: The Role of Religion in Refusing Medical Treatment for Minors*, 58 HASTINGS L.J. 643, 645 (2007); see also *Yoder*, 406 U.S. at 231–32 (indicating that the Court only considered parental free exercise rights because “[t]he children are not parties to this litigation.”).

<sup>44</sup> *Yoder*, 406 U.S. at 241–42 (Douglas, J., dissenting).

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

<sup>46</sup> *Id.* (“And, if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents’ religiously motivated objections.”).

rights.<sup>47</sup> Although the majority in *Yoder* was unwilling to examine the individual interests of children, Douglas' dissent opened the door for minors with differing interests from their parents to be fully heard in subsequent cases.

### *C. Parental Authority in Medical Decision Making*

In the years following *Prince* and *Yoder*, state courts struggled to discern when the state could override the medical decisions of parents. The Supreme Court offered some guidance by illustrating the limits of parental rights of control in *Parham v. J.R.*<sup>48</sup> In that case, two minor plaintiffs were committed by their parents to state-administered mental institutions.<sup>49</sup> Unlike *Yoder*, some of the plaintiffs in this class action lawsuit were minors, so the *Parham* court had to consider their separate interests.<sup>50</sup> Thus, the Court had to balance the interests of the state and the private interests of both parents and their children.<sup>51</sup> Although precedent indicated parents have broad authority over minors, the Court also acknowledged the potential for parents to act against the interests of their children.<sup>52</sup> This possibility justified giving states “constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.”<sup>53</sup> In this case however, there was no evidence of bad faith by the parents, so there was no need for state interference.<sup>54</sup> Nevertheless, the Court recognized the due process rights of minors under the Fourteenth Amendment, insisting that before a minor can be committed, they must receive “an adequate, independent diagnosis of [their] emotional condition and need

<sup>47</sup> *Id.* at 243; see also *In re Gault*, 387 U.S. 1, 13 (1967) (“[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.”).

<sup>48</sup> 442 U.S. 584 (1979).

<sup>49</sup> *Id.* at 590–91.

<sup>50</sup> *Id.* at 600.

<sup>51</sup> *Id.* (“[T]he private interest at stake is a combination of the child’s and parents’ concerns.”).

<sup>52</sup> *Id.* at 602–03.

<sup>53</sup> *Id.* at 603.

<sup>54</sup> *Id.* at 603–04 (holding that complaints over a hospital commitment decision are not enough to limit parental authority to determine what is best for their child). Although the Court did not want to impose “unnecessary procedural obstacles that may discourage the mentally ill or their families from seeking needed psychiatric assistance,” a parent’s decision to institutionalize their child presents enough risk that a procedural inquiry by a “neutral factfinder to determine whether a state’s statutory requirements for admission [were] satisfied” was necessary. *Id.* at 605–06. This way, the Court could effectively balance all three interests (state, parent, child) by placing control of the hospitalization decision in the hands of both parents and the hospital admission staff. *Id.* at 605–07.

for confinement under the [medical standards for admission].”<sup>55</sup> Although the Court ultimately favored the parents’ preferences, their separate consideration of the child’s interest was an important first step in recognizing the independent constitutional rights of children.

In the 1970s, two key cases arose which illustrate the different judicial perspectives on the state’s role in protecting children.<sup>56</sup> The first case, *In re Sampson*,<sup>57</sup> involved a mother who gave consent for her son to undergo a risky surgical procedure to correct her son’s facial deformity.<sup>58</sup> Her son’s condition did not pose an immediate threat to his life, but the corrective surgery could give him the chance for a “normal, happy existence.”<sup>59</sup> Although the mother consented to the surgery, she refused to allow her son to receive a blood transfusion.<sup>60</sup> Her beliefs as a Jehovah’s Witness would not allow her to consent to the transmission, as it would violate the biblical provision against “consumption of blood.”<sup>61</sup> In considering this case, the court did not inquire into the son’s wishes.<sup>62</sup> Instead, the court considered whether a mother’s refusal to give consent for “surgical procedures necessary to insure the physical, mental and emotional well-being of her son” constituted neglect and thus warranted state intervention.<sup>63</sup> Thus, New York and several other states decided that a state may only override parental rights where parents are neglectful.<sup>64</sup> Under this approach, the State’s conclusions about a minor’s best interests would be controlling.<sup>65</sup>

Other states adopted an alternate approach which considered the interests of individual minors.<sup>66</sup> The second case, *In re*

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<sup>55</sup> *Id.* at 606 (“The standard for admission is ‘whether or not hospitalization is the more appropriate treatment’ for the child.”).

<sup>56</sup> See *In re Sampson*, 317 N.Y.S.2d 641 (N.Y. Fam. Ct. 1970); *In re Green*, 307 A.2d 279 (Pa. 1973).

<sup>57</sup> 317 N.Y.S.2d 641 (N.Y. Fam. Ct. 1970).

<sup>58</sup> *Id.* at 645.

<sup>59</sup> *Id.* at 655.

<sup>60</sup> *Id.* at 645.

<sup>61</sup> *Id.* at 646; see also PARK RIDGE CTR. FOR THE STUDY OF HEALTH, FAITH, AND ETHICS, THE JEHOVAH’S WITNESS TRADITION: RELIGIOUS BELIEFS AND HEALTH CARE DECISIONS 1, 2 (Edwin R. Dubose & M. James Penton eds., rev. ed. 2002).

<sup>62</sup> See *In re Sampson*, 317 N.Y.S.2d at 656 (“They are not interested or concerned with whether he does or does not want the essential operation.”).

<sup>63</sup> *Id.* at 658–59.

