

THE JOURNALISM LICENSING PROGRAM: A SOLUTION TO COMBAT THE SELECTIVE EXPOSURE THEORY IN OUR CONTEMPORARY MEDIA LANDSCAPE[♦]

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INTRODUCTION

Freedom of the press is the foundation to efficient self-governance in our democracy.¹ The press and media organizations are instrumental to weed out governmental inefficiencies, corruption, and to educate American citizens about what is occurring in the world around them.²

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¹ See *Thomas Jefferson on Politics & Government*, FAM. GUARDIAN, <https://famguardian.org/subjects/politics/thomasjefferson/jeff1600.htm> (last visited Aug. 23, 2017).

² See Patrick M. Yingling, *Conventional and Unconventional Corruption*, 51 DUQ. L. REV. 263,

During the early twentieth century, newspapers and radio were the primary news consumption methods for households.³ Barriers of entry into these arenas were high, requiring considerable personnel, capital, and infrastructure to produce sustainable content.⁴ The media organizations that were able to eclipse this obstacle held their journalists to a high standard.⁵ At that time, “institutional journalists were powerful guardians of the republic, maintaining high standards of political discourse.”⁶

However, the advent of the Internet and social media has shattered the traditional barriers of entry to foster a contemporary media landscape in which a single individual has the ability to disseminate their thoughts and ideas within seconds, unhinged of any ethical standards.

Broadcast consultant and commentator James Robinson brands this the “democratisation of media,” and argues that modern media has placed more control in the hands of the audience.⁷ Subsequently, Robinson states that media consumers have substantially more autonomy to decide which pieces of news they believe, which pieces they do not, and which are relevant to make up their own view of the story.⁸ This principle has been termed the “selective exposure theory.”⁹ The selective exposure theory is an individual’s propensity to favor information that reinforces his or her pre-existing views, while avoiding contradictory information.¹⁰ The selective exposure theory occurs as a result of cognitive dissonance,¹¹ which is an undesirable feeling that can arise when an individual has contradictory thoughts.¹² To combat this, individuals seek consistency among their beliefs.¹³

311 (2013).

³ See *History of American Journalism*, U. OF KAN., <http://history.journalism.ku.edu/1920/1920.shtml> (last visited Jan. 25, 2017).

⁴ See RICHARD GUNTHER, PAUL A. BECK, PEDRO C. MAGALHAES & ALEJANDRO MORENO, *VOTING IN OLD AND NEW DEMOCRACIES* (2015).

⁵ See JONATHAN McDONALD LADD, *WHY AMERICANS DISTRUST THE NEWS MEDIA AND HOW IT MATTERS* 8 (Princeton U. Press, 2012).

⁶ *Id.*

⁷ See Nic Newman, *The Rise of Social Media and its Impact on Mainstream Journalism* 32 (Reuters Ins. for the Study of Journalism, 2009), <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2017-11/The%20rise%20of%20social%20media%20and%20its%20impact%20on%20mainstream%20journalism.pdf>.

⁸ *Id.*

⁹ See Natalie Jomini Stroud, *Selective Exposure Theories*, OXFORD HANDBOOKS ONLINE 2 (2014), <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199793471.001.0001/oxfordhb-9780199793471-e-009?print=pdf>.

¹⁰ See *Selective Exposure Theory*, WORLD HERITAGE ENCYCLOPEDIA, http://gutenberg.us/articles/eng/Selective_exposure_theory (last visited Jan. 25, 2017).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

The selective exposure theory is prevalent in our political news as select media institutions are viewed as more left or right-leaning.¹⁴ As a result, some citizens are more apt to select like-minded media outlets that reaffirm their views on political issues.¹⁵ For example, more liberal media outlets such as *MSNBC* are more trusted by those who consider themselves either consistently liberal or mostly liberal, while those who identify themselves as mostly conservative or consistently conservative do not trust *MSNBC*.¹⁶ Similarly, more conservative media outlets such as *Fox News* are viewed by those who identify themselves as consistently liberal or mostly liberal as more dishonest than honest, while for those who identify as mostly conservative or consistently conservative, the inverse is true.¹⁷

The selective exposure theory in media can have two applications. First, as described in the preceding paragraph, citizens may act on their predispositions in seeking out their news and information.¹⁸ As media consumers, citizens are free to seek out information that reaffirms their political views—irrespective of that source’s factual accuracy—as any conflict is debated in our marketplace of ideas protected by the First Amendment of the U.S. Constitution.¹⁹ Second, journalists can apply it in their fact finding and reporting on a particular issue.²⁰ However, contrary to its application to media consumers, when these political predilections are displayed by journalists—those who are responsible for producing the facts—it can have a tremendous impact on how issues are shaped and perceived by the public.²¹

In a traditional media landscape in which professional journalists are conducting their due diligence and supporting their propositions with factual evidence, such singularity in opinion is important.²² However, in considering the selective exposure theory in our contemporary media landscape in which amateur websites, blogs, and social media accounts are—once again—unhinged from any ethical standards, few, if any, repercussions exist to penalize them for

¹⁴ See Stroud, *supra* note 9.

¹⁵ *Id.* (demonstrating that this premise has been shown for views on abortion, affirmative action, and gun ownership).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See Ronald K. L. Collins, *Holmes’ Idea Marketplace—its origins & legacy*, FIRST AMEND. CENT. (May 13, 2010) <http://www.firstamendmentcenter.org/holmes%E2%80%99-idea-marketplace-%E2%80%93-its-origins-legacy/>.

²⁰ See Stroud, *supra* note 9.

²¹ *Id.*

²² *What makes a good story?*, AM. PRESS INSTITUTE, <https://www.americanpressinstitute.org/journalism-essentials/makes-good-story/> (last visited Mar. 20, 2018).

inadequate fact-checking or distinctly opinionated and biased articles.²³

This proposal seeks to diminish the influence of the selective exposure theory applied by journalists and to protect media consumers from slanted and biased reporting. To accomplish this feat, I argue the best means is through the establishment of a journalism organization that administers licenses to journalists. Specifically, this licensing program will apply to content on the Internet and social media. The license will not restrict an individual's ability to publish information, as anyone may disseminate information on the Internet and social media—with or without a license. However, the license will serve to distinguish those journalists who have maintained high ethical standards. By distinguishing these individuals as the pinnacle of ethical excellence, my belief is that media consumers will be drawn to them, which will increase consumption and subsequently revenues for their organizations. In turn, as a result of increased consumption, my belief is that those organizations will have a greater incentive to produce high quality content to satisfy and maintain their consumers.

I. IDENTIFYING THE SELECTIVE EXPOSURE THEORY IN MEDIA: DUKE LACROSSE CASE STUDY

An example of how damaging the selective exposure theory can be when applied by journalists, is the 2006 Duke lacrosse scandal in which three Duke University students and lacrosse players—Reade Seligmann, Collin Finnerty, and David Evans—were falsely accused of rape.²⁴ Despite scant evidence and unethical governmental practices, the three men were chastised by the Duke community and the national media for being individuals that fit a predetermined description of who the public believed were responsible.²⁵

A. *Duke's Existential Conflict*

To identify the selective exposure theory in the Duke lacrosse scandal, it is important to understand the juxtaposition of race, class, power, privilege, and wealth between the Duke lacrosse players and the City of Durham. Duke University, located in Durham, North Carolina, is viewed as “the shining castle on the hill”²⁶ within the community. However, Duke and Durham could not have been more different. Durham's \$23,000 median per capita income is just over half the

²³ Mallery Jean Tenore, *Why Journalists Make Mistakes and What We Can Do About Them*, POYNTER (Jul. 7, 2017), <https://www.poynter.org/news/why-journalists-make-mistakes-what-we-can-do-about-them>.

²⁴ William D. Cohan, *Remembering (And Misremembering) the Duke Lacrosse Case*, VANITY FAIR (March 10, 2016, 5:18 PM), <https://www.vanityfair.com/news/2016/03/duke-lacrosse-case-fantastic-lies-documentary>.

²⁵ *Id.*

²⁶ STUART TAYLOR JR. & KC JOHNSON, *UNTIL PROVEN INNOCENT* 18 (2008).

\$41,000 annual tuition paid by Duke students.²⁷ Durham's population is 44% African American,²⁸ and nearly 15,000 city residents work mostly unskilled and low-skilled jobs at Duke.²⁹

The 2006 Duke lacrosse team was comprised of forty-seven players, all but one of whom were white.³⁰ More than half of the players came from affluent or near affluent families and had attended Northeastern prep schools.³¹ Aided by an influential professional lacrosse network, many prepared for successful careers.³² In fact, eight out of the ten seniors on the 2005–2006 roster were planning to begin their careers on Wall Street upon graduation.³³ Socially, the lacrosse players ranked at the top of the dominance hierarchy,³⁴ were viewed as the leaders of the pack in the Duke Saturday tailgate party scene,³⁵ and were “universally known, [and] tend[ed] to be the most desired and most confident guys on campus.”³⁶ This reputation branded the lacrosse team as a group of white men from privileged socioeconomic backgrounds who had power and influence on campus.³⁷

B. *The Alleged Rape*

On March 13, 2006, the Duke lacrosse team solicited two dancers: Crystal Gail Mangum and Kim Roberts.³⁸ The team party was held at 610 North Buchanan Boulevard, an off-campus residence rented by three Duke lacrosse players.³⁹

Mangum was an African American student at North Carolina Central University,⁴⁰ a predominately black university.⁴¹ Mangum had suffered from prolonged psychological problems⁴² and had a history of run-ins with the law.⁴³

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ See WILLIAM D. COHAN, *THE PRICE OF SILENCE* 13 (2014).

