LEGAL CONTEXTS IN REPORTING SCANDAL IN THE UNITED STATES, THE UNITED KINGDOM AND RUSSIA

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Scandals are context-specific media and public reactions, sometimes bordering on outrage, to legal offenses and moral shortcomings across a wide spectrum of political, social, cultural, business, financial, economic, media, and especially sexual spheres. The word “scandal” has a religious, metaphorical origin. The Latin word, *scandalum*, is derived from the Greek word, *scandalon*, which means “an obstacle” or “stumbling block.” Scandals cover moral and legal failings ranging from political corruption and abuse of power to illegal sexual harassment and unlawful sexual gratification. Though scandals were originally righteous indignation, or outrage at religious and moral offenses, in modern societies they represent public outrage at legal offenses or ethical breaches across a broad spectrum of human activity. Some scandals are the result of legal offenses to be sure, but most are expressions of opprobrium at moral shortcomings. Scandals are as old as humankind. They often involve matters that have a public dimension, involve the public interest, speak to the character of political leaders, and therefore attract media coverage. It is usually this coverage that elicits public outrage. The Watergate bugging scandal that engulfed the Nixon administration and the Clinton/Monica Lewinsky sex scandal were media and public reactions to alleged legal and moral offenses in the domains of politics and sexual morality (Dershowitz 1998). The parameters of specific regimes of freedom of speech and expression determine how the media report scandals.

The premise of this chapter is that there are multiple legal contexts for reporting scandals. The actual leeway on reporting depends on the level of editorial independence that specific media law systems allow the press. In some jurisdictions, the law categorizes certain types of legal and moral offenses as “outrageous” or scandalous. For centuries, French law recognized the vague and overbroad offenses of “*outrage aux bonnes mœurs et à l’ordre publique*” (affront to public decency or morality). In the 1990s, that vague, moralistic language criminalizing crimes against public decency and morality was replaced by the equally vague, moralistic statement “violations of human dignity.” This new standard is applicable to the production and distribution of violent pornography that scandalizes the public. Nevertheless, the French media use the word “scandale” to describe public controversies involving individual, political, and corporate malfeasance (AFP 2018). In this chapter, scandals are conceptualized as reactive phenomena triggered by media selection, construction, and re-presentation, in real space and cyberspace, of real or perceived violations of established legal, moral, professional, social, and political norms in specific jurisdictions.
The aim of this chapter is to describe and explain the legal parameters of media reporting of scandals in the USA, the UK, and Russia. The parameters of specific regimes of freedom of speech and expression determine how the media report scandals. The premise is that each country has a context-specific politico-cultural geography of freedom of expression whose “contextual matrices,” to borrow the expression of Legrand (2003, 261), shape its conceptualization and reporting of scandals. I first present editorial independence, the theoretical framework within which the subject of scandals is approached. Editorial independence is the legal right granted to media in democratic societies to report controversial happenings and events within specific legal parameters. I then present an analysis of the legal parameters of reporting scandals in the USA, the UK, and Russia.

What are the legal contexts and parameters of reporting “slander” in the USA, the UK, and Russia? The idea is that the word “scandal” is a plural concept. There is a wide spectrum of politico-cultural geographies of scandal. What might be scandalous in one country might elicit no more than a collective political yawn in another. The three countries were chosen because they are contrasting exemplars of the regulation, journalistic conceptualization, and reporting of scandals.

Theoretical perspective: editorial independence and scandals

This study was carried out within the theoretical framework of editorial independence, a political, cultural, and legal norm that shapes the reporting of scandals. Editorial independence or autonomy is the idea that in democratic societies, editors and publishers have the constitutional right to decide freely and independently what to publish and what not to publish. The principle of editorial independence essentially puts editors in charge of the gatekeeping function of their media outlets. Bourdieu (1994) suggests that journalism is a competitive “structured and structuring” field (un champ) with multiple iterations. Journalism has acquired certain settled rights and privileges through “the autonomy of the field and its capacity to resist mundane demands” (1994, 6). One such right is to practice “eclectic neutrality” in news selection (ibid.). Karppinen & Moe (2016, 105) define media independence as “independence . . . from state control, market forces or mainstream conventions.” American law has the most extensive expression of the right of editorial independence under the First Amendment (Miami Herald v. Tomilò, 1974, p. 258). Under this legal doctrine, editors and editorial boards have the right to publish without fear or favor material that meets their professional norms and serves the public interest. Editors and editorial boards are gatekeepers who make value judgments on what to publish and what not to publish, taking into account the pressures of the journalistic field, as well as the political, cultural, social, moral, legal, ethical, and economic realities of their societies. The UK also has a robust regime of editorial independence under national laws and Article 10 jurisdiction of the European Court of Human Rights. The last jurisdiction we will analyze is Russia. Though the Russian Constitution protects freedom of expression, in reality the press is highly constrained. Hundreds of journalists have been killed for challenging the system or exposing corruption (Shleinov 2007; Roudakova 2009).