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

<sup>65</sup> Because the court made no effort to ascertain Kevin’s interests in this case, they strongly implied that the State’s ideas about a child’s best interests were determinative. *Id.*

<sup>66</sup> See *In re Green*, 307 A.2d 279, 280 (Pa. 1973).

*Green*,<sup>67</sup> illustrates this general approach.<sup>68</sup> *Green* involved claims of neglect brought against the custodial mother of a boy named Ricky who suffered from paralytic scoliosis.<sup>69</sup> Like the mother in *Sampson*, this mother also consented to a risky surgery which would correct her son's spinal deformity.<sup>70</sup> This mother also refused to allow blood transfusions.<sup>71</sup> The court considered whether its interests in protecting minors warranted "the abridgement of a parent's right to freely practice his or her religion when those beliefs preclude medical treatment of a son or daughter whose life is not in immediate danger."<sup>72</sup> In this case, Ricky's condition was not life threatening, so the court ultimately concluded the State had no right to interfere.<sup>73</sup> Significantly, the court took the unusual step of remanding the case for an evidentiary hearing of Ricky's wishes.<sup>74</sup> Although this case limited state interference to "life threatening" circumstances, it nonetheless reflects a clear concern for the wishes of involved minors.<sup>75</sup>

The above cases demonstrate the difficulty of determining the medical rights of parents over their children, especially where religious beliefs are involved. Generally, parents enjoy a broad right to raise their children as they wish, including a right to foster religious beliefs and make medical decisions. But this right clearly ends where religious preferences would put their children at risk. As such, *Sampson* and *Green* illustrate two key issues which divide courts in similar cases: (1) what level of risk warrants state interference and (2) whether the preferences of minors are relevant considerations.<sup>76</sup> Most courts side with the

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<sup>67</sup> 307 A.2d 279 (Pa. 1973).

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

<sup>69</sup> *Id.* Ricky had a 94% curvature of his spine which would eventually render him bedridden. *Id.*

<sup>70</sup> *Id.*; see also *In re Sampson*, 317 N.Y.S.2d at 645.

<sup>71</sup> *In re Green*, 292 A.2d 387, 388 (Pa. 1972).

<sup>72</sup> *Id.* at 390.

<sup>73</sup> *Id.* at 392. The court directly disagreed with the holding in *In re Sampson*. The court in *In re Green* was hesitant to call any surgery "required" where the life of the patient is not at stake. *Id.* at 391-92.

<sup>74</sup> *Id.* at 392. The court noted that the record didn't indicate whether Ricky was a Jehovah's Witness or ever planned on becoming one. *Id.* On remand, Ricky revealed that he did not even want the surgery for fear that it may not "come out right." *In re Green*, 307 A.2d 279, 280 (Pa. 1973).

<sup>75</sup> The court held that the State does not have a sufficient interest to interfere with a parent's religious beliefs unless the child's life is "immediately imperiled by his physical condition." *In re Green*, 292 A.2d at 392.

<sup>76</sup> The *In re Sampson* court stated that it was not necessary that "a child's life be in danger" for a court to decide that state intervention was necessary, and it implied



reasoning in *Sampson* and only address the conflict between parents and the state.<sup>77</sup> But this approach fails to recognize the growing body of scholarship which demonstrates the cognitive abilities of certain minors.

## II. THE MATURE MINOR EXCEPTION

As previously stated, the Supreme Court recognizes the constitutional rights of minors to a certain extent, as “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”<sup>78</sup> But the rights of minors are much more limited than those of adults.<sup>79</sup> This is because of the inherent assumptions that minors are (1) a particularly vulnerable group and (2) unable to make critical decisions in an informed, mature manner.<sup>80</sup> Altogether, these background ideas make it unlikely that the preferences of minors will carry legal weight independent of their parents. This section will address those situations where minors enjoy rights independent of their parents.

### A. Statutory Exemptions

There are three main categories of statutory exceptions to the general rule that a minor cannot make medical decisions for themselves: (1) status exceptions, (2) treatment exceptions and (3) mature minor exceptions. Status exceptions extend decision making authority to certain minors based on certain social or individual circumstances.<sup>81</sup> These circumstances include

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that the quality of a child's life was a relevant consideration. *In re Sampson*, 317 N.Y.S.2d 641, 669 (N.Y. Fam. Ct. 1970). But that court did not consider Kevin's preferences and assumed that State intervention would be in his best interest. *See In re Sampson*, 317 N.Y.S.2d at 659–60. In contrast, the court in *In re Green* clearly limited state interference to life threatening situations but took measures to ascertain Ricky's wishes. 307 A.2d at 280.

<sup>77</sup> *See, e.g., In re Athena Y.*, 161 N.Y.S.3d 335 (N.Y. App. Div. 2021); *In re Faridah W.*, 579 N.Y.S.2d 377 (N.Y. App. Div. 1992).

<sup>78</sup> *In re Gault*, 387 U.S. 1, 13 (1967).

<sup>79</sup> *See Bellotti v. Baird*, 443 U.S. 622, 633–35 (1979).

<sup>80</sup> *Id.* at 634.