³¹ See TAYLOR JR. & JOHNSON, *supra* note 26, at 6.

³² *Id.*

³³ See *id.* at 6–7.

³⁴ See Peter J. Boyer, *Big Men on Campus*, *THE NEW YORKER* (Sept. 4, 2006) <http://www.newyorker.com/magazine/2006/09/04/big-men-on-campus>.

³⁵ See TAYLOR JR. & JOHNSON, *supra* note 26, at 4.

³⁶ Janet Reitman, *Sex & Scandal at Duke*, *ROLLING STONE* (June 15, 2006), <http://www.rollingstone.com/culture/features/sex-scandal-at-duke-sex-at-duke-duke-university-duke-scandal-duke-fraternities-duke-rape-duke-sororities-20060615>.

³⁷ See TAYLOR JR. & JOHNSON, *supra* note 26, at 6.

³⁸ See Gina Pace, *Second Duke Stripper Offers Account*, *CBS NEWS* (Apr. 21, 2006), <http://www.cbsnews.com/news/second-duke-stripper-offers-account/>.

³⁹ See TAYLOR JR. & JOHNSON, *supra* note 26, at 16.

⁴⁰ See Cohan, *supra* note 24.

⁴¹ See TAYLOR JR. & JOHNSON, *supra* note 26, at 19.

⁴² *Id.* (Mangum was diagnosed with hypertension, anxiety, and bipolar disorder).

⁴³ See *Crystal Gail Mangum: Profile of the Duke Rape Accuser*, *FOX NEWS* (Apr. 11, 2007), <http://www.foxnews.com/story/2007/04/11/crystal-gail-mangum-profile-duke-rape-accuser.html>. While working as a dancer in 2003, Mangum stole a client's keys to his taxicab and led police on

Upon arrival, Mangum was suspected to be high or drunk because “she could hardly speak and her words were slurred and at times incomprehensible.”⁴⁴ Shortly after the dancing routine commenced, Peter Lamade suggested Roberts use a broomstick as a sex toy.⁴⁵ The women stopped their performance and went upstairs.⁴⁶ According to time stamped photos, the performance lasted four minutes, from midnight to 12:04 a.m.⁴⁷ Dan Flannery and David Evans followed, seeking to apologize.⁴⁸ The women ignored the pleas as Mangum followed Roberts to the bathroom and shut the door.⁴⁹

Reade Seligmann, one of the three eventual defendants, had left the house, and made eight phone calls between 12:05:37 a.m.—just 90 seconds after the dancing had concluded—and 12:14 a.m.⁵⁰ Seligmann’s last call was for a taxi, which he entered with a teammate at 12:19 a.m.⁵¹ ATM security video nearby stamped Seligmann taking out money between 12:24 a.m. and 12:25 a.m.⁵² Seligmann swiped into his dorm building at 12:46 a.m.⁵³

Still locked in the bathroom, Mangum and Roberts were irate over Lamade’s comments. Flannery slipped money under the bathroom door to get the women out of the house.⁵⁴ The women left the bathroom. Roberts was followed by Mangum.⁵⁵

Roberts proceeded to her car in the front of the house while Mangum went to the backyard.⁵⁶ While on the back porch of the house, Mangum made a call at 12:26 a.m. Time-stamped photos show her standing on the back porch from 12:30:12 a.m. to 12:31:26 a.m.⁵⁷ Kevin Coleman photographed Mangum passed out on the back porch at 12:37:58 a.m.⁵⁸ This six-minute window between 12:31:26 a.m. and 12:37:58 a.m. was the only time the women separated from each other and no documentation exists to establish their whereabouts. By 12:41:32 a.m., Mangum was photographed in the passenger seat of

a chase, reaching speeds up to 70-miles-per-hour while driving in the wrong lane. When Mangum was caught and placed in custody, she was found to have a blood-alcohol content of 0.19, more than double North Carolina’s 0.08 limit. Mangum plead guilty to larceny, speeding to elude arrest, assault on a government official, and DWI.

⁴⁴ COHAN, *supra* note 30, at 17.

⁴⁵ *See id.* at 25.

⁴⁶ *See* TAYLOR JR. & JOHNSON, *supra* note 26, at 26.

⁴⁷ *Id.* at 25.

⁴⁸ *Id.*

⁴⁹ *Id.* at 27.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *See* TAYLOR JR. & JOHNSON, *supra* note 26, at 27.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 28.

⁵⁷ *Id.*

⁵⁸ *See* TAYLOR JR. & JOHNSON, *supra* note 26, at 28

Roberts' car.⁵⁹

Roberts drove to a supermarket where the police were called.⁶⁰ Durham Police Sergeant John Shelton arrived on scene, and noted that Mangum "identified signs and symptoms of a severe mental illness,"⁶¹ was "imminently dangerous to herself or others, and that she was in need of immediate psychiatric care,"⁶² and "met the criteria for involuntary commitment" to Durham Access Center.⁶³ Sergeant Shelton also requested an officer to check on Mangum's children.⁶⁴ Mangum was transported to Durham Access Center, which triggered a series of steps through which she could lose custody of her children.⁶⁵ Up to this point, Mangum had mentioned nothing about a rape to Roberts, the security guard who the women spoke to at the supermarket, or the three police officers who reported to the scene at the supermarket.⁶⁶

Once at Durham Access Center, Mangum began to write down the names of her children.⁶⁷ It was at this point—for the first time—that Mangum stated she was raped.⁶⁸ This terminated the involuntary commitment procedures and any possibility of losing custody of her children.⁶⁹ Subsequently, Mangum was admitted to the Duke University Medical Center.⁷⁰

While at Duke University Medical Center, Mangum spoke with Sergeant Shelton,⁷¹ she stated after her performance "some of the guys from the party pulled her from the vehicle and groped her,"⁷² but "no one forced her to have sex."⁷³ Sergeant Shelton briefly left the room, and upon returning Mangum stated she was raped.⁷⁴ After this encounter, Sergeant Shelton believed Mangum was lying.⁷⁵ Subsequently, Mangum was interviewed by Durham police officer Gwen Sutton.⁷⁶ Mangum told Sutton that "five men raped her in the

⁵⁹ *Id.*

⁶⁰ See COHAN, *supra* note 30, at 23.

⁶¹ *Id.* at 25.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See TAYLOR JR. & JOHNSON, *supra* note 26, at 31.

⁶⁵ See COHAN, *supra* note 30, at 26.

⁶⁶ See *id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 26 (defense attorneys would later argue that because of Mangum's previous interactions with the law, she knew that the involvement of the Department of Social Services would lead to her children being taken away).

⁷⁰ *Id.* at 27.

⁷¹ *Id.*

⁷² See COHAN, *supra* note 30, at 27.

⁷³ *Id.*

⁷⁴ *Id.* at 32.

⁷⁵ *Id.* at 27.

⁷⁶ *Id.*

bathroom,⁷⁷ one of her attackers was named Brett,⁷⁸ and that the act occurred for a half hour.⁷⁹ Duke University Police Officer Christopher Day filed the first operations report, which was in contradiction to both Sergeant Shelton and Officer Sutton's interviews.⁸⁰ Day stated Mangum "was claiming that she was raped by approximately twenty white males at 610 N. Buchanan Street."⁸¹ In the report, Day noted that Mangum "changed her story several times."⁸²

Mangum was then examined by a nurse, Jeni Hauver, who asked Mangum to rate her pain on a scale of one to ten, with ten being the "worst ever."⁸³ Mangum stated her pain was "a perfect ten" or the "worst ever."⁸⁴ According to court documents, however, "nurse Hauver tested Mangum for symptoms associated with pain and found none."⁸⁵ Following Hauver's assessment, two doctors and one nurse examined Mangum's condition, all were unanimous in finding no evidence of physical pain.⁸⁶

On the morning of March 14, Mangum provided the most detailed account of what occurred the previous night.⁸⁷ Mangum claimed she entered the bathroom where Adam closed the door to separate her from Roberts and said to Mangum, "You can't leave."⁸⁸ With the bathroom door closed, Mangum stated that Adam, Brett, and Matt began to rape her.⁸⁹ Mangum claimed Matt stated that he was "getting married tomorrow."⁹⁰ However, no Duke lacrosse player on the roster was getting married the next day, nor were any getting married in the foreseeable future.⁹¹ Mangum claimed the attack occurred at 1:00 a.m.⁹²—fourteen minutes *after* Reade Seligmann, an eventual defendant, had swiped into his dorm room.⁹³

⁷⁷ *Id.*

⁷⁸ See COHAN, *supra* note 30, at 27.

⁷⁹ See TAYLOR JR. & JOHNSON, *supra* note 26, at 32.

⁸⁰ See COHAN, *supra* note 30, at 29.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 28.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See TAYLOR JR. & JOHNSON, *supra* note 26, at 32 (the doctors and nurses failed to find any bruises, bleeding, vaginal or anal tearing, physical grimacing, sweating, or changes in vital signs that were associated with the described pain. Further, Mangum's physical examination revealed no sign of rectal penetration or trauma).

⁸⁷ See COHAN, *supra* note 30, at 30.