Historical legal context of reporting scandal in the USA

The characters of American presidents have always been a very important element of American political culture (Sheehy 1988, 12). This is especially pronounced in the era of President Trump, who has been shrouded in scandals. This kind of emphasis on the character of the president of the USA and questions about his fitness for office are not unprecedented. A good number of
presidents have caused scandals because they failed to live up to expected standards of morality. John and Edward Kennedy had their scandals, and President Nixon had the Watergate bugging scandal. This emphasis on character is grounded in American religion, which de Tocqueville (1862) observed was the fundamental philosophical underpinning of American democracy. The religious tradition that undergirds America’s emphasis on the upright character of its leaders is Puritanism, which originated in seventeenth-century England as a religious and political reform movement within the established Church of England. The Puritans emphasized the religious discipline and strict moral rectitude of their leaders (Emerson 1968, 44). Political or religious leaders who failed to live up to expected Biblical standards scandalized the community. This Puritan emphasis on character and fitness for public office is now a fundamental norm in American politics. This phenomenon of political character examination has been amplified by the Internet and its associated networked social media. The first president of the Internet era to undergo microscopic political and religious examination over allegations of sexual misbehavior and political malfeasance was Bill Clinton (Dershowitz 1998; Eko 2000). Moral rectitude has become a fundamental hurdle that all appointees to federal judgeships and the U.S. Supreme Court must clear before they are confirmed. The slightest whiff of sexual misconduct is enough to trigger a full-blown political scandal. This was the case with judge Brett Kavanaugh, whom President Trump nominated to the U.S. Supreme Court and who was accused of an attempted rape that allegedly occurred 36 years earlier when he was in high school. The testimony of the accuser and the accused turned out to be a media circus.

**The American media and scandals**

In the USA, the media are also conceptualized as the Fourth Estate, watchdogs of the public interest. They are assigned the task of denouncing individual, collective, and corporate predatory activities, as well governmental abuse of power. This is the so-called “checking function” that makes the media enforcers of the legal, ethical, and moral norms of society (Middleton, Lee & Stewart 2017, 31). In addition to their checking function, the media are considered the writers of the rough draft of history. As such, they are often the public platforms on which spectacles of scandals are exposed and played out. The broad right of freedom of speech and of the press guaranteed under the exceptional First Amendment spawned a brand of journalism in the nineteen century that was noted for “muckraking,” rabble-rousing, and scandal-mongering. De Tocqueville (1862) described the typical American journalist of the 1830s as a scandal-monger. This was his reaction to the partisan journalism in vogue at that time. After American journalism had gone through a highly partisan phase (1801–1860), it went into a “yellow” sensational phase (1892–1914). Sensationalism, scandal-mongering, and muckraking were so prevalent that two eminent jurists, Warren and Brandeis (1890), proclaimed that the Biblical prophecy about the public proclamation of private matters had come true: “What is whispered in the closet will be proclaimed from the housetops.” Warren and Brandeis (1890, 195) called for urgent legal recognition of a right of privacy. The proposal ultimately led to the emergence of the law of privacy in the USA.

**Legal justifications for reporting scandal**

The Bill of Rights (the first ten amendments to the American Constitution) is described as a negative charter of expressive liberties, which enumerates what the government is not permitted to do that might eviscerate the rights of citizens (Jackson v. Byrne, 1984, p. 1446). Under the negative logic of the First Amendment, Congress—and by extension federal, state, and local governments—are barred from interfering with the mass media and Internet content.
All attempts by the government to censor speech before it has been uttered or published are illegal (New York Times v. United States, 1971). This First Amendment ideological edifice is underpinned by an ancient theory of free speech, namely, faith that good ideas will ultimately prevail over bad ones if the government assumes a viewpoint-neutral regulatory posture and refrains from discriminating against speech on the basis of its content in spaces of public discourse, such that the ultimate result is a free, uninhibited exchange of ideas—and scandals.