<sup>81</sup> Rhonda Gay Hartman, *Coming of Age: Devising Legislation for Adolescent Decision-Making*, 28 AM. J. L. & MED. 409, 421 (2002).

marriage,<sup>82</sup> homelessness,<sup>83</sup> pregnancy,<sup>84</sup> emancipation,<sup>85</sup> high school graduation,<sup>86</sup> and membership in the armed forces.<sup>87</sup> Treatment exceptions similarly extend autonomy to minors who are considering certain types of treatment.<sup>88</sup> Most states allow minors to consent to treatment for substance abuse, venereal diseases, pregnancy, and mental health problems.<sup>89</sup> These statutes are based on policy concerns for public health and safety, as adolescents who are afraid to inform their parents of their problems may forgo medical treatment entirely.<sup>90</sup>

Although founded on public policy and consistency concerns, neither status exceptions nor treatment exceptions assess the actual decision-making capacity of individual minors. Only mature minor exceptions take this consideration into account.<sup>91</sup> The idea behind the exception is relatively simple: if a minor demonstrates sufficient capacity to make an autonomous decision, that decision will be respected.<sup>92</sup> Although some states have statutorily codified this doctrine, most only

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<sup>82</sup> See, e.g., ME. REV. STAT. ANN. tit. 22, § 1503 (West 2019); MD. CODE ANN., HEALTH-GEN. § 20-102(1) (West 2019); MASS. GEN. LAWS ch. 112, § 12F (2022); MONT. CODE ANN. § 41-1-402(1)(a) (2021); 23 R.I. GEN. LAWS § 23-4.6-1 (2022).

<sup>83</sup> See, e.g., ARIZ. REV. STAT. ANN. § 44-132(a) (2021).

<sup>84</sup> See, e.g., MD. CODE ANN., HEALTH-GEN. § 20-102(c)(4) (West 2021); MONT. CODE ANN. § 41-1-402(1)(c) (2021); N.C. GEN. STAT. § 90-21.5 (2021).

<sup>85</sup> See, e.g., N.C. GEN. STAT. § 90-21.5(b) (2021); ME. REV. STAT. ANN. tit. 22, § 1503 (West 2019) (sixty-day period attached to living separately and independently); MINN. STAT. ANN. § 144.341 (West 2021) (no time period); MONT. CODE ANN. § 41-1-402(1)(b) (2021) (no time period); OKLA. STAT. ANN. tit. 63, § 2602(A)(2) (2021) (no time period).

<sup>86</sup> See, e.g., MONT. CODE ANN. § 41-1-402(1)(A) (2021); 35 PA. STAT. AND CONS. STAT. § 10101 (West 2022).

<sup>87</sup> See, e.g., ME. REV. STAT. ANN. tit. 22, § 1503 (2019); MASS. GEN. LAWS ch. 112, § 12F (2022).

<sup>88</sup> See Hartman, *supra* note 81, at 420–21.

<sup>89</sup> See, e.g., N.C. GEN. STAT. § 90-21.5 (2021).

<sup>90</sup> See Will, *supra* note 9, at 256.

<sup>91</sup> See, e.g., ARK. CODE ANN. § 20-9-602(7) (2021) (“It is recognized and established that, in addition to other authorized persons, any one (1) of the following persons may consent, either orally or otherwise, to any surgical or medical treatment or procedure not prohibited by law that is suggested, recommended, prescribed, or directed by a licensed physician: . . . (7) Any unemancipated minor of sufficient intelligence to understand and appreciate the consequences of the proposed surgical or medical treatment or procedures, for himself or herself . . .”).

<sup>92</sup> See, e.g., ARK. CODE ANN. § 20-9-602(7) (2021) (allowing unemancipated minors to consent to medical treatment if they are of sufficient intelligence to understand and appreciate the consequences of their decision); IDAHO CODE § 39-4302 (2022) (stating that any person of competent intelligence to comprehend the nature and the significant risks posed by the medical treatment is competent to consent on his own behalf); NEV. REV. STAT. § 129.030(2) (2021) (permitting a minor who understands the purpose of the procedure and its likely outcome to consent, but the provider must make efforts to seek minor's consent to communicate with parents in most instances).

recognize it as a branch of common law—which truly began with Douglas’ dissent in *Yoder*.<sup>93</sup> Since *Yoder*, courts have primarily recognized rights for mature minors in the context of abortion decisions.

### *B. Abortion*

Following its decision in *Roe v. Wade*,<sup>94</sup> the Supreme Court struggled to articulate the limits of state regulation on adolescent access to abortion procedures. Any discussion about the rights of adolescents to choose to have an abortion necessarily implicates the rights of parents to make medical treatment decisions for their children. The Supreme Court first addressed this issue in *Planned Parenthood v. Danforth*,<sup>95</sup> where two physicians contested a Missouri abortion law requiring minors to obtain parental consent before they could receive an abortion. In striking down the law, the Court declared that “[a]ny independent interest the parent may have in the termination of the minor daughter’s pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.”<sup>96</sup> The Supreme Court thus recognized the right of minors to make their own healthcare choices through a judicial bypass system.<sup>97</sup>

In years following *Planned Parenthood*, the Court upheld their grant of self-determination to minors in the context of abortion specifically. Just one year later, they affirmed that the “right to privacy in connection with decisions affecting procreation extends to minors as well as to adults.”<sup>98</sup> Although states pushed back by enacting parental notification requirements, the Supreme Court only upheld these statutes where a judicial

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<sup>93</sup> See Will, *supra* note 9, at 260.

<sup>94</sup> 410 U.S. 113 (1973).

<sup>95</sup> *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 58 (1976).

<sup>96</sup> *Id.* at 75; see also *id.* at 73–74 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 392 F. Supp. 1362, 1376 (E.D. Mo. 1975) (Webster, J., dissenting)) (quoting the dissent of the lower court which argued a minor should be “entitled to the same right of self-determination now explicitly accorded to adult women, provided she is sufficiently mature to understand the procedure and to make an intelligent assessment of her circumstances with the advice of her physician.”).

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

<sup>98</sup> *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693 (1977).

bypass option was available.<sup>99</sup> In *Bellotti v. Baird*,<sup>100</sup> the Court indicated two ways for minors to bypass parental refusal and obtain authorization for an abortion: (1) if a pregnant minor can show she is “mature enough and well informed to make her abortion decision” or (2) if she cannot make this decision independently, an abortion would be in her “best interests.”<sup>101</sup> Although the Court did not provide much guidance in maturity determinations, they set an important precedent: the decisions of pregnant minors with sufficient maturity must be respected.

