The Rules of Evidence and the Rules of Public Debate

Geoffrey R. Stone

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles

Part of the Law Commons

Recommended Citation
The Rules of Evidence and the Rules of Public Debate

Geoffrey R. Stone†

Professor Frederick Schauer offers a unique and interesting perspective on the responsibilities of a free press, particularly insofar as he draws on the analogy between the standards of a criminal trial and the standards of journalistic behavior. As he observes, "in many respects the journalist is like a criminal court, for when it comes to allegations of official misconduct the publication of the story . . . can have adverse consequences quite severe for the individual involved."¹ Thus, he adds, "it may seem plausible for the journalist . . . to think of herself as being the equivalent of a criminal court in terms of procedures and . . . burden of proof."² This is a useful analogy. I would like to build on the point. The specific question I will explore is whether the rules of evidence should serve as the rules of public debate.³

I. The Rules of Evidence

Let me begin, then, with the rules of evidence. In a trial, the general theory of admissibility or exclusion of evidence is as follows: evidence is admissible if it is both material and relevant, and if its probative value is not substantially outweighed by the dan-

† Harry Kalven, Jr. Professor of Law and Dean, The University of Chicago Law School. I would like to thank Danny Boggs, Anne-Marie Slaughter Burley, Abner Greene, Elena Kagan, Larry Kramer, David Strauss, and Cass Sunstein for their helpful comments on an earlier version of this paper.

¹ Frederick Schauer, Slightly Guilty, 1993 U Chi Legal F 83, 99.

² Id (emphasis omitted).

³ At the outset, one might wonder whether the constitutional guarantee of free speech has any relevance to the trial process. It is generally agreed that the free speech guarantee serves three primary values—self-governance, search for truth, and individual self-fulfillment. See, generally, Geoffrey Stone, Louis Seidman, Cass Sunstein, and Mark Tushnet, Constitutional Law 1017-24 (Little Brown & Co., 2d ed 1991) ("Stone Casebook"). Although these values do not translate perfectly to the context of criminal trials, they are certainly important factors in shaping the rules of evidence. The search for truth and self-governance rationales clearly undergird much of the law of evidence. Even the self-fulfillment theory finds expression in rules, for example, that recognize the criminal defendant’s right to testify in his own behalf and in the privilege against compelled self-incrimination.
gers of undue prejudice or jury confusion, considerations of time or undue delay, or the furtherance of some external social policy.

Evidence is material if it is offered to prove some fact that is of consequence to the determination of the action. For example, evidence that the defendant earned less than $600 in a particular year is material in a prosecution for failure to file a tax return because a person earning less than $600 is not required to file a return. That the defendant earned less than $600 is not material in a prosecution for armed robbery, however, for poverty is not a defense to the crime of armed robbery.

Evidence is relevant if it has any tendency to make the existence of a material fact either more or less probable than it would be without the evidence. For example, evidence that the defendant owns rat poison is relevant to whether he committed a murder in which the victim was killed with rat poison because it shows that the defendant had the capacity to commit the crime. Such evidence is not, however, relevant to whether the defendant committed a murder in which the victim was strangled because the defendant's ownership of rat poison does not increase the probability that he committed the murder.

Evidence that is both material and relevant is presumptively admissible, that is, such evidence is admissible unless its probative value—the extent to which it actually proves what it is offered to prove—is substantially outweighed by some competing consideration. There are essentially four such considerations. The first is "undue prejudice." "Undue prejudice" exists whenever the jury is likely to give the evidence far more weight than it should and is thus more likely to reach the "correct" result without the evidence than with it. For example, in an accident case, a plaintiff who has lost the use of his limbs may offer to drag himself across the floor to demonstrate the extent of his injuries. Because of the inflammatory nature of this evidence, the judge is likely to find it unduly prejudicial and, thus, inadmissible.

The concern with jury confusion arises when the evidence is likely to muddy rather than clarify an issue. Again, the assumption is that the jury is more likely to reach the correct result without the evidence than with it. An example might be complex expert testimony on an issue that does not require the presentation of such proof. The concern with time is similarly straightforward. Suppose, for example, the defense counsel wants the judge and jury transported five hundred miles to view the scene of the car accident that led to the litigation. The judge might reasonably find
that, in light of the availability of photographs, the view is not worth the time.

Finally, the external social policy problem arises when the admission of material and relevant evidence would frustrate some social policy that is external to the trial process itself. An example is the exclusionary rule, which renders inadmissible relevant and material evidence seized in an unlawful search in order to deter the police from engaging in such searches.

II. Materiality and Relevance

What does all this have to do with the responsibilities of a free press? As I stated at the outset, the question I want to consider is the extent to which these rules should also be the rules of public debate. After all, these rules are designed to ensure that we have fair, accurate, and expeditious judicial proceedings. These rules play a critical role in our decision whether to find a person guilty of a crime. They are designed to ensure reliable factfinding upon which we base some of society's most important decisions—whether or not to deprive an individual of his liberty or even his life. Should not these same rules be the rules of public debate?

I would like to begin the inquiry with the requirements of materiality and relevance. It should immediately be apparent that the question of whether any particular fact is material or relevant to public debate is quite controversial. Is evidence that a presidential candidate has been unfaithful to her husband relevant to her fitness to be president? Some among us will say it is relevant; others will disagree. Is it relevant if only 70 percent of the people think it relevant? Forty percent? Five percent? Is it relevant if even a single person thinks it relevant?