An important First Amendment principle that justifies reporting scandals is newsworthiness. This concept has been defined as “the public’s right to know” (Restatement (2d) of Torts, 1977). Public scrutiny of public officials in the USA is premised on the assumption that the actions of these officials are newsworthy. This principle requires that the private and public activities of all public officials and candidates for public office be scrutinized in the public interest. The notion of “public interest” is very broad. It includes “anything that might touch on an official’s fitness for office” (Monitor Patriot v. Roy, 1971). Thus, any matter that might scandalize any section of the public is a relevant subject of investigative journalistic interest. The principle of “fitness for office” is well established in American jurisprudence. As early as 1908, a court held that “a candidate for office must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office” (Coleman v. Maclean, 1908). The Supreme Court of the United States has also held that society’s interest in public officials is not limited to the formal discharge of their official duties. The Court ruled that the public’s interest in public officials extends to “anything which might touch on that official’s fitness for office . . . Few personal attributes are more germane to fitness for office than dishonesty, malefeasance, or improper motivation, even though these characteristics may also affect the official’s private character” (Garrison v. Louisiana, 1964, p. 77). These decisions were made in the contexts of scandals involving public officials or candidates for public office, who attempted to use the law to protect their private lives from media scrutiny.

The Puritan ethos of the necessity of uprightness of character in public servants, newsworthiness, and the right to know have evolved into a robust First Amendment politico-cultural context that has shaped the reporting of scandal in the USA. The Supreme Court of the United States has analogized faith in the salubrious effects of free and open social discourse to a “marketplace of ideas” (U.S. v. Abrams, 1919) characterized by a laissez-faire free flow of ideas, information, and discourse (Eko 2001). The USA is essentially a marketplace of political scandal. Schauer (2005, 47) suggests that it has a “radically nonjudgmental First Amendment,” and that, due to its commitment to robust public debate, “the harm of unpublished truth about public officials and public figures is far greater than the harm of unsanctioned falsity” (ibid., 40).

The question then is whether there is a First Amendment right to scandalize and to report scandal. The answer is affirmative. In Hustler Magazine v. Falwell (1988, p. 56), the Supreme Court of the United States essentially stated that there is a First Amendment right to scandalize: “the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.” In Terminiello v. Chicago (1949, p. 1) the Court held that “a function of free speech under our system is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” Under the First Amendment architecture of freedom of speech, the speech rights of the speaker—and this includes speakers of the legally unrecognized category of speech that is popularly known as “hate speech”—almost always trump the feelings of the listener, if the speech does not incite imminent violence. It is immaterial whether the listener is scandalized or not. It is within this First Amendment framework that scandals are reported in the USA.
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The context of journalistic reporting of scandal in the UK

In recent years the UK has witnessed a number of media scandals that have put the spotlight on its cultural geography of freedom of expression, rule of law, and media ethics. Under the British system, the press is conceptualized as “a Fourth Estate,” a counter-power equivalent to the Fourth Estate that had emerged in France at the onset of the French Revolution of 1789 (Carlyle 1837). This metaphor conceptualized the media as a watchdog of the public interest against governmental, corporate, and individual excesses. Historically, the Government and the Church controlled the press in order to prevent publication of what was classified as “seditious or heretical works.” The common law offence of criminal and seditious libel were punishable in the eighteenth century (Leveson 2012, 58). In the nineteenth, “scandalous,” sex-themed, printed material that associated Church leaders with immorality, or commented on social mores, was regulated under the laws of obscenity. Under nineteenth-century British law, for printed matter to be declared “obscene,” courts had to decide “whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall” (Regina v. Hicklin, 1868). Furthermore, to be judged scandalous and criminalized, the printed matter had to be of a nature to “suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and licentious character” (ibid.). The law classified obscenity as “scandalous” in the religious sense of the word. This meant that the material would be tantamount to a moral stumbling block that had potential to deprave the unsophisticated lower classes.

Nevertheless, the British press has a historic tradition of freedom of expression and editorial autonomy aimed at checking the powerful. Furthermore, the principle of editorial independence, a traditional journalistic value, has recently been officially recognized and strengthened in the Defamation Act 2013, which is applicable in England and Wales. This piece of legislation reinforced the media’s right of freedom of expression by recognizing defenses of “substantial truth,” “honest opinion,” and “privileged statements” (concerning publication on a matter of public interest). In making a determination whether the statement complained of is in the public interest, “the court must make such allowance for editorial judgement as it considers appropriate” (Defamation Act 2013).