The Supreme Court has not extended the mature minor exception to adolescents outside of the abortion context. Nevertheless, some states have afforded similar rights to minors in the medical setting.<sup>102</sup>

*C. Jurisdictional Approaches: Mature Minors, Medical Consent, & The Right to Die*

Of the courts that have addressed the mature minor doctrine, the Tennessee Supreme Court’s decision in *Cardwell v. Bechtol*<sup>103</sup> presents the clearest adoption of the exception.<sup>104</sup> In that case, a seventeen-year-old girl—Sandra Cardwell—received treatment

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<sup>99</sup> See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (“[I]f the State decides to require a pregnant minor to obtain one or both parents’ consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.”).

<sup>100</sup> 443 U.S. 622 (1979).

<sup>101</sup> *Id.* at 643–44. The Court further held that “every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents,” but the Court maintained the right to require parental consultation if it determines that it would be in the minor’s best interests. *Id.* at 647.

<sup>102</sup> See, e.g., Ala. Code § 22-8-4 (2021) (“Any minor who is 14 years of age or older, or has graduated from high school, or is married, or having been married is divorced or is pregnant may give effective consent to any legally authorized medical, dental, health or mental health services for himself or herself, and the consent of no other person shall be necessary.”); Ark. Code § 20-9-602(7) (2021) (“It is recognized and established that, in addition to other authorized persons, any one (1) of the following persons may consent, either orally or otherwise, to any surgical or medical treatment or procedure not prohibited by law that is suggested, recommended, prescribed, or directed by a licensed physician: . . . (7) Any unemancipated minor of sufficient intelligence to understand and appreciate the consequences of the proposed surgical or medical treatment or procedures, for himself or herself . . . .”); IDAHO CODE § 39-4503 (2022) (“Any person . . . who comprehends the need for, the nature of and the significant risks ordinarily inherent in any contemplated hospital, medical, dental, surgical or other health care, treatment or procedure is competent to consent thereto on his or her own behalf.”).

<sup>103</sup> 724 S.W.2d 739 (Tenn. 1987).

<sup>104</sup> *Id.* at 745.

from an osteopathic physician for back pain without her parents' consent.<sup>105</sup> Sandra and her parents later sued the osteopath for battery (failure to obtain informed consent).<sup>106</sup> In its ruling, the Tennessee Supreme Court held that the "mature minor" exception was part of the state's common law tradition<sup>107</sup> and that determinations of minor consent capacity are fact questions for the jury.<sup>108</sup> The court limited its adoption of the exception by the common law Rule of Sevens, which is generally applied in criminal cases.<sup>109</sup> Under this rule, minors under the age of 7 are presumed to lack capacity, minors between 7 and 14 carry a rebuttable presumption of no capacity, and minors between 14 and 21 carry a rebuttable presumption of capacity.<sup>110</sup> In this case, the court held that the jury was justified in concluding that the minor "had the ability, maturity, experience, education and judgment . . . to consent knowingly to medical treatment."<sup>111</sup> Although this course of treatment proved ineffective, Sandra was nonetheless empowered through the mature minor exception to consent to treatment.

Other early cases involving the mature minor doctrine considered issues related to medical decision-making for critical and life-prolonging care.<sup>112</sup> Of courts who have considered this issue, their rulings are clearly informed by judicial perspectives on the rights and responsibilities of individuals in death. Some courts emphasize the individuality of dying and work to respect the decisions of competent individuals.<sup>113</sup> Others focus on the quality of a patient's life and tailor their decisions based on "best interests" determinations.<sup>114</sup> Beyond serving as precedent on

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<sup>105</sup> Although Sandra was unaware of what exact therapy was involved, she generally understood this physician's osteopathic practice because her father had previously been treated by him. *Id.* at 743.

<sup>106</sup> *Id.* at 742.

<sup>107</sup> In support of its decision to adopt the exception, the court relied on caselaw from other jurisdictions, legal commentary, and the requirements for child consent in the Second Restatement of Torts § 892A. *Id.* at 742-49.

<sup>108</sup> *Id.* at 748.

<sup>109</sup> *Id.* at 749.

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

<sup>111</sup> *Id.* (holding that the jury was justified in finding that a minor who was 17 years and 7 months old, a senior in high school, with good grades, college plans, a drivers' license, and who had responsibly used her father's signed, blank checks since the age of 14 was mature enough to consent to medical treatment).

<sup>112</sup> See, e.g., *Belcher v. Charleston Area Med. Ctr.*, 422 S.E.2d 827, 837 (W. Va. 1992); *In re Swan*, 569 A.2d 1202 (Me. 1990); *In re Guardianship of Crum*, 580 N.E.2d 876 (Ohio Prob. Ct. 1991).

<sup>113</sup> See, e.g., *Belcher*, 422 S.E.2d at 835-36.

<sup>114</sup> See, e.g., *In re Swan*, 569 A.2d at 1205-06; see also *In re Guardianship of Crum*, 580 N.E.2d at 882-83.

which other courts may rely when considering legal autonomy issues, these cases indicate the extent of judicial support for the medical decisions of mature minors.