Happily, we need not decide these questions at this point, for the primary reason for excluding immaterial or irrelevant evidence is that its presentation is a waste of time. If the evidence proves nothing in dispute, why take the time at trial to hear it? Because judicial time and resources are limited, it is costly to hear evidence that serves no constructive purpose. Hence, we toss it out. In public debate, however, there is no similar constraint. For the New York Times to report that a presidential candidate has been unfaithful may be a waste of time if it is irrelevant—that is, if it is of interest to zero voters—but that waste of time is of less concern to society than a waste of limited judicial resources. If the only objection to publication of the information is that no one cares about it,
we can leave it to the media to make their own decisions about publication.\(^4\)

Of course, my "unfaithful candidate" example is more complex, for there may be reasons for concern beyond the arguable irrelevance of the information. I will return to those issues later.\(^6\)

For the time being, it is sufficient to say that we do not need rules of relevance or materiality for public debate because such debate is not constrained by the same sorts of time and resource limitations as is the judicial system.\(^6\)

III. EXTERNAL SOCIAL POLICY

The next basis for the exclusion of evidence is the promotion of some external policy. This situation tends to arise in the law of evidence in two situations. First, in some circumstances, the rules of evidence exclude categories of proof for this reason only when the evidence offered is of relatively slight probative value. This is illustrated by evidence that the defendant in a car accident case made repairs to the car after the accident, such as paying to have the brakes fixed. If such evidence is offered to prove that the brakes were in a defective condition at the time of the accident, it will be inadmissible. This is so because of the combination of two factors.

First, the probative value of the evidence on this point is relatively low because there are many reasons why a person may repair brakes after an accident even if they were not previously in a negligent condition—for example, he may want to be extra cautious in the future. Thus, although the evidence is not irrelevant, it is not highly probative, either. Second, to admit such evidence would deter individuals from improving the safety of their cars after accidents because of a concern that such conduct would later be used against them in court. This is the external social policy. In this situation, the rules of evidence conclude that the probative value

\(^4\) The resources available to the media are, of course, not unlimited. But the limitations are not so severe that we cannot leave it to the media to decide what is and what is not worth publishing.

\(^6\) See Part VI.

\(^6\) For an even clearer example, consider a newspaper story stating that my hypothetical presidential candidate uses a blue toothbrush. That is presumably irrelevant to everyone, but we would hardly bother to prevent the press from publishing the information if it wants to do so. It should also be evident, by the way, that the consideration of time and undue delay can be disposed of in a similar manner. For the most part, these concerns do not pose the problem in public debate that they do in a trial, so we do not need a rule to deal with them.
of the evidence is outweighed by the interest in not frustrating the external social policy of promoting repair.\(^7\)

If a party offers the same evidence, however, not to prove prior negligence, but to prove that the defendant owns the car (assuming this is in dispute), then the evidence will be admissible despite the fact that its admission may to some extent undermine the external social policy. This is so because the probative value of the evidence on the issue of ownership is high—after all, people ordinarily do not pay to repair cars they do not own.

The second type of rule concerning external social policy operates without regard to the probative value of the evidence. That is, the harm from admission of the evidence is thought to be so great that the evidence is deemed inadmissible regardless of its probative value. This type of rule is illustrated by the exclusionary rule and by the attorney-client privilege. For example, evidence of drugs found in a defendant's possession in an unlawful search is highly probative of guilt. Nonetheless, the exclusionary rule renders the evidence inadmissible. Similarly, proof that the defendant admitted his guilt to his attorney is highly probative of guilt. But such evidence will be held inadmissible in order to promote the confidentiality of the attorney-client relationship.

Interestingly, although we do not usually think of them as rules of evidence for public debate, current First Amendment doctrines closely track these two types of evidentiary rules governing external social policies. The first type of rule, illustrated by the repair rule, finds parallels in the First Amendment distinction between "high" and "low" value speech.\(^8\) For example, non-newsworthy invasions of privacy are actionable because their probative value to public debate is thought to be low and outweighed by their harm to the individual whose privacy is invaded. Newsworthy invasions of privacy, on the other hand, are protected by the First Amendment because the probative value is higher. Thus, disclosing that X rents sexually explicit movies may be actionable as an invasion of privacy if X is an ordinary citizen, but may be protected speech if X is a candidate for public office.\(^9\) Similarly, a sexually explicit movie that meets the criteria for obscenity can be prohibited, but an equally explicit movie that has serious political,

\(^7\) FRE 407.

\(^8\) See, generally, Stone Casebook at 1144-1257 (cited in note 3).