⁸⁸ *Id.*

⁸⁹ *Id.* at 31.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See TAYLOR JR. & JOHNSON, *supra* note 26, at 34

⁹³ See *id.* at 26

C. *The Subsequent Investigation*

On March 14, Sue Wasiolek, the assistant dean of students and former attorney was notified of the situation.⁹⁴ Dean Wasiolek told Pressler that the accuser was not credible, that Mangum's story had changed repeatedly, and that the "Duke's top campus cop said it would 'go away.'"⁹⁵ Wasiolek and Pressler confronted the team's co-captains with the news.⁹⁶ The co-captains stated that "two strippers" and "thirty people were there," all of whom were on the lacrosse team.⁹⁷ However, the players vehemently denied Mangum's allegations, and Wasiolek assured the players that Mangum's story was not credible, instructed the players that they did not need an attorney, and that they should remain silent about the allegations and not even tell their parents.⁹⁸

On March 16, Mangum gave her first account of the incident since her visit to the hospital. Interviewing officers arranged a photo lineup of twenty-four of the forty-six white players.⁹⁹ Despite naming Matt, Brett, and Adam as the attackers, Mangum identified *four players* with 100 percent certainty and a fifth—Reade Seligmann—with a "'70 percent' confidence level."¹⁰⁰ All four faces Mangum selected with 100 percent certainty were none of the eventual three defendants.¹⁰¹ Brad Ross, one of the accused identified by Mangum with 100 percent certainty, was not even in Durham the night of March 13.¹⁰² Mangum did not identify David Evans, an eventual defendant, despite viewing his photo twice.¹⁰³

Based upon Mangum's statements, the police obtained a search warrant for 610 North Buchanan Boulevard.¹⁰⁴ The players provided full access to the house, voluntarily agreed to be interviewed, provided signed statements, gave blood and hair samples, offered to take a lie detector test, and disclosed the passwords to their email and instant messenger accounts.¹⁰⁵ All three residents waived their Fifth Amendment right against self-incrimination to provide complete disclosure.¹⁰⁶

⁹⁴ See TAYLOR JR. & JOHNSON, *supra* note 26, at 37.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See COHAN, *supra* note 30, at 35.

⁹⁸ See TAYLOR JR. & JOHNSON, *supra* note 26, at 37 (Flannery recalls Dean Sue saying: "Don't tell anyone. Not even your parents." However, Dean Sue has denied this).

⁹⁹ *Id.* at 38.

¹⁰⁰ *Id.* at 38–39.

¹⁰¹ See Lara Setrakian, *Charges Dropped in Duke Lacrosse Case*, ABC NEWS (Apr. 11, 2007), <http://abcnews.go.com/US/LegalCenter/story?id=3028515&page=1>.

¹⁰² See TAYLOR JR. & JOHNSON, *supra* note 26, at 39.

¹⁰³ See Office of the Att'y Gen. of N.C., Durham County Superior Court case file Nos. 06 CRS 4332-4336, 5582-5583.

¹⁰⁴ See TAYLOR JR. & JOHNSON, *supra* note 26, at 41.

¹⁰⁵ *Id.* at 43.

¹⁰⁶ *Id.*

Roberts was not questioned until March 20.¹⁰⁷ Roberts stated Mangum's allegations were a "crook" because she was with Mangum the whole time.¹⁰⁸ Roberts' subsequent written statement on March 22 contradicted Mangum on all points.¹⁰⁹ Roberts stated as far as she knew, no player had touched either woman and that Mangum had said nothing about being raped at any point that night while they were together.¹¹⁰

Prosecutors sought to compel all forty-six white lacrosse players to provide DNA swabs and photos to police through a nontestimonial identification order (NTO).¹¹¹ In order to do so, the district had to show probable cause that Mangum had been raped and that each of the forty-six players whose DNA was sought by the district had participated in some way in the felony.¹¹²

The NTO falsely stated medical records and interviews, and revealed that the victim had signs, symptoms, and injuries consistent with being raped.¹¹³ The NTO did not mention Mangum's history of private performances, which, on the weekend of March 10–13, Mangum had four private hotel room engagements with escort customers.¹¹⁴ Further, the NTO did not mention Mangum's inconsistent stories, her incapacitated condition during and after the performance, Roberts' statement that the allegations were a "crook," the cooperation of the three lacrosse players, and Mangum's assertion that her assaulters were named Adam, Matt, and Brett.¹¹⁵ With no proof, the NTO stated that the players concealed their identities by utilizing aliases and uniform numbers to communicate.¹¹⁶ This claim was explicitly denied by Roberts who stated Flannery had showed his ID to her when she first arrived at the house.¹¹⁷ Despite this, Judge Ronald Stephens approved the NTO.¹¹⁸

D. Durham District Attorney Michael Nifong

Beginning in April 2005, Michael Nifong served as Durham County District Attorney.¹¹⁹ Nifong was not elected to serve as district attorney, but was appointed by North Carolina Governor Michael

¹⁰⁷ *Id.* at 46.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 57.

¹¹⁰ See TAYLOR JR. & JOHNSON, *supra* note 26, at 57.

¹¹¹ *Id.*

¹¹² See N.C. GEN. STAT. §15A-273 (1973).

¹¹³ See TAYLOR JR. & JOHNSON, *supra* note 26, at 58.

¹¹⁴ *Id.* at 20.

¹¹⁵ *Id.* at 58.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 59.

¹¹⁹ See *Duke Prosecutor on Trial*, THE WASHINGTON TIMES, <https://www.washingtontimes.com/news/2007/jun/13/duke-prosecutor-on-trial/> (last visited Jan. 25, 2017); See TAYLOR JR. & JOHNSON, *supra* note 26, at 81.

Easley.¹²⁰ Nifong's term was to last 20 months before the position was up for re-election and, being an appointed member to an elected position, Nifong promised Governor Easley he would not run for a full term.¹²¹ Soon after appointment, Nifong fired Assistant District Attorney Freda Black, a longtime rival.¹²² Shortly thereafter, Black announced her candidacy for the Durham District Attorney election.¹²³ There was little doubt that Black, a democrat, would fire Nifong in return if she were to win the office.

Nifong, also a democrat, soon abandoned his promise to Governor Easley, and made plans to run for a full four-year term as Durham District Attorney.¹²⁴ If Nifong were to win the election and finish out his four-year term in office, he would receive North Carolina's maximum pension plan, increasing his current pension by \$15,000 annually.¹²⁵

In March, Nifong found himself in a precarious position. The demographic composition of those eligible to vote in the primary was evenly split between African American and Caucasian voters.¹²⁶ No Republican candidate was expected to run, so the presumptive democratic nominee would likely be Durham County's next district attorney.¹²⁷ Durham's African American community disfavored both Nifong and Black, and supported third party candidate, African American defense attorney Keith Bishop.¹²⁸ Bishop was expected to garner much of the African American vote, and Black—in a district where 57% of the voters were female—was expected to garner a majority of the women's vote.¹²⁹ In the months leading up to the May 2, 2006 primary, Black amassed more than four times the fundraising sum Nifong did. According to a private poll on March 27, 2006, Black had a 17 point lead over Nifong in the democratic primary race.¹³⁰ Subsequently, Nifong doubled-down on himself, and loaned \$30,000 of his own money to his campaign.¹³¹

Finding himself down, out-funded, with a substantial personal investment on the line, and with a slim chance of preserving his political future, Nifong needed to make an impact before the May 2, 2006 Democratic Primary. Mangum—an African American woman—proved

¹²⁰ See TAYLOR JR. & JOHNSON, *supra* note 26, at 81.

¹²¹ *Id.*

¹²² *Id.* at 82.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See TAYLOR JR. & JOHNSON, *supra* note 26, at 82

¹²⁷ *Id.*

¹²⁸ *Id.* at 83.

¹²⁹ *Id.* at 84.

¹³⁰ *Id.*

¹³¹ *Id.*

to be the perfect catalyst. On March 27, 2006, Nifong received his first briefing on the case.¹³² He proceeded to spend over forty hours that week on at least seventy media interviews and press conferences.¹³³

E. *The Media and Duke's Response*

Objectivity is a central pillar of ethical journalism.¹³⁴ When covering sensational events, it is important that the journalist let the event speak for itself, and not let personal preference dramatize the story.¹³⁵ It is up to the journalist to present the story without comments and let the reader assess the event and their opinion of the story themselves.¹³⁶ However, whether journalists apply the selective exposure theory consciously or subconsciously, they prioritize select information that reinforces personal or societal views, while evading information that is contradictory to these understandings.¹³⁷ Under the selective exposure theory, reporting the facts of an event is no longer the journalist's central objective.¹³⁸ Instead, the journalist will seek out information from individuals and institutions that merely reinforce his or her predispositions.¹³⁹ When journalists become entrenched in their predictions and turn a blind-eye to the truth, this can become dangerous because of a journalist's unique ability to serve as a communicative bridge between the people and the events within their community.¹⁴⁰

The Duke lacrosse scandal provides for a well-suited demonstration of this communicative bridge. A senior *Times* alumnus emailed Kurt Andersen of *New York Magazine*, stating that “[y]ou couldn't *invent* a story so precisely tuned to the outrage frequency of the modern, metropolitan, *bien pensant* journalist.” Kurt Andersen noted that story was about “successful white men at the Harvard of the South versus a poor single mother enrolled at a local black college, jerky superstar jocks versus \$400 out-call strippers, a boozy Animal House party, shouts of ‘nigger,’ and a three-orifice gangbang rape in a

¹³² See Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to “Do Justice”*, 76 *FORDHAM L. REV.* 1337, 1348 (2007).

¹³³ See TAYLOR JR. & JOHNSON, *supra* note 26, at 85.

¹³⁴ See *SPJ Code of Ethics*, SOC'Y OF PROF. JOURNALISTS (Sept. 6, 2014, 4:49 PM), <http://www.spj.org/ethicscode.asp>.

¹³⁵ See DAVID RANDALL, *THE UNIVERSAL JOURNALIST* 155 (5th ed. 2011).

¹³⁶ *Id.*

¹³⁷ See Natalie Jomini Stroud, *Media Use and Political Predispositions: Revisiting the Concept of Selective Exposure*, 30 *POL. BEHAV.* 341 (2008).