In its consideration of adolescent decision-making capacity, the Supreme Court of Appeals of West Virginia established a precedent that focuses on the wishes of the individual.<sup>115</sup> In that case, the minor's father consented to a DNR order without any discussion with his son.<sup>116</sup> Like *Cardwell*, the court in *Belcher* adopted the common law mature minor doctrine and considered determinations of maturity to be a question of fact.<sup>117</sup> If there were discrepancies between the wishes of the minor and their parents, the court concluded that the "good faith" decision of the physician should be followed.<sup>118</sup> Interestingly, the court asserted that experience with illness, rather than age, should be the chief consideration in determining maturity, as maturity is linked with confronting the challenge of illness.<sup>119</sup> Thus, the court provided another avenue through which a mature minor may bypass the objections of their parents.<sup>120</sup> Further, throughout its opinion, the *Belcher* court showed a serious concern for the integrity of the decisional process as well as the protection of the preferences of adolescents whose life was at risk.

While the *Belcher* court focused on maturity determinations, other courts are more outcome focused, and emphasize quality of life over maturity in deciding whether minors can refuse life-sustaining treatment.<sup>121</sup> For example, the high courts of both Maine and Ohio recognized a minor's right to refuse life-sustaining medical treatment based on evidence of the minor's previously expressed wishes.<sup>122</sup> In both cases, the court admitted hearsay testimony by the minors' parents that

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<sup>115</sup> See *Belcher*, 422 S.E.2d at 835–36.

<sup>116</sup> *Id.* at 829–31.

<sup>117</sup> *Id.* at 837.

<sup>118</sup> The court reasoned that physicians, rather than judges or parents, possess the expertise to assess an adolescent's capacity to "appreciate the nature, risks, and consequences of the medical procedure to be performed, or the treatment to be administered or withheld." *Id.* at 838.

<sup>119</sup> As to this assertion, the court reasoned, "[i]t is difficult to imagine that a young person who is under the age of majority, yet, who has undergone medical treatment for a permanent or recurring illness over the course of a long period of time, may not be capable of taking part in decisions concerning that treatment." *Id.* at 837.

<sup>120</sup> *Id.* at 838.

<sup>121</sup> See, e.g., *In re Swan*, 569 A.2d 1202, 1205–06 (Me. 1990); see also *In re Guardianship of Crum*, 580 N.E.2d 876, 882–83 (Ohio Prob. Ct. 1991).

<sup>122</sup> See *In re Swan*, 569 A.2d at 1205; see also *In re Guardianship of Crum*, 580 N.E.2d at 882.

they did not wish to receive further treatment.<sup>123</sup> Neither court inquired into the maturity or capacity of the minors when they purportedly expressed these wishes.<sup>124</sup> While some commentators cite *Swan* and *Crum* as evidence of an “expanding legal recognition and respect for adolescent autonomous wishes,”<sup>125</sup> the extent to which these wishes were truly autonomous is unclear. Reliance on the testimony of parents whose wishes coincide with the purported expressions of their children leaves potential that the desires of these minors are not heard at all. In some ways, these courts paid lip service to the rights of minors but failed to separate their interests from those of their parents. Further, the courts’ neglect to make any maturity inquiry or to provide a standard for future inquires supports the idea that these decisions expand parental rights rather than child rights.

### III. MERGING THE DOCTRINES: RELIGIOUS INTEGRITY & MATURE MINORS

Cases involving a minor’s refusal of medical treatment due to religious beliefs are not just medical in nature and implicate a host of constitutional questions. As a result, simply assessing a patient’s capacity based on their medical understanding is insufficient. Courts must also seriously consider the integrity of a minor’s religious beliefs where they form the basis of a medical treatment decision.

Although it is settled law that parents may not refuse medical treatment for their children based on religious beliefs if it would put their children’s lives at risk,<sup>126</sup> precedent involving religious refusal of minors themselves is less clear. In theory, the mature minor doctrine should answer this question, as it requires confirmation that an adolescent has “developed underlying and

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<sup>123</sup> In *In re Swan*, the court admitted testimony from Chad's mother that she and Chad had discussed a highly publicized case involving a step-grandson of a close friend of Chad's grandmother. 569 A.2d at 1205. The step-grandson was in a persistent vegetative state. *Id.* When she explained to Chad that such a person required total care, she remembered him saying, “if I can't be myself . . . no way . . . let me go to sleep.” *Id.* In *In re Guardianship of Crum*, the court highlighted testimony that Dawn had previously commented about a foster child who suffered from spina bifida, saying that it was unfair for him to live like that and that she would not want to live like that. 580 N.E.2d at 882.

<sup>124</sup> See *In re Swan*, 569 A.2d at 1205; see also *In re Guardianship of Crum*, 580 N.E.2d at 882.

<sup>125</sup> See Hartman, *supra* note 81, at 441.

<sup>126</sup> See *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

enduring aims and values, and thus, decision-making capacity or the ability to make autonomous decisions.”<sup>127</sup> In practice however, courts are skeptical of granting minors the same level of religious autonomy as adults. When confronted with medical treatment issues involving religious minors, state courts have adopted inconsistent solutions. Some have skirted the issue of religion altogether,<sup>128</sup> while others limited or expressly denied the religious refusal rights of minors.<sup>129</sup>

The courts in *In re E.G.*<sup>130</sup> and *In re Long Island Jewish Medical Center*<sup>131</sup> both avoided (intentionally or unintentionally) deciding whether the religious beliefs of minors carried legal weight in the medical context.<sup>132</sup> *In re E.G.* involved a minor who refused blood transfusions necessary to sustain her life based on her religious beliefs.<sup>133</sup> The Illinois Supreme Court held that if the minor could prove her maturity by “clear and convincing” evidence, then she had a right to control her own health care.<sup>134</sup> This right included the authority to refuse medical treatment.<sup>135</sup> Because the court based its reasoning on the common law rights of mature minors, it did not address underlying questions about the religious integrity of minors.<sup>136</sup> Similarly, the court in *In re Long Island Jewish Medical Center* did not provide a clear rule.<sup>137</sup> But in that case, this ambiguity was more the result of an immature minor than purposeful vagueness by the court.<sup>138</sup> Nevertheless, that court expressed its support for the mature minor doctrine in other contexts and did not discount a future discussion of religious refusals by mature minors.<sup>139</sup>

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<sup>127</sup> Will, *supra* note 9, at 284.