\(^9\) See, for example, Briscoe v Reader’s Digest Association, 4 Cal 3d 529, 93 Cal Rptr 866, 483 P2d 34 (1971).
literary, artistic or scientific value is protected speech because of its greater First Amendment value.\(^{10}\)

The second type of external social policy rule also finds parallels in First Amendment doctrine. Just as in the exclusionary rule and attorney-client privilege contexts, where we exclude even highly probative evidence from jury consideration because of the harm its use would pose to some external policy, so too do we permit government to exclude from public debate information that poses a clear and present danger of a grave harm.\(^{11}\) This is illustrated in the free press/fair trial area, where the Court will uphold restrictions on press coverage if such restrictions are essential to guarantee a fair trial,\(^{12}\) and in the national security context, where the Court has said it will allow government to restrict the publication of even information that could be quite important to public debate if the publication presents a clear and present danger to a compelling governmental interest.\(^{13}\) Although we do not usually think of these First Amendment principles as rules of evidence, they are in fact parallel to the logic and structure of the rules we use in the evidentiary system.

IV. False Statements of Fact—Libel

Another problem I would like to consider concerns the presentation of false or fabricated evidence. Most commonly, this takes the form of perjury. The rules of evidence do not permit the presentation of knowingly false evidence. The reasons for this rule are clear. Such evidence serves no legitimate purpose in the effort to determine the truth. But it is worse than that, for such evidence is also destructive of the factfinding process. It attempts to distort, distract, and mislead. At best, such evidence will waste time and effort in requiring energy to be devoted to demonstrating that the testimony is false; at worst, the falsehood will not be revealed and the jury will reach the wrong substantive result. Knowingly false evidence is per se inadmissible in the trial context and its presentation is punishable by law.\(^ {14}\)

How does this compare to the rules of public debate? The comparison is quite complex. The variant of this problem in the

---

\(^{10}\) Miller v California, 413 US 15 (1973).

\(^{11}\) See Stone Casebook at 1025-1120 (cited in note 3).


\(^{14}\) See, for example, 18 USC § 1621 (1988).
context of public debate that has generated the most attention is the issue of libel. The Court has held that libel of public figures and public officials is actionable only if the speaker acted with knowledge of the falsehood or with reckless disregard for the truth. The Court has held further that libel of persons other than public figures and public officials is actionable if the speaker acted negligently.

The first thing to note is that the Court appears to give less protection to false statements in public debate than the rules of evidence give to false statements in the judicial system. That is, in the judicial context, false statements are prohibited only if they are knowingly false. What, if anything, explains this disparity? One explanation is that the rule against perjury applies to all false statements, whereas the rules governing libel in public debate apply only to false statements constituting libel. Thus, the libel rules arguably serve two purposes. Like the general rule against perjury, they protect the process against the harm caused by false statements. But they also serve another purpose, for they are designed to protect the interests of individuals whose reputations are damaged by false statements. This second purpose falls squarely within the external social policy category. That is, if we take the perjury rules as a baseline, we can say that we restrict false statements in the libel context beyond "knowing falsehoods," not because of our interest in the purity of the process, but because of our additional interest in protecting the reputations of the victims of such expression.

---

17 It is noteworthy that, in defining the law of libel, most jurisdictions recognize an absolute privilege for false statements made in the course of the judicial process. See Bruce Sanford, Libel and Privacy § 10.4.2 (Prentice Hall Law & Business, 1987 Supp). Thus, we are more willing to tolerate inadvertent, but negligent or reckless, falsehoods in the judicial process than in public debate, even at the cost of damage to individual reputation. This may be so for two reasons. First, we may conclude there is an even greater need to encourage openness and to avoid chilling effects in the trial setting than in public debate. Second, we may be more willing to tolerate inadvertent inaccuracy in the judicial process because the availability of cross-examination and other devices for discerning inaccuracy at trial make us more confident of our ability to discover and disclose factual error at trial than in public debate. In public debate, counter-speech is less likely than cross-examination at trial to be effective in correcting inaccuracy, and those who may have learned of inaccurate statements in the course of public debate are less certain than jurors at trial to learn of subsequent challenges and corrections. Hence, we may conclude that we do not need to punish mere reckless or negligent false statements at trial because they are less likely to have a harmful effect.
This understanding of the law of libel sheds light on an interesting question. In his article, Professor Schauer observes that it seems anomalous that under *New York Times Co. v Sullivan* and similar decisions, a reporter could be held liable for publishing information about a candidate for public office that turns out to be false even if the reporter did not act with knowledge that the information was false at the time she published it. For example, suppose a reporter is 40 percent confident that a candidate for governor had taken a bribe. Schauer posits that under *New York Times* the reporter who has a 60 percent probability that the information is false would act with reckless disregard for the truth if she published the information. *New York Times* therefore acts as a deterrent to publication.

Schauer argues that this may be overly restrictive because there may be voters who would not vote for a candidate who is 40 percent likely to have taken a bribe. But *New York Times* will prevent the voter from obtaining the information. Schauer posits that in such circumstances *New York Times* undermines rather than supports the political process because it undermines the autonomy of such voters.

I have several reactions to this puzzle. First, this problem arises only insofar as the reporter does not act with knowledge of falsity. If the reporter knows the information to be false, it is hard to imagine any legitimate purpose to be served by its publication, and a prohibition on publication in such circumstances would in no way undermine either public debate or voter autonomy. The problem therefore arises only insofar as the reporter knows there is a possibility that the information is true, but is deterred from publishing it by the reckless disregard aspect of the rule. But if we were to apply only the evidentiary rule of perjury (knowing falsehood) to public debate, there would be no problem along these lines.