¹³⁸ *Understanding bias*, AMERICAN PRESS INSTITUTE, <https://www.americanpressinstitute.org/journalism-essentials/bias-objectivity/understanding-bias/> (last visited Mar. 20, 2018).

¹³⁹ R. Kelly Garrett, *Politically Motivated Reinforcement Seeking: Reframing the Selective Exposure Debate*, 59 *J. OF COMM.* 676 (2009).

¹⁴⁰ Bob Steele, *The dangers of activist-driven journalism*, CNN (Sept. 30, 2010, 9:38 AM EDT), <http://www.cnn.com/2010/OPINION/09/30/steele.objective.journalism/index.html>.

bathroom.”¹⁴¹

Two of Durham’s most widely circulated newspapers, *The Herald-Sun* and *The News & Observer*, acted on their predilections in favor of Mangum and Nifong by “downplaying or omitting altogether the ever-growing evidence of innocence.”¹⁴² *The Herald-Sun* published an editorial on March 28 falsely stating “[w]hen police officers arrived at the house with a search warrant on March 16, none of the players would cooperate with the investigation.”¹⁴³

The News & Observer’s publications on the matter withheld “alleged” from their description of the players, but labeled Mangum as a “victim.”¹⁴⁴ An article by *The News & Observer*’s Ruth Sheehan stated, “[m]embers of the Duke men’s lacrosse team: You know. We know you know. Whatever happened in the bathroom at the stripper party gone terribly terribly bad, you know who was involved. Every one of you does. And one of you needs to come forward and tell the police.”¹⁴⁵

In Duke University President Richard Brodhead’s first public statement about the events, he stated “[p]hysical coercion and sexual assault are unacceptable in any setting and have no place at Duke’ . . . ‘[t]he criminal allegations against three members of our men’s lacrosse team, if verified, will warrant very serious penalties.”¹⁴⁶ Yet, President Brodhead also stated “there are very different versions of the central events. No charges have been filed, and in our system of law, people are presumed innocent until proven guilty.”¹⁴⁷ However, in their publication about the statement, the *Associated Press* included President Brodhead’s first statement condemning sexual assault, but conspicuously excluded his warning against a rush to judgment.¹⁴⁸

In a March 28, 2006 address, District Attorney Nifong, the man responsible for upholding justice, stated, “. . . [t]here are three people who went into the bathroom with the young lady, and whether the other people there knew what was going on at the time, they do now and have not come forward.”¹⁴⁹ Taylor Jr. and Johnson note that “[t]he local papers took Nifong’s inflammatory statements as gospel and threw gasoline on the flames.”¹⁵⁰

In reaction to a campus flier that had the Duke lacrosse website

¹⁴¹ Kurt Andersen, *Rape, Justice, and the ‘Times’*, N.Y. MAG., <http://nymag.com/nymag/rss/crime/22337/>.

¹⁴² TAYLOR JR. & JOHNSON, *supra* note 26, at 65.

¹⁴³ *Id.* at 88.

¹⁴⁴ *Id.* at 65.

¹⁴⁵ *Id.* at 76.

¹⁴⁶ TAYLOR JR. & JOHNSON, *supra* note 26, at 70.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ TAYLOR JR. & JOHNSON, *supra* note 26, at 87.

¹⁵⁰ *Id.*

photos of all forty-six white players with the headline “PLEASE COME FORWARD,”¹⁵¹ Sal Ruibal of *USA Today* wrote that it “looked like a wanted poster: 40 faces of young men, smiling smugly for the camera . . . [t]hese men are wanted on the Duke campus.”¹⁵² Fellow *USA Today* reporter Christine Brennan stated that the players were:

giving us all a whole new definition of the word teamwork. Perhaps if no one is found guilty of any criminal activity in this unseemly affair, the collective silence of the Blue Devils someday will be seen as admirable. For now, though, the sports world’s vaunted concept of team is reaching a frightening extreme.¹⁵³

The New York Times’ coverage led by sportswriter Joe Drape was initially principled and unbiased.¹⁵⁴ Unlike much of the media coverage, Drape voiced the defense’s arguments¹⁵⁵ and contained positive quotes about the players from their high school headmasters.¹⁵⁶ In particular, Drape’s March 31st article critiqued Mangum’s credibility, the validity of Roberts’ March 14 911 call, and Mangum’s restatement of the events.¹⁵⁷ According to Taylor Jr. and Johnson, “the more . . . [Drape] . . . pushed, the more . . . [he] . . . came to believe that Mangum was not credible and her rape charge was probably false.”¹⁵⁸

However, by early April, Drape said he was “having problems with the editors.”¹⁵⁹ According to Taylor Jr. and Johnson, “soon after Drape privately told people at Duke and, presumably, at the *Times* that this looked like a hoax, his byline disappeared from the Duke lacrosse story.”¹⁶⁰ Drape would later say that his “editors wanted a more prosecution line” and “wanted to stress the race-sex class angle without dwelling on the evidence of innocence.”¹⁶¹

Soon thereafter, *The New York Times* reporters changed their tune. Rick Lyman implied guilt in his March 31 article by closing with a

¹⁵¹ The flier’s sub-header quoted Durham Police Captain David Addison, which read: “[w]e’re not saying that all 46 were involved. But we do know that some of the players inside that house on that evening knew what transpired and we need them to come forward.” See DON YAEGER, IT’S NOT ABOUT THE TRUTH: THE UNTOLD STORY OF THE DUKE LACROSSE CASE AND THE LIVES IT SHATTERED 134 (2008).

¹⁵² TAYLOR JR. & JOHNSON, *supra* note 26, at 118–19.

¹⁵³ Christine Brennan, *Wrong Time for Team Unity in Duke Probe*, USA TODAY (Mar. 29, 2006, 11:31 PM), http://usatoday30.usatoday.com/sports/columnist/brennan/2006-03-29-duke-lacrosse_x.htm.

¹⁵⁴ See TAYLOR JR. & JOHNSON, *supra* note 26, at 119.

¹⁵⁵ See Joe Drape, *Lawyers for Lacrosse Players Dispute Accusations*, N.Y. TIMES (Mar. 31, 2006), <http://www.nytimes.com/2006/03/31/sports/lawyers-for-lacrosse-players-dispute-accusations.html>.

¹⁵⁶ See TAYLOR JR. & JOHNSON, *supra* note 26, at 120.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

quote from a female Duke student: "Is this going to be a team of rich white men who get away with assaulting a black woman?"¹⁶² *Times* reporter Selena Roberts also echoed this in her March 31 piece stating, "[a]t the intersection of entitlement and enablement, there is Duke University, virtuous on the outside, debauched on the inside . . . Does President Brodhead dare to confront the culture behind the lacrosse team's code of silence or would he fear being ridiculed as a snitch?"¹⁶³

The media's polarized coverage ignited a firestorm, which publicly indicted the lacrosse team based upon scant evidence. Such coverage resulted in wanted posters being placed around campus of the white lacrosse players.¹⁶⁴ Rallies were also held outside 610 North Buchanan Boulevard, where individuals banged pots and pans in the early morning until players emerged to answer questions.¹⁶⁵ Many in the Duke academic community publicly castigated the team, including English professor Houston A. Baker Jr. who, in a public letter to the Duke administration, demanded for the immediate dismissal of all lacrosse players and coaches.¹⁶⁶ In his letter, Baker acknowledged a "'culture of silence' that seeks to protect white, male athletic violence" in which he characterized the lacrosse team as a group of "white, violent, drunken men . . . veritably given license to rape, maraud, [and] deploy hate speech."¹⁶⁷

F. *The Aftershock*

Such public reaction led to head coach Mike Pressler being forced out by the administration after being the subject of hate calls, harassment, and vandalism by members of the Duke community.¹⁶⁸ President Brodhead suspended the remainder of the lacrosse season.¹⁶⁹ On April 11, 2007, North Carolina Attorney General Roy Cooper dropped all charges against the three lacrosse players accused of first degree rape, first degree sexual offense, and kidnapping.¹⁷⁰ Subsequently, on June 16, 2007, Durham District Attorney Nifong was disbarred after the state bar found him guilty of "fraud, dishonesty,

¹⁶² See TAYLOR JR. & JOHNSON, *supra* note 26, at 120

¹⁶³ *Id.* at 121.

¹⁶⁴ *Id.* at 104.

¹⁶⁵ See Melissa McNamara, *Rape Allegations Cloud Duke Lacrosse*, CBS NEWS (Mar. 29, 2006, 8:41 AM), <http://www.cbsnews.com/news/rape-allegations-cloud-duke-lacrosse/>.

¹⁶⁶ See TAYLOR JR. & JOHNSON, *supra* note 26, at 106.

¹⁶⁷ *Id.*

¹⁶⁸ See Kevin Paul Dupont, *Duke Still Gets 'F' for Mike Pressler's Firing*, BOSTON GLOBE (Apr. 24, 2015), <https://www.bostonglobe.com/sports/2015/04/24/duke-still-gets-for-handling-mike-pressler-firing/aGAhDPoW7bNhzawQByhCM/story.html>.

¹⁶⁹ See *Duke's Lacrosse Team Suspended Pending DNA Results*, ESPN (Mar. 31, 2006), <http://www.espn.com/college-sports/news/story?id=2387151>.