<sup>128</sup> See, e.g., *In re E.G.*, 549 N.E. 2d 322 (Ill. 1989); see also *In re Long Island Jewish Med. Ctr.*, 557 N.Y.S.2d 239 (N.Y. Sup. Ct. 1990).

<sup>129</sup> See, e.g., *Novak v. Cobb Cnty. Kennestone Hosp. Auth.*, 849 F. Supp. 1559 (N.D. Ga. 1994); see also *Commonwealth v. Nixon*, 761 A.2d 1151 (Pa. 2000).

<sup>130</sup> 549 N.E.2d 322 (Ill. 1989).

<sup>131</sup> 557 N.Y.S.2d. 239 (N.Y. Sup. Ct. 1990).

<sup>132</sup> 549 N.E.2d at 327–28; 557 N.Y.S.2d at 242.

<sup>133</sup> *In re E.G.*, 549 N.E. 2d at 323.

<sup>134</sup> *Id.* at 326–27.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 328 (“Because we find that a mature minor may exercise a common law right to consent to or refuse medical care, we decline to address the constitutional [religion] issue.”). *But see id.* at 328 (holding that if her mother had not agreed with E.G.’s decision, it would “weigh heavily against the minor’s right to refuse.”).

<sup>137</sup> *In re Long Island Jewish Medical Center*, 557 N.Y.S.2d at 242.

<sup>138</sup> *Id.* at 243.

<sup>139</sup> *Id.* (“While this court believes there is much merit to the ‘mature minor’ doctrine, I find that Phillip Malcolm is not a mature minor.”).



Not all courts are as supportive of the mature minor doctrine. The rulings of state courts in *Novak v. Cobb County Kennestone Hospital Authority*<sup>140</sup> and *Commonwealth v. Nixon*<sup>141</sup> illustrate a lack of trust in the capacity of minors to determine their own medical treatment in emergency situations—especially where religion is involved.<sup>142</sup> In *Novak*, a sixteen-year-old refused blood transfusions after a car accident.<sup>143</sup> Doctors later administered blood transfusions over the objections of both the minor and his parents in order to save his life.<sup>144</sup> Although acknowledging that minors have constitutional rights, the court held that minors do not have the right to refuse medical treatment based on their religious beliefs.<sup>145</sup> The court noted that the United States Supreme Court had only expanded medical decision-making authority to minors in abortion cases.<sup>146</sup> As such, the state court concluded there was no statutory or common law support for granting minors free exercise protections in the medical context.<sup>147</sup>

Similarly, the Pennsylvania Supreme Court in *Nixon* held that minors did not have the authority to refuse life-saving treatment based on their religious convictions.<sup>148</sup> In that case, the minor suddenly fell ill and refused to go to a hospital and chose instead to address her sickness through spiritual treatment.<sup>149</sup> She eventually died, and her parents were convicted of involuntary manslaughter of their child, Shannon.<sup>150</sup> On appeal, they argued that (1) Shannon had a privacy right to refuse medical treatment, and (2) Shannon was a mature minor who may decide to refuse medical treatment herself.<sup>151</sup> According to the court's reading of the states' mature minor statute, the Pennsylvania state legislature did not intend that "any minor, upon the slightest showing, has capacity to consent or to refuse medical treatment

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<sup>140</sup> 849 F. Supp. 1559 (N.D. Ga. 1994).

<sup>141</sup> 761 A.2d 1151 (Pa. 2000).

<sup>142</sup> See *Novak*, 849 F. Supp. at 1559; see also *Nixon*, 761 A.2d at 1151.

<sup>143</sup> *Novak*, 849 F. Supp. at 1563.

<sup>144</sup> *Id.* at 1564.

<sup>145</sup> *Id.* at 1574.

<sup>146</sup> *Id.* See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

<sup>147</sup> *Novak*, 849 F. Supp. at 1576.

<sup>148</sup> *Commonwealth v. Nixon*, 761 A.2d 1151, 1156 (Pa. 2000).

<sup>149</sup> *Id.* at 1152.

<sup>150</sup> *Commonwealth v. Nixon*, 718 A.2d 311, 312 (Pa. Super. Ct. 1998).

<sup>151</sup> *Nixon*, 761 A.2d at 1152. The court held that although Shannon had privacy rights protected by both the state and federal constitutions, those rights were overridden by the compelling state interest as *parens patriae* to protect the life of an unemancipated minor. *Id.* at 1156.

in a life and death disputation.”<sup>152</sup> As such, the court revoked the possibility that the maturity of an unemancipated minor may be brought as an affirmative defense.<sup>153</sup>

#### IV. NORTH CAROLINA LAW

While many states have extended statutory rights to mature minors, North Carolina has not.<sup>154</sup> Accordingly, North Carolina General Statutes section 90-21.5 provides that:

- (a) Subject to subsection (a1) of this section, any minor may give effective consent to a physician licensed to practice medicine in North Carolina for medical health services for the prevention, diagnosis and treatment of (i) venereal disease and other diseases reportable under G.S. 130A-135, (ii) pregnancy, (iii) abuse of controlled substances or alcohol, and (iv) emotional disturbance. This section does not authorize the inducing of an abortion, performance of a sterilization operation, or admission to a 24-hour facility licensed under Article 2 of Chapter 122C of the General Statutes except as provided in G.S. 122C-222. This section does not prohibit the admission of a minor to a treatment facility upon his own written application in an emergency situation as authorized by G.S. 122C-222.
- (b) Any minor who is emancipated may consent to any medical treatment, dental and health services for himself or for his child.<sup>155</sup>

Clearly, North Carolina statutory law only grants minors autonomy according to certain status and age exceptions.<sup>156</sup>

Although the caselaw in the state grants minors more independence—it is not much more. Generally, minors may only receive medical treatment over the objections of their

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<sup>152</sup> *Id.* In a footnote the court cited to the superior court's statement in *Commonwealth v. Cottam*, 616 A.2d 988 (Pa. Super. Ct. 1992), that even if a minor were found to be mature enough to freely exercise their religious beliefs, it would not abrogate the parents' affirmative duty to provide care direction and sustenance. *Id.* at 1155–56 n.4.