Second, I might quibble with Professor Schauer about whether a 60 percent probability of falsehood constitutes reckless disregard. But that is a mere quibble. The problem as a matter of principle would be the same even if the reporter is 99 percent confident of falsehood. There may be voters who would vote against a candidate if there is even a one percent chance that he had taken a
bribe, and the question remains: how can we justify denying them that information consistent with voter autonomy?

Third, the situation in which the reporter is only 40 percent or 20 percent or one percent confident of truth can presumably be taken care of by reporting, not the ultimate fact—that candidate X took a bribe, but by accurately reporting the underlying facts from which the reporter draws her inference, thus leaving it to voters themselves to draw whatever inference they see fit. For example, the reporter could report not that X took a bribe, but that “I received an anonymous phone call reporting that X took a bribe,” or that “X was indicted for bribery,” or that “X was seen taking cash from Y.” By adopting such an approach, the reporter avoids making a false statement and gives voters the opportunity to draw their own conclusions from the underlying factual information.

Interestingly, the rules of evidence track this approach. The “opinion rule,” for example, which is designed to preserve the autonomy of jurors, ordinarily requires witnesses to state only the underlying information that is within their personal knowledge. It prohibits witnesses from drawing the inferences themselves. That task is left to the jury. At least in the context I am now discussing, reporters arguably should provide only underlying information as well. Indeed, recent judicial interpretations of both the common law and the First Amendment look precisely in this direction. Under the “neutral reportage” rule, courts generally hold that a reporter cannot be held liable for accurately reporting newsworthy libelous statements made by others, and under the doctrine of “false implication,” courts generally hold that a reporter cannot be held liable for accurately reporting underlying facts even if the implications drawn from those facts by others are erroneous and libelous.

---

**FRE 701.**

**It is true, of course, that expert witnesses are allowed to offer their opinions about the inferences to be drawn from the underlying facts, FRE 702, and reporters might arguably be analogized to expert witnesses in the context of public debate. But even if this is so, expert witnesses themselves can be required to disclose the bases of their opinions so that the jurors can make their own, ultimate assessments. FRE 705. At least in situations where reporters might otherwise act with reckless disregard for the truth, this is a reasonable expectation of them as well.**


These are relatively recent developments, however. Traditional common law principles were not so generous. To the contrary, historically a reporter could be held liable for accurately reporting libelous statements made by others and for accurately reporting facts from which readers might foreseeably draw erroneous and libelous inferences. To the extent this was so in the past, and to the extent it remains the law in some jurisdictions today (at least when the reporter acts with reckless disregard of the risk of defamatory injury to reputation), the "solution" of having the reporter accurately publish only the underlying factual information would not solve the puzzle.

Is this a problem? The net effect of such a rule would be to deter reporters from disclosing information upon which at least some voters might reasonably rely in deciding not to vote for candidate X even if it is only 40 percent or 20 percent or 1 percent likely that candidate X actually did the act. As we already have seen, we do not prevent jurors from learning of such information. That is, although we prevent jurors from hearing knowingly false testimony and the opinions of witnesses about the inferences jurors should draw from the underlying facts, we certainly permit jurors to hear evidence that—standing alone—may be only 40 percent or 20 percent or 1 percent likely to prove some ultimate fact. In short, we trust jurors to make their own judgments in this regard.

Professor Schauer suggests that it is anomalous for us not to have similar faith in the autonomy of voters. If jurors can have such evidence, why not voters as well? This would seem to pose the fundamental question: When may government exclude information from public debate because it does not trust voters to deal with the information in a responsible manner? But it does not.

The reason it does not pose that question should be evident from my earlier statements. We discourage reporters from publishing information that the reporter does not know to be false, but that may be false, not to protect the purity of public debate or to protect voters from possibly inaccurate information, but to protect the reputations of those who might otherwise be the victims of the libel. The problem, in other words, is no different than other problems of restricting speech in order to promote a competing, external social policy. When we prevent individuals from learning of national security information or facts about pending trials or "non-newsworthy" information that invades someone's privacy, we

** See, generally, Sanford, *Libel and Privacy* at 179-87 (cited in note 17).
deprive at least some citizens of information they might like to have, sometimes even for the purpose of voting. But we do so, not for the purpose of denying them access to the information as such, but to serve some other social policy. Whether that policy is fair trial, national security, individual privacy, or individual reputation makes no difference for these purposes. The critical fact is that the government’s purpose is not to deprive voters of information in an effort to “improve” public debate. Thus, the rules of libel law, as presently constituted, do not present us with that problem.

I should note, by the way, that I do not mean to suggest that Professor Schauer’s point is unhelpful or that existing libel law strikes the right balance. To the contrary, it may well be that existing libel law is too restrictive of free expression because it deprives individuals of information that they, as voters, would like to act upon even if there is a high probability of inaccuracy. That is an important insight. My point is only that existing libel law is not inconsistent with the rules of evidence governing perjury and that the greater restrictions on false statements in the context of libel law should be understood, in terms of the rules of evidence, as merely another manifestation of the competing social policy paradigm.

V. False Statements other than Libel

This brings me to another component of the problem of false statements of fact. Up to this point, I have focused only on the law of libel. What about false statements of fact that do not constitute libel? As already noted, the rules of evidence absolutely prohibit knowingly false statements of fact in the judicial context, whether or not they constitute libel. The rule against perjury is designed to prevent the harm to the system caused by such testimony.