¹⁷⁰ See Duff Wilson & Juliet Macur, *2 Duke Athletes Charged with Rape and Kidnapping*, N.Y. TIMES (Apr. 19, 2006), <http://www.nytimes.com/2006/04/19/sports/sportsspecial/2-duke-athletes-charged-with-rape-and-kidnapping.html>.

deceit or misrepresentation; of making false statements of material fact before a judge; of making false statements of material fact before bar investigators, and of lying about withholding exculpatory DNA evidence.”¹⁷¹

II. WHY PROTECTION AGAINST THE SELECTIVE EXPOSURE THEORY MATTERS NOW

As demonstrated by the Duke lacrosse scandal, journalists cannot always be relied upon to report an accurate depiction of events, as the selective exposure theory impacts journalists with predispositions that prioritize select information over others. Further, as citizens increasingly turn to online media for their news—where there is potential for greater misinformation—there is heightened concern of a misled citizenry.¹⁷²

According to the Pew Research Center, 38% of Americans receive their news online, and there is strong evidence to demonstrate online media can soon become the most common platform through which Americans receive their news.¹⁷³ However, the fast-paced nature of online journalism has led to unsettling change, such as poor verification procedures in the name of being the first organization to report, and “how blogs and social media have blurred the lines between fact and opinion.”¹⁷⁴ This conflation between fact and opinion has led to the proliferation of fake news,¹⁷⁵ and the public’s difficulty in deciphering the difference between fact and opinion.¹⁷⁶

This was demonstrated in a Stanford University study¹⁷⁷ in which researchers asked 25 Stanford undergraduates to evaluate two organization websites: The American Academy of Pediatrics and the American College of Pediatricians. The American Academy of

¹⁷¹ Lara Setrakian & Chris Francesceni, *Former Duke Prosecutor Nifong Disbarred*, ABC NEWS (June 16, 2007), <http://abcnews.go.com/TheLaw/story?id=3285862>.

¹⁷² See *The Modern New Consumer*, THE PEW RES. CTR. (July 7, 2016), <http://www.journalism.org/2016/07/07/pathways-to-news/>. According to the Pew Research Center, television—which is currently the most popular way Americans receive their news at 57%—is mostly used by those 50+. 72% of those polled in the 50–64 age bracket and 85% of those in the 65+ bracket consume their news via TV. However, 50% of those polled in the 18–29 age bracket and 49% of those polled in the 30–49 age bracket state they consume news through online sources.

¹⁷³ See *id.*

¹⁷⁴ Whit Richardson, *Online Journalism Poses Challenges, but Doesn’t Require New Ethical Guidelines*, SABEW, <https://sabew.org/2013/04/online-journalism-poses-challenges-but-doesnt-require-new-ethical-guidelines/> (last visited January 25, 2017).

¹⁷⁵ See *The Rise and Rise of Fake News*, BBC TRENDING (Nov. 6, 2016), <http://www.bbc.com/news/blogs-trending-37846860>.

¹⁷⁶ See *Student Have ‘Dismaying’ Inability to Tell Fake News from Real, Study Finds*, NPR (Nov. 23, 2016, 12:44 PM), <http://www.npr.org/sections/thetwo-way/2016/11/23/503129818/study-finds-students-have-dismaying-inability-to-tell-fake-news-from-real>.

¹⁷⁷ See *id.*

Pediatrics is an organization with 64,000 members that issues more than 500 titles for healthcare professionals.¹⁷⁸ The American College of Pediatricians is a fringe group that has been criticized for utilizing their platform to promote their political agenda, including the discouragement of adoption by same-sex couples and single parents.¹⁷⁹ It is considered a hate group by the Southern Poverty Law Center.¹⁸⁰ Stanford University students spent 10 minutes evaluating the content of both websites and had free reign on the Internet to research both organizations.¹⁸¹ More than half of the students—from the most selective college in the country—concluded the American College of Pediatricians was “more reliable.”¹⁸²

Such difficulty in deciphering between real and fake information was not as threatening twenty years ago because a platform to widely disseminate misinformation was not as accessible to those with lower ethical standards. An apt illustration of the issues in our media landscape was demonstrated in the 2016 United States Presidential election. During the final three months of the campaign, the top twenty fake news articles were shared *more than* the top twenty real news articles.¹⁸³ Two of the most circulated false news stories claimed that Hillary Clinton sold weapons to ISIS, and that the Pope had endorsed Donald J. Trump for president.¹⁸⁴ As shown, with no factual evidence, individuals and websites have the ability to broadly distribute questionable or indeed false information to citizens who increasingly face difficulty decoding fact from fiction.

III. THE JOURNALISM LICENSING PROGRAM

Individuals consume news to be better informed, and are more likely to consume media they feel most accurately reports the news.¹⁸⁵ Based upon this premise, the objective of the Journalism Licensing Program (JLP) is to differentiate—or validate—journalists who have embodied strong ethical practices in their reporting. Following their license grant, an insignia will be shown next to their name on any article

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

¹⁸² See Sam Wineburg & Sarah McGrew, *Why Student Can't Google Their Way to the Truth*, EDUC. WEEK (Nov. 1, 2016), <http://www.edweek.org/ew/articles/2016/11/02/why-students-cant-google-their-way-to.html>.

¹⁸³ See Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook*, BUZZFEED NEWS (Nov. 16, 2016, 5:15 PM), https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm_term=.tb8vD0kK3#.udKE1d6n3.

¹⁸⁴ *Id.*

¹⁸⁵ See Andrew Selbst, *The Journalism Ratings Board: An Incentive-Based Approach to Cable News Accountability*, 44 U. MICH. J. L. REFORM 467, 483 (2011).

they author online, and next to their name on social media accounts, to differentiate them from their fellow publishers. The license insignia will help the public decode fact from fiction, and guide them towards more ethical reporters, if that is the information they decide to consume. My belief is that this insignia distinction will result in higher readership, and thus, increased revenue for those ethical journalists and their associated organizations. In turn, I believe publishers across our media landscape will prioritize ethical requirements, and raise the bar in their journalism practices.

This license is *not* one that dissuades or excludes journalists from publication. It is a license that informs the public that a particular journalist has met select ethical criteria in their reporting. The JLP is intended to only assess individual journalists, and not their associated organizations. Evaluating the larger journalism institution would require the JLP committee to weigh the significance, impact, and consequences from different writers in disparate subject-matters, which I believe would require broad and excessive generalizations.

A. *JLP Committee Member Composition and Selection*

The first issue is who will serve on the licensing committee. Journalists currently serving in the industry would present too many conflicts of interest, and would draw too much skepticism from the public to deem the licenses an effective check on unethical reporting.¹⁸⁶ However, there are a multitude of journalism organizations currently in existence that are dedicated to ensuring the protection of journalists and the ethical practice of journalism across the country.¹⁸⁷ Examples include the Reporters Committee for Freedom of the Press, the Society of Professional Journalists, and the American Press Institute.¹⁸⁸ Such organizations are comprised of individuals who are independent of publishing news organizations, yet contain professionals who are knowledgeable about the field and its practices to effectively serve as adjudicators for the licensing committee.¹⁸⁹

Additionally, I believe it will be valuable to have a small minority of citizens with no previous journalism experience serve on the JLP. While this approach may seem incongruous, I believe it will serve several critical functions. First, it will increase public trust. In recent years, governmental officials, successful businessmen and women, and

¹⁸⁶ For example, how would a journalist assess their colleague's work? Or, a past publication they worked at?

¹⁸⁷ See Jeremy Porter, *30 Organizations Dedicated to Keeping Journalism Great*, JOURNALISTICS (May 18, 2009), <http://blog.journalistics.com/2009/30-organizations-dedicated-to-keeping-journalism-great/>.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

journalists have been perceived as “elite”¹⁹⁰ and out-of-touch with some American citizens.¹⁹¹ Public trust is the key to this program. If citizens are able to serve on the committee, it can help demonstrate to those American citizens who maybe discontent with what is perceived as elitism in the media that their perspective is being heard. Second, American citizens are who this program intends to help—that is the JLP’s customer—not journalists. Understanding the perspective of the customer is fundamental to any business.¹⁹² The JLP is no different. Third, this will keep members of the committee honest and provide them with a diversity of perspectives which would result in a more thorough and effective review process.

The second issue is whose work the committee members will be assessing. The JLP is intended, at least initially, to apply to political journalists covering the federal government’s legislative, judicial, and executive branches. I have selected this area of the media landscape first because I believe it has been the area most riddled by fake news and misinformation.¹⁹³ The committee will meet as a whole to review that political journalist’s entire body of work from that year. This will occur on an annual basis. So, for example, all members of the committee will meet at the end of 2016 to assess a journalist’s body of work from 2016. If committee members approve of that journalist’s work for the year, a license will be granted to that journalist for 2017. At the end of 2017, this process will repeat. All political journalists will be adjudicated exclusively upon their publications that year.

The third issue is transparency. The rise or fall of this program will depend upon public trust. If citizens become cynical of the program and its practices, it will be ineffective. To guard against this, it is imperative to have extensive disclosure requirements that are closely monitored. Disclosure procedure is three-fold. First, adjudicators must state whether they have previously worked for the affiliated institution of the journalist they assess. Second, they must disclose whether they have any personal relationship with that journalist. If any of the adjudicators have any personal or institutional relationship with a journalist whose organization they are critiquing, they must recuse themselves from assessment. Third, adjudicators must disclose their political party

¹⁹⁰ Andrew McGill, *U.S. Media’s Real Elitism Problem*, THE ATLANTIC (Nov. 19, 2016), <http://www.theatlantic.com/politics/archive/2016/11/fixing-americas-nearsighted-press-corps/508088/>.

¹⁹¹ See Jon Bruner, *Is the Media Out of Touch? A Look at the Numbers*, FORBES (Jan. 9, 2012, 12:15 PM), <http://www.forbes.com/sites/jonbruner/2012/01/09/is-the-media-out-of-touch-a-look-at-the-numbers/2/#e1ee1830d235>.

¹⁹² See Jure Klepic, *The Importance of Consumer Insights in Today’s Marketing Strategies*, HUFFINGTON POST (Nov. 4, 2014, 8:45 AM), http://www.huffingtonpost.com/jure-kleplic/the-importance-of-consume_b_6083324.html.

¹⁹³ See Angie Drobnic Holan, *2016 Lie of the Year: Fake News*, POLITIFACT (Dec. 13, 2016, 5:30 PM), <http://www.politifact.com/truth-o-meter/article/2016/dec/13/2016-lie-year-fake-news/>.

affiliation to ensure decisions are not determined on a purely partisan basis.

The fourth issue is protection against partisan politics in the administration of licenses. If the public believes licenses are administered based upon partisan lines, the JLP will be futile. Consequently, my goal is to split the committee along political party lines as equally as possible to ensure politics plays no part in the allocation or revocation of licenses. This strategy has been successfully implemented by the Securities and Exchange Commission (SEC).¹⁹⁴ The SEC is led by five commissioners.¹⁹⁵ While the president appoints all five commissioners,¹⁹⁶ the Securities Exchange Act of 1934 requires no more than three commissioners come from the same political party.¹⁹⁷ Considering there needs to be an odd number of committee members to prevent a hung decision, there will always be one additional supporter for one political party over the other on the committee. Accordingly, judgments to grant or revoke a license will not be determined by a committee majority, but by a supermajority of committee members, for example two-thirds, to ensure bipartisan support in the administration or revocation of licenses.

B. *Defining the Standard of Review*

No one set of values defines ethical journalism, but there are several prevailing philosophies among news agencies that will formulate the standard of review. Aidan White of the Ethical Journalism Network promulgates these core principles: accuracy, independence, impartiality, humanity, and accountability.¹⁹⁸ White defines accuracy as “no deceptive handling of the facts.”¹⁹⁹ Independence means “the work that you do is your own work” that is not on behalf of the government, a business, or a special interest group.²⁰⁰ Impartiality encompasses an understanding that there is more than one side of every story, and a journalist’s responsibility is to inform the public of each view.²⁰¹ Humanity compels a journalist to be cognizant that his or her words can have harmful consequences to people, and that it is not the job of the journalist to do harm, but to protect citizens.²⁰² Accountability requires journalists to engage with the audience to correct mistakes, and be

¹⁹⁴ See U.S. SEC. & EXCHANGE COMMISSION, available at <https://www.sec.gov/about/commissioner.shtml>.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See *The 5 Principles of Ethical Journalism*, ETHICAL JOURNALISM NETWORK <http://ethicaljournalismnetwork.org/who-we-are/5-principles-of-journalism>.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

prepared to provide remedies when they get it wrong.²⁰³

Today, rating systems are ubiquitous. Consumers can rate appliances and technology through *Consumer Reports*²⁰⁴ or local businesses on Yelp,²⁰⁵ while the federal government utilizes a rating system to appraise financial institutions.²⁰⁶ These five principles—accuracy, independence, impartiality, humanity, and accountability—will serve as the foundation to JLP’s ratings-based approach to journalism. JLP committee members will evaluate a journalist’s body of work from the preceding year on a scale of one to five and determine how well they abided by these evaluations. Each committee member’s rating will be aggregated with the others to determine an average. If that average exceeds an allotted benchmark score, the journalist is awarded a license, which distinguishes them from their peers as a diligent, principled, and ethical reporter.

To meet disclosure requirements, committee members will be required to submit written reports for every journalist. The report will specify what publication components the adjudicator found adequate or inadequate to meet the ethical requirements and why. These reports will be publicly available to aid the citizenry in obtaining the full context and reasoning of a license award or revocation. If an author fails to meet the allotted benchmark, he or she will still be free to publish online and on social media. However, my belief is that the absence of the license insignia will create sufficient consumer skepticism to deter citizens from reading and sharing that content.

IV. DECIDING BETWEEN A PUBLIC OR PRIVATE LICENSING ADMINISTRATION

The primary legal issue in constructing the JLP is whether a governmental agency or private institution should administer the licenses. Each presents legal and ethical concerns that require further discussion.

A. *Assessing the Constitutionality of a Public JLP*

The two principal advantages of a public JLP are that it will have the strong financial support of the federal government to ensure adequate resources, as well as an infrastructure of governmental officials to safeguard against ethical dishonesty or exploitation. However, a public JLP would necessitate governmental control over the grant or revocation of journalism licenses, thereby triggering First

²⁰³ *Id.*

²⁰⁴ See *About Us*, CONSUMER REP., <http://www.consumerreports.org/cro/about-us/index.htm>.

²⁰⁵ See *About Us*, YELP, <https://www.yelp.com/about>.

²⁰⁶ See *Selbst*, *supra* note 185, at 484.

Amendment protections.²⁰⁷ This issue presents constitutional difficulties because the U.S. Supreme Court has been “far from clear”²⁰⁸ in its First Amendment regulation jurisprudence.

The threshold issue is differentiating between content-based restrictions and content-neutral restrictions.²⁰⁹ Content-based actions face strict scrutiny,²¹⁰ which is a form of judicial review that requires the legislature to demonstrate a compelling governmental interest that is narrowly tailored to achieve its end.²¹¹ Its application is strict in name, but fatal in practice.²¹² As a general rule, “laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.”²¹³ By contrast, content-neutral speech restriction faces a more lenient intermediate scrutiny.²¹⁴ To pass intermediate scrutiny, the challenged law must further an important government interest through means that are substantially related to that interest.²¹⁵

The objective of the JLP is to distinguish, or validate, those journalists who have embodied strong ethical practices in their reporting to help the public decode fact from fiction in the news they consume. Therefore, the JLP’s evaluation components—accuracy, independence, impartiality, humanity, and accountability—relate directly to a journalist’s ethical *practices*, and not to the *content* of his or her work. As demonstrated, there is no doubt that the JLP distinguishes between favorable and unfavorable journalism practices, but the inquiry into a journalist’s content presents a more nuanced discussion.

A journalist’s job is two-fold: to apply these practices in his or her fact-finding and information gathering, and to ensure these ethical practices carry over in publication. Therefore, while the JLP’s evaluation principles may directly affect a journalist’s practices, it is impossible to consider the journalist’s practices without concurrently critiquing the *content* of their work. From this perspective, it is difficult to see how a public JLP committee evaluation is not content-based.

Thus, to be a constitutional public program, the government must successfully argue that a public JLP fits within the construct of content

²⁰⁷ See Charles F. Hinkle, *Regulation of Speech on the Internet*, STOEL RIVES (June 21, 2005), <https://www.stoel.com/regulation-of-speech-on-the-internet#five>.

²⁰⁸ *Id.* at 501.

²⁰⁹ See Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 596 (2003).

²¹⁰ *Id.*

²¹¹ See *Strict scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny (last visited Mar. 20, 2018).

²¹² *Id.*

²¹³ *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 623 (1994).

²¹⁴ *Id.*

²¹⁵ See *Intermediate scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/intermediate_scrutiny (last visited Mar. 20, 2018).

neutrality. The first inquiry in determining content neutrality is whether the government has adopted a speech regulation because of disagreement with the message it conveys.²¹⁶ Justice Kennedy's excerpt from *Ward v. Rock Against Racism* is often used by the Court to describe content-based/content neutral analysis.²¹⁷ The speech is content neutral so long as it is "justified without reference to the content of the regulated speech."²¹⁸

As it pertains to the first inquiry, the JLP's objective is not to limit free speech in any way, and a committee member's ideological disagreement with a particular message is irrelevant to license adjudication. With the JLP's stern disclosure requirements, the citizenry and judiciary can be assured regulation based upon messages that committee members disagree with will not be an issue. However, the second inquiry poses the same problems that the content based analysis did. In the JLP committee's reports, they will be required to state why they believe a journalist's work is adequate or inadequate to meet the ethical requirements. Such explanations require "reference to the content of the regulated speech" as set forth by Justice Kennedy.²¹⁹ This is a central component to the disclosure requirements. Neglecting to explain why committee members believe a journalist's practices were adequate or inadequate would draw far too much consumer skepticism. JLP committee members will have to reference the content of the regulated speech. Therefore, under both the traditional content-based and content neutral analysis, a public JLP is arguably unconstitutional.

However, a narrow exception to the content neutral inquiry exists which may justify a public JLP. In select instances, the United States Supreme Court has utilized the secondary effects doctrine to defend a facially content-based action.²²⁰ Under this exception, the Court will look beyond content discriminatory speech restrictions to characterize its justification as content-neutral.²²¹ This exception was applied in *City of Renton v. Playtime Theatres, Inc.*,²²² in which Playtime Theatres challenged the constitutionality of a zoning ordinance that prohibited adult motion picture theatres within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park, or school.²²³ In upholding the ordinance, Justice Rehnquist stated:

²¹⁶ See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

²¹⁷ See Jacobs, *supra* note 209, at 604.

²¹⁸ *Ward*, 491 U.S. at 791.

²¹⁹ *Id.*

²²⁰ See Jacobs, *supra* note 209, at 605.

²²¹ *Id.*

²²² *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986).

²²³ *Id.* at 43.