<sup>153</sup> *Id.* at 1155.

<sup>154</sup> See N.C. GEN. STAT. § 90-21.5 (2021).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

parents (religious or otherwise) if the parents have been adjudicated neglectful.<sup>157</sup> As the Supreme Court of North Carolina stated, “absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail.”<sup>158</sup> The state gives primacy to parental rights due to the presumption that parents will act in the “best interests” of their children.<sup>159</sup> Where a parent’s conduct is inconsistent with their children’s “best interests,” they lose their “paramount status” and the state may intervene in its role as *parens patriae*.<sup>160</sup> But there is no evidence in North Carolina caselaw of court considerations of individual minor interests or maturity in medical decision-making cases.

With the onset of Covid-19 and the public health concerns it creates, the state legislature amended the North Carolina General Statutes section 90-21.5 to include:

- (a1) Notwithstanding any other provision of law to the contrary, a health care provider shall obtain written consent from a parent or legal guardian prior to administering any vaccine that has been granted emergency use authorization and is not yet fully approved by the United States Food and Drug Administration to an individual under 18 years of age.<sup>161</sup>

This amendment went into effect on August 20, 2021 and barred minors from receiving vaccines granted emergency use authorization by the FDA.<sup>162</sup> Only three days later, the Pfizer-BioNTech Covid-19 vaccine was granted full FDA approval for

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<sup>157</sup> See *In re Hughes*, 119 S.E.2d 189, 191 (N.C. 1961); *In re Huber*, 291 S.E.2d 916 (N.C. Ct. App. 1982), *appeal dismissed and denied*, 294 S.E.2d 223 (N.C. 1982); *In re Stratton*, 571 S.E.2d 234 (N.C. Ct. App. 2002), *writ denied*, 572 S.E.2d 159 (N.C. 2002).

<sup>158</sup> *Petersen v. Rogers*, 445 S.E.2d 901, 905 (N.C. 1994). In *Peterson*, the reviewing court held that an extensive inquiry into the plaintiff’s religious beliefs was unnecessary. *Id.* Such an inquiry would only be necessary where parents are clearly neglectful and thus lose their rights of control over their children. *Id.*

<sup>159</sup> *Price v. Howard*, 484 S.E.2d 528, 534–35 (N.C. 1997).

<sup>160</sup> *Id.*

<sup>161</sup> N.C. GEN. STAT. § 90-21.5 (2021).

<sup>162</sup> *Id.*

individuals 16 years and older.<sup>163</sup> As previously enacted, North Carolina G.S. 90-21.5 gives minors the legal authority to prevent communicable diseases reportable under G.S.130A-135—which includes Covid-19.<sup>164</sup> As such, adolescents 16 and 17 years of age have the ability to consent to the Covid-19 vaccine, if they show the decisional capacity to do so.<sup>165</sup>

This extension of decision-making authority to minors in the medical setting is unprecedented in North Carolina. While granting greater autonomy to minors may simply be the result of health concerns surrounding Covid-19, it also signals a growing trust in the capacity of certain minors. This movement towards recognizing greater medical rights for minors should not be curtailed to the treatment of “communicable diseases” such as Covid-19. Rather, North Carolina legislators should extend the same level of trust to minors in other treatment contexts.

## V. MEDICAL DECISION-MAKING BYPASS RIGHT FOR MATURE MINORS

### A. Proposed Solution

In response to the public health crisis created by Covid-19, state legislatures have afforded greater legal deference to the interests of minors in the medical setting. But this deference is limited to vaccinations—creating a legal paradox where minors may individually consent to more experimental treatments like the Pfizer-BioNTech Covid-19 vaccine but are barred from making their own decisions about well-established medical procedures. One way to resolve this inconsistency would be to adopt a more wide-reaching mature minor exception for individuals in the medical context.

A deferential law granting physicians the ability to make legally binding maturity determinations would provide an efficacious solution. This system would allow treatment decisions to be made quickly without requiring a judicial determination of maturity in every case. Deference to the

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<sup>163</sup> Press Release, U.S. Food & Drug Administration (FDA), FDA Approves First Covid-19 Vaccine (Aug. 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine>.

<sup>164</sup> N.C. GEN. STAT. § 90-21.5 (2021).

<sup>165</sup> *Id.* At this time, written consent from parent or a legal guardian is required for twelve to fifteen-year-old minors to receive Pfizer COVID-19 vaccine because of the emergency use authorization. *Id.*

understanding of attending physicians is important, as research on child psychology varies widely<sup>166</sup> and there is no bright line rule demarcating when a child reaches “maturity.”<sup>167</sup> Nevertheless, some minors are demonstrably mature and capable of making serious medical decisions. Therefore, this decision should be delegated to the attending physician, as they have more experience with both (1) medical standards of competency in pediatric patients and (2) the individual patient.