The modern British popular press is famous for being the purveyor of scandal and sensational journalism. Due to its reputation as the cradle of the “world’s most flamboyant and sensationalist tabloids” with their legendary gossip columns, frontal nudity, and other excesses (Fridriksson 2004), the British print media have a tradition of voluntary self-regulation through organizations like the Newspaper Proprietors Association, the National Union of Journalists, the Society of Editors, the Press Complaints Commission, the Independent Press Standards Organisation, and the News Media Association (News Media Association 2017). Though the British broadcast media are not subject to content-based regulations, they are required “not to offend good taste” (Fridriksson 2004). This vague and elastic concept covers everything from profane and vulgar language to indecent, sex-themed speech. Furthermore, as a result of increasing multiculturalism in the UK, and the emergence of a number of controversies involving a clash between freedom of expression and demands for respect for different religious traditions, the common law offences of blasphemy and blasphemous libel were decriminalized in England and Wales in 2008.

The News of the World phone hacking scandal

The illegal and unethical actions of a British newspaper, the News of the World, led to the Leveson Inquiry that reexamined the legal and ethical foundations of British journalism. In effect, a
number of interconnected media scandals that involved unlawful interceptions of communications, telephone, and voicemail hacking, allegations of improper payments from journalists to police officers, alleged computer hacking at the News of the World, and perversions of justice led to Metropolitan police investigations—code named Operation Weeting—that ran from 2011 to 2012 (Sedghi 2012). This whole saga was triggered by the conviction in 2007 of News of the World royal editor Clive Goodman and private investigator Glenn Mulcaire of illegal interception of communications and interception of voicemail messages. This journalistic scandal turned the spotlight on the British media and the context of the journalistic reporting of scandals in the UK.

In the wake of this scandal, the British Prime Minister David Cameron appointed Law Lord Leveson to inquire into the “culture, practices and ethics of the press.” His report surveyed the history of the freedom of the press in the UK and restated its place in the democratic culture of the country and the wider European context. The report observed that the press “acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country” (Leveson 2012, 57). However, it also observed that while “the press must also be ‘active’, professional and inquiring” (ibid. 56), it must operate within the framework of the rule of law:

In a modern democracy that abides by the rule of law, press freedom can never mean a press which sits outside, above and beyond, or in disregard of, the law. Respect for the law is the common framework within which the press, as an important commercial sector, is enabled to flourish, to preserve and enjoy its freedoms, and to make its unique contribution to a democratic society.

(ibid. 65–66)

The media in the UK are also subject to Article 10 (freedom of expression) of the European Court of Human Rights, which enforces the provisions of the European Convention on Human Rights, and has developed a dynamic body of case law that is enlarging the scope of freedom of expression in continental Europe. The Leveson Inquiry reiterated the fact that the European Court of Human Rights has recognized the role of the media as a “public watchdog” (ibid. 60) and that Article 10, which has been incorporated into British law,

expressly acknowledges that freedom of expression generally, including freedom of press expression, may be restricted where necessary to protect the legitimate aims of a democracy. The court has recognised that freedom of expression may need to be restricted in the interests of national security and public morality, as well as individual rights to privacy and peaceful enjoyment of property.

(ibid. 61)

Thus, in reporting scandals, the press in the UK has to be aware that its freedom is not unlimited or even absolute. In evaluating media performance in the context of reportage on scandals, courts will seek to strike a balance between the freedoms guaranteed under national law and international instruments, and “the restrictions necessarily placed on that freedom in a democratic society” (Leveson 2014, 61).

The legal context of reporting scandal in Russia

Russia is a jurisdiction that conceptualizes the relationship between the citizen and the state differently from what obtains in Western liberal democratic countries. In Russia, there is a “tendency
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toward authoritarian leadership, a strong preference for state interests over individual rights, and a corresponding priority of material well-being over democratization” (Hinteregger & Heinrich 2004, 14). In this system, scandals are regulated within the framework of the constitutionally guaranteed right of freedom of expression as balanced with the interest of the state in maintaining control of the instrumentalities of communication and in the interest of national security, public peace, tranquility, and morality. In Russia the main bone of contention in matters of freedom of speech and expression is the tension between the right of the citizen speaker and the interpretations of that speaker’s speech by government officials, representatives of the all-powerful state. Russia has an authoritarian tradition that goes back to the Tsarist Regime of the nineteenth century. That system continued under the Soviet Communist System and the post-Soviet Russian Federation. Furthermore, the government and the Soviet Communist Party had a peculiar relationship with the mass media, a partnership that Thomas Wolfe describes as “government by journalism” (Wolfe 2005, 143). In this system, journalists carried out extra-publication activities. They threatened to investigate or investigated complaints, grievances, and even claims of corruption, scandals, abuse of power and privilege, and resolved them informally, often without publishing the findings of their journalistic investigations (Roudakova 2009). The system was set up to stifle outrage and scandal. The post-Soviet journalistic system is marked by economic flux and political-economic alliances between journalists and private sponsors (politicians and entrepreneurs) desirous of promoting private economic and political agendas. This has led to a “deprofessionalization” of journalism and a loss of journalistic autonomy (ibid., 419). Furthermore, there is a certain degree of uncertainty with respect to law, policy, journalistic ethics, and the boundaries between newsmaking, political activism, publicity, and advertisements (ibid., 423). Additionally, this professional unraveling of Russian journalism has both been aided by, and taken advantage of, the regime of Vladimir Putin (Shevtsova 2004). Censorship has been reintroduced on certain topics in state-owned and some privately owned media outlets. There is no room for watchdog journalism and scandal reporting in this system (Schleinov 2007; Roudakova 2010).

In an article entitled “Journalism as Prostitution: Understanding Russia’s Reaction to Anna Politkovskaya’s Murder,” Roudakova (2010) suggested that the murder of journalists and political dissidents in Russia does not give rise to public outrage and never become scandals due to the role that journalism played as a bedfellow of the Soviet Communist regime and the neo-authoritarian, post-Soviet regime of Putin. Russian journalist, Roman Schleinov (2007, 13), suggests that Russia is essentially scandal proof:

Russian state officials do not resign after press revelations have directly implicated them in criminal cases... assassinations of journalists do not bring thousands out onto the streets or provoke questions of the authorities... [who] are effectively accountable to the public... and tend to interpret journalistic criticism as open hostility... Unpleasant reports will not be widely disseminated since central TV channels are entirely under state control... investigation agencies and the office of the public prosecutor are not independent... courts are subservient and parliament is saturated with members of the presidential party. Even the publication of documents from criminal cases in which the head of state’s name has appeared will not bring repercussions.

Thus, under Putin, the media do not have the editorial independence to report economic and political scandals without fear of violent reprisals. The system effectively takes away the human and journalistic right to be scandalized. Despite the fact that Russia is a signatory to the European Convention on Human Rights, it has not transposed Article 10 of the European Court of Human Rights into its domestic law.
Government control of the Internet and online media

The context of reporting scandal online is also very restricted. According to the OpenNet Initiative of Harvard University, “the Russian government actively competes in Russian cyberspace employing second- and third-generation strategies as a means to shape the national information space and promote pro-government political messages and strategies” (Russia 2010). A few years after the Internet was available across the whole world, the Russian Duma (Parliament) granted the Federal Security Bureau (FSB) statutory authority to require all Russian communication service providers to install—at their nodes and servers, and at their own expense—an interface known by its Russian acronym, “SORM,” (System of Operative Investigative Activities). This interface consists of hardware and software that route all incoming and outgoing Internet traffic on the .ru (Russian) country domain through FSB facilities for the purposes of information security and law enforcement (Rohozinski 2000). In 2000, the Minister of Information Technology and Communications of the Russian Federation issued “Order No. 130 Concerning the Introduction of Technical Means to Ensure Investigative Activities (SORM) in Telephones, Mobile phones, Wireless Communication and Radio paging Networks” (Ministry of Communication 2000). In the same year, President Putin amended the law instituting SORM-2 to increase to seven, the number of governmental agencies that could have access to information gathered by the system. These agencies include the Federal Tax Police, the Interior Ministry Police, the Federal Protective Service, as well as the border patrol and customs branches of the FSB. As soon as these mass surveillance systems went operational, Russian human rights groups claimed that the country was a police state. Journalistic reporting in this surveillance culture can be dangerous. Despite these complaints, the Russian Supreme Court held that the SORM mass surveillance system did not violate the Constitution of the Russian Federation (Judgment of the Supreme Court of the Russian Federation 2000).

Conclusion

This chapter has shown that media coverage of the problem of scandals, like coverage of all happenings, takes place within the framework of specific politico-cultural geographies and parameters of freedom of speech and expression. Each regime has its context-specific conceptualization and interpretation of the rule of law, human rights, freedom of expression, matters of public concern, governmental interests, and journalistic editorial independence. Different regimes of freedom of expression shape different iterations of the journalistic paradigm and their conceptualizations and reportage of scandals.

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