[T]he city's pursuit of its zoning interests here was unrelated to the suppression of free expression. The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views.²²⁴

The Court has only extended the secondary effects to sexual speech.²²⁵ When the Court employs the secondary effects doctrine, they are protecting local communities from the harmful secondary effects that sexual expression can have, such as crime "caused by the presence of even one such establishment."²²⁶

To prove a public JLP constitutional under such reasoning, the government's argument would be two-fold. First, they would need to demonstrate that a citizenry consuming misinformation about its government is corrosive to democracy, just as explicit sexual expression is damaging to local communities. Second, the government would need to prove that validating ethical journalists "protect[s] and preserve[s] the quality"²²⁷ of information that its citizenry consumes, just as regulating explicit sexual expression leads to a reduction in crime and immorality in the community. In doing so, the Court would need to be convinced that such regulation is acutely "unrelated to the suppression of free expression."²²⁸

However, in my opinion, the Court would not be convinced of such an argument. There is a demonstrative reason why the Court has refused to extend the secondary effects doctrine past sexual expression—it falls only within the outer ambit of the First Amendment's protection.²²⁹ Nevertheless, the JLP speaks to a much more sensitive issue of the "privilege to speak one's mind, although not always with perfect good taste, on all public institutions."²³⁰ Further, the Court has made clear that a lower standard of scrutiny for secondary effects has no application to content-based regulations.²³¹ To validate an argument for a public JLP, the government would have to prove the JLP is not content-based. As demonstrated, I believe no such solution exists under the secondary effects doctrine.

Another potential argument the government can utilize to validate a public JLP can be found in *Turner Broadcasting System, Inc. v.*

²²⁴ *Id.* at 48.

²²⁵ See Jacobs, *supra* note 209, at 605.

²²⁶ *Playtime Theatres, Inc.*, 475 U.S. at 47–48.

²²⁷ *Id.* at 48.

²²⁸ *Id.*

²²⁹ See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000).

²³⁰ *Bridges v. California*, 314 U.S. 252, 270 (1941).

²³¹ See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 867–68 (1997).

F.C.C.,²³² which makes it “clear that mere examination of content in decision-making does not render a policy ‘content-based.’”²³³ Concerned with a competitive imbalance in the television broadcasting industry, Congress passed the Cable Television Consumer Protection and Competition Act of 1992, which required cable television systems to devote a specified portion of their channels to the transmission of local and public stations.²³⁴ These were termed “must-carry provisions.”²³⁵ In ruling that the must-carry provisions were of “content-neutral character”²³⁶ and thus constitutional, Justice Kennedy stated: “Although the provisions interfere with cable operators’ editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations, the extent of the interference does not depend upon the content of the cable operators’ programming”²³⁷ because “[n]othing in the Act imposes a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select.”²³⁸

The government can argue that a license administered by the public JLP is akin to the must-carry provision. *Turner*’s must-carry provision mandates local and public content be carried by cable providers because “Congress’ overriding objective [in enacting the must-carry provision] was not to favor programming of a particular content, [viewpoint, or format,] but rather to preserve access of free television programming for the 40 percent of Americans without cable.”²³⁹ Congress did not intend to favor or disfavor select subject matter, viewpoints, or formatting. Additionally, since it was in the best interest of the American people, Congress was able to directly compel a private institution to broadcast content. The JLP is also intended not to favor or disfavor select subject matter, viewpoints, or formatting *and* is in the best interest of the American people because it will ensure that those political journalists who are abiding by strong ethical standards are identified. Unlike *Turner*, compulsion is not necessary under a public JLP. If online publishers feel that the ethical requirements of accuracy, independence, impartiality, humanity, and accountability are too burdensome, expensive, or will be to the detriment of their readers, they are free to continue their traditional practices. As a result, not only does the JLP meet the requisite requirements which validate the must-carry provision, but the selective form of expression under the JLP is

²³² See *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622 (1994).

²³³ *Selbst*, *supra* note 185, at 502.

²³⁴ See *Turner Broadcasting System, Inc.*, 512 U.S. at 622.

²³⁵ *Id.*

²³⁶ *Id.* at 652.

²³⁷ *Id.* at 643–44.

²³⁸ *Id.* at 644.

²³⁹ *Id.* at 623.

optional to publishers, not compulsory like the must-carry provision. Thus, the argument will be that, under the JLP, publishers have greater First Amendment autonomy of expression than under the must-carry provision.

Finally, the government may seek support for a public JLP through commercial speech law. Commercial speech occurs when the speaker is engaged in commerce and the intended audience are actual or potential consumers.²⁴⁰ An example of commercial speech are advertisements that are provided a lower intermediate standard of protection in First Amendment cases.²⁴¹ While verified journalists would never be categorized as such because they inform the public about newsworthy events and not commercial activity, commercial speech can help to classify fake news. Fake news is malicious. Fake news is also false information that becomes credible most often through the promotion or dissemination by major political or media figures.²⁴² Traditionally, fake news was more conspicuous and easier to decipher as “[t]he type of material that would previously only be forwarded in an ALL CAPS chain-letter email.”²⁴³ Now, fake news is being printed on what appears to be professional looking websites that can lead people to believe the content is credible.²⁴⁴ For example, ABC News is a reputable news source comprised of award-winning journalists, using the web address ABCnews.com.²⁴⁵ Their fringe site that disseminates fake news is ABCnews.com.co.²⁴⁶ As demonstrated by the parallel web domain name and its professional appearance, websites such as ABCnews.com.co and the Denver Guardian, a fake news site designed to look like a real Colorado newspaper, thrive on deception.²⁴⁷ These fabricated or exceedingly misleading news stories are effective because they are mixed into the flow of true or mostly true stories.²⁴⁸ The goal of fake news sources is to be believed and shared,²⁴⁹ as a story shared by a prominent public figure could result in nearly \$10,000 of revenue for

²⁴⁰ See *Commercial speech*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/commercial_speech (last visited Mar. 20, 2018).

²⁴¹ See *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973).

²⁴² See Amanda Carpenter, *What is 'Fake News' Anyway?*, CONSERVATIVE REV. (Dec. 9, 2016), <https://www.conservativereview.com/commentary/2016/12/what-is-fake-news-anyway#sthash.20bqoJPI.dpuf>.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ See ABC NEWS, <http://abcnews.go.com/>.

²⁴⁶ See ABC News.com.co, <http://abcnews.com.co/>.

²⁴⁷ See *id.*; see Eric Lubbers, *There is no such thing as the Denver Guardian, despite that Facebook post you saw*, THE DENVER POST (NOV. 7, 2016, 5:26 PM), <https://www.denverpost.com/2016/11/05/there-is-no-such-thing-as-the-denver-guardian/>.

²⁴⁸ See Abby Ohlheiser, *This is How Facebook's Fake-News Writers Make Money*, WASH. POST (Nov. 18, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/11/18/this-is-how-the-internets-fake-news-writers-make-money/?utm_term=.09db4561a12f.

²⁴⁹ *Id.*

the fringe site.²⁵⁰

Advertising is no different. Broadly, both fake news sites and advertisers successfully market their goods and services to consumers to make money. Specifically, fake news sites seize on individuals' biases as explained by the selective exposure theory, and influence citizens into believing their misinformation is truthful and into disseminating it to their followers across social media, which results in more clicks and revenues for their site.

The United States Supreme Court has restricted the use of false, deceptive, and misleading commercial speech,²⁵¹ ruling the First Amendment "does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely."²⁵² The Court restricted such speech in *Friedman v. Rogers*, in which a Texas optometrist challenged the legality of the Texas Optometry Act.²⁵³ The Act prohibited the practice of optometry under a trade name.²⁵⁴ Justice Powell held that the prohibition was constitutional because the regulation was in furtherance of protecting the public from trade name practices that proved to be deceptive and misleading.²⁵⁵ The Court found no First Amendment protection existed because the optometrist who uses a trade name does not wish to editorialize on any subject, whether cultural, philosophical, or political,²⁵⁶ nor did he or she "wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters."²⁵⁷ Its purpose is strictly business, and was therefore categorized as a form of commercial speech and nothing more.²⁵⁸

The reasoning that supported the constitutional suppression of speech in *Friedman* can be analogous to the suppression of fake news because both can be argued to deceive the public in an attempt to generate revenue. Similar to the trade practices in *Friedman*, the government can argue that fake news sites are intended to deceive and mislead because their stories have no basis in truth. Next, the government must demonstrate such misinformation does not benefit the public by editorializing information or through reporting newsworthy facts to promote an educated citizenry, but is exclusively intended for commercial purposes—to generate clicks and revenues from their

²⁵⁰ *Id.*

²⁵¹ See *Friedman v. Rogers*, 440 U.S. 1, 9 (1979).

²⁵² *Id.* at 10.

²⁵³ *Id.* at 3.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 9.

²⁵⁶ See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

²⁵⁷ *Id.*

²⁵⁸ See *Friedman v. Rogers*, 440 U.S.1, 10 (1979).

readership as actual or potential consumers. The government's final step would be to argue that a public JLP is the narrowest means to combat these deceptive practices. If this premise is successfully demonstrated, the government can invalidate fake news websites as commercial speech for "strictly business"²⁵⁹ purposes and nothing more.

Ultimately, the central examination in determining whether commercial speech falls within First Amendment protection is found in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.²⁶⁰ Justice Powell promulgated a four-part test:

For commercial speech to come within . . . [First Amendment protection], [1] it at least must concern lawful activity and not be misleading. Next we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.²⁶¹

Under this examination, the first prong presents the greatest obstacle for a public JLP. While there is no doubt that fake news has been proven to be misleading,²⁶² demonstrating a lack of lawful activity will be more difficult. To do so, the government can utilize libel law. Libel is a form of defamation that is expressed in print or writing that is injurious to a person's reputation, exposes a person to public hatred, contempt or ridicule, or injures a person in his/her business or profession.²⁶³ As stated, the JLP will initially apply to political journalists covering the federal government's legislative, judicial, and executive branches because this has been where fake news has had its greatest impact.²⁶⁴ Because the federal government's branches require reporting on public figures or matters of public concern, actual malice will need to be shown to prove an absence of lawful activity.²⁶⁵ Actual malice exists when a statement is made with knowledge of its falsity or with reckless disregard for whether the statement was false or not.²⁶⁶ Under this scienter requirement, the plaintiff must demonstrate through clear and convincing evidence that the defendant actually knew the information was false or entertained serious doubts as to the truth of the

²⁵⁹ *Id.*

²⁶⁰ See *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

²⁶¹ *Id.* at 566.

²⁶² See Timothy B. Lee, *Facebook's Fake News Problem, Explained*, VOX (Nov. 16, 2016), <http://www.vox.com/new-money/2016/11/16/13637310/facebook-fake-news-explained>.

²⁶³ See *Libel*, LEG. INFO. INST., <https://www.law.cornell.edu/wex/libel> (last visited Aug. 22, 2017).

²⁶⁴ See Holan, *supra* note 193.

²⁶⁵ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

²⁶⁶ *Id.* at 280.

publication.²⁶⁷ This requirement is very difficult to prove.²⁶⁸ In fact, in “only a handful of cases over the last decades have plaintiffs been successful in establishing the requisite actual malice to prove defamation.”²⁶⁹ Thus, this argument, too, will present a trying case for the government to constitutionalize a public JLP.

B. *Disproving a Public JLP*

Despite the potential for nuanced arguments that may validate a public JLP, I ultimately believe a public JLP would engender too much skepticism, and is therefore an imperfect means of enacting the program. As stated, the JLP’s success or failure will be rooted in public trust. If Americans possess firm convictions that the program is responsible and trustworthy, it will thrive and effectively serve its intended goal of aiding the citizenry in deciphering between fact and fiction in the news. However, any governmental regulation of the First Amendment will fall under immediate legislative and judicial scrutiny, which will lead the public to instantaneously question its validity. The First Amendment is viewed with a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”²⁷⁰ There is no doubt that a public JLP would help Americans decode fact from fiction, to undermine fake news and misinformation online and on social media, and to ensure that the basis of our democracy always remain a well-informed citizenry. However, the conflicts between a public JLP and the First Amendment are undeniable. As stated in *Miami Herald Pub. Co. v. Tornillo*, “[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.”²⁷¹ The First Amendment is rooted in the proclamation that “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.”²⁷² Ultimately, I believe the most well-founded conclusion is that a public JLP restricts, rather than broadens, the dissemination of information. While individual journalists are not excluded from publication under the JLP, it serves to distinguish select journalists from others, and has a direct relationship on which journalists, websites, and social media accounts the public choose to visit. Such an impact only results in the constraint, not the

²⁶⁷ See *Proving Fault: Actual Malice and Negligence*, DIGITAL MEDIA L. PROJECT, <http://www.dmlp.org/legal-guide/proving-fault-actual-malice-and-negligence> (Last visited Mar. 20, 2018).

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Sullivan*, 376 U.S. at 270.

²⁷¹ *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

²⁷² *Id.* at 252.

expansion of information. Based upon these tenets, a public JLP is unattainable due to its prospect of unconstitutionality.

C. *Arguments for a Private JLP*

Due to the potential constitutional conflicts of a public JLP, I believe the best means of accomplishing a rating system for political journalists online and on social media would be through a private program. Unlike governmental restrictions of speech, First Amendment protections do not apply for private actors.²⁷³ Thus, social media institutions possess broad autonomy to control their users' content. For example, according to Facebook's Statement of Rights and Responsibilities, Facebook reserves the right to "remove any content or information you [the user] post on Facebook if we believe that it violates this Statement or our policies."²⁷⁴ With broad autonomy to regulate content, a private JLP will not be restricted by the First Amendment, but instead by the terms of the contract between the JLP and individual websites and social media platforms that opt to display the JLP insignia.

However, while constitutionality is not problematic, a private JLP presents unique obstacles not present under a public JLP. Funding for a private JLP will need to be dramatically different. This can be done through the administration of the licenses to individual journalism sites and their associated social media accounts. The private JLP company can contract with sites such as *The New York Times* and *Facebook* to display the insignia next to the journalist's name on the byline of their articles. Each year, the JLP can charge those sites an allotted amount for the right to display the insignia. Journalism organizations will have an incentive to continue purchasing the licenses because without it they will be viewed as maintaining inferior ethical standards as compared to competing organizations that continuously choose to purchase and display the license insignia.

There is evidence to demonstrate that a rating-based approach to political journalism can be a successful and sustainable enterprise. Private rating systems have proven to be an advantageous resource for the public.²⁷⁵ Now, as Harvard Business School Professor Michael Luca notes, ratings systems like Yelp are "somewhat of a substitute for traditional forms of reputation."²⁷⁶ This success has been demonstrated

²⁷³ See Charles F. Hinkle, *Regulation of Speech on the Internet*, STOEL RIVES (June 21, 2005), <https://www.stoel.com/regulation-of-speech-on-the-internet#five>.

²⁷⁴ See *Facebook Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/terms>.

²⁷⁵ See Michael Blanding, *The Yelp Factor: Are Consumer Reviews Good for Business?*, HARVARD BUS. SCH. (Oct. 24, 2011), <http://hbswk.hbs.edu/item/the-yelp-factor-are-consumer-reviews-good-for-business>.

²⁷⁶ *Id.*

to positively impact the restaurant industry, as each star added on a Yelp review translates to a 5 to 9 percent increase in revenues.²⁷⁷ Not only have Americans demonstrated their trust in rating systems, but there is precedent to support that expert-based rating systems can be successful too. *Consumer Reports* is an independent organization that provides evidence-based product testing and ratings through the research of trusted experts²⁷⁸ for everything from cars to watches to washing machines.²⁷⁹ Their primary source of communication to the public is through ad-free monthly magazines that are issued to paying subscribers.²⁸⁰ Consumers have trusted their work since 1936.²⁸¹ Such longstanding support for an expert rating-system can be indicative of widespread public support for a private JLP. As it pertains to media consumption, citizens primarily seek out news to be better informed and are more likely to consume the media that they believe most accurately reports the news.²⁸² Just as shoppers who search for the most efficient goods and services utilize *Consumer Reports* for proficient analysis, media consumers can utilize the JLP insignia as a guide to consuming the most ethical news.

The other stated principal advantage of a public JLP is the government's ability to provide ethical oversight to the committee and its members. However, the federal government may not be the most appropriate institution to manage such a program. According to October 2015 polling data, public trust in the government is at historic lows,²⁸³ with only 20% of Americans stating that they can trust the government in Washington to do what is right “‘just about always’” (4%) or ‘most of the time’ (16%)’.²⁸⁴ With such prevalent skepticism of the federal government and the immediate scrutiny that will result from governmental action into the First Amendment arena, a private program with rigid disclosure requirements may in fact be an approach more likely to win the trust of the media consuming public.

Therefore, it is my conclusion that a private JLP will be the most legal, ethical, and efficient means of enacting the JLP. A ratings-based approach has been validated in other arenas, and can thus provide a platform for sustained funding for the JLP. Additionally, with strict

²⁷⁷ *Id.*

²⁷⁸ See *About Us*, CONSUMER REP., <http://www.consumerreports.org/cro/about-us/index.htm> (last visited Aug. 22, 2017).

²⁷⁹ See Paul Hiebert, *Consumer Reports in the Age of the Amazon Review*, THE ATLANTIC (Apr. 13, 2016), <https://www.theatlantic.com/business/archive/2016/04/consumer-reports-in-the-age-of-the-amazon-review/477108/>.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² See *Selbst*, *supra* note 185, at 483.

²⁸³ See *Public Trust in Government: 1958–2017*, PEW RES. CTR. (May 3, 2017), <http://www.people-press.org/2017/05/03/public-trust-in-government-1958-2017/>.

²⁸⁴ *Id.*

disclosure requirements on who is assessing a journalist's content, what their political predilections are, and what their rationale was for their conclusion, I believe a private JLP upholds strong integrity practices to ensure the faith of the American citizenry.

CONCLUSION

As evidenced by the Duke lacrosse scandal through reports in *The News & Observer*, *The Herald-Sun*, *Associated Press*, *USA Today*, and *The New York Times* as well as the public's reaction to the events, both citizens and journalists are plagued by the selective exposure theory. If the JLP was in effect during this time, some of the journalists who reported on the scandal may or may not have lost their licenses, but at least would have had to answer for improperly informing the public.

Journalists are supposed to serve as the gatekeepers of information,²⁸⁵ to protect the public from misguided or imbalanced reporting. When they fail, they should be held accountable. However, no effective contemporary accountability system exists. Of course newspaper subscribers may unsubscribe, or daily website visitors may become weekly website visitors, but such consumer responses may not materially impact journalism practices. Under the contemporary system, the status quo will remain and the selective exposure theory will still have an influence in our media landscape. The JLP dismantles the status quo. By creating a system that records both the journalist's strengths and flaws, both citizens and journalists will be better informed. Citizens will become more vigilant media consumers. In their reporting, my belief is that journalists will pause and question their fact-finding procedures, and be led by the impetus of truth and not personal predilections. If such a system were in place at the time of the Duke lacrosse scandal, it may have caused journalists to more critically scrutinize Mangum's story and to seek out a perspective that the journalist may not agree with. After all, such diversity of thought is what freedom of the press is all about.²⁸⁶

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²⁸⁵ Monica Stevens, *Journalist Gatekeeper Responsibilities*, CHRON, <http://work.chron.com/journalist-gatekeeper-responsibilities-12377.html> (last visited Aug. 22, 2017).

²⁸⁶ See *Freedom of Speech and Freedom of Press*, LINCOLN U., <http://www.lincoln.edu/criminaljustice/hr/Speech.htm> (last visited Mar. 20, 2018).

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