Similarly, the Supreme Court has recognized that there is “no constitutional value in false statements of fact” in public debate. Does it therefore follow that, by analogy to the rules of evidence, knowingly false statements made in the course of public debate can constitutionally be punished even if they do not constitute libel? Suppose, for example, that X, a candidate for political office, falsely states that he is a graduate of The University of Chicago Law School. Surely, if such a statement were made by X while testifying as a witness at trial, it could give rise to a prosecution for perjury.

\[\text{Gertz, 418 US at 340.}\]
Interestingly, government rarely has attempted to prohibit false statements in public debate outside the libel context. As a result, there is little law directly on this question, and the Supreme Court has never explicitly addressed the issue.** It would certainly be plausible, however, for the Court to uphold such a law, limited to knowing falsehoods, by analogy to the evidentiary rule of perjury.

There are two points I would like to make about this. First, although one could imagine the Court upholding a law limited to prohibiting knowing falsehoods in public debate, it would be much more difficult for the Court to uphold a law that extended to reckless disregard. Upon first glance, one might assume that the extension of *New York Times* to this situation would be quite natural. After all, if we can restrict false statements that are libelous if there is reckless disregard, why not false statements generally? As I already have indicated, however, there is an important difference, for libel law is premised on a special concern with protecting individual reputation. That concern is not present with other types of false statements in public debate. Of course, government does have an interest in protecting the quality of public debate. But it would be difficult to explain why a broader restriction (reckless disregard rather than knowing falsehood) is more necessary in the context of public debate than in the context of the judicial process.** In any event, if we use the rules of evidence as a guide, as this inquiry presupposes, the burden would be on the proponent of such a broader restriction to explain why the perjury rule of knowing

** In *Garrison v Louisiana*, 379 US 64 (1964), the Court stated that simply because "speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution" and that "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." Id at 75. *Garrison* itself involved a prosecution for libel, however, so it is not clear that this statement should be taken to reach beyond the libel context. In several other cases, the Court has reviewed prosecutions for false statements of fact in public debate outside the libel context, and applied the ordinary clear and present danger standard without regard to the falsity of the speech at issue. See *Pennekamp v Florida*, 328 US 331 (1946); *Craig v Harney*, 331 US 367 (1947). See also *Schaefer v United States*, 251 US 466 (1920), in which Justice Brandeis, joined by Justice Holmes, argued in a dissenting opinion that even if speech in public debate is false, it may not be punished unless it creates a clear and present danger. In several more recent decisions, lower courts have upheld the actions of state election commissions in restricting the dissemination of nonlibelous false statements of fact in the context of political campaigns. See, for example, *Pestrak v Ohio Elections Commission*, 926 F2d 573 (6th Cir 1991); *Geary v Renne*, 914 F2d 1249 (9th Cir 1990); *Tomei v Finley*, 512 F Supp 695 (N D Ill 1981).

** For some tentative thoughts related to this question, see note 17.
falsehood is insufficient to serve the government's legitimate interest in the context of public debate.

The second point I would like to make about this situation concerns the question whether the Court should uphold a law that prohibits knowingly false statements of fact in the course of public debate. The argument for upholding such a law is clear. Such statements have no constitutional value, they are destructive of public debate, we have routinely prohibited such statements in the judicial process, and all the reasons that lead us to have a law of perjury in the judicial process should lead us to have a similar law in the context of public debate.

Nonetheless, in my view, such a law would be unconstitutional. I must admit, however, that this conclusion turns out to be much harder to justify than I thought it would be when I began this inquiry. Let me begin by disposing of two arguments that might seem to support my conclusion, but that do not really take us very far.

First, in the perjury context the individual is under oath at the time he makes the false statement. Thus, he is on notice of the risk of possible prosecution and he is fully aware of the seriousness of the occasion and of the duty to be scrupulously accurate and truthful. This is not so in the context of public debate, where the speaker or reporter is not under oath. This distinction is not irrelevant, but it does not clinch the case either. I would hasten to point out that there are situations in which we punish false statements even in the absence of an oath. It is unlawful, for example, to make knowingly false statements to a law enforcement officer in the course of his duties.\(^\text{30}\) Moreover, one can argue that public debate is sufficiently important to the well-being of society, and knowingly false statements are sufficiently obviously wrong and harmful to that process, that individuals can reasonably be said to be on notice. And this would be especially true for at least two classes of potential defendants—political candidates and members of the press. For at least these two groups, the absence of an oath should not be dispositive.

Second, one might argue that, in the context of public debate, the proper response to "bad" speech is not punishment, but counter-speech. That is, we should leave it to the "marketplace of ideas" to sort out the true from the false. This, too, is not irrelevant, but cannot carry the day. Note that the counter-speech/mar-

---

\(^{30}\) See, for example, 18 USC § 1001 (1990).
ketplace of ideas notion is far more compelling when we deal with ideas and opinions than when we deal with facts than can objectively be proved true or false. Moreover, and more important, a similar argument could be made about the trial process. That is, rather than punish perjury, we could simply leave it to the parties and their attorneys to engage in counter-speech to set the record straight for jurors. We do not, however, follow that approach. Rather, we recognize that it takes time and energy to respond to false statements and that disputes over such evidence can distract and confuse jurors, even if they eventually discern the falsehood. And, of course, there is always the possibility that they will not discern the falsehood and that they therefore will reach an erroneous conclusion on the basis of knowingly false testimony. In such circumstances, we reject the counter-speech/marketplace of ideas argument and prohibit perjury outright. It would seem that the same reasoning should prevail in the context of public debate. We can hope that counter-speech will set the record straight, but why open the door to this at all? It is a lot more direct simply to follow the perjury lead and prohibit such statements altogether.\footnote{One might argue that in the trial context we are quite concerned about limited time and resources, whereas in the public debate context this is less of a problem. We already saw this in the discussion of immaterial and irrelevant evidence. On this view, we cannot afford the time it takes to engage in counter-speech in trials. Because the time issue is only a part, and probably only a small part, of the concern with perjury, however, this is not an important distinction in this context.}

In the end, however, I think such a law invalid because of the danger of putting government in the position routinely to decide the truth or falsity of all statements in public debate. The point is not that government does not have a legitimate interest in protecting the quality of public debate. Surely it does. It is, rather, that there is great danger in authorizing government to involve itself in the process in this manner. This danger stems from the possible effect of partisanship affecting the process at every level. The very power to make such determinations invites abuse that could be profoundly destructive to public debate.\footnote{Does this mean that the law of perjury should be unconstitutional? This does not follow, for although there are occasional instances in which perjury law, like any other law, can be abused for partisan reasons, the problem is much less likely to arise in the general run of perjury prosecutions than in actions for false statements in public debate.}

Does this mean that \textit{New York Times} is wrong and that libel law also is unconstitutional? Not necessarily, for there is a long history of private actions for damage to reputation that seems to coexist reasonably well with vigorous public debate, although the
question is far from clear. Indeed, I would be particularly concerned about some of the reform proposals of the law of libel, such as those that would permit actions for mere declarations of falsity, precisely because such an approach could effectively turn courts into roving commissions on truth and thus enhance the dangers of partisanship.

VI. DISTRUST OF JURORS AND VOTERS

The final aspect of the law of evidence I will discuss focuses on those rules concerned about undue prejudice. These rules exclude evidence because its probative value is thought to be outweighed by the risk that jurors will overvalue the evidence to such a degree that they are more likely to reach a correct result without the evidence than with it.

Consider, for example, a prosecution for armed robbery in which the government offers proof that the defendant has three prior convictions for armed robbery. Such evidence is clearly relevant. That is, the fact that the defendant has three prior convictions tells us something useful about his character—he has the moral capacity to engage in this sort of conduct. Put in relevance terms, it is more likely that a particular individual with three prior convictions for armed robbery committed the crime in question than a particular individual about whom we know nothing. The evidence tends to make the proposition of the defendant's guilt more likely than if we did not have the evidence.

On the other hand, evidence of the defendant's prior convictions, although relevant, is of relatively low probative value. Many people have this characteristic, and the fact of the defendant's bad character—standing alone—moves us only a very small way towards the conclusion that he was the one who committed the particular crime in question. In thinking about the probative value of this evidence, it may be useful to compare it to other kinds of evidence often available, such as eyewitness identification, a confession, or the fact that the defendant was found in possession of the stolen property.

Evidence of the defendant's bad character is thus relevant, but of only low probative value. If that were all there is to the matter, the evidence surely would be admissible. But there is more, for the law of evidence reflects the concern that, presented with such evi-

---

**See, for example, Pierre Leval, The No-Money, No-Fault Libel Suit: Keeping Sullivan in Its Proper Place, 101 Harv L Rev 1287 (1988).**
dence, jurors would tend to give it too much weight. The concern is that jurors who know that the defendant has committed such crimes in the past will regard the defendant as a bad person and thus root against him in the evaluation of the case as a whole. In such circumstances, jurors may tend to see the defendant as someone who should be behind bars whether or not he committed the particular crime charged. "Indeed," they may think, "it really doesn't matter whether he committed this crime, for he probably committed other crimes for which he hasn't been caught or punished, so we'd better just put him away."

Based on such concerns, the law of evidence provides that the prosecution in a criminal case may not, on its own initiative, introduce evidence of the defendant's bad character. The judgment is that, even though such evidence is relevant, the jury is more likely to reach the correct result in the case if it does not learn of the evidence than if it does. Such evidence is thus per se inadmissible.3

Does it therefore follow that in public debate the press should not report about the bad character of a candidate for political office because of a similar concern that voters, like jurors, will tend irrationally to overvalue the evidence? For example, does the logic of this rule of evidence suggest that the press should not be permitted to report that a candidate previously had been convicted of bribery? The very statement of the example makes clear how counterintuitive such a rule would be when viewed against our usual assumptions about public debate. But why is public debate different in this regard from the trial process?

The answer is not, of course, that voters are better able to deal with such evidence than jurors. As individuals, voters are no different from jurors, and they are subject to the same biases and irrationalities. Moreover, if anything, the trial setting provides a better context for attempting to educate jurors to the risk that they may overvalue such proof. Why, then, is such information appropriate in public debate, even though it is condemned in the judicial process?

There are several explanations. First, in the criminal trial, the prosecution offers such evidence to prove that because the defendant behaved badly in the past he is more likely to have committed the particular crime with which he is now charged. The jury is not being asked to make an overall assessment about how the defend-

---

3 See, for example, FRE 404(a).
ant behaves generally; it is asked to decide whether he did a particular act on a particular occasion.

In the political process, however, voters are asked to make a more generalized assessment of how the candidate will behave when faced with a broad range of possible problems over a period of time. In that context, evidence of character is much more useful, for although it may not tell us much about how the candidate will behave in a single, particularized situation, it does give us a sense of how he will behave in general. To that extent, the probative value of the evidence is much higher in this context than in the usual criminal trial and, indeed, the probative value may be sufficiently great to outweigh the risk of undue prejudice.

Interestingly, this reasoning tracks that of the law of evidence, for although the prosecution is routinely prohibited from introducing evidence of the defendant’s bad character to prove he acted in accordance with that character on a particular occasion, it is permitted to introduce such evidence, despite the risk of undue prejudice, if it is relevant to some other issue, such as motive, identity, intent, or knowledge, where the probative value may be higher. For example, if the defendant is charged with armed robbery, the prosecution could not introduce evidence of the defendant’s prior convictions for armed robbery merely to prove his general criminal disposition, but it could introduce evidence that he needed money to buy heroin because such evidence would be highly probative of the defendant’s motive to commit the crime. 35

A second reason why the “admissibility” of bad character evidence in public debate is consistent with the “exclusion” of such evidence in criminal trials is that even in criminal trials the prosecution is permitted to introduce evidence of the defendant’s bad character once the defendant voluntarily opens the door to such evidence by offering proof of his own good character. 36 In the political context, it would be reasonable to conclude that the candidate, by virtue of his candidacy, has by definition proclaimed his own good character, thus opening the door to evidence that would rebut that implicit assertion. 37

35 FRE 404(b). It is also noteworthy that evidence of character is generally admissible when character is itself an ultimate issue. See Edward W. Cleary, McCormick on Evidence § 187 (West Publishing Co., 3d ed 1984).
36 FRE 404(a)(1).
37 This argument would have as much force in the context of public figures, as distinct from public officials and candidates for public office.
This does not end the matter, however, for even when the prosecution is permitted to introduce evidence of the defendant's bad character in a criminal trial, the evidence must deal with traits of character that are relevant to the crime charged. Suppose, for example, the defendant is charged with embezzlement and, to establish his own good character as proof of innocence, he introduces evidence that he is a financially responsible individual. Although the prosecution will be permitted to respond to this proof with its own evidence that the defendant is not a financially responsible individual, it will not be permitted to prove that he is a person of violent disposition. This is so because the defendant's tendency toward violence is not relevant to the charge of embezzlement, but the risk remains high that, informed of this fact, jurors might nonetheless become unduly prejudiced against him. Thus, such evidence is inadmissible.

What are the implications of this conclusion for public debate? This brings me back to the illustration I used earlier—should the press be prohibited from publishing information to the effect that a candidate was unfaithful to her husband? Although evidence of corruption is clearly relevant to a candidate's fitness for office, what about proof of marital infidelity?

Suppose a state enacts a law prohibiting any person from publishing information disclosing a political candidate's unfaithfulness. Would such a law violate the First Amendment? How would one reconcile such a law with the exclusion of similarly inflammatory and marginally probative evidence in the trial context? One answer, of course, is that such evidence is not marginally probative, but is in fact highly probative of what many voters want—or do not want—in an elected official.

The problem is that unlike the trial context, where we can agree without too much difficulty about what character traits are or are not relevant to whether the defendant committed the crime charged, there is no such consensus about what character traits we seek in a public official. Some voters may care that a candidate consumes too much alcohol, but may not care that he has smoked marijuana. Other voters may care that he once had a homosexual encounter, but may not care that he has been unfaithful to his wife. Some voters may care that a candidate lied to get into college, but may not care that he lied to avoid the draft. In attempting to resolve this problem, it will be useful to clarify precisely why we want to restrict such expression. First, we may want to restrict the dissemination of information concerning some aspects of a candidate's character because we believe that such information is ir-
relevant to a determination of the candidate’s fitness for office. But if that is the sole reason for restricting the expression, there is no need to do so, for as I explained earlier, there is no need to restrict the publication of information in public debate merely because it is irrelevant.\textsuperscript{38}

Second, we may want to restrict the dissemination of information concerning some aspect of a candidate’s character because a majority believes that the information is irrelevant to the candidate’s fitness for office, but it is concerned that a minority will inappropriately consider the information relevant. In this situation, the majority wants to restrict the information because it distrusts other citizens who will give weight to information that the majority thinks should not be considered. For the majority to restrict the publication of information on this basis would be highly paternalistic and, thus, constitutionally problematic.\textsuperscript{39} Moreover, as in the false statement context, there is a danger that considerations of partisanship would seriously distort the political process if we were to grant government the power to excise from public debate those facts that the majority thinks the minority should not consider. To justify such a restriction in a principled manner, the majority would have to demonstrate, at the very least, that the minority’s different view about the value of the information is clearly irrational. Needless to say, it would be very difficult for the majority to justify such a conclusion, for this sort of paternalism cuts to the very heart of voter autonomy and to the right of each citizen to decide for herself what factors she will consider in deciding how to cast her vote.\textsuperscript{40}

Third, we may want to restrict the dissemination of information concerning some aspect of a candidate’s character because we believe it is irrelevant to his fitness for office or, if relevant, is only

\textsuperscript{38} See Part II.

\textsuperscript{39} Such paternalistic justifications for the suppression of information in public debate are incompatible with the basic premises of First Amendment theory, and are thus constitutionally disfavored. See Geoffrey Stone, Content Regulation and the First Amendment, 25 Wm & Mary L Rev 189, 207-17 (1983).

\textsuperscript{40} One might ask why this is not also true in the trial context. That is, why not permit jurors to learn of the defendant’s general bad character? Is not the decision to deprive jurors of such information equally paternalistic? Two answers come to mind. First, as already noted, in the trial context, proof of character is only circumstantially related to whether the accused committed the particular crime in question, whereas in the political context proof of character is central to the issue of overall fitness for office. In the trial context, the exclusion of the evidence is evidentiary; in the political context, it is substantive. Second, the risk of impermissible partisanship is likely to be much greater in the political than in the trial setting.
marginally probative. We fear, however, that like jurors in a criminal trial, we will tend to overreact to the information in an irrational manner. We therefore conclude that we are more likely to reach a sound result in the political process if we are deprived of such information than if we learn of it. If the "we" in this discussion includes all members of the community, without exception, then a law prohibiting the publication of such information would seem consistent with the exclusion of analogous evidence in a criminal trial. The phenomenon of "undue prejudice" is well established in the law of evidence, and there can be little doubt that the exclusion from public debate of such information in the circumstances described would be both sensible and principled. Unfortunately, as a practical matter, this situation is only hypothetical, for it is impossible to conceive of a circumstance in which all members of the community would agree that such information would be both of marginal probative value and unduly prejudicial to the point where they all would want to be deprived of the information.

Fourth, as a practical matter, the issue raised above will arise only in circumstances in which a majority concludes that the information should be restricted, but a minority wants access to the information. In this situation, however, the justification for restricting the information is not that the majority thinks that the minority should not be allowed to consider the information, but that the majority wants to deprive itself of the information. The fact that the minority is also and at the same time deprived of the information is not the result of paternalism, as such. It is, rather, the unavoidable consequence of the majority's desire to deprive itself of the information.

In theory, at least, this is not an insignificant distinction. As we have seen, there are many circumstances in which we deprive voters of relevant information. This is most often the case when the value of the information is thought to be slight or when the value of the information, even if considerable, is thought to be outweighed by the harm caused by its disclosure. The former is illustrated by doctrines governing invasion of privacy; the latter is illustrated by doctrines governing national security or fair trial. On this theory, for the government to prohibit the disclosure of certain information about political candidates, such as information about their sexual conduct, is at least plausibly constitutional, for it avoids any reliance on a claim of paternalism and fits into the pre-existing model for considering the constitutionality of other restrictions on speech. Finally, a law restricting such information may be reinforced by invoking, not only the majority's claim that
it wants to shield itself from its own irrationality, but also some additional interest, such as protection of the privacy of political candidates. Adding this interest to the restriction side of the equation would strengthen still further the claim for restriction.

**CONCLUSION**

I will close with a few final thoughts on "the responsibilities of a free press." As I have tried to show, in many instances the evidentiary rules of public debate can be reconciled with the evidentiary rules of the judicial process. Although the rules are often different, there are sound reasons for most, if not all, of the differences. It is important to emphasize, however, that in some important instances—such as the non-regulation of false statements and unduly prejudicial disclosures in public debate—we adopt a stance of non-regulation, not because the problems that arise in the judicial process do not arise in public debate, but because we cannot trust government to exercise the power to regulate such expression in public debate.

It is precisely in these situations that the "responsibilities of a free press" are paramount. For although we cannot trust government to regulate false statements of fact and unduly prejudicial material in public debate, this does not mean that such speech cannot seriously undermine public debate and, with it, the democratic process. Traditionally, the press has played a critical role in maintaining this process. Until recently, for example, the press tended not to report information about the private sexual conduct of political candidates. In exercising such discretion, the press acted like a judge in a criminal trial, preventing the people—the jurors—from learning information that arguably would distort their judgment and distract their attention from more important matters.

Today, however, as part of a general breakdown of journalistic standards, the press, driven by rampant commercialism, routinely sensationalizes such information to the detriment of the political process. This poses a fundamental problem, for if we are unwilling to trust government to regulate the press, we must be content to leave the critical decisions about such matters to the press. But it is no longer clear that a society dedicated to maintaining an effective, fair, and open political process should delegate the decision of such fundamental questions concerning the structure and nature of our political process to the unelected, unrepresentative members of the private press.
The critical question is thus not only whether we should trust the government to regulate the press, but whether we should trust the press to define our political process. We must understand that the choice that confronts us is more subtle and more difficult than whether we want the government to control the press. It is a choice between two competing power centers—one subject to political control, the other increasingly controlled by the market. As the Hutchins Commission noted a half-century ago, the right of the press to be free is not a rule of nature, but a tool of democracy. The press must not forget that it has responsibilities, as well as rights.