Delegating maturity determinations to physicians would both expedite the opportunity of minors to assert their legal rights and allow for a more developmental approach to informed consent.<sup>168</sup> Such an approach would recognize the unique nature of pediatric practice, which allows for “increasing inclusion” of the minor’s opinions over time.<sup>169</sup> The decision-making capacity of minors is dependent on several factors: cognitive ability, moral authority, and maturity of judgment. Studies indicate that children as young as seven years old enter the “concrete operations stage” of development, allowing them “limited logical thought processes and the ability to develop a reasoned decision.”<sup>170</sup> As such, physicians can receive informed assent (if not fully informed consent) from children above the age of seven if they explain the proposed treatment in “developmentally appropriate language.”<sup>171</sup> Seriously including minors in discussions about their medical treatment will not only protect their rights, but also foster a sense of autonomy and personal responsibility for health in young individuals.

This deference to physicians should be paired with a judicial bypass system<sup>172</sup> which would expeditiously deal with parents

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<sup>166</sup> Courts considering maturity have come to a wide variety of outcomes. Delegating authority to physicians would place the decision in the hands of more “expert” individuals. *See Lee v. Weisman*, 505 U.S. 577, 636 (1992) (Scalia, J., dissenting) (“[I]nterior decorating is a rock-hard science compared to psychology practiced by amateurs.”).

<sup>167</sup> Katz et al., *Informed Consent in Decision-Making in Pediatric Practice*, PEDIATRICS, Aug. 2016, at e9, <https://publications.aap.org/pediatrics/article/138/2/e20161485/52519/Informed-Consent-in-Decision-Making-in-Pediatric>.

<sup>168</sup> *Id.*

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

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

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

<sup>172</sup> This judicial bypass system would be similar to those in place for minors considering abortion. *See, e.g., Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (“[I]f the State decides to require a pregnant minor to obtain one or both parents’ consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.”).

who wish to dispute a physician's assessment of maturity. This bypass system would allow parents to petition the court for a hearing on the maturity of their minor child. These petitions should be prioritized and heard within seventy-two hours.<sup>173</sup> At the hearing, parents should have the chance to dispute the physician's assessment of their child's maturity. Although judges should consider maturity on a case-by-case basis, a system of presumptions could provide a set of guidelines. For example, a workable system could create a rebuttable presumption of maturity for individuals aged 16-17 and a rebuttable presumption of immaturity for those aged 12-15.<sup>174</sup> Such a system would provide flexibility for minors whose life experiences expedite their development into maturity.<sup>175</sup> It would also require younger minors who are more likely to rely on their socioemotional impulses to demonstrate full reasoning about their decisions.<sup>176</sup>

A doctor's expert opinion would weigh heavily in these bypass hearings but would not be determinative. During the hearing, the judge would also consider a myriad of other factors such as "academic performance, intellectual capacity, participation in extracurricular activities, at school, plans for the future, and the [minor's] ability to handle [their] own finances."<sup>177</sup> Judges would measure these factors against the generally accepted requirements of informed consent for minors.<sup>178</sup>

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<sup>173</sup> This time requirement is based on the 72-hour requirement for judicial hearings on abortion waivers set in Mississippi. MISS. CODE ANN. § 41-41-55(3) (2022). In North Carolina however, this requirement is much more lenient (no more than seven days) N.C. GEN. STAT. § 90-21.8(d) (2021).

<sup>174</sup> For a similar proposal regarding a judicial bypass option for mature minors (not their parents), see Josh Burk, *Mature Minors, Medical Choice, and the Constitutional Right to Martyrdom*, 102 VA. L. REV. 1355 (2016).

<sup>175</sup> "Adolescents or older children who have experienced serious and/or chronic illnesses often have an enhanced capacity for decision-making when weighing the benefits and burdens of continued treatment[.]" Katz et al., *supra* note 167, at e10.

<sup>176</sup> "The implications for decision-making by adolescents in stressful health care environments are that they may rely more on their mature limbic system (socioemotional) rather than on the impulse-controlling, less-developed prefrontal cognitive system." Katz et al., *supra* note 167, at e8.

<sup>177</sup> See Burk, *supra* note 174, at 1371.

<sup>178</sup> "The general consensus among scholars and courts finds a minor capable of a mature decision if she is able to fully discuss the medical procedure, understand the risks, and has the ability to make a choice without undue peer or parental pressure." Burk, *supra* note 174, at 1371.

### *B. Potential Objections*

Those who object to this solution will first claim it represents an undue infringement on the constitutional right of parents to direct the upbringing of their children. They may argue that requiring parents to request a judicial hearing to dispute the maturity determination of a physician would place parents at a disadvantage in an area where they traditionally enjoy a high degree of legal deference: family decision-making. However, the traditional rights of parents are not exhaustive; they only allow for the support and preservation of the child's interests.<sup>179</sup> The constitution does not protect a parent's right to express their own choices (religious or otherwise) through their children.<sup>180</sup> As such, any objections based on parental beliefs which conflict with the "best interests" of their children are not protected.

Further, the rights of parents must be balanced against equally embedded ideas of personal liberty and bodily integrity underlying the doctrine of informed consent.<sup>181</sup>

## CONCLUSION

As studies continue to reveal the potential for minors to fully participate in their own healthcare, the legal system faces an important question: how much "personal liberty" are we willing to grant minors? Although the law in North Carolina has yet to answer that question, SL 2021-110 indicates a higher degree of trust which could open the way for more consistent legal treatment of minor rights. The proposal in this note provides a legislative option which would secure the personal integrity of capable minors while still providing a legal outlet for parents to retain their constitutional control over their children.

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<sup>179</sup> See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

<sup>180</sup> See *id.*

<sup>181</sup> See *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("[N]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . .").