

# JOURNAL OF INTERNATIONAL MEDIA & ENTERTAINMENT LAW

PUBLISHED BY THE DONALD E. BIEDERMAN ENTERTAINMENT  
AND MEDIA LAW INSTITUTE OF SOUTHWESTERN LAW SCHOOL  
IN ASSOCIATION WITH THE  
AMERICAN BAR ASSOCIATION FORUMS ON COMMUNICATIONS LAW AND THE  
ENTERTAINMENT AND SPORTS INDUSTRIES

Volume 8, Number 2

2019-2020



## SYMPOSIUM

FAKE NEWS AND “WEAPONIZED DEFAMATION”:  
GLOBAL PERSPECTIVES

## EDITOR’S NOTE

## ARTICLES

Credibility-Enhancing Regulatory Models to Counter Fake News:  
Risks of a Non-Harmonized Intermediary Liability Paradigm Shift  
*Teresa Rodríguez de las Heras Ballell*

Criminal Defamation: Still “An Instrument of Destruction” In the Age of Fake News  
*Jane E. Kirtley & Casey Carmody*

Stemming the Tide of Fake News: A Global Case Study of Decisions to Regulate  
*Amy Kristin Sanders, Rachel L. Jones, and Xiran Liu*

Legal Responsibility for Fake News  
*Tommaso Tani*

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The *Journal of International Media & Entertainment Law* is published twice a year by Southwestern Law School, in cooperation with the American Bar Association.  
ISSN: 1556-875X.

**Postmaster:** Send address changes to the Biederman Institute at Southwestern Law School, 3050 Wilshire Boulevard, Los Angeles, California 90010.

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## Editor's Note

This issue is the second of three devoted entirely to articles from our 2018 symposium conference, entitled *Fake News and "Weaponized Defamation": Global Perspectives*, a global participation event sponsored by the Journal in partnership with the *Southwestern Law Review* and *Southwestern International Law Journal*. In 2020, the topics in these articles resound with new urgency, as countries, including the United States, face the scourge of disinformation in their efforts to contain a worldwide coronavirus pandemic.

The first article, "Credibility-Enhancing Regulatory Models to Counter Fake News: Risks of a Non-Harmonized Intermediary Liability Paradigm Shift," by Professor Theresa Rodríguez de las Heras Ballell, posits a need for uniformity in the reassessment of online liability policies to enlist digital intermediaries and platform operators in the battle to enhance credibility and counter misinformation. "Criminal Defamation: Still 'An Instrument of Destruction' in the Age of Fake News," by Professor Jane E. Kirtley and Casey Carmody, describes how criminal defamation statutes are a cudgel against a free press that hobbles efforts to curb fake news in the U.S. and abroad.

In "Stemming the Tide of Fake News: A Global Case Study of Decisions to Regulate," Professor Amy Kristin Sanders and co-authors Rachael L. Jones and Xiran Liu categorize three approaches to addressing fake news in social media: private-sector scrutiny, government-run scrutiny, and, the authors' main focus, legislation that would punish fake news purveyors with fines and jail time. And, finally, Tommaso Tani offers "Legal Responsibility for False News," a deep dive into the nature of fake news and the legal infirmity of efforts to regulate it beyond existing criminal and tort remedies.

In the summer of 2020, the Journal will publish its last set of fake news and weaponized defamation articles revised from papers delivered at our 2018 conference. For this issue, I want to acknowledge the hard work and can-do spirit of the Journal's student editors, who persevered to complete this volume, and much of the next one, from the socially distant confines of their homes. Special thanks also to Emily A. Rehm, an adjunct professor at Southwestern and a former student supervising editor, and to my long-time Biederman Institute colleague Michael D. Scott.

This volume is dedicated to Professor Robert C. Lind, the fissile material that sparked the chain reaction that became the Biederman Entertainment and Media Law Institute at Southwestern Law School.

Your comments, suggestions, and feedback are always welcome.

Professor Michael M. Epstein  
Supervising Editor

# CREDIBILITY-ENHANCING REGULATORY MODELS TO COUNTER FAKE NEWS: RISKS OF A NON-HARMONIZED INTERMEDIARY LIABILITY PARADIGM SHIFT

Teresa Rodríguez de las Heras Ballell\*

Safe harbor provisions for electronic intermediary service providers represent a key common policy in worldwide Internet regulation. Although there are disparities in scope, applicable conditions, and effects, intermediary liability exemptions have been extensively incorporated into most jurisdictions and are the backbone of electronic commerce and information society services (in the EU terminology) legal framework. To date, it has been a rather undisputed assumption that the intermediary (non-) liability paradigm has accelerated the expansion and consolidation of digital activities. Safe harbors do rightly allocate incentives to reach a compromise between the free provision of intermediary services that are arguably critical for the survival and development of the digital society, and the reasonable protection of rights. However, today's digital scene has changed considerably, so as to challenge the sustainability of intermediary liability paradigm and put into question the continuation of intermediary liability in its current form. The proliferation of fake news and alarming use of disinformation campaigns based on the dissemination of deliberately false information have precipitated the debate on the actual and prospective role of digital intermediaries and the suitability of current liability rules to enhance trust and counter misinformation. Intermediaries are a determining component of misinformation machinery. Although fake news is typically user-fabricated content, intermediaries provide them with the features needed to gain impact: accessibility, visibility, virality, and, as a consequence, perceived credibility. Therefore, because the original source of the disinformation can neither be easily located nor effectively combated,

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\* Professor of Commercial Law, Universidad Carlos III de Madrid. [teresa.rodriguezdelasheras@uc3m.es](mailto:teresa.rodriguezdelasheras@uc3m.es) and *2017-2018 Chair of Excellence*, Oxford University, Harris Manchester College, Commercial Law Center (UC3M-Santander Chairs of Excellence Program). Member of the Expert group to the EU Observatory on the Online Platform Economy.

regulators turn their attention toward intermediaries as they are more accessible, in an attempt to control this growing information challenge. If accessibility, visibility or virality were contained, the effects of misinformation would be significantly restrained. The policy options that should be adopted to achieve such a positive outcome are difficult to pinpoint. Approaches differ, and such disparities contribute to continue debilitating credibility and foster jurisdictional arbitrage and “platform shopping” as a new version of forum shopping. In such a context, the aim of this Article is to dive into the global debate about the need for a paradigm shift in the liability policy towards an increasing involvement of digital intermediaries and platform operators to enhance credibility and counter misinformation. To that end, the Article will analyze and compare regulatory models and contrast their implications.

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## I. THE LAYERS OF DIGITAL INTERMEDIATION: ACCESSIBILITY, VISIBILITY, AND CREDIBILITY

Digital intermediaries play a critical role in our digital society. Business transactions, economic activities, social interaction, educational and cultural environments, and other varied dimensions of digital economy are widely facilitated, enabled, and encouraged by intermediaries.<sup>1</sup> Essentially, digital intermediaries are key facilitators of digital activities by providing accessibility and visibility of digital content, data, and information, and generate trust by enhancing credibility in digital interactions. Digital intermediary activities constitute the backbone of the digital living.

To that end, digital intermediation evolves and transforms to progressively satisfy new needs, repair failures, and face novel challenges of a changing and dynamic digital society. Therefore, in tracing its evolution over the last decades, several superimposed layers of digital intermediation<sup>2</sup> can be discovered. Such a digital archeological initiative reveals how digital intermediaries have successively addressed and fulfilled the most urging need of digital communities at each stage of evolution. First, accessibility: intermediaries have focused on providing the most basic need for digital users: readily accessible digital content and services. Accessibility would be then the first and primitive layer. Second, visibility: as the vast informative exuberance of our overinformed digital society incremented, real accessibility and attention-capturing-and-retaining capacity dramatically decreased. To ensure effective access to pertinent, convenient, and sought information, visibility-providing strategies are imperative. Accordingly, intermediaries are necessary to provide and enhance visibility. Third, once extensive accessibility and high visibility are assured, credibility becomes the scarcest value in the digital scene. Trust generation constitutes the most critical factor for the sustainability and the growth of the digital society. Not surprisingly, intermediaries make efforts to generate confidence and create trustworthy environments as trusted third parties. Metaphorically, these “layers of digital intermediation” conform today’s digital geology.

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<sup>1</sup> Bailey, J. The Emergence of Electronic Intermediaries, Proceedings of the 17th ICIS, Cleveland, OH, 391-99, (1996); Bailey, J. and Bakos, Y. An Exploratory Study of the Emerging Role of Electronic Intermediaries, International Journal of Electronic Commerce, 7-20 (1996); Bakos, Y., The Emerging Role of Electronic Marketplaces on the Internet, Communications of the ACM, 35-42 (1998); P.K. Kannan et al., The Internet Information Market: The Emerging Role of Intermediaries, Handbook on Electronic Commerce, 569-90 (2000).

<sup>2</sup> See Teresa Rodríguez de las Heras Ballell, Intermediación electrónica y generación de confianza en la Red: escenarios de riesgos y responsabilidad, Revista Española de Seguros, núm. 153-54, 43-68 (2000).

These fundamental roles of intermediaries in digital society do, however, constitute their greatest vulnerability, as they exacerbate their exposure to risk. In fact, insofar as intermediaries provide accessibility, and visibility to user-generated content, where such content is illegal, harmful, or false, it might be easily argued that they do indeed facilitate the infringement, enable the causation of damage, or even amplify the impact by providing tools to disseminate the information. Likewise, to the extent that intermediaries act voluntarily, or are involuntarily treated – on grounds of the reasonable expectation of users – as trusted third parties, they might arguably be endorsing or supporting the content they transmit, store, search, link, or make available. Accordingly, their exposure to liability increases greatly.

This Article is based on the premise of the above-described two-faced role of intermediaries to devise possible strategies to counter fake news. Intermediaries are a determining component of misinformation machinery. Although fake news is typically user-fabricated content, intermediaries provide them with the needed features to gain impact: accessibility, visibility, virality, and, as a consequence, perceived credibility. Therefore, because the original source of the disinformation can neither be easily located nor effectively combated, regulators turn their attention toward intermediaries as they are more accessible, in an attempt to control this growing information challenge. If accessibility, visibility or virality were contained, the effects of misinformation would be significantly restrained. The policy options that should be adopted to achieve such a positive outcome are difficult to pinpoint. Where the intermediary liability regime (“safe harbor” provisions) was clearly designed in the appreciation of the positive role of intermediaries as providers of accessibility, visibility, and credibility, and with the aim to preserve it, how to face their contributory role from a legal perspective in the misinformation machinery is still undefined and rather uncertain. The new challenges might require a paradigm shift on liability. There are some signs that point in this direction that are being noticed.

In the European Union, how to respond to this problem is not yet defined. Recent debates at Parliament reveal a lack of agreement on how to best counter fake news. Accordingly, all regulatory alternatives are under consideration.<sup>3</sup> Some voices are more inclined to support a paradigm shift on liability to incentive intermediaries to act expeditiously to remove illegal

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<sup>3</sup> Divergences among Member States to combat disinformation are also revealed by the Report of the Presidency to the European Council on June 20-21, 2019, on countering disinformation and the lessons learnt from the European elections sent to Delegates by the Presidency of the Council of the European Union at [https://www.euractiv.com/wp-content/uploads/sites/2/2019/06/imfname\\_10910650.pdf](https://www.euractiv.com/wp-content/uploads/sites/2/2019/06/imfname_10910650.pdf).

(false) content, resort to fact-checkers, implement effective notice and complaint systems, or even assume a general duty to monitor in order to detect obviously false information. Other positions however, seem keener on preserving the current liability system or to rely on user-controlled monitoring schemes.<sup>4</sup> No EU-wide regulatory action has been adopted yet, but a High-Level Group (“the HLEG”) is being set up by the European Commission to advise on policy initiatives to counter fake news and the online spread of disinformation.<sup>5</sup> Concurrently, Member States are individually adopting or considering the adoption of domestic initiatives. The relatively recent German *Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz - NetzDG*<sup>6</sup>) – Act to Improve Enforcement of the Law in Social Networks – that entered into force on October 1, 2017, and the adoption in France of controversial legislative initiatives<sup>7</sup> to combat during electoral periods false information and propaganda are illustrative examples of such domestic actions.

Behind such uncoordinated response, there is a profound unfinished debate about the most effective ways to counter misinformation. As the fake-news phenomenon has aroused social alarm and political concerns, some positions defend that political action is essential. Other stances, however, tend to rely more on liability-based strategies to better allocate incentives and risks among participants. Under this approach, diverse regulatory models can be devised, such as voluntary self-regulation models, administrative sanctioning systems, or civil liability regimes. In this

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<sup>4</sup> See the details on actions adopted at domestic and to be considered at EU level as described in the report *The legal framework to address “fake news”: possible policy actions at the EU level*, Policy Department for Economic, Scientific and Quality of Life Policies (Author: Andrea Renda (CEPS - Centre for European Policy Studies and College of Europe), Directorate-General for Internal Policies, PE 619.013- June 2018, from p. 18 in particular – at [http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/619013/IPOL\\_IDA\(2018\)619013\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/619013/IPOL_IDA(2018)619013_EN.pdf).

<sup>5</sup> European Commission, *A multi-dimensional approach to disinformation*. Report of the independent High level Group on fake news and online disinformation, March 2018, <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation>.

<sup>6</sup> *Gesetz zur Verbesserung der Rechtsdurchsetzung in Sozialen Netzwerken* (Network Enforcement Act) [NetzDG] [Act to Improve Enforcement of the Law in Social Networks], Sept. 1, 2017, BGBl at 3352 (Ger.).

<sup>7</sup> *Loi organique n° 2018-1201 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information*, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037847556&dateTexte=20190715> (Organic Law Against Manipulation of Information) and *Loi n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information*, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037847559&dateTexte=20190715> (Act on the Fight Against the Manipulation of Information).

context, perceptible signs of a possible paradigm shift regarding intermediary liability regime could be indicating a choice for the latter regulatory option. A liability-based action would appear to be a very effective deterring and controlling strategy, less political, and more neutral, but in practice, it requires the transfer of power to private entities to manage the creation of opinion in the digital society. The consequences of such a model cannot be ignored.

Yet in absence of a harmonized single action, approaches differ, and such disparities contribute to the continuation of debilitating credibility, fostering jurisdictional arbitrage and “platform shopping”<sup>8</sup> as a new version of forum shopping.<sup>9</sup>

The aim of this Article is to dive into the global debate about the need for a paradigm shift in the liability policy toward an increasing involvement of digital intermediaries and platform operators to enhance credibility and counter misinformation. To that end, the Article will analyze and compare regulatory models and contrast their implications. With such goals, the analysis will be structured as follows.

First, a legal concept to embrace fake news phenomenon must be defined (*infra* Part II). Such a defining effort is conclusive to properly ponder regulatory models. My proposal is that fake news impact has two dimensions: the factual one that determines its veracity, and the social one that is based on perception. Whereas the former requires an objective test and needs a credibility reference endorsed by a trusted third party, the latter is diffuse and subjective and depends on community perception.

Second, upon the previous demarcation of the scope, alternative regulatory models will be compared (*infra* Part IV). Before diving into the different regulatory models and policy options, Part III explains the current liability regime for intermediaries to contextualize the further debate and traces the signs of change revealing a perceptible liability paradigm shift. Against such a backdrop, policy options to enhance credibility and counter misinformation could be basically implemented under the two following regulatory models: centralized credibility-enhancing models based on the

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<sup>8</sup> The expression has been coined by the author and it is further described in Teresa Rodríguez de las Heras Ballell, *Rules for a Platform Economy: A Case for Harmonization to Counter «Platform shopping» in the Digital Economy*, en Ilaria Pretelli (ed.), *Conflict of Laws in the Maze of Digital Platforms - Le droit international privé dans le labyrinthe des plateformes digitales - Actes de la 30e Journée de droit international privé du 28 juin 2018 à Lausanne*, Zurich: Shulthess, 2018, pp. 55-79.

<sup>9</sup> See generally Teresa Rodríguez de las Heras Ballell, *Rules for Electronic Platforms: The Role of Platforms and Intermediaries in Digital Economy A Case for Harmonization*, UNCITRAL (Jun. 09, 2017), [http://www.uncitral.org/pdf/english/congress/Papers\\_for\\_Programme/139-RODRIGUEZ-Rules\\_for\\_Electronic\\_Platforms.pdf](http://www.uncitral.org/pdf/english/congress/Papers_for_Programme/139-RODRIGUEZ-Rules_for_Electronic_Platforms.pdf).

trust-generating role of a trusted third party; and decentralized credibility models based on distributed-trust schemes and community-managed monitoring. Both models can be ably combined and coordinated. But legal rules have to decide which are the triggers to action and which are the consequences. If a policy option leading to an increasing involvement of intermediaries and platforms in detection, prevention and enforcement is chosen, the formulation of intermediary and platform duties is imperative. What kinds of duties? Is a general duty to monitor under consideration? Should automatic monitoring be deemed a general supervision? Would “best efforts” duties suffice? Would third-party fact-checkers be more effective than user-triggered flagging? An array of consequences arising from the different regulatory scenarios must be carefully considered. A legislative action aimed to intensify liability exposure could cause a retraction of intermediaries, endanger neutrality, and threaten freedom of expression under the phantom of censorship. Contrariwise, a soft-law option for promoting the adoption of code of conducts and standards could fragment the market and motivate “platform shopping.”

Third, it is concluded that any action to counter fake news should be widely coordinated and harmonized at an international level. In fact, no change in liability paradigm should be conducted on a local or regional basis. Risks of a paradigm shift in intermediary liability are high, but risks of a non-harmonized action in this issue are immense. Fragmentation, discrepancies among jurisdictions, legal arbitrage and “platform shopping” would exacerbate the perception of misinformation and lack of credibility in the digital scene. This Article makes a case for international harmonization on intermediary liability.

## II. DEFINING THE PROBLEM: CONCEPTUALIZING “FAKE NEWS”

The term “fake news” has become extraordinarily popular to describe many different contexts of misinformation and disinformation, but also to denote pure illegal content, defamation, parody, or simply offensive content. As a consequence, “fake news” is useful to direct attention toward a well-identified social problem, although the concept is vague, imprecise, and to a certain extent, confusing to employ in legal analysis. On the one hand, “fake news” phenomenon certainly comprises more than news. It encompasses any visual, graphical, or textual content produced and disseminated on a digital format that is likely to misinform. On the other hand, the term “fake news” is used to tag a wide array of mis- and disinformation types, including manipulated content, false content,

misleading content or fabricated content.<sup>10</sup> With such impreciseness, the term is unsuitable for delimiting the scope of application of any regulatory action.

Aware of the complexity of the phenomenon and the difficulties to formulate a univocal legal concept of “fake news,” a purpose-specific definition and the identification of relevant factors are proposed. As the ultimate aim of this Article is to assess the feasibility and gauge the effectiveness of liability-based regulatory strategies to counter misinformation and ponder their repercussions, the definition of fake content must be formulated to achieve those purposes.

If the delimitation of the scope is approached from the perspective of intermediary liability, a categorization based on types of potential harm deriving from the content at stake becomes relevant. Precisely, harm caused by digital content can be varied in nature (moral, reputational, patrimonial, or even indirectly physical or personal) and may differ in extent. Where some digital content is likely to cause damages to identified individual persons (either natural persons or moral ones), other content simply generates collective harm. In the latter case, despite the severity of the harm and the ampleness of the negative impact, no specific victims can be singled out. Proper “fake news” in a strict definition does very frequently fall under this last category. The spread of manipulated, false, fabricated, or misleading content has a demolishing impact on collective trust, and on the ability of a society to create a common dialogue on shared accurate facts. It undermines the value of objective facts, delegitimizes experts’ voices and authoritative institutions, and radicalizes confronting stances in a context of chaos and confusion.<sup>11</sup> “Fake news” would then be representing a variety of mis and disinformation vehicles. Repercussions are alarming, but specific quantifiable damage might not be proven, and identifiable injured persons might not be located.

The above-stressed characteristics of misinformation and disinformation vehicles have a very relevant effect on the legal analysis and a direct impact on the components of the liability machinery. If the damage is diffused, it will be questionable who is entitled to claim compensation, if

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<sup>10</sup> Claire Wardle, *Fake News. It's Complicated*, FIRST DRAFT, <https://medium.com/1st-draft/fake-news-its-complicated-d0f773766c79> (last visited Sept. 12, 2019).

<sup>11</sup> See U.N. Special Rapporteur on Freedom of Opinion and Expression, *Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda*, <http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=21287&LangID=E> (last visited Sept. 12, 2019). The authors point out propaganda in legacy and social media is fueled by both States and non-State actors, and the various harms to which they may be a contributing factor.

any. If the harm is a devaluation of collective trust, it might be difficult to quantify damages. Damage to public interest is probably the most feared and destabilizing impact of the spread of falsity, but it may not be compensable under the coordinates of the civil liability regime. If the liability system is founded on a notice-based scheme, it might be discussed who is expected to report and allege legitimate interests to act. Consequently, should fake-news-combating response be addressed to intermediaries and articulated by a liability-oriented discourse, all these considerations must be taken into account to devise the model.

Given the previous analysis, it can be sustained that intermediaries could have to face three categories of content: illegal content, harmful content, and false content. Although in certain cases these categories can coincide, they must be treated and approached as distinct and separate ones. Illegal content and false news might not produce actual damage, whereas harmful content could be entirely accurate and truthful, and might be fully licit and legitimate. Therefore, illegality, harmfulness, and falsity constitute different factual spheres that require appropriate responses. Hence, preventive measures, reparation and compensation mechanisms contrived to combat the effects of illegality and harmfulness are not equally effective to counter falsity. False content adds intricacies in the detecting and assessing phase and in the ascertaining of damages. The incontrollable spread of “fake news”, the penetrating impact of misinformation in society’s stability, and the devastating effects on trust has crudely revealed such a gap, the lack of preventive and protective measures against falsity.

Yet, unlike illegal and harmful content, setting a fair balance of conflicting rights and interests at stake in case of false content is more complex and unstable. As the contours of false content are blurred, and the potential harm is – albeit severe and massive – highly diffuse, freedom of expression becomes especially vulnerable to any ill-advised restrictive or banning decision.<sup>12</sup>

Consequently, this Article is exclusively focused on the role of intermediaries in the sphere of falsity and the advisability of a liability-based regulatory strategy to counter misinformation to that extent. European bodies have claimed a higher responsibility of intermediaries and platforms in tackling illegal and harmful content.<sup>13</sup> Likewise, the perceived paradigm shift of intermediaries’ liability regime, as further analyzed in this Article (*infra* Part III), would work for and extend essentially over illegal

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

<sup>13</sup> See European Parliament 2016/2274 (INI), 15 June 2017, P8\_TA(2017)0272.

and harmful content.<sup>14</sup> However, both policy proposals – higher responsibility and civil liability – have to be tested within a regulatory strategical context to counter “fake news.” Implications, consequences, and intricacies will undoubtedly be different.

Within such a phenomenal delimitation, my proposal is that fake news has two dimensions: the factual one that determines its veracity, and the social one that is based on perception. Falsity perception and misleading effect may be determined by the substance or by the form. As a matter of fact, true content can be presented in a way likely to mislead, confuse, or trigger misinterpretation. Whereas the former requires an objective test and needs a credibility reference endorsed by a trusted third party, the latter is diffuse and subjective and depends on community perception.

In regard to the factual dimension, “fake news” necessarily embraces a degree of falsity. Whereas veracity presents only a face, falsity ranges a wide spectrum of inveracities. Falsity in any degree is assessed on an objective basis. Although intent is relevant to distinguish disinformation, as a deliberate act from misinformation, as an inadvertent omission or unintentional sharing of false information, as well as to determine the illegality of the act or even the compensational damages, it will be ignored for the purposes of defining “false content” in a liability scheme for intermediaries. Whether digital intermediaries and platforms decide to implement proactive mechanisms to detect false content and remove it, the intentional factor in the origination or in the dissemination should not be incorporated in the process, as it is essentially irrelevant for the limited purpose of the detection. Nonetheless, intermediaries may use objective factors as a proxy for intentionality such as repetitive dissemination of false content, volume of spread “fake news,” or other circumstances revealing an organized and systematic structure to misinform. Likewise, intermediaries may calibrate the severity of penalties laid down in the platform’s internal policy to rigorously respond to intentional massive spread of false content with the most radical sanction of expulsion from users’ community, closing of account, or disabling of access.<sup>15</sup>

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<sup>14</sup> This self-regulation strategy relies on voluntary cooperation of the biggest digital platforms to combat the spread of illegal hate speech in Europe. European Commission Press Release IP/16/1937, European Commission and IT Companies Announce Code of Conduct on Illegal Online Hate Speech (May 31, 2016). But see European Parliament, stating: “The liability rules for online platforms should allow the tackling of issues related to illegal content and goods in an efficient manner, for instance by applying due diligence while maintaining a balanced and innovation-friendly approach.” European Parliament, *supra* note 13, at ¶ 34.

<sup>15</sup> See Teresa Rodríguez de las Heras Ballell, *The Legal Anatomy of Electronic Platforms: A Prior Study to Assess the Need of a Law of Platforms in the EU*, 3 No. 1 ITALIAN L.J. 149, 149-76 (2017).

Strategies implemented by global platforms and intermediaries based on the reliance upon fact-checkers, the verification by authoritative sources, and even the devising of report systems<sup>16</sup> are indeed directed to reinforce the veracity dimension.

The second dimension of “fake news” is a social one. The gravity of the problem created by systematic misinformation is not only caused by the falsity of the content, but also principally exacerbated by its uncontrollable penetration, and its pervasive expansion producing a deafening “noise,” silencing authoritative voices, and concealing fact-checked content. The risk of “fake news” is that it becomes widely credible. Factors other than the veracity of facts are able to generate a perception of credibility. Misallocated or wrongly placed trust might have a more negative effect than distrust.<sup>17</sup> To attenuate this wrong perception of credibility, fact checking is frequently ineffective, as content is infused by other credibility indicia based on popularity. Compared to the widely shared misinformation, fact-checking response might not gain sufficient relevance and even, perceived as a minority opinion, it dilutes its credence.

Popularity – number of likes, retweets, followers – as proxy for credibility, veracity or relevance is the expression of a deeper vulnerability of our society: the tyranny of quantification. Lists, ratings, rankings, priority orders, numbers offer today a safer way to understand an uncertain and complex world. Certainly, quantification helps decision-making. The digital revolution has drastically reduced the cost to count, quantify, rank, and rate.<sup>18</sup> This obsessive wish to measure every aspect of human behavior along with a blinded confidence in the value of quantification to order the world, to represent quality, to quantify credibility, to objectivize every attribute, and to beat any threat of subjectivism, lead to a “omnimetric society.” Quantification suggests objectivity, evokes neutrality, and enables comparability under a very simple successive order. As a consequence, it is extremely ineffective to combat popularity-based credibility without exploiting the same power of numbers. It is irrelevant whether the rectification content is reliable, well founded, and factually objective, insofar as it is unable to gain the merits and the credence that a massive spread provides. For a simplistic understanding of an omnimetric society, minority means irrelevance, popularity means credibility, majority means veracity.

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<sup>16</sup> “[T]he importance of taking action against the dissemination of fake news; calls on the online platforms provide users with tools to denounce fake news in such a way that other users can be informed that the veracity of the content ...” European Parliament, *supra* note 13, at ¶ 35.

<sup>17</sup> See generally Russell Hardin, *Distrust*, 81 B.U. L. REV. 495 (2001).

<sup>18</sup> See Bruno S. Frey, *Omnimetrics and Awards*, 2017 CESifo Working Papers, 1, 3.

The omnimetric nature of modern society is aggravated by another sociological component: the proliferation of peer-based structures. Bourgeoning sharing economy, collective creation, crowdfunding, or reputational rating mechanisms are rooted in that community-based approach. Trust also relies on peers. The social consequences of that perspective directly impact the dimensions of the “fake news” phenomenon and make its containment more difficult. Peer-determined “truth” is prioritized over traditional authoritative sources that become less visible or even less credible.

Therefore, these two features of modern society, intensified by digitalization, exacerbate the intricacies of the “fake news” problem and debilitate the effectiveness of any fighting strategy against it. Apparently, the only objective truth is that which can be quantified, and the only trust is that which is shared.

The role of intermediaries is critical in this second dimension of “fake news.” Intermediaries and platforms fuel credibility perception by providing accessibility, visibility, and virality mechanisms to user-generated/distributed content. From that perspective, intermediaries and platforms represent a critical component in the misinformation machinery. It is undeniable that intermediaries and platform provide the infrastructure for the dissemination, create an environment suited to ignite credibility perception, and exacerbate the massive effects of false news. Nevertheless, it is highly questionable that such an infrastructural contribution should lead to any level of liability. More interestingly, it is even more uncertain how platforms should act to contain virality, counter popularity-measured credibility, and combat with objectivity and fact checking oversized perception of trustfulness. A regulatory model that happens to dislocate incentives may trigger an overly cautious reaction of intermediaries and platforms, for fear of the liability consequences, likely to distort the free flow of ideas in the digital world, to encroach upon freedom of expression, and to fragment the information scene into biased “ideological silos.”

### III. INTERMEDIARY LIABILITY PARADIGM IN CONTEXT

The crucial role of digital intermediaries for a well-functioning digital market and a flourishing digital society was clearly perceived at the very early stage by national and regional regulators, in particular, the United States of America and European Union legislators. The need to ensure a proper and effective performance of intermediary activities became soon an imperative policy concern. To that end, an allocation of risks and incentives should be achieved. The formulation of intermediary liability-exempting rules (“safe harbor” provisions) has been the widespread common

regulatory response to articulate that fundamental policy. As a matter of fact, safe harbor provisions for electronic intermediary service providers represent a key common policy in worldwide internet regulation.<sup>19</sup> Although there are disparities in scope, applicable conditions, and effects, intermediary liability rules have been extensively incorporated into most jurisdictions.<sup>20</sup> Inspired by the U.S. legal precedent (essentially, Section 512 of the Digital Millennium Copyright Act),<sup>21</sup> intermediary liability exemptions have been the central axis of electronic commerce and the information society services legal framework in Europe from the outset.<sup>22</sup>

To date, it has been a commonplace assumption that the intermediary non-liability paradigm has accelerated the expansion and consolidation of the digital environment.

Intermediary liability regime pivots on two key tenets and a legal concept of service providers to define the scope of application. First, the ban of imposing a general obligation to monitor on service providers.<sup>23</sup> Second, a knowledge-and-take-down system.<sup>24</sup> Both tenets constitute the pillars of a negligence-based liability system. Accordingly, those service providers falling under the “safe harbor” provisions are exempted from any general obligation to proactively monitor or filter the information they transmit or the content they store, copy, or search, or to actively seek facts, indicia, or circumstances that might signal illegality.<sup>25</sup> Hence, in the absence of general duties to monitor, service providers must act only upon obtaining knowledge or awareness of the illegal information or activity; then, they have to proceed expeditiously to remove, or disable access to that content or service. Knowledge is essentially obtained from notice mechanisms implemented by service providers to enable users to flag, denounce, or report infringing content, unlawful activities, or any other illegal material. In sum, intermediary service providers do not have any duty to monitor, on a general and proactive basis, any content they transmit,

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<sup>19</sup> See generally World Intermediary Liability Map, <http://cyberlaw.stanford.edu/our-work/projects/world-intermediary-liability-map-wilmap> (illustrating and providing detailed information about the global regulatory response to intermediary liability) (last visited May 24, 2020).

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

<sup>21</sup> 17 U.S.C. § 512 (2010).

<sup>22</sup> Council Directive 2000/31 art. 1, 2000 O.J. (L178) 1-16. [hereinafter *Directive on Electronic Commerce*].

<sup>23</sup> *Id.* at art. 15.

<sup>24</sup> *Id.* at art. 14.

<sup>25</sup> *Directive on Electronic Commerce*, *supra* note 22 at Recital 47 in relation to art. 15. Article 15.1 states: “Member States shall not impose a general obligation providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity . . . .”

store, copy, or search and they are called to act only when and to the extent they have knowledge or awareness of illegal information or activities.

On the grounds of the above-described two key tenets (no duty to monitor and knowledge-based take-down obligations), intermediary liability regime applies to intermediary service providers, whereas content and service providers other than the latter ones are subject to general liability rules. The underlying assumption is then that intermediary service providers do neither control nor be aware of any information, content, or activity that they transmit, store, search, or anyhow enable. The rationale behind the description of service providers falling under the safe harbor provisions is that they perform a passive, technical and purely instrumental role. Paradigmatically, they provide access, transmission, caching, hosting, or searching services.

However, after almost two decades of evolution, the digital scene has changed considerably. Therefore, the intermediary liability paradigm has been shaken and the continuation of intermediary liability in its current form has come into question. The confluence of several trends has precipitated the debate on the need for a paradigm shift in the intermediary liability system.

First, the transformation of the Digital Economy into the Platform Economy has raised the question about the legal concept of intermediary service providers and therefore the delimitation of the scope of application of the safe harbor provisions.<sup>26</sup>

Second, some ongoing regulatory proposals (namely, under the EU Digital Single Market Strategy)<sup>27</sup> and judicial decisions in different jurisdictions seem to veer toward increasing proactive monitoring and filtering obligations and pave the path for a progressive eroding of the “no monitoring obligations” tenet.

Third, intermediaries play a central role in prevention, civil protection of rights, and voluntary enforcement in the framework of a conspicuous regulatory strategy to promote private ordering increasingly adopted and deployed by governments to face digital challenges<sup>28</sup> – particularly visible

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<sup>26</sup> See generally Teresa Rodríguez de las Heras Ballell, *El régimen jurídico de los Mercados Electrónicos Cerrados (e-marketplaces)* (Marcial Pons, 2006).

<sup>27</sup> European Commission, *A Digital Single Market Strategy for Europe*, COM (2015) 192 final (May 6, 2015).

<sup>28</sup> The governing abilities of platforms mark the approach of the publication *Platform Regulations: How Platforms are Regulated and How They Regulate Us*, Official Outcome of the UN IGF Dynamic Coalition on Platform Responsibility, United Nations Internet Governance Forum Geneva, December 2017 Luca Belli and Nicolo Zingales (eds.), [https://juliareda.eu/wp-content/uploads/2019/09/Reda2017\\_Platform-regulations-how-platforms-are-regulated-and-how-they-regulate-us3.pdf](https://juliareda.eu/wp-content/uploads/2019/09/Reda2017_Platform-regulations-how-platforms-are-regulated-and-how-they-regulate-us3.pdf). About the central economic and societal role of platforms, see Alexandre de Stree & Miriam Buiten, Marting Peitz, CERRE Report, *Liability of online hosting platforms*.

in the Digital Single Market for EU.<sup>29</sup> Prevention, control, and enforcement tasks are gradually transferred to and allocated on intermediaries.<sup>30</sup> In that context, platforms and intermediaries have implemented monitoring mechanisms and automatic filtering systems on a voluntary basis to counter fake news, hate speech, copyright infringement, and illegal content addressed to minors.

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*Should exceptionalism end?*, September 2018, [https://www.cerre.eu/sites/cerre/files/180912\\_CERRE\\_LiabilityPlatforms\\_Final\\_0.pdf](https://www.cerre.eu/sites/cerre/files/180912_CERRE_LiabilityPlatforms_Final_0.pdf)

<sup>29</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, SWD (2016) 172 final, COM (2016) 288 final Brussels, 25.5.2016, at 3. *See also* the Recitals of the Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186/57, 11.7.2019, explaining the relevant role of platforms and online intermediation services providers.

<sup>30</sup> The most illustrative examples of this trend are:

First, Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92-125, art. 17.4:

If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have: (a) made best efforts to obtain an authorisation, and (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event (c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).

Second, Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, OJ L 303, 28.11.2018, p. 69-92, art. 28b:

Without prejudice to Articles 12 to 15 of Directive 2000/31/EC, Member States shall ensure that video-sharing platform providers under their jurisdiction take appropriate measures to protect: (a) minors from programmes, user-generated videos and audiovisual commercial communications which may impair their physical, mental or moral development in accordance with Article 6a(1); (b) the general public from programmes, user-generated videos and audiovisual commercial communications containing incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter; (c) the general public from programmes, user-generated videos and audiovisual commercial communications containing content the dissemination of which constitutes an activity which is a criminal offence under Union law, namely public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541, offences concerning child pornography as set out in Article 5(4) of Directive 2011/93/EU of the European Parliament and of the Council (\*) and offences concerning racism and xenophobia as set out in Article 1 of Framework Decision 2008/913/JHA.

These trends reveal that an intermediary liability paradigm is under consideration. Nevertheless, alternative models are not yet well defined. The implications of new models for digital society, the protection of rights, internet neutrality, and the preservation of trust are significant. The current liability model embeds a fair balance between freedom of information, protection of rights, and intermediaries' freedom to conduct their business.<sup>31</sup> A paradigm shift of liability would challenge that balance. Therefore, a debate to reach public consensus on the model of digital society is necessary to have a proper understanding of state-of-the-art technology and its future possibilities. Additionally, serious attempts to produce harmonized rules are imperative.

#### *A. New Challenges and Orientations: Intermediary Liability Regime Under Consideration*

Today, the paradigms of intermediary liability face significant challenges. While the digital economy evolves and society becomes increasingly digital, the context, the players, and the problems to address under the safe harbor regime have also been transformed. These transformative forces and challenging trends have an impact on the basis of the established paradigm. The stability and soundness of the paradigm and the flexibility of the liability rules to adapt to the new circumstances then come into question. More interestingly, it is discussed whether liability rules in their current form are playing the role attributed thereto.

In this section, the three main challenges and new orientations that were identified earlier will be discussed and further elaborated on as main triggers of the debate for reshaping the liability regime. First, the emergence and rapid proliferation of platform operators. Second, the escalation in number, severity and intensity of harming situations. Third, the promotion of private ordering and voluntary enforcement.

#### 1. The Transformation of Digital Economy into a Platform Economy

Electronic platforms are the dominant organizational model<sup>32</sup> for economic activities, social networking, and emerging businesses in today's digital society and have transformed social, political, public, and

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<sup>31</sup> Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, 2012; Case C-236/08, *Google France SARL and Google Inc. v. Louis Vuitton Malletier SA*, 2008; Case C-237/08, *Google France SARL v. Viaticum SA and Luteciel SARL*, 2009; Case- C-238/08, *Google France SARL v. Centre national de recherche en relations humaines (CNRRH) SARL*, 2010.

<sup>32</sup> Thomas W. Malone, Joanne Yates & Robert I. Benjamin. *Electronic Markets and Electronic Hierarchies*, 30(6) Communications of the ACM, at 484-97 (1987).

educational contexts. The emergence and increasing popularity of disruptive models, such as sharing-based economy, crowdfunding, or fintech variants, have not only been made possible but greatly stimulated by platform-based solutions. The scaling-up presence of platforms in the digital economy and their growing market power has unveiled a visible disruptive effect on varied angles. Social, economic, and legal disruptions are perceptible, or certainly expected to explode soon. Their social and economic disrupting potential is clearly observed in the transformation of social relationships, market structures, and economic paradigms induced by platform-based emerging models (sharing-driven business models,<sup>33</sup> Fintech variants,<sup>34</sup> crowdfunding<sup>35</sup>). Along with these noticeable social and economic disruptions, the platform model is also proving to be legally disruptive. Their self-regulation power linked to an intense centripetal force that accelerates concentration, the critical role likely to be played by platform operators in prevention and civil enforcement, and the trust-generating capacity of platforms in a digital society have started to strongly attract an increasing interest of regulators and supervisors. With the issuance of public consultations and special reports, and the work undertaken by research groups,<sup>36</sup> first moves have been made at the EU level<sup>37</sup> and in some national jurisdictions<sup>38</sup> showing interest in platform economy.

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<sup>33</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A European agenda for the collaborative economy*, SWD 184 final (2016).

<sup>34</sup> World Economic Forum, *Beyond Fintech: A Pragmatic Assessment Of Disruptive Potential In Financial Services* (Aug. 22, 2017), <https://www.weforum.org/reports/beyond-fintech-a-pragmatic-assessment-of-disruptive-potential-in-financial-services> (last visited Sept. 12, 2019); Teresa Rodríguez de las Heras Ballell, *Challenges of Fintech to Financial Regulatory Strategies* (Marcial Pons, 2019).

<sup>35</sup> Teresa Rodríguez de las Heras Ballell, *A Comparative Analysis of Crowdfunding Rules in the EU and U.S.*, Stanford TFLF Working Paper Series, Working Paper num. 28, [https://law.stanford.edu/publications/no-28-a-comparative-analysis-of-crowdfunding-rules-in-the-eu-and-u-s\\_](https://law.stanford.edu/publications/no-28-a-comparative-analysis-of-crowdfunding-rules-in-the-eu-and-u-s_)

<sup>36</sup> Christoph Busch et al., *Research group on the Law of Digital Services. Discussion Draft of a Directive on Online Intermediary Platforms*, 5 EuCML 164-69 (Apr. 2016). The Project is today a European Law Institute (ELI) Project (Model Rules on Online Intermediary Platforms) approved by the ELI Council on September 7, 2016. The author of this Paper joined the ELI Project Team in 2016 and participated in all Project meetings in Krakow (Jan. 2017), Osnabrück (Mar. 2017) and Berlin (Nov. 2017). Project Rapporteurs are BUSCH, Christoph (Univ. of Osnabrück); DANNEMANN, Gerhard (Humboldt Univ. Berlin); SCHULTE-NÖLKE, Hans (Univ. of Osnabrück and Nijmegen); WIEWIOROWSKA-DOMAGALSKA, Aneta (Univ. of Osnabrück); ZOLL, Fryderyk (Univ. of Krakow and Osnabrück). The opinions expressed in this paper are personal views of the author and do not necessarily represent the Project Team's views.

<sup>37</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, SWD (2016) 172 final, COM (2016) 288 final Brussels (2016).

Optimal liability regime for platform operators is a critical policy concern underlying all these legislative and pre-legislative initiatives. Whether platform operators act as pure intermediaries protected by liability rules, or, in contrast, they should be requested or encouraged to the adoption of proactive measures is a dilemma that finds an effective breeding ground in an expanding platform economy.

As far as the legal framework for the provision of online services is concerned, electronic platform operators can be deemed intermediary service providers (ISPs) in relation to content, activities and behaviours, published, transmitted or performed by their users. Accordingly, a safe harbour regime would be applicable to delimit their liability – articles 12-15 *Directive on Electronic Commerce* with direct antecedents in U.S. legal model divided into the Communications Decency Act of 1996 included as Part V of Telecommunications Act (Pub. L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 230) and the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat 2860 (28 Oct. 1998) (codified at 17 U.S.C. § 512). The European Court of Justice confirmed that assertion when expressly held in *L'Oréal SA and Others v. eBay International AG and Others*<sup>39</sup>:

Article 14(1) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on Electronic Commerce”) must be interpreted as applying to the operator of an online marketplace where that operator has not played an active role allowing it to have knowledge or control of the data stored.

However, the above-cited decision of the Court differs from the most recent opinion held in the Uber Spain case. Although the opinion is disputable to a certain extent, the European Court of Justice, in *Asociación Profesional Elite Taxi v Uber Systems Spain, SL*,<sup>40</sup> follows the Advocate General’s Opinion.<sup>41</sup> As Advocate General Szpunar had proposed, the Court

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<sup>38</sup> In France, three regulations (decrees) have been adopted to reinforce the transparency and the loyalty of platforms: *Décret N° 2017-1434 du 29 Septembre 2017 Relatif Aux Obligations D'information Des Opérateurs De Plateformes Numériques*, JORF n°0233 du 5 octobre 2017; *Décret N° 2017-1435 du 29 Septembre 2017 Relatif à La Fixation D'un Seuil De Connexions à Partir Duquel Les Opérateurs De Plateformes En Ligne élaborent Et Diffusent Des Bonnes Pratiques Pour Renforcer La Loyauté, La Clarté Et La Transparence Des Informations Transmises Aux Consommateurs*, JORF n°0233 du 5 octobre 2017; *Décret N° 2017-1436 Du 29 Septembre 2017 Relatif Aux Obligations D'information Relatives Aux Avis En Ligne De Consommateurs*, JORF n°0233 du 5 octobre 2017.

<sup>39</sup> Case C-324/09, *L'Oréal SA and Others v. eBay International AG*, 2011.

<sup>40</sup> Case C-434/15. ECLI identifier: ECLI:EU:C:2017:981, *Asociación Profesional Elite Taxi v Uber Systems Spain, SL*, 2017. Text available at <http://curia.europa.eu/juris/celex.jsf?celex=62015CJ0434&lang1=es&type=TEXT&ancre=> (last visited Sept. 12, 2019).

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

understands that the service offered by Uber cannot be classified as an “information society service,” but it amounts to the organization and management of a comprehensive system for on-demand urban transport. Accordingly, the Court aligns with the Advocate General’s arguments and proposes that the service offered by Uber as the platform operator must be classified as a “service in the field of transport.” Thus, the separation line between operator and users providing the service dilutes, and the platform operator becomes a direct supplier instead of a provider of intermediary services.

Nonetheless, electronic platforms are contract-based. Such a contractual infrastructure defines the liability regime and indeed allocates duties and liabilities between operators and platform’s members. Since “safe harbor” regime is based on lack of knowledge and lack of control, operators manage to preserve their position with a right (but not an obligation) to monitor and supervise so as to enhance confidence without exposing themselves to liability risks.<sup>42</sup> Concurrently, the assumption that to a certain extent the operator of supervisory, sanctioning, or reviewing functions for the purposes of managing the platform may frontally question the assumption that the operator is not playing “an active role” in the meaning of the Court’s decision. Therefore, the application of “safe harbor” provisions to platforms may require a further analysis of the functional and operational platform models to specifically assess the nature and the extension of its role.

Furthermore, the analysis becomes more complex due to the fact that there is not a comprehensive, general regulation on platforms. Sector-specific regulations have been adopted at different levels to tackle issues arising from sectorial platforms such as crowdfunding platforms,<sup>43</sup> Alternative Trading Systems<sup>44</sup>/Multilateral Negotiating Systems or

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<sup>42</sup> Teresa Rodríguez de las Heras Ballell, *La responsabilidad de las plataformas: Alcance, límites y estrategias*, 369-393 (2006).

<sup>43</sup> See European Commission Staff Working Document, *Crowdfunding in the EU Capital Markets Union* (May 3, 2016), [http://ec.europa.eu/finance/general-policy/docs/crowdfunding/160428-crowdfunding-study\\_en.pdf](http://ec.europa.eu/finance/general-policy/docs/crowdfunding/160428-crowdfunding-study_en.pdf) (last visited Sept. 12, 2019) (enclosing a comparative table of domestic bespoke regimes adopted by Member States). U.S. Rules on Crowdfunding are essentially comprised of the legal provisions of Title III “Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012” of *Jumpstart Our Business Startups Act*, *JOBS Act* (Apr. 5, 2012), which is implemented by the final rules adopted by the Securities Exchange Commission (SEC) under the Securities Act of 1933 and the Securities Exchange Act of 1934 (17 CFR Parts 200, 227, 232, 239, 240, 249, 269, and 274 [Release Nos. 33-9974; 34-76324; File No. S7-09-13] RIN 3235-AL37). The final rules and forms went into effect May 16, 2016, except that instruction 3 adding part 227 and instruction 14 amending Form ID went into effect January 29, 2016.

<sup>44</sup> Jonathan R. Macey & Maureen O’Hara, *Regulating Exchanges and Alternative Trading Systems: A Law and Economics Perspective*, 28 J. LEGAL STUD. 17 (1999).

Facilities,<sup>45</sup> or the most recent timid, irregular, and to some degree erratic regulatory actions on economy-sharing models.<sup>46</sup> Given their sector-specific scope, these rules do not embrace platforms as a whole, but solely address special features of those platforms falling under their scope of application and for the purposes of protecting certain interests – market stability, transparency, investors' interests, systemic risk, consumer rights, tax collection, and fraud. Under these disparate approaches, platform operators may be required to comply with certain specific duties within the relevant sectoral sphere.

In sum, the transformation of digital economy into a platform economy obscures the binomial classification of service providers – intermediary service providers v. content and general (non-intermediary) service providers – and complicates the application of the intermediary liability regime to the new players (platform operators).

## 2. The Escalation in Number, Severity and Intensity of Harming Situations and the Role of Intermediaries

The recent controversy about “fake news” and the use of social media for spreading hate speech, violence, or extremist ideologies (e.g., white supremacist, neo-Nazis, alt-right groups) has put intermediaries and platforms in a quandary. Some popular platforms have decided to react, even compromising their neutrality, by removing content, closing accounts, or publicly denying service to certain users, and implementing mechanisms to automatically identify false news. Certainly, none of these situations are new, but they have ultimately exploded with unprecedented virulence arousing social alarm, attracting regulatory attention due to severe policy concerns, and invading international political discourse and diplomacy.<sup>47</sup>

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<sup>45</sup> For instance, in the European Union, Art.4 (15) MiFID defined “Multilateral trading facility (MTF)” as “a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules – in a way that results in a contract in accordance with the provisions of Title II.”

<sup>46</sup> See Guido Smorto, *Critical Assessment of European Agenda for the Collaborative Economy, on behalf of European Parliament. In-Depth Analysis for the IMCO Committee.* vol. IP/A/IMCO/2016-10, at 9 (2016).

<sup>47</sup> See Jean-Baptiste Jeangène Vilmer, Alexandre Escorcica, Marine Guillaume & Janaina Herrera, *Information Manipulation. A Challenge for Our Democracies. A report by the Policy Planning Staff (CAPS, Ministry for Europe and Foreign Affairs) and the Institute for Strategic Research (IRSEM, Ministry for the Armed Forces),* (2018); See also *Report on Initiatives to Counter Fake News in Selected Countries: Argentina, Brazil, Canada, China, Egypt, France, Germany, Israel, Japan, Kenya, Malaysia, Nicaragua, Russia, Sweden, United Kingdom,* Apr. 2019, Law Library of Congress, Global Legal Research Directorate, <http://www.law.gov>; see also Chris Marsden & Trisha Meyer, *Regulating disinformation with artificial intelligence,* Study – Panel for the Future of Science and Technology, European Parliamentary Research Service (Mar.

The array of proactive policies and strategies implemented by platforms and intermediaries in response to such a hostile, menacing context, raises important challenges. First, it means a progressive departure from neutrality. The uncertain consequences of a trip towards a market of biased players are yet unknown. Second, it will require recalibrating liability rules where intermediaries decide to select, assess, remove, and actively monitor. Third, it will very likely head to arbitrage and “platform shopping” in a world without a uniform response yet.

### 3. The Promotion of Private Ordering and Voluntary Enforcement Mechanisms

Finally, States have realized how weak and ineffective their traditional preventive and enforcement legal machinery is in the digital scene. Accordingly, a progressive and timid but revealing “conveyance” of powers and responsibilities in prevention and civil enforcement from public bodies to platform operators is increasingly visible. The premise inspiring such a conspicuous transfer is that platforms are best situated to detect infringement promptly prevents damages to rights or interests, and effectively enforces rights with contractual-based mechanisms. The collaboration of platform operators and intermediaries enhances the effectiveness of legal enforcement, but also raises legal concerns.

In this context of promotion of private ordering<sup>48</sup> and voluntary enforcement, the intermediary liability paradigm is under consideration. Liability regime is critical to rightly allocate incentives and align interests with policy goals. Should policy goals change to seek greater involvement of intermediaries and platforms in prevention and enforcement, the liability regime might be reshaped.

#### B. *Signs of Change? – Digital Intermediaries in a Quandary*

A safe harbor-based liability regime for digital intermediaries has remained as a solid foundational pillar of information society services and an electronic commerce legal framework for almost two decades. Its value in reconciling conflicting interests at stake were acknowledged and recognized by case law and legislative policy decisions. The expansion of digital activities and, certainly, the scaling-up emergence of platform-based models in all their variants (collaborative economy, fintech, crowdfunding, social networks, e-marketplaces) have been deeply supported and

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2019), [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/624279/EPRS\\_STU\(2019\)624279\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/624279/EPRS_STU(2019)624279_EN.pdf).

<sup>48</sup> Steven Schwarcz, *Private Ordering*, 97 NW. U.L. REV. 319, 319-50 (2002).

encouraged by the intermediary liability paradigm as devised in its original form.

Nonetheless, a dramatic transformation of digital context experienced over the years threatens to destabilize the solidity of current regimen and dilute the rationale behind the liability paradigm. The current system is shaken, and several signs of change are already perceptible. Nevertheless, prospective models resulting from a potential paradigm shift are not clearly delineated yet. The consequences of such a shift will be highly relevant for our digital society and should not be ignored.

Under this section, some perceived signs of change<sup>49</sup> will be exposed and analyzed to envisage afterwards possible alternative models for intermediary liability and discuss their implications and expected outcomes below (*infra* Part IV).

First, recent case law in multiple jurisdictions shows a progressive distancing from intermediary liability tenets and upholds proactive monitoring obligations on intermediaries in relation to a wide array of infringements and illegal activities.<sup>50</sup> Although that departing trend is not consistent and contrasts with other decisions reinforcing the tenets of the current liability paradigm,<sup>51</sup> it depicts a cracked picture.

It is increasingly visible that there is a jurisdictional discourse that stresses the concern about the alarming threat posed by digital means to certain rights, especially intellectual property infringement, privacy violations, defamation and hate speech.<sup>52</sup> Along the lines of that narrative, the digital environment would create unprecedented risks causing massive and persistent damages, unstoppable infringements, and a viral negative impact on rights. Such a reasoning could be paving the path toward a veering from negligence-based liability to strict liability on the grounds of *cuius commode eius et incommoda* principle and would endorse an imposition of monitoring obligations on intermediaries. In that regard, these decisions sustain that insofar as providers obtain economic benefits

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<sup>49</sup> Giancarlo Frosio, *From horizontal to vertical: an intermediary liability earthquake in Europe*, 12 J. INTELLECTUAL PROP. LAW & PRAC. 565, 565-75 (2016).

<sup>50</sup> Giancarlo Frosio, *The Death of 'No Monitoring Obligations': A Story of Untameable Monsters*, 8(3) J. INTELLECTUAL PROP., INFO. TECH. & E-COMMERCE L. 212 (2017).

<sup>51</sup> See Rodriguez M. Belen *c/Google y Otro s/ daños y perjuicios*, R.522.XLIX, Sup. Ct. of Arg., (Oct. 29, 2014); *Reti Televisive Italiane S.p.A. (RTI) v. Yahoo! Italia S.r.l. (Yahoo!) et al*, N RG 3821/2011, Milan Ct. App., (Jan. 7, 2015); *TF1 v. DailyMotion*, Paris Ct. App., (Dec. 2, 2014).

<sup>52</sup> S.T.J., SP No. 1.306.157, Relator: Des. Luis Felipe Salomão, 24.03.2014, 1, Superior Tribunal de Justiça Jurisprudência [S.T.J.J.] (Braz.); *Universal City Studios v. Corley*, 273 F.3d 429 (2d Cir. 2001); *Delfi AS v. Estonia*, 2015-II Eur. Ct. H.R. (2015).

(advertisements, mainly) should contribute in blocking or delisting infringing material.<sup>53</sup>

With such arguments, some above-referred judicial decisions held, apparently, under the umbrella of the Recital 40 of the *Directive on Electronic Commerce*, that intermediaries and platforms have the obligation not only to remove infringing material upon notice, but also to prevent repetition of further infringements adopting monitoring measures.<sup>54</sup> Interestingly, another decision links the specific duty to monitor the platforms to those content that prove to be popular, attracting special interests of users with a number of views, visits, or downloads.<sup>55</sup> Accordingly, such indicia of popularity should trigger the duty of the platform to examine the legal status of those contents and, if necessary, to protect it from infringement. That curious delimitation of the duty seems to be inspired by the acknowledgement of a special greater responsibility of platforms and intermediaries to protect rights and interests, employed by other courts as well to declare the reasonableness of proactive monitoring obligations on “new generation” hosting services.<sup>56</sup>

Second, several legislative actions, in particular within the framework of the EU Digital Single Market scheme, apparently point a shift of tendency towards the introduction of filtering and monitoring obligations on

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<sup>53</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 15, 2013, I ZR 79/12, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=64b5038f0e7c75357e0d9a484f2919e9&nr=65240&pos=0&anz=1>.

<sup>54</sup> Giancarlo Frosio, *The Death of ‘No Monitoring Obligations’: A Story of Untameable Monsters*, 8(3) J. INTELLECTUAL PROP., INFO. TECH. & E-COMMERCE L. 212, 204 (2017). First, in *Delta TV v. Google and Youtube*, n. 1928/2017 n. 38112/2013, ORDINARY TRIBUNAL OF TURIN (Jan. 25, 2017), [https://www.laleggepertutti.it/wp-content/uploads/2017/04/sentenza\\_1928\\_17.pdf](https://www.laleggepertutti.it/wp-content/uploads/2017/04/sentenza_1928_17.pdf), the Court held that “(d)eve dunque affermarsi che per la piattaforma You Tube (essendo ciò pienamente possibile dal punto di vista tecnico, sebbene con un minimo margine di possibilità di insuccesso) sussiste un vero e proprio obbligo giuridico di impedire nuovi caricamenti di video già segnalati come violazione del diritto d’autore . . .” – “(a)ssuming that it is fully possible from a technical point of view, although with a minimum margin for failure, there subsists on YouTube an actual legal obligation to prevent further uploads of videos already flagged as infringing of third-party copyrights” (translation by the author). Second, in the Brazilian decision *Google Brazil v. Dafra*, Special Appeal No. 1306157/SP, Superior Court of Justice, Fourth Panel, (Mar. 24, 2014), <https://wilmap.law.stanford.edu/news/brazilian-supreme-court-found-google-liable-videos-parodying-dafra-commercials>, the Court held that Google had the duty to “certain proactive control” over future uploads, albeit accepting that there are some limitations to that proactive monitoring. Third, the French decision *APC et al v. Google, Microsoft, Yahoo!, Bouygues et Al*, Cour d’Appel Paris, n°040/2016 (Mar. 16 2016), <https://juriscom.net/wp-content/uploads/2016/03/16032016caparis.pdf>, confirms the measures imposed on the intermediaries aimed to proactively expunge search results from any link to the same websites.

<sup>55</sup> *Baidu v. Register.com*, 760 F. Supp. 2d 312 (S.D.N.Y. 2010).

<sup>56</sup> Trib. 23 giugno 2014, n. 38113, Foro. It (It.).

intermediaries in some areas and a general support of voluntary prevention and enforcement mechanisms. In order to prevent copyright infringement,<sup>57</sup> the *Directive on Copyright for a Digital Single Market*<sup>58</sup> and the *Audiovisual Media Services Directive*<sup>59</sup> would encourage the adoption of effective content recognition technologies to prevent the availability of infringing content.

Apparently, these cooperative obligations would introduce, at least, duties to prevent future infringements with a more general scope, even if they can be still considered specific in relation to previously identified content or rights.

In regard to harmful content to minors and hate speech on video-sharing platforms, the *Audiovisual Media Services Directive*<sup>60</sup> provides (art. 28b) – certainly, without prejudice of Articles 14 and 15 of the *Directive on Electronic Commerce*<sup>61</sup> – the obligation of video-sharing service providers to adopt adequate measures to protect minors and prevent hate and violent speech (terms of use, report and flag system, age verification, parental control, rating mechanisms, explanation of reporting and flagging).

The system could veer from a notice-and-take-down-based model toward a duty-of-care-centred model. In this context, several regulatory proposals in the EU, as referred to above, seem to reveal a possible replacement of the horizontal liability intermediary regime with a number of vertical sectorial liability regimes introducing filtering obligations, proactive measures, or protective mechanisms for intermediaries and platforms in areas such as copyright infringement, illegal activities, or minors' protection. Which protocols, good practices, and measures that platform and intermediaries could implement to fulfil their “duty of care” will be a key strategical issue likely to affect the sustainability of the model and the stability of the market.

More importantly, and even if such a regulatory change would not materialize, a policy shift from an intermediary liability approach to

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<sup>57</sup> U.S. Copyright Office, Joint Supplemental Comments of American Federation of Musicians et al. (Feb. 21, 2017), <https://www.regulations.gov/document?D=COLC-2015-0013-92433>.

<sup>58</sup> *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives, 96/9/EC and 2001/29/EC*, OJ L 130, 17.5.2019, p. 92-125, art. 17.4

<sup>59</sup> *Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities*, OJ L 303, 28.11.2018, at 69-92.

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

<sup>61</sup> *Directive on Electronic Commerce*, *supra* note 22, at art. 14, 15.

intermediary responsibility strategy has clearly begun. The Communication *Tackling Illegal Content Online Towards and Enhanced Responsibility of Online Platforms*<sup>62</sup> is an extraordinarily illustrative expression of such a policy trend, subsequently crystallized in the *Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online*.<sup>63</sup> Although it might not entail any specific amendments to current legal framework, as stated in the *Tackling Illegal Content Communication*,<sup>64</sup> this responsibility-enhancing strategy settles a new context to interpret current liability regime and reflect on future changes. Even if, at the moment, it is simply projecting a political stance and an effective collaboration between private players and authorities, it will undoubtedly be triggered any time the debate on how responsibility is articulated in specific obligations.

Third, platforms and intermediaries have responded to a challenging environment with the increasing implementation of voluntary monitoring mechanisms, automatic filtering, and self-regulatory actions to prevent illegal activities and enable private enforcement. For example, the ContentID scheme implemented by YouTube allows for singling out digital content in advance for the purposes of blocking, monitoring, or applying monetizing strategies.<sup>65</sup> Tripadvisor has deployed an alerting mechanism to warn users, adopting a proactive and active role beyond the notice-based borders and assuming its own duty accordingly.<sup>66</sup> Facebook has developed strategies to counter fake news and hate speech based on external fact-checkers and internal algorithm-conducted automatic procedures to detect content or sources.<sup>67</sup> Facebook, Microsoft, Twitter, and YouTube, along with other platforms and social media companies have agreed with the

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<sup>62</sup> *Tackling Illegal Content Online Towards an Enhanced Responsibility of Online Platforms*, COM (2017) 555 final (Sept. 28, 2017) [hereinafter *Tackling Illegal Content Communication*].

<sup>63</sup> *Commission Recommendation of 1.3.2018 on Measures to Effectively Tackle Illegal Content Online*, COM 2018 1177 final (Jan. 3, 2018).

<sup>64</sup> As is stated in the Conclusions of the *Tackling Illegal Content Communication* (p. 20): “[t]his Communication provides guidance and does not as such change the applicable legal framework or contain legally binding rules.” Likewise, it can be also inferred from Recitals 7), 26), 33), 36) and 41), and Chapter I, 3 of the Recommendation, insofar as the measures proposed by the EU Commission shall be applied “without prejudice” of the existing legal framework as defined in Articles 14 and 15 of the Directive 2000/31.

<sup>65</sup> See Google Help Center, *What is a Content ID claim?*, <https://support.google.com/youtube/answer/6013276> (last visited May 24, 2020).

<sup>66</sup> See Lindsay Nelson, *TripAdvisor's Commitment to Family Safety*, TRIPADVISOR, <https://www.tripadvisor.com/blog/tripadvisors-commitment-to-traveler-safety-us> (last visited May 24, 2020). Two new features have been implemented in the platform to enhance safety and security and facilitate the access to safety-related information.

<sup>67</sup> Tessa Lyons, *Hard Questions: What's Facebook's Strategy for Stopping False News?*, FACEBOOK (May 2018), <https://about.fb.com/news/2018/05/hard-questions-false-news>.

European Commission on a code of conduct setting a set of public commitments to counter the spread of illegal hate speech online.<sup>68</sup>

#### IV. CREDIBILITY-ENHANCING REGULATORY MODELS TO COUNTER FAKE NEWS: POSSIBLE MODELS AND IMPLICATIONS. A CASE FOR HARMONIZATION

Signs of change are perceptible, but whether these signals announce a future regulatory change or simply the raising of policy concerns that will be addressed with cooperation, self-regulation, market-driven solutions, and political initiatives is still uncertain. Yet it is the moment for anticipating possible models and discussing their implications.

##### *A. An Intermediary-Greater-Responsibility Model: Shift from an Intermediary Liability Approach to an Intermediary Responsibility Strategy*

A shift from an intermediary liability approach to an intermediary responsibility strategy is comprehensible in political and social terms, but it raises complexities to articulate its legal consequences. The model survives without legal reform only to the extent that cooperation, self-regulation, and voluntary measures work effectively.

A case for greater responsibility of intermediaries and platforms to combat illegal activities, hate speech, racism or extremism seems to start crystallizing in several resolutions, communications, and position papers at the European Union. Given the visible loss of protagonism of traditional authoritative sources, a greater-responsibility strategy to counter misinformation might be the expected move of European authorities. Intermediaries and platforms would collaborate with public bodies, and traditional authoritative exponents.<sup>69</sup> However, concurrently, they would emerge as new gatekeepers.<sup>70</sup> That position would give rise to the deterioration of an assumption of neutrality in medium and structures for creating opinion and the multiplication of reference points.

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<sup>68</sup> EU Code of Conduct, [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online\\_en#theeucodeofconduct](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en#theeucodeofconduct) (last visited May 24, 2020). The Code of Conduct was agreed on in May 2016 by the Commission with Facebook, Microsoft, Twitter and YouTube. In the course of 2018, Instagram, Google+, Snapchat and Dailymotion joined the Code of Conduct, and in January 2019, Jeuxvideo.com joined.

<sup>69</sup> *Tackling Illegal Content Communication*, *supra* note 62, at 8.

<sup>70</sup> Reinier Kraakman, *The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986).

Yet, from a regulatory point of view, the decision to devise a model of intermediary responsibility to combat “fake news” has to address two delicate issues: the legal consequences of responsibility and the personal scope of that responsibility.

The first issue to deal with is how to articulate responsibility in legal terms. Unlike liability that is linked to patrimonial or administrative consequences (fines, sanctions, loss of license, prohibition to carry out an activity), responsibility here is configured as a set of commitments whose compliance is highly encouraged, but fundamentally depends upon voluntary measures. Market discipline and reputation play a critical role in this respect. Accordingly, regulatory strategies must principally consist of codes of conduct, EU-wide standards, good practices, and other self-regulation instruments. Such a policy option is convenient and frequently advisable, where a binding regulatory option is unworkable or may endanger the sustainability of the system, as well as where a temporary solution is needed to understand and define the problem in the transition to a more elaborated future regulatory action. The intricacies of the “fake news” problem might recommend such a provisory approach to enable platforms to develop private solutions and to test them in the market and compete before formulating a binding regulatory model.

In sum, a greater-responsibility model shows an appreciable level of adaptability and facilitates the transition to the next regulatory step without distorting the market and encouraging innovation in producing effective solutions. It is, however, a weak approach from the enforcement perspective as it essentially relies on voluntary cooperation of platforms and intermediaries.

The second issue to address is the delimitation of the scope. Bigger platforms arguably contribute in a greater manner to misinformation. The spread of “fake news” is wider, reaches a larger audience, and above all, creates a higher perception of credibility due to popularity indexes. Both the size and the penetration of bigger platforms expose them to greater risks and concurrently, would seem to justify an imposition of greater responsibility. That reasoning appears to be behind the scope of the *Code of Conduct on countering illegal hate speech online*, signed by Facebook, Microsoft, Twitter, and YouTube, as well as the scope of application of the German *NetzDG* that applies to platforms with at least two million registered users (in the Federal Republic of Germany).<sup>71</sup> Both initiatives target illegal or unlawful content, described in relation to typified offenses per the applicable legislation. The rationale behind exempting smaller

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<sup>71</sup> *Netzdurchsetzungsgesetz* [NetzDG] [Network Enforcement Act], Oct. 1, 2017, BUNDESGESETZBLATT, Teil I [BGBl I] at 3352 (Ger).

platforms from the obligations of monitoring and removal of content would be to avoid the substantial costs that implement and manage the procedure for handling complaints. Nonetheless, it cannot be ignored that doing so would likely create a competitive disadvantage in the platform market and, more interestingly, may trigger undesired “platform shopping.” If the imposed obligations are too onerous and the penalties for non-compliance too stringent, platforms could be dissuaded from growing beyond the regulatory threshold in order to avoid falling under the legal regime.

The other possible interpretation of popularity in a responsibility-based model would be in relation to the content to be protected or monitored, that is, as a trigger for the platform to action. The aforementioned *Baidu* case develops this reasoning. Where digital content becomes popular, the platform should have the responsibility to pay special attention and adopt protective measures. In regard to “fake news,” an equivalent analysis would lead to defend that, even if platforms are not subject to a general duty to monitor, they might be expected to carry out specific checking to assess veracity over those content that reach significant levels of popularity. In absence of a standard concept of popularity, such approach does moderately alleviate the burden on platforms to monitor, while the other issues remain unsolved.

#### *B. Alternatives to Define the Duties of Platforms to Counter Fake News*

As discussed above, one of the key tenets articulating the intermediary liability paradigm is the nonexistence of a general duty to monitor. Intermediaries are only called to act by disabling or removing relevant content upon obtaining knowledge. Thus, the knowledge-and-take-down pillar represents the second key tenet of the current liability regime. As it has been discussed before, there are signs of change pointing toward a possible paradigm shift.

Should a paradigm shift be considered, two scenarios may be envisioned. First, a general duty to monitor is laid out. Second, proactive monitoring duties are encouraged where certain conditions are met (blatantly illegal content, suspicious activities, hate speech, etc.). Under both scenarios, the critical policy decision is to determine whether such duties are *obligations de résultat* or *obligation de moyens*. In other words, should intermediaries be liable in case their implemented state-of-the-art mechanisms to monitor fail to detect illegal/harmful/false content, to do it timely, or to remove content or disable access in an effective manner?

Although it is declared<sup>72</sup> that the adoption of encouraged proactive monitoring does not entail losing the protection of safe harbor protection for collaborative platforms, it is undeniable that it implies obtaining knowledge and therefore triggering the duty to expeditiously react. How the adequacy of the measures will be assessed, and the consequences defective or ineffective measures will have, are relevant issues to discuss. Whether the duty to monitor, even on a voluntary basis, is an obligation of result or an obligation of means is uncertain. Whether proactive monitoring measures serve to provide genuine knowledge of illegality or harmful potential is disputable. Accordingly, intermediaries and platforms will perform their functions in a misty atmosphere.

Effectiveness in proactive monitoring can be significantly enhanced by incorporating automatic filtering, algorithm-based mechanisms, and AI-guided monitoring systems. Nevertheless, automation raises concerning risks of over-removal, and awakes the phantom of censorship. A growing trend toward the increase of transparency in the configuration, operation and self-learning processes of algorithms is echoing such concerns. Full disclosure and clear explanation on platforms' content policies in the terms of the service,<sup>73</sup> on notice-and-action procedures, and on automatic filtering criteria should attenuate those concerns. In market-oriented terms, transparency would increase competition in the market of platforms and enable reasonable choices and educated decisions.

Likewise, other safeguards against over-removal and abuse of the system might be adopted to alleviate the risk of encroaching upon the freedom of speech. Reasonable notice procedures, well-designed and continuously supervised automatic filtering, and balanced removal policy should be complemented with trusted flagging systems, counter-notice procedures, and measures to prevent and penalize bad-faith notices and counter-notices.

### 1. Alternative Liability Models to Consider

Alternative liability models range between two dimensions. On one hand, it has to be decided among three policy options: no liability, negligence-based liability or strict liability. On the other hand, a model of civil liability, administrative liability, or criminal liability can be devised.

If negligence-based liability were to be replaced by a strict liability system, serious implications on the market, the protection of rights

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<sup>72</sup> *Tackling Illegal Content Communication*, *supra* note 62, at 10.

<sup>73</sup> Teresa Rodríguez de la Heras Ballell, *Terms of Use, Browse-Wrap Agreements and Technological Architecture: Spotting Possible Sources of Unconscionability in the Digital Era*, 2009 CONTRATTO E IMPRESA EUROPA 841.

(freedom of speech, free access to information, freedom to run a business), and the preservation of neutrality would have to be carefully gauged. Over-removal is a very likely expected result, as platforms and intermediaries will strive hard to minimize their exposure to liability risks.

Criminal liability would likely distort the market in an irreparable manner. As a consequence, freedom of speech, free flow of information, and dialogue values would be severely hampered. A model of administrative liability would penalize any typified contravention of those legal duties set out by regulations with fines, or other administrative sanctions. That has been the path taken in Germany with the enactment of the *NetzDG*. Under this Act, the commission of a regulatory offense as provided for by the law, either intentionally or negligently, will be sanctioned with a fine of up to five million euros.<sup>74</sup> Under this model, infringements are essential to a procedural nature: failure to provide a specified procedure, to supply it correctly, to monitor the handling of complains, to rectify an organizational failure in due time, or to name the required authorized person, among others. In sum, the law delineates a legal model for “a good, responsible platform/intermediary” (strictly speaking, provider of a social network in the terminology used by the law). The law encourages platforms falling under the scope of application to become more responsible in the fighting against illegal content. High fines would act as deterrents for deviation.

Unlike an administrative liability model, a civil liability model depends on the basic triggers for claiming liability. Fundamentally – fault, causation, and compensable damage. Platforms and intermediaries will certainly be encouraged to adopt adequate systems and formulate reasonable content policy to demonstrate diligence. Nevertheless, unlike illegal and harmful content, in cases of false content, damage will be diffuse and very frequently hard to quantify, as content is disseminated by users. An overzealous diligence of platforms to detect and block “fake news” might lead to unreasonable restriction of speech, a biased control of opinions, and a drastic increase of the costs of platforms’ activity. The increase in cost and complexity favors big platforms and intensely disfavors small and medium competitors. Excessive costly measures could augment the concentration of the platforms’ market.

## 2. A Case for Harmonization

The intermediary liability paradigm (“safe harbor” provisions), that has been the backbone of the digital living to date, is under consideration. The

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<sup>74</sup> *Netzdurchsetzungsgesetz* [NetzDG] [Network Enforcement Act], Oct. 1, 2017, BGBl I at 3355 (Ger).

sound liability regime seems to need a transformation to face new challenges. An alarming spread of “fake news” and a growing international concern about the pervasive penetration of misinformation does precisely defy the continuity of the liability paradigm for intermediaries in its current form. Additionally, the burgeoning Platform Economy represents an important challenge for the liability system. All variants of platforms, aggregators, social networks, sharing-based models, and a wide gamut of other intermediaries not only enable the emergence and blooming of “fake news,” but principally trigger its virality as a proxy for credibility in an escalation of uncontrollable misinformation that is very hard and unlikely to counter with objectivity, fact-checking, and deep reflection. There is no time for that, and numbers play against.

The first conclusion of this Article is then that there are signs of change pointing at an eventual liability paradigm shift, but the resulting model is still uncertain and undefined. As discussed above, the implications of different alternative models are significant for the shaping of our digital society, the protection of rights, Internet neutrality, and the preservation of trust. In the case of false content, the need to set a fair balance between rights and interests at stake is trickier and even more imperative, as the collective memory, the global dialogue, and the access to information, knowledge and culture might be endangered.

Upon observation of such a still-uncertain paradigm shift, the second conclusion is that a line must be drawn to distinguish illegal content, harmful content, and false content. An eventual reform on the liability paradigm cannot be undertaken on an all-embracing basis. Both in terms of protected interests and potential harm, falsity-related situations differ from those defined by illegality and harmfulness. Therefore, a distinct and separate approach is needed to interpret the perceptible paradigm shift in the context of “fake news.”

Third, if intermediaries and platforms should be forced or encouraged to act against alleged false content, as they are expected to detect, prevent, and remove illegal content and harmful one, the distorting effects may be unprecedented and highly undesired. As the line between untrue content and opinion is very thin, the encouragement of a zealous monitoring, verification, and filtering of potential false content may lead to discrimination and ideological marginalization, biased control, over-removal, or prevalence of dominant informative or ideological lines.

The impact of “fake news” casts over two dimensions: the factual one that represents its degree of veracity, and the social one that determines its credibility, on grounds of its popularity. Whereas inveracity can be fought with fact-checking, trusted flaggers, and authoritative gatekeepers,

any attempt to undermine the credibility perception requires play with popular equivalents. Those alternative models that have been previously discussed aimed to urge or encourage platforms and intermediaries to cooperate with public authorities, trusted third parties, and authoritative voices to detect false content address the first dimension. However, it is doubtful whether platforms should collaborate on infusing artificial popularity, stirring the spread of the fact-checking content or the rectification, or provoking prompt virality.

Considering the above-discussed alternative models are likely to result from a paradigm shift in liability, the following model proposal to enhance credibility and counter fake news is outlined below.

First, a greater-responsibility model to ensure cooperation of platforms and intermediaries with authorities seems to be a reasonable stage to start. It incentivizes innovation, increases competition, and is based on voluntary collaboration. However, it must be a temporary model – testing grounds for the future devising of a regulatory model.

Second, the promotion of transparency on content policy, notice and counter-notice procedure, and automatic filtering design and operation also provide a defensible regulatory solution. It is cautious, prudent, and only slightly invasive. Market discipline works and users make their informed free decisions.

Third, a strict liability regime, as well as the imposition of a general duty to monitor, to counter “fake news” cannot be allowed. The expected consequences would be highly undesirable and detrimental to the development of our digital society. Contrarily, a model aimed to encourage the implementation of clear notice and counter-notice procedure, reliable fact-checking and trusted flaggers, transparent content policy, and effective measures to prevent bad-faith notices and counter-notices appears to be a reasonable policy option to set a fair balance between the right to access to information, the freedom of speech and the liberty to run a business in a competitive market.

The dilemma is still whether to rely on voluntary compliance and self-regulation (code of conducts and collaboration), to articulate a model of administrative liability to sanction any contraventions of the legally established duties (in line with the German *NetzDG*), or to preserve a negligence-based liability model where civil liability will be triggered only upon assessing the concurrence of basic legal requirement (negligence, causation, compensable damage). At the moment, this Article tends to favor the latter liability model in the belief that it sets a fair balance of rights and interests, promotes innovation and competition among platforms to develop

cost-effective monitoring procedures, and safeguards the free exercise of fundamental liberties in an open society.

Fourth, the increasing employment of automatic filtering and algorithm-based monitoring is undeniable. The magnitude of digital society makes their use today reasonable and inevitable to maintain the biggest platforms' functionality. Human-based content-specific monitoring and checking is inconceivable on a proactive and general basis. Automatic detection followed by human assessment would certainly be a more practical model. Nonetheless, automation still raises many concerns and risks, along with its perceptible advantages in processing and monitoring. Automatic discrimination, opacity, or ideological/informational marginalization is credible fears, particularly in our thesis of the two dimensions of "fake news." Automatic filtering heavily impacts on the perception side. Credibility perception would be artificially inflated or deflated by the effect of automatic blockage of certain content. Therefore, careful legislative attention on automatic mechanisms is imperative.

To that end, the recent *EU Regulation on Data Protection*<sup>75</sup> sets an important precedent to make algorithms accountable that, despite the specific scope of the Regulation, it might be extrapolated to the automatic filtering mechanisms to counter false content. As per Article 22 of the *EU Regulation*, the use of automated decision-making, if it has legal consequences for the person whose data is concerned, or if it affects this person in other significant ways, it is prohibited. This general prohibition is limited by three broad exceptions: a specific law authorizes algorithmic decision-making; it is based on an individual's explicit consent; or it is needed for entering into or performing a contract. In this context, safeguards must be implemented to facilitate the exercise of the right to obtain human intervention, the right to express one's point of view and the right to contest the automated decision. Nonetheless, it has still been alleged that such protective measures might not suffice and the need to enshrine a singular right to receive an explanation how the algorithms work and how a specific decision was made has been proposed.<sup>76</sup> A right to explanation that goes beyond a mere duty of transparency may apply to automatic filtering on "fake news" and it may play an effective role in the countering model to be designed.

Finally, this Article concludes that any action to counter fake news should be widely coordinated and harmonized at an international level. In

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<sup>75</sup> Regulation 2016/679, 2016 O.J. (L 119) 1 (EU).

<sup>76</sup> Sandra Wachter, Brent Mittelstadt & Luciano Floridi, *Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation*, 7 Int'l Data Privacy L. 76 (2017).

fact, irrespective of the adopted regulatory model, no change in the liability paradigm should be conducted on a local or regional basis. As it has been noticed, risks of a paradigm shift in intermediary liability are high, but the risks of a non-harmonized action in this issue are immense. Fragmentation, discrepancies among jurisdictions, and legal and regulatory arbitrage would exacerbate the perception of misinformation and lack of credibility in digital scene. More importantly, a disharmonized strategy against “fake news” would likely provoke a new variant of regulatory arbitrage – “platform shopping.” Discrepancies in regulations and diversity in platforms’ policies and procedure would fragment the digital scene in a plurality of fora. The production and dissemination of “fake news” might circumvent the most stringent regulatory models and the most fake-news-unfriendly platforms with skillful “platform shopping.” Only if more rigorous regulatory models and more respectful platforms manage to make their strategies a proxy for credibility, the regulatory competition will produce a positive effect. Then complying platforms would become trusted third parties, returning to a centralized-trust model. Otherwise, if regulatory arbitrage deteriorates confidence and impedes users’ ability to identify credibility indicia, misinformation would endure eluding the efforts made to counter it.

# CRIMINAL DEFAMATION: STILL “AN INSTRUMENT OF DESTRUCTION” IN THE AGE OF FAKE NEWS

Jane E. Kirtley\* & Casey Carmody\*\*

## I. INTRODUCTION

When Bangladeshi journalist Abdul Latif Morol, a correspondent for the Daily Probaha, used Facebook on August 1, 2017 to relay reports about the death of a goat, he was not expecting to be the target of a criminal defamation prosecution.<sup>1</sup> The previous day, Bangladesh’s Minister of State for Fisheries and Livestock Narayan Chandra Chanda donated the goat to a poor farmer in Dumuria during an event sponsored by the government’s local livestock department.<sup>2</sup> Following the event, news organizations published stories noting that the goat had died overnight. Morol took to Facebook to report the information, writing, “Goat given by state minister in the morning dies in the evening.”<sup>3</sup>

Soon after the post was published, fellow journalist Subrata Faujdar, a correspondent for the Daily Spandan, filed a criminal defamation complaint against Morol.<sup>4</sup> Faujdar claimed that Morol’s post, which also contained a photo of the minister, was intended to demean the official.<sup>5</sup> Faujdar was a supporter of the ruling party in Bangladesh and filed the complaint because

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\* Silha Professor of Media Ethics and Law, and Director, Silha Center for the Study of Media Ethics and Law, Hubbard School of Journalism and Mass Communication, University of Minnesota; Affiliated Faculty Member, University of Minnesota Law School.

\*\* PhD Candidate, Hubbard School of Journalism and Mass Communication, University of Minnesota. The authors gratefully acknowledge the research assistance of Scott Memmel, PhD candidate and editor Silha Bulletin, Hubbard School of Journalism and Mass Communication, University of Minnesota, in the preparation of this article.

<sup>1</sup> See *Bangladeshi journalist arrested for reporting death of goat*, COMM. TO PROTECT JOURNALISTS (Aug. 1, 2017), <https://cpj.org/2017/08/bangladeshi-journalist-arrested-for-reporting-deat.php>; *Bangladesh detains journalist over Facebook post on dead goat*, HINDUSTAN TIMES (Aug. 1, 2017), <http://www.hindustantimes.com/world-news/bangladesh-detains-journalist-over-facebook-post-on-dead-goat/story-ousJN1fAbldoTSBerbeP.html>; *Journalist arrested for sharing dead goat’s news on FB*, PROTHOM ALO (Aug. 1, 2017), <http://en.prothomalo.com/bangladesh/news/155161/Journalist-arrested-for-sharing-dead-goat%E2%80%99s-news>

<sup>2</sup> *Bangladeshi journalist arrested for reporting death of goat*, *supra* note 1.

<sup>3</sup> *Bangladesh detains journalist over Facebook post on dead goat*, *supra* note 1.

<sup>4</sup> *Journalist arrested for sharing dead goat’s news on FB*, *supra* note 1.

<sup>5</sup> *Id.*

he “felt bad about the issue.”<sup>6</sup> Specifically, Faujdar’s complaint alleged that the Facebook post had harmed the minister’s reputation in violation of Section 57 of Bangladesh’s Information & Communication Technology Act 2006, which criminalizes publishing material online deemed to contain false information, defamatory statements, and expression which tarnishes the image of the state or of an individual.<sup>7</sup> The law also carries maximum penalties of 14 years in prison and fines equivalent to more than \$100,000 in U.S. dollars.<sup>8</sup> Morol was arrested by Bangladesh police on August 1 before later being released on bail. As of December 2017, Morol was still facing the charges.<sup>9</sup>

A journalist facing a criminal punishment over a Facebook post about a dead goat seems absurd, but criminal defamation provisions used to punish such expression remain on the books in countries worldwide. In his concurring opinion in *Garrison v. Louisiana*,<sup>10</sup> U.S. Supreme Court Justice William O. Douglas warned that criminal defamation actions brought by government officials constituted an “instrument[] of destruction” for free expression. Despite the assertions of many legal scholars, criminal defamation statutes continue to pose a significant threat to freedom of expression, in the United States and worldwide.

Although many regard such laws as anachronistic, criminal defamation prosecutions are a regular occurrence throughout the world. Social media, blogs, and other forms of digital expression have made it easy to criticize powerful individuals. Those criticized retaliate by filing criminal complaints, enabling law enforcement authorities to search homes, seize computers and mobile devices, and arrest bloggers and other individuals who often lack resources available to legacy media. In some parts of the world, journalists and editors are forced to defend themselves in court against government officials’ or private figures’ criminal defamation lawsuits, risking fines and potential imprisonment. Several prominent individuals have sought to wield criminal defamation as a punitive measure against critics rather than as a tool to merely protect their reputations. Even when criminal defamation charges or lawsuits are dropped or dismissed, the

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<sup>6</sup> *Id.*

<sup>7</sup> Information & Communications Act (Act No. 39/2006) (Bangl.); *see also* ARTICLE 19, BANGLADESH: ANALYSIS OF INFORMATION COMMUNICATION TECHNOLOGY ACT 14-19 (2016), <https://www.article19.org/data/files/medialibrary/38365/Bangladesh-ICT-Law-Analysis.pdf>.

<sup>8</sup> *Id.*; *Bangladeshi journalist arrested for reporting death of goat*, *supra* note 1.

<sup>9</sup> Aliya Iftikhar, *Bangladesh’s defamation law is ‘avenue to misuse power,’ local journalists say*, COMM. TO PROTECT JOURNALISTS (Dec. 8, 2017), <https://cpj.org/blog/2017/12/bangladeshs-defamation-law-is-avenue-to-misuse-pow.php>.

<sup>10</sup> 379 U.S. 64, 81-82 (1964) (Douglas, J., concurring).

targeted speakers are frequently chilled from engaging in future speech. Perhaps even more alarming, criminal defamation prosecutions are not limited to countries with regressive views toward open expression.

In recent years, numerous criminal defamation prosecutions have occurred in the United States and the world over. This paper documents selected examples of the charges, prosecutions, convictions, and punishments that result from some of the criminal defamation laws remaining in existence across the globe. We collected reports and updates published between 2015 and 2017 by several free press advocacy organizations, including the Committee to Protect Journalists (CPJ), the International Press Institute, Freedom House, Article 19, Reporters Without Borders, and the Organization for Security and Co-operation in Europe's Representative on Freedom of the Media.<sup>11</sup> Our analysis examined stories from news organizations in several countries, as well as court opinions and decisions. Using this compilation of information, we identified general trends and themes emerging from criminal defamation cases in the United States as well as internationally. The result is not an exhaustive accounting of all criminal defamation cases throughout the world. Rather, our aim is to provide illustrative examples to demonstrate that criminal defamation remains an "instrument of destruction."

This article begins with an examination of how criminal defamation laws are being used throughout the United States and internationally. First, we discuss the types of criminal defamation prosecutions found in the United States, which typically involve disputes between private individuals. We also examine examples of the types of reporting and criticisms that have prompted government officials and public figures outside the United States to seek criminal prosecution of journalists, news organizations, and others. Our analysis then turns to the penalties and adverse consequences journalists and other critics face when accused of committing criminal defamation in the United States and abroad. Finally, we discuss the continued threat that these criminal provisions pose for freedom of expression worldwide, particularly in the context of allegations of "fake news," and consider the steps necessary to combat this threat.

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<sup>11</sup> COMM. TO PROTECT JOURNALISTS, CRITICS ARE NOT CRIMINALS: COMPARATIVE STUDY OF CRIMINAL DEFAMATION LAWS IN THE AMERICAS (2016); INT'L PRESS INST., OUT OF BALANCE: DEFAMATION LAW IN THE EUROPEAN UNION (2015); FREEDOM HOUSE, FREEDOM OF THE PRESS 2017 (2017); ORG. FOR SECURITY AND CO-OPERATION IN EUR., DEFAMATION AND INSULT LAWS IN THE OSCE REGION: A COMPARATIVE STUDY (2017).

## II. CRIMINAL DEFAMATION CASES IN THE UNITED STATES

Many media law scholars have described criminal defamation law in the United States as “essentially dead”<sup>12</sup> and “virtually eradicated.”<sup>13</sup> Legal thinkers who acknowledge that criminal defamation is not entirely moribund nevertheless suggest that criminal penalties for false, harmful statements “belong in our history texts, not in our law books”<sup>14</sup> and have “no place in a democratic society.”<sup>15</sup> Others contend that criminal defamation in the United States is a “minimal legal threat”<sup>16</sup> and that prosecutions are “relatively rare.”<sup>17</sup>

This position is perhaps understandable if one relies solely on U.S. Supreme Court precedent. In 1964, the high court’s decision in *Garrison v. Louisiana* held that the Constitution forbade civil or criminal sanctions for truthful statements about public officials acting in their official capacities.<sup>18</sup> Referencing their decision in *New York Times v. Sullivan*, decided earlier that same year, the Court determined that criminal sanctions could be imposed only when a person made statements with “actual malice”—i.e., knowledge of falsity or reckless disregard for the truth.<sup>19</sup> That decision seemed to deal a death blow to criminal defamation in the United States.

However, criminal defamation has continued to live on in the United States. Although there are no federal criminal penalties for libelous speech, 17 states still have criminal defamation statutes on the books.<sup>20</sup> Researchers

<sup>12</sup> Salil K. Mehra, *Post a Message and Go to Jail: Criminalizing Internet Libel in Japan and the United States*, 78 U. COLO. L. REV. 767, 768 (2007).

<sup>13</sup> Edward L. Carter, *Outlaw Speech on the Internet: Examining the Link Between Unique Characteristics of Online Media and Criminal Libel Prosecutions*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 289, 292 (2005).

<sup>14</sup> Gene Policinski, *Criminal Libel: A Bad Idea in a Free Society*, FIRST AMENDMENT CENTER (Feb. 17, 2012), <http://www.firstamendmentcenter.org/criminal-libel-a-bad-idea-in-a-free-society>.

<sup>15</sup> Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. L. & POL’Y 433, 435 (2004).

<sup>16</sup> GENELLE BELMAS & WAYNE OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW 183 (2014).

<sup>17</sup> ROBERT TRAGER ET AL., THE LAW OF JOURNALISM AND MASS COMMUNICATION 176-177 (3rd ed. 2012).

<sup>18</sup> *Garrison v. Louisiana*, 379 U.S. 64 (1964).

<sup>19</sup> *Id.* at 74.

<sup>20</sup> *See, e.g.*, ALA. CODE § 13A-11-160 (2017); FLA. STAT. §§ 836.01-836.12 (2017); IDAHO CODE §§ 18-4801 to 18-4809. (2017); KAN. STAT. ANN. § 21-6103 (2017); LA. STAT. ANN. § 14:47 (2017); MASS. GEN. LAWS ANN. 272 § 98C (West 2017); MICH. COMP. LAWS ANN. § 750.370 (West 2017); MINN. STAT. § 609.765 (2017); MISS. CODE ANN. § 97-3-55 (2017); MONT. CODE ANN. § 45-8-212 (2017); N.H. REV. STAT. ANN. § 644:11 (2017); N.C. GEN. STAT. § 14-47 (2017); N.D. CENT. CODE § 12.1-15-01 (2017); OKLA. STAT. tit. 21 §§ 771-781. (2017); UTAH CODE ANN. § 76-9-404 (West 2017); VA. CODE ANN. § 18.2-417 (West 2017); WIS. STAT. § 942.01 (2017).

examining state trial court records have observed that criminal prosecutions for defamation are more common than scholarly consensus would suggest.<sup>21</sup> These criminal defamation prosecutions rarely involve matters of public concern, only occasionally are brought by public officials, and seldom involve “mainstream media.” However, they are by no means unheard of. Typically, public officials who do instigate criminal libel prosecutions are more likely to target outspoken individuals, many of whom operate blogs or act as citizen journalists, rather than the institutional press. Those public officials are able to utilize criminal complaints as a means to empower law enforcement officials to search homes and seize property, which, in turn, is a way to intimidate and silence critics.

Interestingly, Louisiana appears to be particularly active. For example, in 2016, a Louisiana sheriff executed a search warrant on a local police officer’s home in search of a blogger.<sup>22</sup> The search, conducted by Terrebonne Parish Sheriff Jerry Larpenter’s office, sought to uncover the identity of the publisher of “ExposeDAT,” a blog reporting on the relationships and possible corruption between politicians and business officials in the parish. Specifically, the blog publicized financial dealings between the parish government and a local insurance agent. The agent’s office was hired to set up the parish government’s insurance coverage, which was done without a public bidding process and for which the sheriff’s office was billed monthly. The blog noted that the insurance agent, who served as the president of the local parish levee and conservation board, also employed the sheriff’s wife, and raised questions about whether her employment contributed to the agent’s new business arrangements.<sup>23</sup>

The insurance agent filed a criminal defamation complaint against the blog in August 2016, which the sheriff’s office used as the basis to investigate.<sup>24</sup> After obtaining IP address records from AT&T, the sheriff’s

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<sup>21</sup> See David Pritchard, *Rethinking Criminal Libel: An Empirical Study*, 14 COMM. L. & POL’Y 303, 313 (2009) (finding that Wisconsin initiated 61 criminal prosecutions for criminal defamation between 1991 and 2007); Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and “Cyberstalking”*, 107 NW. U.L. REV. 731, 753 (2013) (finding at least 300 criminal defamation convictions in Virginia between 1993 and 2008). In Minnesota, the researchers for this paper found that prosecutors in Minnesota had filed criminal defamation charges 121 times between 2006 and 2014, resulting in 26 convictions.

<sup>22</sup> WWL Staff, *Terrebonne Sheriff trying to use criminal statute to unmask online critic*, WWLTV (Aug. 3, 2016), <http://www.wvlv.com/news/local/lafourche-terrebonne/terrebonne-sheriff-trying-to-use-criminal-statute-to-unmask-online-critic/287169610>.

<sup>23</sup> *Id.*

<sup>24</sup> Naomi LaChance, *Sheriff’s Raid to Find Blogger Who Criticized Him was Unconstitutional, Court Rules*, THE INTERCEPT (Aug. 26, 2016), <https://theintercept.com/2016/08/26/sheriffs-raid-to-find-blogger-who-criticized-him-was-unconstitutional-court-rules>.

office searched police officer Wayne Anderson's home and seized several computers and smart phones.<sup>25</sup> The blog's author was subsequently revealed to be Anderson's wife, Jennifer Anderson.<sup>26</sup> After the search, the Andersons challenged the constitutionality of the warrant in state court. The Louisiana Court of Appeal for the First Circuit determined that the warrant was invalid.<sup>27</sup> The appellate court dismissed the warrant after finding that it lacked probable cause, noting that the insurance agent held a public position as president of the conservation board. Citing *Garrison v. Louisiana*,<sup>28</sup> the court determined that the "conduct complained of is not a criminally actionable offense" because Louisiana's criminal defamation law had been deemed unconstitutional "as it applies to public expression and publication concerning public officials, public figures and private individuals engaged in public affairs."<sup>29</sup> The Andersons also sued Larpenier in federal district court, alleging that Larpenier had violated their First and Fourth Amendment rights.<sup>30</sup> The district court denied a motion from Larpenier asserting qualified immunity from the charges,<sup>31</sup> and he later reached an undisclosed settlement with the Andersons.<sup>32</sup>

Louisiana officials in other parts of the state have also filed criminal defamation complaints against their critics. A council member in Livingston Parish filed an incident report in 2012 stating that a critic who posted under a pseudonym in the comments section of a local newspaper's Facebook page had written negative remarks about three council members. During its investigation related to the incident report, local sheriff's office detectives subpoenaed Facebook and the local Internet service provider, which provided records linking the pseudonymous accounts to the address

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<sup>25</sup> David Hammer, *Houma PD reinstates officer raided over blog posts*, WWLTV (Aug. 14, 2016), <http://www.wwltv.com/news/local/lafourche-terrebonne/houma-pd-reinstates-officer-raided-over-blog-posts/297429131>.

<sup>26</sup> David Hammer, *Terrebonne, Dove dismissed from ExposeDAT suit, pay \$50k*, WWLTV (June 30, 2017), <http://www.wwltv.com/news/local/terrebonne-dove-dismissed-from-exposedat-suit-pay-50k/453424073>.

<sup>27</sup> *Terrebonne Parish Sheriff's Office v. Anderson*, No. 2016KW1093, 2016 WL 11184720, at \*1 (La. Ct. App. Aug. 25, 2016); see also Eugene Volokh, *Louisiana sheriff (Jerry Larpenier) illegally uses criminal libel law to unmask a critic*, WASH. POST (Aug. 30, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/30/louisiana-sheriff-jerry-larpenier-illegally-uses-criminal-libel-law-to-unmask-a-critic>.

<sup>28</sup> 379 U.S. 64 (1964).

<sup>29</sup> *Terrebonne Parish Sheriff's Office*, 2016 WL 11184720, at \*1.

<sup>30</sup> *Anderson v. Larpenier*, No. 16-13733, slip op. at 3 (E.D. La. July 19, 2017).

<sup>31</sup> *Id.* at 1.

<sup>32</sup> Katie Moore, *Terrebonne Sheriff reaches 'compromise' with blogger in 1st Amendment lawsuit over illegal search*, WWLTV (Sept. 7, 2017), <http://www.wwltv.com/news/local/investigations/katie-moore/terrebonne-sheriff-reaches-compromise-with-blogger-in-1st-amendment-lawsuit-over-illegal-search/472063049>.

of Royce McLin. The detectives executed a warrant on McLin's home and seized computers, one of which was later confirmed to be linked to the pseudonymous Facebook account. Later, the council members swore out criminal complaints alleging they were subjected to criminal defamation because of the comments. Three warrants were issued for McLin's arrest. McLin voluntarily surrendered to authorities after learning of the charges, but the district attorney's office dismissed the charges four months later.<sup>33</sup>

McLin then sued the Livingston Parish sheriff's office and the council members, alleging that they had violated his First and Fourth Amendment rights. However, the U.S. Court of Appeals for the Fifth Circuit dismissed his lawsuit, holding that the defendants were entitled to qualified immunity,

In a separate instance, a judicial candidate was under investigation and accused of committing criminal defamation after running ads claiming that his incumbent opponent was a "coke-snorting, meth-buying, drunken judge."<sup>34</sup> The Montana Attorney General's Office ultimately declined to prosecute the candidate.<sup>35</sup>

Perhaps due to the strength of the *Garrison* precedent, prosecutions involving public officials or public issues tend to be the exception rather than the norm in the United States. More often, criminal defamation prosecutions involve disputes between private individuals.<sup>36</sup> One study found that 37 of 61 criminal libel prosecutions initiated in Wisconsin between 1991 and 2007 involved solely private affairs. Eleven cases involved low-level government employees who did not have control over the direction of public policy, and the disputes were over private issues. The other thirteen cases involved criticisms of public officials. But nearly all of the cases did not involve disputes over what would generally be regarded as matters of public concern.<sup>37</sup> Similarly, thirteen criminal defamation prosecutions in Minnesota between 2011 and 2014 had little to do with matters of public interest - rather, many of the cases involved the disclosure of private information via online communication.<sup>38</sup>

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<sup>33</sup> McLin v. Ard, 866 F.3d 682, 686-87 (5th Cir. 2017).

<sup>34</sup> See Perry Backus, *Former Ravalli County judicial candidate asks federal court to stop defamation investigation*, RAVALLI REPUBLIC (May 13, 2017), [http://ravallirepublic.com/news/local/article\\_a1b95e8f-c3bd-5fb3-a31c-06cfba83062e.html](http://ravallirepublic.com/news/local/article_a1b95e8f-c3bd-5fb3-a31c-06cfba83062e.html); see also Kevin Maki, *Attorney general's office won't prosecute attorney over campaign ads*, NBC MONTANA (Nov. 17, 2017), <http://www.nbcmontana.com/news/keci/attorney-generals-office-wont-prosecute-attorney-over-campaign-ads/658236509>.

<sup>35</sup> Maki, *supra* note 34.

<sup>36</sup> See Pritchard, *supra* note 21, at 317.

<sup>37</sup> *Id.* at 318.

<sup>38</sup> *Id.*

One example of a criminal defamation prosecution over a private dispute is *State of Minnesota v. Turner*, decided by the Minnesota Court of Appeals in 2015.<sup>39</sup> Prosecutors brought charges against Timothy Turner, alleging he violated the state's criminal defamation statute when he published multiple posts on online-classified advertising service Craigslist to exact revenge on a former lover.<sup>40</sup> Prosecutors alleged Turner wrote the posts, containing sexually explicit text, posing as his ex-girlfriend and her underage daughter.<sup>41</sup> Several men subsequently sent messages soliciting sex and containing pornographic images to the woman and her daughter.<sup>42</sup> Turner was later found guilty of committing criminal defamation. However, the Minnesota Court of Appeals overturned the conviction and declared Minnesota's criminal defamation law unconstitutional, holding the statute was overbroad because under its own terms truth could serve as a defense only if a statement was also "communicated with good motives and for justifiable ends."<sup>43</sup> The appellate court also declined to narrowly construe that statute, finding the standard requiring a true statement to be "only exempt if it is fair and made in good faith" was in direct conflict with the U.S. Supreme Court's decision in *Garrison*.<sup>44</sup>

The appellate court's decision was not the final blow to criminal defamation in Minnesota. In 2016, rather than repeal the law, the Minnesota state legislature amended the criminal defamation statute to criminalize "false and defamatory" statements, removing only language that placed limitations on truth as a defense.<sup>45</sup> In early 2017, Robert Drews pleaded guilty to violating the amended criminal defamation statute after initially being charged with making threats of terrorism.<sup>46</sup> Drews had phoned an ex-girlfriend's new beau and threatened to use a bomb to kill the couple during an upcoming date at a casino.<sup>47</sup> Drews later pleaded guilty to criminal defamation, admitting that he sent text messages to the new boyfriend that included false information about the sexual history of Drews' ex-

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<sup>39</sup> *State v. Turner*, 864 N.W.2d 204, 206 (Minn. Ct. App. 2015).

<sup>40</sup> MINN. STAT. § 609.765; see *Turner*, 864 N.W.2d at 206.

<sup>41</sup> *Turner*, 864 N.W.2d at 206.

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

<sup>43</sup> *Id.* at 209.

<sup>44</sup> *Id.* at 211.

<sup>45</sup> 2016 Minn. Laws. ch. 126, § 8.

<sup>46</sup> MINN. STAT. § 609.713.

<sup>47</sup> Statement of Probable Cause, *State of Minnesota v. Robert Edward Drews*, No. 27CR1619904 (Minn. Dist. Ct., Hennepin County, 2017).

girlfriend.<sup>48</sup> The resulting punishment included a suspended jail sentence and a fine.<sup>49</sup>

Although anti-SLAPP (strategic lawsuit against public participation) statutes might seem to provide a possible means to curtail criminal defamation actions in frivolous cases, the personal nature of the communications in these examples suggests that they are unlikely to be effective. Several states have enacted anti-SLAPP laws to curtail baseless lawsuits designed to intimidate speakers, including journalists and news media organizations, from participating in discussions on matters of public concern.<sup>50</sup> However, a California state court decision in 2010 held that the state's anti-SLAPP statute was inapplicable in a civil lawsuit based on a cyber bullying claim involving private parties.<sup>51</sup> In that case, the family of a high school student, D.C., sued the family of another student, R.R., in 2005 after the latter posted threats and derogatory comments about the former's sexual orientation on a website promoting D.C.'s entertainment career.<sup>52</sup> D.C. alleged in his lawsuit that R.R. had libeled him by falsely claiming D.C. was homosexual, intentionally inflicted emotional distress through outrageous statements, and had violated D.C.'s rights under the state's hate crimes laws prohibiting threats of violence motivated by perceived sexual orientation.<sup>53</sup>

R.R. filed an anti-SLAPP motion under California state law, claiming that his message was protected speech because he had written his comments in a public forum on an issue of public interest.<sup>54</sup> The trial court denied R.R.'s motion, finding that his statements were not made in connection to a public issue, and the California Court of Appeal, Second District, affirmed the trial court's decision, finding that R.R. had failed to prove that his comments were matters of public interest or that D.C. was a public figure in this context.<sup>55</sup> "The public was not fascinated with D.C., nor was there widespread public interest in his personal life," the appellate court wrote. "Simply put, R.R.'s message did not concern a person in the public eye,

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<sup>48</sup> Petition to Enter Plea of Guilty, *State of Minnesota v. Robert Edward Drews*, No. 27CR1619904 (Minn. Dist. Ct., Hennepin County, 2017).

<sup>49</sup> *State of Minnesota v. Robert Edward Drews*, No. 27CR1619904 (Minn. Dist. Ct., Hennepin County, 2017).

<sup>50</sup> *Anti-SLAPP statutes and commentary*, MEDIA L. RES. CTR., <http://www.medialaw.org/component/k2/item/3494> (last visited Sept. 2, 2019).

<sup>51</sup> *D.C. v. R.R.*, 106 Cal. Rptr. 3d 399, 399 (Ct. App. 2010); *id.* at 409.

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

<sup>53</sup> *Id.* at 406.

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

<sup>55</sup> *Id.* at 428-29.

conduct that could directly affect large numbers of people beyond the participants, or a topic of widespread public interest.”<sup>56</sup>

Although anti-SLAPP statutes are typically invoked in civil litigation, the California case demonstrates the limits of such speech-protective laws in cases involving private matters. A majority of the criminal defamation cases in the United States do involve purely personal disputes, and the California appellate court decision suggests that defendants in such cases cannot turn to anti-SLAPP statutes as a tool to defend themselves. Moreover, anti-SLAPP laws in many states have come under intense criticism in recent years.<sup>57</sup> The highest courts in Minnesota and Washington struck down their respective state anti-SLAPP statutes, finding that the laws deprived claimants of the right to a trial by jury as guaranteed by their state constitutions and the Sixth Amendment to the U.S. Constitution.<sup>58</sup>

Although the majority of American states have abandoned criminal punishments for false speech harming others' reputations, criminal defamation statutes remain alive and well in many parts of the United States. These criminal defamation cases most often involve disputes between private individuals, though notable exceptions involving public officials filing complaints against bloggers or individual critics do occur. But on the whole, public officials or figures seeking criminal defamation prosecutions to target traditional journalists or newspapers are rare, unlike many other parts of the world.

### III. CRIMINAL DEFAMATION CASES OUTSIDE OF THE UNITED STATES

Outside the United States, public officials and figures appear more willing, or even eager, to seek criminal penalties against their critics, including those who would be considered traditional journalists. Many international criminal defamation cases stem from private prosecutions, which are barred or limited in most parts of the United States.<sup>59</sup> This ability

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

<sup>57</sup> See Dillon White, *Updates to State Laws Create Challenges, New Benefits for News Organizations*, SILHA BULL. 23, (2015), <http://silha.umn.edu/assets/pdf/2015-summerfinal.pdf>; Scott Memmel, *Several State Courts and Legislatures Grapple with Anti-SLAPP Laws*, SILHA BULL. 53 (2017), <http://hdl.handle.net/11299/197789>; Scott Memmel, *Several State Courts and Legislatures Grapple with Anti-SLAPP Laws*, SILHA BULL. 53 (2017), <http://hdl.handle.net/11299/197789>.

<sup>58</sup> *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 638 (Minn. 2017); *Davis v. Cox*, 183 Wn.2d 269, 279 (Wash. 2015); see White, *supra* note 57 (for an analysis on how anti-SLAPP deprives claimants); Memmel, *supra* note 57.

<sup>59</sup> See, e.g., *Linda R.S. v. Richard D.*, 410 U.S. 614, 616-18 (1972); *Leeke v. Timmerman*, 454 U.S. 83, 87 (1981); *State ex rel. Wild v. Otis*, 257 N.W.2d 361, 363-65 (Minn. 1977); *State v. Harrington*, 534 S.W.2d 44, 49-51 (Mo. 1976); see also Matthew S. Nichols, *No One Can Serve*

to initiate private prosecutions appears to create wider variations in the types of criminal defamation cases that occur.

Through our examination of reports on international criminal defamation, we found that four major types of categories of international criminal defamation cases emerged. These categories include criticisms of powerful people perceived as insults, allegations of corruption, accusations of other questionable behavior, and accusations of sexual indiscretions. These categories are not exhaustive and can overlap, but many cases fall within this typology.

#### *A. Criticisms Perceived as Insults*

The most predominant category of criminal defamation cases involves situations in which a government official or other public figure with significant social influence perceives criticism as an insult. For example, an outspoken Canadian blogger in New Brunswick faced a criminal defamation investigation in 2012 over online posts criticizing local police officers.<sup>60</sup> Charles LeBlanc used his blog to criticize a Fredericton police officer that had given him a ticket for failing to wear a bicycle helmet, writing that the official was a “fascist cop” and “sexual pervert Québécois [constable].”<sup>61</sup> The officer filed a criminal defamation complaint against LeBlanc, which resulted in Fredericton police officers searching LeBlanc’s apartment and seizing computer equipment.<sup>62</sup> The New Brunswick Justice Department later decided not to bring charges against LeBlanc under Section 301 of Canada’s Criminal Code, which punishes “defamatory libel.”<sup>63</sup> Department officials noted that other Canadian provinces had previously found Section 301 unconstitutional because it did not require prosecutors to show that a defendant had known that an alleged libelous statement was false.<sup>64</sup>

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*Two Masters: Arguments Against Private Prosecutors*, 13 CAP. DEF. J. 279 (2001) (discussing problems private prosecutors face).

<sup>60</sup> *Controversial blogger charged with libel*, CBC NEWS (Jan. 20, 2012), <http://www.cbc.ca/news/canada/new-brunswick/controversial-blogger-charged-with-libel-1.1145586>; see also COMM. TO PROTECT JOURNALISTS, *supra* note 11, at 22.

<sup>61</sup> *‘The end of the road’: libel charge against Charles LeBlanc not approved*, CBC NEWS (May 9, 2017), <http://www.cbc.ca/news/canada/new-brunswick/charles-leblanc-libel-charge-dropped-1.4106455>.

<sup>62</sup> *Controversial blogger charged with libel*, *supra* note 60.

<sup>63</sup> Canada Criminal Code, R.S.C. 1985, c. C-46 § 301.

<sup>64</sup> *Fredericton blogger libel charges won’t proceed*, CBC NEWS (May 4, 2012), <http://www.cbc.ca/news/canada/new-brunswick/fredericton-blogger-libel-charges-won-t-proceed-1.1153501>.

Because of their contentious history with LeBlanc, Fredericton police officials referred the matter to the Edmundston Police Force, which arrested LeBlanc in November 2016.<sup>65</sup> The officers told LeBlanc that the new investigation was based on Section 300 of the Canadian Criminal Code, which punishes anyone “who publishes libel that he knows is false.”<sup>66</sup> The justice department in New Brunswick again declined to bring charges against LeBlanc.<sup>67</sup> After this decision, Edmundston Police Chief Gilles Lee said that the criminal defamation investigations into LeBlanc’s blog postings were at “the end of the road.”<sup>68</sup>

Additional examples from other countries include traditional journalists and other commentators facing criminal investigations, charges, or convictions for publishing criticism that government officials or public figures perceive as insults. In 2015, the European Court of Human Rights upheld a criminal defamation conviction of an Italian attorney who was upset about the outcome of a case and criticized a specific district court judge in a letter, alleging that the judge had willfully committed errors while presiding over the case.<sup>69</sup> The court found that the letter overstepped the bounds of permissible criticism because it suggested the judge had disregarded her ethical duties—potentially a criminal offense—without providing any proof that such claims were true.<sup>70</sup>

By contrast, the following year, the European Court of Human Rights overturned the criminal defamation conviction of a Polish newspaper editor who published a satirical story calling a local government employee a “numbskull,” “poser,” and a “dim-witted official,” as well as describing the local mayor and spokesperson as “dull bosses” for their roles in a local farming project.<sup>71</sup> The court determined that the conviction had interfered with the editor’s right to freedom of expression to comment on issues of legitimate public concern.<sup>72</sup> In 2017, French journalists Elise Lucet and

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<sup>65</sup> Alan White, *Charles LeBlanc investigated again for libel against Fredericton police*, CBC NEWS (Nov. 16, 2016), <http://www.cbc.ca/news/canada/new-brunswick/charles-leblanc-fredericton-police-libel-1.3853481>.

<sup>66</sup> Canada Criminal Code, R.S.C. 1985, c. C-46 § 300.

<sup>67</sup> *The end of the road*, *supra* note 61.

<sup>68</sup> *Id.*

<sup>69</sup> Peruzzi v. Italy, App. No. 39294/09 Eur. Ct. H.R. Rep. (2015), <http://hudoc.echr.coe.int/eng?i=001-155974>; *see also ECtHR: Are Criminal Defamation Laws protecting the Judiciary from legitimate criticism?*, ARTICLE 19 (July 14, 2015), <https://www.article19.org/resources/ecthr-are-criminal-defamation-laws-protecting-the-judiciary-from-legitimate-criticism>.

<sup>70</sup> *Id.*

<sup>71</sup> Ziemiński v. Poland (No. 2), App. No. 1799/07 Eur. Ct. H.R. (2016), <http://hudoc.echr.coe.int/eng?i=001-164453>.

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

Laurent Richard faced a criminal defamation lawsuit filed in a French court by the Azerbaijani government after they described it as a “dictatorship.”<sup>73</sup> The court later dismissed the lawsuit, noting, “press law has been put in place to prevent political censorship.”<sup>74</sup>

These examples are only a small sample of the variety of international criminal defamation cases involving criticism that public officials and figures perceive as insults.

### *B. Allegations of Corruption*

International cases of criminal defamation also frequently involve accusations of official corruption, intimating that public officials or prominent figures have personally benefitted from malfeasance.<sup>75</sup> Once exposed, the public officials or figures typically seek a criminal defamation conviction against the journalists or news organizations that publicized the corrupt activity. One such case arose in Bulgaria in 2000. In the Bulgarian education system, after completing the seventh or eighth grade, students continue into either an ordinary or a specialized secondary school, depending on their scores on competitive examinations.<sup>76</sup> Under Ministry of Education regulations, children with certain medical conditions or special educational needs can be admitted to specialized secondary schools without an examination, and in May 2000, the Ministry of Education and Science appointed four officials to select such students for admission into these schools.<sup>77</sup> The following month, 14 parents wrote a letter to the Ministry, alleging that 157 students, mostly the children of medical doctors, paramedical staff, and teachers, had been admitted to specialized schools based on their medical conditions, despite the fact that many were “perfectly healthy.”<sup>78</sup> The parents also alleged that several children had been admitted in exchange for payments.<sup>79</sup>

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<sup>73</sup> *French Court Hears Case of Journalists Accused of Calling Azerbaijan ‘Dictatorship’*, RADIOFREEEUROPE/RADIOLIBERTY (Sept. 6, 2017), <https://www.rferl.org/a/azerbaijan-france-court-journalists-tried-for-saying-dictatorship/28717296.html>; *Journalists on trial in France after calling Azerbaijan a dictatorship*, COMM. TO PROTECT JOURNALISTS (Sept. 7, 2017), <https://cpj.org/2017/09/journalists-trial-france-azerbaijan.php>.

<sup>74</sup> *French Court Rejects Baku’s Defamation Case Against Journalists*, RADIOFREEEUROPE/RADIOLIBERTY (Nov. 7, 2017), <https://www.rferl.org/a/french-court-rejects-azerbaijan-journalist-case-censorship/28840783.html>.

<sup>75</sup> *Kasabova v. Bulgaria*, App. No. 22385/03 Eur. Ct. H.R. (2013), <http://hudoc.echr.coe.int/eng?i=001-104539>.

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

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

<sup>78</sup> *Id.*

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

Katya Kasabova, a journalist for the newspaper *Compass*, wrote a story about the scandal titled “Corruption in Burgas education! Four experts and a doctor sacked over bribes?”<sup>80</sup> The story reported that the four officials “[would] be sacked for corruption.”<sup>81</sup> It further stated that “40 boys and girls . . . got onto the [specialized secondary school] lists despite having no right to benefit from the privilege” and that the officials “pocketed at least 300 [United States] dollars” for every child they let through, totaling \$15,000.<sup>82</sup>

In December 2000, the four officials filed a criminal complaint against Kasabova and the editor-in-chief of *Compass* in the Burgas District Court.<sup>83</sup> The officials argued that several statements in the three stories written by Kasabova constituted defamation under Article 147 of the Criminal Code of Bulgaria.<sup>84</sup> In May 2002, a Bulgarian court found Kasabova guilty of defaming the four officials.<sup>85</sup> The district court later ordered her to pay an administrative fine, damages, and the legal costs of the officials.<sup>86</sup> The court found that Kasabova had failed to provide adequate evidence that she had fully vetted the allegations against the officials, thus “failing to fulfill her journalistic duty.”<sup>87</sup> In 2011, the European Court of Human Rights overturned the judgment, finding that the financial penalties were disproportionate given that the total cost was more than 35 times Kasabova’s monthly salary.<sup>88</sup> However, the Court also found that the Bulgarian courts’ judgment that Kasabova had not fulfilled her journalistic duty was “reasonable.”<sup>89</sup>

Several cases of journalists facing criminal defamation charges that stem from reporting on corruption have arisen in Central and South America. For example, the former director of a public college in Peru brought a criminal defamation complaint against *Nor Oriente* editor Alejandro Carrascal Carrasco after the newspaper published reports of

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<sup>80</sup> *Id.*; see also ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 70.

<sup>81</sup> *Kasabova*, App. No. 22385/03.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*; see also Alexander Kashumov, *Publication of Unverified Data is Acceptable When There is No Timely Information on Wrongdoings*, ACCESS TO INFO. PROGRAMME (2012), [http://www.aip-bg.org/en/publications/newsletter/Publication\\_of\\_Unverified\\_Data\\_is\\_Acceptable\\_When\\_There\\_is\\_No\\_Timely\\_Information\\_on\\_Wrongdoings](http://www.aip-bg.org/en/publications/newsletter/Publication_of_Unverified_Data_is_Acceptable_When_There_is_No_Timely_Information_on_Wrongdoings); ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 70.

<sup>84</sup> НАКАЗАТЕЛЕН КОДЕКС [Criminal Code] [Crim. Code] art. 147 (Bulg.).

<sup>85</sup> ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 70.

<sup>86</sup> *Id.*

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

<sup>88</sup> *Id.*; *Kasabova*, App. No. 22385/03; see also Kashumov, *supra* note 83.

<sup>89</sup> *Id.*

corruption at the institution.<sup>90</sup> The editor was convicted and sentenced to a year in prison in 2010, but the Peruvian Supreme Court later overturned the conviction.<sup>91</sup> In 2011, a Bolivian sports journalist was arrested for writing about alleged corruption related to the Bolivia's National Soccer Association president's management of the organization's funds.<sup>92</sup> The journalist was convicted and ordered to pay a fine.<sup>93</sup> José Rubén Zamora Marroquín, editor of Guatemalan newspaper *elPeriódico*, faced a criminal defamation complaint filed by President Otto Pérez Molina in late 2013 after reporting on corruption within the president's administration.<sup>94</sup> A court barred the editor from leaving the country after the complaint was filed and was considering whether to freeze his assets.<sup>95</sup> However, the president later withdrew the complaint in early 2014 after consulting attorneys.<sup>96</sup> Molina resigned from the presidency and was arrested on charges of corruption in 2015.<sup>97</sup>

### C. Allegations of Malfeasance or Other Questionable Behavior

The third grouping of international criminal defamation cases involves public officials or figures engaging in malfeasance or other types of questionable behavior. These individuals attempt to retaliate against journalists and news organizations through criminal defamation charges. In these instances, the official's or public figure's malfeasance may not result in any specific personal benefit. However, the alleged behavior can directly affect the public if the individual has violated ethical or legal boundaries.

In late 2016, BBC's Southeast Asia correspondent Jonathan Head faced a criminal defamation prosecution brought by an attorney in Thailand over

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<sup>90</sup> *Newspaper editor jailed for defamation in Peru*, COMM. TO PROTECT JOURNALISTS (Jan. 14, 2010), <https://cpj.org/2010/01/newspaper-editor-jailed-for-defamation-in-peru.php>.

<sup>91</sup> *Peruvian Supreme Court frees editor jailed for defamation*, COMM. TO PROTECT JOURNALISTS (June 21, 2010), <https://cpj.org/2010/06/peruvian-supreme-court-frees-editor-jailed-for-def.php>.

<sup>92</sup> *Id.*

<sup>93</sup> COMM. TO PROTECT JOURNALISTS, *supra* note 11, at 81.

<sup>94</sup> *Guatemalan government targets elPeriódico editor*, COMM. TO PROTECT JOURNALISTS (Jan. 8, 2014), <https://cpj.org/2014/01/guatemalan-government-targets-elperiodico-editor.php>.

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

<sup>96</sup> Alejandro Martínez, *Guatemala's president and vice president withdraw criminal complaints against newspaper editor*, JOURNALISM IN THE AMERICAS BLOG (Jan. 15, 2014), <https://knightcenter.utexas.edu/en/blog/00-14972-guatemala%E2%80%99s-president-and-vice-president-withdraw-criminal-complaints-against-newspape>.

<sup>97</sup> Azam Ahmed & Elisabeth Malkin, *Otto Pérez Molina of Guatemala is Jailed After Resigning the Presidency*, N.Y. TIMES (Sept. 3, 2015), <https://www.nytimes.com/2015/09/04/world/americas/otto-perez-molina-guatemalan-president-resigns-amid-scandal.html>.

his reporting on a criminal group's scheme to scam foreign retirees out of their properties.<sup>98</sup> The story included allegations that a retired British businessman's wife had forged his signature on documents that removed him as the head of a company that owned several Thai properties.<sup>99</sup> Head reported that attorney Pratuhan Thanarak had notarized the businessman's signature on the documents.<sup>100</sup> Head also reported that the attorney admitted on tape that the businessman was not present when the documents were signed.<sup>101</sup> The businessman's wife was later convicted and jailed for her role in the fraud scheme.<sup>102</sup>

Thanarak brought a private criminal defamation prosecution against Head, alleging that the report caused him to be "defamed, insulted or hated."<sup>103</sup> In addition to criminal defamation, Head faced a separate criminal charge under Thailand's Computer Crimes Act, which forbade uploading "false data" online.<sup>104</sup> Thai authorities also ordered Head to surrender his passport while the trial was proceeding, which could have taken up to two years.<sup>105</sup> But in August 2017, Thanarak dropped his criminal defamation suit against Head on the first scheduled day of the trial.<sup>106</sup>

Journalists in other parts of the world have also faced criminal defamation prosecutions as a result of reports of government officials' and prominent figures' questionable behavior. In 2011, Montenegrin journalist Petar Komnenić was convicted of defaming government authorities after publishing a report alleging that officials had conducted illegal surveillance on judges.<sup>107</sup> He was ordered to pay a fine of 3,000 euros or serve four

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<sup>98</sup> Lindsay Murdoch, *BBC to fight for correspondent Jonathan Head's freedom in Thailand*, SYDNEY MORNING HERALD (Feb. 26, 2017), <http://www.smh.com.au/world/bbc-to-fight-for-correspondent-jonathan-heads-freedom-in-thailand-20170223-gukbxd.html>.

<sup>99</sup> *Id.*

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

<sup>101</sup> *Id.*

<sup>102</sup> Agence France-Presse, *BBC journalist Jonathan Head on trial in Thailand over unusual defamation case*, GUARDIAN (Aug. 23, 2017), <https://www.theguardian.com/world/2017/aug/23/bbc-journalist-jonathan-head-on-trial-in-thailand-over-unusual-defamation-case>.

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

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

<sup>105</sup> *Id.*

<sup>106</sup> *BBC correspondent Jonathan Head has criminal defamation suit dropped in Thailand*, GUARDIAN (Aug. 24, 2017), <https://www.theguardian.com/world/2017/aug/24/bbc-correspondent-jonathan-head-has-criminal-defamation-suit-dropped-in-thailand>.

<sup>107</sup> Aleksandar Vasovic & Matt Robinson, *Montenegrin journalist given prison term for libel*, REUTERS (Apr. 18, 2012), <https://www.reuters.com/article/us-montenegro-journalists/montenegrin-journalist-given-prison-term-for-libel-idUSBRE83H19E20120418>.

months in jail as a penalty for the conviction.<sup>108</sup> Komnenić's conviction was initially upheld on appeal in 2012 despite Montenegro's decriminalization of defamation a few months after his trial.<sup>109</sup> The Montenegrin parliament subsequently passed a law in 2013 that provided amnesty to people convicted of criminal defamation, and Komnenić was eventually pardoned.<sup>110</sup>

Ecuadorian President Rafael Correa filed a criminal defamation suit against newspaper *El Universo* over a column calling him a dictator.<sup>111</sup> *El Universo* columnist Emilio Palacio accused Correa of granting troops permission to fire on a hospital filled with patients during a police protest in September 2010.<sup>112</sup> A trial court convicted Palacio and the owners of *El Universo* of defaming Correa, sentencing them to three-year prison terms and assessing damages equivalent to \$42 million in U.S. dollars, and the penalties were upheld on appeal by the Ecuadorian Supreme Court of Justice in 2012.<sup>113</sup> Shortly thereafter, Correa granted pardons to the *El Universo* owners and Palacio, citing the international condemnation of the convictions as the motivating force.<sup>114</sup>

#### D. Allegations of Sexual Indiscretions

The final broad category of cases includes instances in which journalists and news organizations face criminal defamation charges related to reports of sexual indiscretions of government officials or other public figures. In many instances, the indiscretions may simply be embarrassing to the prominent individual; in other cases, the alleged behavior could potentially constitute a violation of law. After allegations of sexual indiscretions are made public, the official or high-profile figure seeks criminal punishments against the reporter or news organizations. These types of cases are less prevalent than cases found in the other categories.

Canadian fashion designer Peter Nygard initiated a private criminal defamation prosecution against three Canadian Broadcasting Corporation

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

<sup>109</sup> *Journalist sentenced to jail for libel in Montenegro*, COMM. TO PROTECT JOURNALISTS (April 30, 2012), <https://cpj.org/2012/04/journalist-sentenced-to-jail-for-libel-in-monteneg.php>.

<sup>110</sup> *Freedom of the Press 2013: Montenegro*, FREEDOM HOUSE (2013), <https://freedomhouse.org/report/freedom-press/2013/Montenegro>.

<sup>111</sup> COMM. TO PROTECT JOURNALISTS, *supra* note 11, at 95.

<sup>112</sup> See William Neuman, *President of Ecuador to Pardon Four in Libel Case*, N.Y. TIMES (Feb. 27, 2012), <http://www.nytimes.com/2012/02/28/world/americas/president-of-ecuador-to-pardon-four-in-libel-case.html>.

<sup>113</sup> *Id.*

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

(CBC) journalists in 2011.<sup>115</sup> Nygard filed the complaint after the CBC investigative news show “Fifth Estate” aired a critical documentary in 2010 reporting that the designer was abusive to staff working at his estate in the Bahamas.<sup>116</sup> The documentary also reported that Nygard engaged in sexual conduct with an underage girl from the Dominican Republic at his Bahamian home in 2003.<sup>117</sup> After the documentary aired, Nygard filed a criminal defamation suit against “Fifth Estate” host Bob McKeown and the program’s producers, Timothy Sawa and Morris Karp, alleging that the journalists had violated Sections 300 and 301 of the Canadian Criminal Code.<sup>118</sup> In April 2017, the CBC journalists lost a years-long procedural battle in a Manitoba appellate court, which denied the journalists’ attempts to dismiss summonses to appear in district court to face the charges.<sup>119</sup> The decision allowed Nygard’s prosecution targeting the CBC to move forward.<sup>120</sup>

Peruvian journalist Paul Segundo Garay Ramírez also faced prosecution in 2011 over allegations that he made defamatory remarks about a local attorney during a radio broadcast.<sup>121</sup> Prosecutor Agustín López Cruz brought a suit against Ramírez, claiming that the journalist was the unidentified voice on an undated radio clip where the speaker described the prosecutor as an “erotic dwarf” who sexually harassed young litigants.<sup>122</sup> Ramírez denied that his voice was on the recording and claimed that the prosecutor brought the case as retribution for his reporting on corruption.<sup>123</sup> Neither Cruz nor Ramírez provided evidence to definitively prove their claims during the trial.<sup>124</sup> Ramírez was convicted and sentenced to three years in prison, and the Peruvian Supreme Court recommended the

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<sup>115</sup> COMM. TO PROTECT JOURNALISTS, *supra* note 11, at 22.

<sup>116</sup> Jamie Cameron, *Repeal Defamatory Libel*, CENTRE FOR FREE EXPRESSION (July 5, 2017), <https://www.cfe.ryerson.ca/blog/2017/07/repeal-defamatory-libel>.

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

<sup>118</sup> Canada Criminal Code, R.S.C. 1985, c C-46 §§ 300-301.

<sup>119</sup> Canadian Broadcasting Corp. v. Morrison, 2017 MBCA 36 (Can.); *see also* David Larkins, *Nygard scores win against CBC*, WINNIPEG SUN (April 8, 2017), <http://winnipeg.sun.com/2017/04/09/nygard-scores-win-against-cbc/wcm/fa749449-155a-46c4-bc9c-993f90c1aed3>.

<sup>120</sup> Larkins, *supra* note 119.

<sup>121</sup> COMM. TO PROTECT JOURNALISTS, *supra* note 11, at 104.

<sup>122</sup> *Peru frees journalist jailed for defamation*, COMM. TO PROTECT JOURNALISTS (Oct. 31, 2011), <https://cpj.org/2011/10/peru-frees-journalist-jailed-for-defamation.php>.

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

<sup>124</sup> Joel Simon, *Peru must take steps to decriminalize defamation*, COMM. TO PROTECT JOURNALISTS (Aug. 4, 2011), <https://cpj.org/2011/08/peruvian-government-must-take-steps-toward-decrimi.php>.

conviction be overturned after receiving a report from Peru's chief prosecutor highlighting deficiencies in the evidence used at trial.<sup>125</sup>

Looking ahead, it is possible that the number of criminal libel prosecutions involving allegations of sexual misconduct could increase in the near future. In the United States, the "#MeToo movement" has prompted greater scrutiny and awareness of allegations of sexual harassment and assault. The #MeToo campaign, launched by activist Tarana Burke in 2006,<sup>126</sup> gained prominence in 2017 after widespread reports alleging high-profile film producer Harvey Weinstein of sexually harassing women in Hollywood circles for years, which resulted in his termination from the movie studio bearing his name.<sup>127</sup> Shortly thereafter, other powerful and prominent figures in film and media faced credible accusations of similar misbehavior, resulting in many losing their jobs.<sup>128</sup> At the same time, women, and some men, took to social media sites to share stories of sexual harassment and sexual assault they had faced to demonstrate how commonplace such misconduct can be.<sup>129</sup> In some situations, individuals who disclosed accounts of sexual harassment or assault included the names of the alleged perpetrators.

Unsurprisingly, civil defamation lawsuits followed.<sup>130</sup> In an October 2017 Facebook post, Melanie Kohler accused film director Brett Ratner of

<sup>125</sup> *Peru frees journalist jailed for defamation*, *supra* note 122.

<sup>126</sup> See ME TOO, <https://metoomvmt.org> (last visited May 25, 2020).

<sup>127</sup> Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>.

<sup>128</sup> See Kim Barker & Ellen Gabler, *Charlie Rose Made Crude Sexual Advances, Multiple Women Say*, N.Y. TIMES (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/us/charlie-rose-women.html>; Sydney Ember, *Glenn Thrush, New York Times Reporter, Accused of Sexual Misconduct*, N.Y. TIMES (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/business/media/glenn-thrush-sexual-misconduct.html>; John Koblin & Michael M. Grynbaum, *Mark Halperin, a Top Political Journalist, Faces Multiple Claims of Harassment*, N.Y. TIMES (Oct. 26, 2017), <https://www.nytimes.com/2017/10/26/business/media/halperin-sexual-harassment.html>; Kristine Phillips, *Netflix drops 'House of Cards' star Kevin Spacey after new allegations arise*, WASH. POST (Nov. 4, 2017), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/11/04/netflix-is-dropping-kevin-spacey-from-house-of-cards/>; Paul Farhi, *'Today' show host Matt Lauer fired after claims of 'inappropriate sexual behavior'*, WASH. POST (Nov. 29, 2017), [https://www.washingtonpost.com/lifestyle/style/today-show-host-matt-lauer-fired-after-claims-of-inappropriate-sexual-behavior/2017/11/29/ee85bf42-d4fd-11e7-b62d-d9345ced896d\\_story.html](https://www.washingtonpost.com/lifestyle/style/today-show-host-matt-lauer-fired-after-claims-of-inappropriate-sexual-behavior/2017/11/29/ee85bf42-d4fd-11e7-b62d-d9345ced896d_story.html); Abby Ohlheiser et al., *Garrison Keillor, founder of 'A Prairie Home Companion,' fired after allegations of improper behavior*, WASH. POST (Nov. 29, 2017).

<sup>129</sup> Anna Codrea-Rado, *#MeToo Floods Social Media With Stories of Harassment and Assault*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html>.

<sup>130</sup> See Joanne Sweeney, *Can you be sued for sharing your #MeToo story?*, SALON (Dec. 16, 2017), <https://www.salon.com/2017/12/16/can-you-be-sued-for-sharing-your-metoo-story/>.

rape, claiming that he “had preyed on me as a drunk girl [and] forced himself upon me.” Soon after, Ratner’s attorney threatened her with a defamation lawsuit, and Kohler removed the post.<sup>131</sup> A week later, on November 1, the *Los Angeles Times* published a story recounting six additional allegations of sexual harassment by Ratner, including celebrities.<sup>132</sup> Within hours, Ratner filed a lawsuit against Kohler in the District Court of Hawaii, even though she was not quoted in the *Los Angeles Times* article.<sup>133</sup> Kohler filed a motion in early January 2018 asking the district court to apply the anti-SLAPP law of California where Ratner lives and the alleged rape occurred, to dismiss Ratner’s suit.<sup>134</sup> However, Ratner later agreed to drop the lawsuit in October 2018 for an undisclosed reason.<sup>135</sup>

Meanwhile in Kentucky, the owner of a prominent Louisville bar filed defamation lawsuits in state court in November 2017 against two women for alleging on social media that he had raped one of them, and drugged the other two weeks earlier.<sup>136</sup> One of the posts included a picture of the owner as well as “#metoo” in the caption.<sup>137</sup> In November 2018, one of the women accusing the bar owner of assault filed a countersuit, alleging the owner of improperly using his lawsuit and the court system to harass her.<sup>138</sup>

Allan Cobb, a lawyer representing the woman, told the *Louisville Courier Journal* the lawsuit was also intended to discourage other possible victims from speaking out. “The circus (our client) has been through may

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<sup>131</sup> Amy Kaufman & Richard Winton, *She accused director Brett Ratner of rape in a Facebook post. Then he sued her for defamation*, L.A. TIMES (Nov. 2, 2017), <http://www.latimes.com/business/hollywood/la-fi-ct-brett-ratner-melanie-kohler-lawsuit-20171102-story.html>.

<sup>132</sup> Amy Kaufman & Richard Winton, *Six women accuse filmmaker Brett Ratner of sexual harassment or misconduct*, L.A. TIMES (Nov. 1, 2017), <http://www.latimes.com/business/hollywood/la-fi-ct-brett-ratner-allegations-20171101-htmstory.html>.

<sup>133</sup> Kaufman & Winton, *supra* note 131.

<sup>134</sup> Christie D’Zurilla, *Woman sued by Brett Ratner asks court to dismiss defamation case*, L.A. TIMES (Jan. 3, 2018), <http://www.latimes.com/entertainment/la-et-entertainment-news-updates-2018-woman-sued-by-brett-ratner-asks-court-to-1515006314-htmstory.html>.

<sup>135</sup> Mike Fleming, Jr., *Brett Ratner & Accuser Find Common Ground; Defamation Suit Dismissed – Update*, DEADLINE (Oct. 2, 2018), <https://deadline.com/2018/10/brett-ratner-melanie-kohler-settlement-lawsuit-defamation-sexual-assault-allegation-1202474696>.

<sup>136</sup> Bailey Loosemore & Darcy Costello, *Haymarket Whiskey Bar reopens as owner files suit against woman who said he raped her*, COURIER J. (Dec. 6, 2017), <https://www.courier-journal.com/story/news/local/2017/11/29/haymarket-whiskey-bar-matthew-landan-defamation-lawsuit-rape-allegation/907567001>.

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

<sup>138</sup> Bailey Loosemore, *Where the Haymarket Whiskey Bar lawsuit stands one year later*, COURIER J. (Nov. 28, 2018), <https://www.courier-journal.com/story/news/crime/2018/11/28/haymarket-whiskey-bar-metoo-rape-allegations-one-year-later/2136014002>.

be a deciding factor for these women,” Cobb told the *Courier Journal*. “It’s not something women want to come forward to and expose themselves to. It’s abuse of process, and we’re going to show, we believe, that he’s trying to silence a victim.”<sup>139</sup> The litigation remained ongoing as of early 2020.<sup>140</sup>

These cases—admittedly, all civil proceedings—demonstrate that prominent figures in the United States have quickly turned to defamation litigation as a way to combat allegations of sexual harassment and silence critics. As movements such as #MeToo grow internationally, it is likely only a matter of time before government officials and public figures begin to exploit criminal defamation laws in an attempt to silence even legitimate accusations of sexual misconduct. Numerous examples in the United States and throughout the world show that if criminal defamation laws are available, people will use them as a way to stifle criticisms.

Although not an exhaustive list, the examples in these four categories illustrate the most common types of situations where public officials and prominent figures seek to utilize criminal defamation to pursue and punish their critics. These international cases demonstrate that powerful figures are willing to attack individuals such as journalists, bloggers and critics, as well as large news organizations. The cases also show that those in the public eye are willing to target critics who engage in commentary they perceive as insults, allegations of corruption, malfeasance, or sexual indiscretions. These types of cases present real threats to freedom of expression and the public’s “right to know.”

#### IV. CRIMINAL DEFAMATION PENALTIES WITHIN AND OUTSIDE THE UNITED STATES

Throughout the world, journalists and other individuals charged with criminal defamation typically face three possible punishments: monetary penalties, imprisonment, and being temporarily barred from journalistic practice. However, in the majority of instances, criminal defamation charges against journalists are either not formally levied or are dropped. Additionally, many defamation convictions are overturned on appeal, or a governmental authority grants a pardon. Nevertheless, the specter of punishment for criminal defamation remains a threat to the ability to practice robust journalism.

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*; see also Bailey Loosemore, *Haymarket Whiskey Bar: Woman who says owner drugged her files countersuit*, *COURIER J.* (Dec. 26, 2017), <https://www.courier-journal.com/story/news/crime/2017/12/26/haymarket-lawsuit-matthew-landan-countersuit-drugged-drink/980693001>.

### A. Financial Penalties

When journalists are punished for criminal defamation, they most often face financial penalties, which may take the form of a monetary fine, a mandated donation to a charity or other non-governmental organization, the freezing of the individual's bank account, or garnishment of a portion of their wages. One such case unfolded in Azerbaijan in November 2009, when Azerbaijan Interior Minister Ramil Usubov filed a criminal defamation lawsuit against Ayyub Karimov, editor-in-chief of the Azerbaijani newspaper *Femida 007*.<sup>141</sup> Usubov claimed that a series of articles published in the newspaper were inaccurate and damaged his dignity and honor.<sup>142</sup> Karimov had also criticized the Ministry of Internal Affairs in an interview with the opposition daily newspaper *Azadlig* (*Freedom*), contending that the Ministry had become a "nest" for criminals.<sup>143</sup> In a subsequent interview with Human Rights Watch, Karimov defended his interview:

In my commentary to Azadlig I didn't identify the names of any individual. It wasn't a personal insult against the minister. . . . I expressed my opinion after a group of criminals and kidnapers had been arrested in the Ministry [of Internal Affairs]. Present counter-arguments, and if I am proved wrong, then ask me to refute my words by publishing a retraction. But imprisonment is simply retaliation.<sup>144</sup>

The charges against Karimov were brought under Article 147 of the Criminal Code of the Republic of Azerbaijan.<sup>145</sup> The Yasamal District Court sentenced Karimov to an 18-month suspended sentence, ordered that his salary be garnished by 15 percent for the duration of the sentence, and forced him to pay legal costs.<sup>146</sup> An appeals court upheld the sentence in October 2010.<sup>147</sup>

Although these financial penalties might appear *de minimis*, they can be crippling to journalists in developing countries. If there is no financial assistance available, fines could potentially force journalists into poverty or

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<sup>141</sup> *Azerbaijani Journalist Convicted Of Libel*, RADIOFREEEUROPE/RADIO LIBERTY (Feb. 4, 2010), [https://www.rferl.org/a/Azerbaijani\\_Journalist\\_Convicted\\_Of\\_Libel/1949038.html](https://www.rferl.org/a/Azerbaijani_Journalist_Convicted_Of_Libel/1949038.html).

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

<sup>143</sup> *Beaten, Blacklisted, and Behind Bars: The Vanishing Space for Freedom of Expression in Azerbaijan*, HUMAN RIGHTS WATCH (Oct. 10, 2010), <https://www.hrw.org/sites/default/files/reports/azerbaijan1010W.pdf>.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*; see also AZƏRBAYCAN RESPUBLİKASININ CİNAYƏT MƏCƏLLƏSİ [Criminal Code] art. 147 (Azer.); ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 48.

<sup>146</sup> ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 51; *Azerbaijani Journalist Convicted of Libel*, *supra* note 141.

<sup>147</sup> *Id.*

even compel them to leave the field entirely. In 2012, the Regional Court in Plzeň and the Czech Constitutional Court confirmed the criminal defamation conviction of a journalist working for the tabloid newspaper *Blesk (Flash)*.<sup>148</sup> The case arose in 2008 when the journalist, who was not named in any of the news stories but was identified as a male, covered the murder of a woman and her small child in the town of Luh nad Svatavou, near the German border.<sup>149</sup> The alleged killer, the uncle of the murdered woman, had hanged himself in the woman's home.<sup>150</sup> The woman's body was found naked, and, coupled with other evidence, the journalist reported that she had had voluntary "wild sex" with the killer before she was murdered.<sup>151</sup> The woman's husband then brought charges for criminal defamation, claiming that the reporter's insinuation that the alleged sexual encounter had been consensual was false, and that it was "unsubstantiated and was not confirmed by later police investigations," according to a local news story.<sup>152</sup>

Although the journalist claimed he had made every effort to obtain accurate information, the District Court found that he had damaged the honor, human dignity, and reputation of the deceased and survivors under Article 84 of the Czech Criminal Code.<sup>153</sup> The court ordered him to pay a fine of 80,000 Czech crowns (~\$3,700), four times the journalist's monthly salary of 20,000 crowns.<sup>154</sup> Because of the potential financial hardship of the fine, the newspaper ultimately paid it on the journalist's behalf.<sup>155</sup>

### B. Imprisonment

Journalists also face imprisonment when convicted of criminal defamation charges, although this happens less frequently than the imposition of monetary penalties. Our examination found several instances in which journalists spent time in jail or prison or were

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<sup>148</sup> Nález Ústavního soudu ze dne 18.10.2012 (ÚS) [Decision of the Constitutional Court of Oct. 18, 2012], sp.zn. II. ÚS 2042/12 (Czech); see also ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 83.

<sup>149</sup> ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 83; *Soud potvrdil novináři trest za zprávu o tragédii se třemi mrtvými* [The court upheld the journalists' punishment for a report on a tragedy with three dead], NOVINKY (Nov. 5, 2012) (Czech), <https://www.novinky.cz/krimi/283727-soud-potvrdil-novinari-trest-za-zpravu-o-tragedii-se-tremi-mrtvymi.html>.

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

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

<sup>152</sup> *Soud potvrdil novináři trest za zprávu o tragédii se třemi mrtvými*, *supra* note 149.

<sup>153</sup> *Id.*; see also Trestní zákoník, Zákon č. 40/2009 Sb. (Czech).

<sup>154</sup> ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 83.

<sup>155</sup> *Id.*

ordered to carry out sentences of hard labor or other compulsory work. One such sentence was imposed in Belarus. In June 2002, Mikola Markevich, editor-in-chief of *Pahonia (The Emblem)*, a Grodno-based independent weekly newspaper, and Pavel Mazheiko, a journalist for the same newspaper, were convicted of defaming Belarus President Alexander Lukashenko under Article 367 of the Belarusian Criminal Code.<sup>156</sup> The charges were brought following an article published during the September 2001 presidential elections in which Markevich and Mazheiko called upon voters to oppose Lukashenko, alleging that he was involved in the “disappearances” of political leaders.<sup>157</sup> However, before the 11,000 issues of the paper containing the article could be disseminated, they were confiscated at the printing house.<sup>158</sup> Authorities shut down *Pahonia* in November 2001.<sup>159</sup>

Both Markevich and Mazheiko received sentences of “restricted freedom,” with the editor-in-chief receiving two and a half years and the journalist receiving two years, and while the sentences were later reduced on appeal to one year each, the men were still required to engage in hard labor under police supervision.<sup>160</sup> Markevich was sentenced to spend the duration of his sentence in the town of Osipovichy, while Mazheiko was sentenced to serve his term in Zhlobin—both small, economically depressed towns located in the areas affected by the fallout from the 1986 Chernobyl nuclear disaster.<sup>161</sup> In these towns, the journalists were required to work any hard labor job they could find before eventually being released in March 2003.<sup>162</sup>

In an interview with *International League for Human Rights* editor Victor Cole, the journalists compared their sentences to that of political

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<sup>156</sup> Victor Cole, *Convicted Journalists Leave Hometown To Serve Their Terms*, 5 BELARUS UPDATE (September 2002), <http://spring96.org/en/news/11548>; see also КОДЕКС РЕСПУБЛИКИ БЕЛАРУСЬ ОБ АДМИНИСТРАТИВНЫХ ПРАВОНАРУШЕНИЯХ [Criminal Code of the Republic of Belarus] [Crim. Code] art. 367 (Belr.).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> HUMAN RIGHTS WATCH, WORLD REPORT 2003: EVENTS OF 2002, 314 (2003), <http://pantheon.hrw.org/legacy/wr2k3/>.

<sup>160</sup> *Id.*; see also Cole, *supra* note 156; Mikola Markovic, Pavel Mazheiko, ENGLISH PEN (Feb. 14, 2003), <https://www.englishpen.org/campaigns/mikola-markovic-pavel-mazheiko>; *Belarus court jails journalists*, BBC (June 24, 2002), <http://news.bbc.co.uk/2/hi/europe/2063322.stm>.

<sup>161</sup> Cole, *supra* note 156.

<sup>162</sup> *Id.*; Mikola Markovic, Pavel Mazheiko, *supra* note 160.

prisoners during the reign of Soviet dictator Josef Stalin, who used internal exile as a means of punishing critics of his regime.<sup>163</sup> “The parallels with the Stalin era are obvious,” Markovic said. “My grandfather was repressed, and now the Belarusian authorities are using the same methods.”<sup>164</sup> Although this particular example involved a sentence of hard labor, our examination also uncovered cases in which other individuals convicted of criminal defamation served sentences ranging from one month to two and a half years in prison, including in Azerbaijan,<sup>165</sup> Bolivia,<sup>166</sup> Ecuador,<sup>167</sup> Slovenia,<sup>168</sup> and India,<sup>169</sup> among others.

### C. Barred from the Practice of Journalism

Although comparatively rare, some journalists have been barred from practicing journalism for a designated period of time. In 2015, the Leninsky District Court in the Russian Federation found journalist and blogger Sergei Reznik (Сергей Резник) guilty of insulting the deputy prosecutor of the Rostov region, as well as the criminal police investigator and the deputy chief of the Centre for Extremism Prevention of the Russian Federation Ministry of Internal Affairs Main Directorate.<sup>170</sup> The court determined Reznik had used his blog on *LiveJournal* to criticize law

<sup>163</sup> Cole, *supra* note 156.

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

<sup>165</sup> *Azerbaijan: Opposition Editor Sentenced to Prison*, HUMAN RIGHTS WATCH (April 25, 2007, 8:00 PM), <https://www.hrw.org/news/2007/04/25/azerbaijan-opposition-editor-sentenced-prison>; see also Daisey Sindelar, *Fatullayev: 'I'm Still Here – Alive, Working, and Telling the Truth'*, RADIOFREEEUROPE/RADIODLIBERTY (Oct. 3, 2011, 2:28 PM), [https://www.rferl.org/a/fatullayev\\_says\\_im\\_still\\_here/24347732.html](https://www.rferl.org/a/fatullayev_says_im_still_here/24347732.html) (discussing prison experience); see also ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 17, 52.

<sup>166</sup> COMM. TO PROTECT JOURNALISTS, *supra* note 11, at 81; see also Scott Griffen, *Defamation Conviction in Bolivia Part of Wider Trend*, INT'L PRESS INST. (March 23, 2012), <https://ipi.media/defamation-conviction-in-bolivia-part-of-wider-trend>.

<sup>167</sup> *Ecuadorian Provincial Reporter Jailed on Defamation Charges*, COMM. TO PROTECT JOURNALISTS (May 2, 2011, 2:58 PM), <http://cpj.org/2011/05/ecuadoran-provincial-reporter-jailed-on-defamation.php>; see also COMM. TO PROTECT JOURNALISTS, *supra* note 11, at 95-96.

<sup>168</sup> Jure Predanič, *Mitja Kunstelj bo moral zaradi bloganja v zapor* [*Mitja Kunstelj Will Have to go to Prison for Blogging*], DELO (May 13, 2013, 8:47 PM), <http://www.del.si/novice/kronika/mitja-kunstelj-bo-moral-zaradi-bloganja-v-zapor.html>; *Blogger Gets Six Months in Jail for Defamation*, REPORTERS WITHOUT BORDERS (May 16, 2013), <https://rsf.org/en/news/blogger-gets-six-months-jail-defamation>; See also ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 215.

<sup>169</sup> *Indian State Assembly Sentences Two Editors to Prison for Defamation*, COMM. TO PROTECT JOURNALISTS (June 23, 2017, 1:53 PM), <https://cpj.org/2017/06/indian-state-assembly-sentences-two-editors-to-pri.php>; see also *Karnataka Assembly Sentences Two Journalists to Jail for 'Defaming' Legislators*, WIRE (June 22, 2016), <https://thewire.in/150406/karnataka-assembly-sentences-two-journalists-to-jail-for-defaming-legislators>.

<sup>170</sup> ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 200.

enforcement officials, referring to them in derogatory terms such as “marmosets” and “crocodiles,” and describing one official as a “tractor driver,” “scoundrel,” “swindler,” and more.<sup>171</sup> The court found such statements of the journalist to be insulting and in violation of Article 319 of the Russian Federation Criminal Code.<sup>172</sup>

After conviction under Article 319, the court barred the journalist from working at any media agencies for one year and 10 months.<sup>173</sup> On the other charges, Reznik was sentenced to three years in a prison colony, to begin upon finishing an 18-month prison term for a separate offense in 2013.<sup>174</sup> Reznik’s lawyer, Tumas Misakyan, told the International Bar Association that the Russian criminal code’s section on criminal defamation was being abused and employed as a means of denying freedom of expression to those with legitimate criticisms to make.<sup>175</sup> He said, “You just cannot predict what you should and should not say . . . It is not possible to correlate the words with the [court] sentence you get because it is completely subjective implementation—and misuse—of the law.”<sup>176</sup>

#### D. No Formalized Punishments

Although the journalists discussed above faced financial penalties, imprisonment, and being barred from practicing journalism, the majority of cases identified in our examination did not result in the imposition of judicially sanctioned punishment. In fact, many criminal defamation complaints are dismissed or dropped before a formal trial on the charges can take place, though journalists are still subject to searches, arrests, and imprisonment while the charges are still under consideration.

One such case arose in the United States in 2003 when Thomas Mink launched his online and print newsletter, *The Howling Pig*, while a student at the University of Northern Colorado.<sup>177</sup> Mink intended the newsletter to

<sup>171</sup> Polly Botsford, *Word Crimes – Defamation and Freedom of Expression*, INT’L BAR ASS’N (Feb. 15, 2016), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=9e40e124-20bb-4533-a919-c7b5345f34c4>.

<sup>172</sup> *Imprisoned Russian Journalist Sentenced to New Three-Year Jail Term*, COMM. TO PROTECT JOURNALISTS (Jan. 22, 2015, 5:44 PM), <https://cpj.org/2015/01/imprisoned-russian-journalist-sentenced-to-new-thr.php>; See also ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 200; UGOLOVNYI KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code] art. 319 (Russ.).

<sup>173</sup> ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 200.

<sup>174</sup> *Imprisoned Russian journalist sentenced to new three-year jail term*, *supra* note 172.

<sup>175</sup> Botsford, *supra* note 171.

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

<sup>177</sup> *Mink v. Suthers*, 482 F.3d 1244, 1249-51 (10th Cir. 2007), *cert. denied*, 552 U.S. 1165 (2008); see also Patrick File, *Update: Colorado Prosecutor Violated Student Editor’s Rights with*

be “a regular bitch sheet that will speak truth to power, obscenities to clergy, and advice to all the stoners sitting around watching Scooby Doo,” as well as “a forum for the pissed off and disenfranchised in Northern Colorado, basically everybody.”<sup>178</sup> Mink wrote irreverent editor’s notes under the pseudonym “Junius Puke” alongside an altered photo of then-University of Northern Colorado economics professor Junius Peake, which depicted the professor in dark sunglasses and a Hitler-like mustache.<sup>179</sup>

In November 2003, Peake contacted the police, claiming that he was criminally defamed by *The Howling Pig*’s use of his photograph, as well as by statements in the newsletter alleging that the professor “gambled in tech stocks” in the 1990s and wore sunglasses to avoid being recognized by his colleagues on Wall Street where “he managed to luck out and ride the tech bubble of the nineties like a \$20 whore and make a fortune,” among other statements.<sup>180</sup> Under Colorado’s criminal defamation statute in place at the time, it was a class 6 felony to knowingly publish any statement tending to “impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule.”<sup>181</sup>

On December 12, 2003, police executed a search warrant on Mink’s residence and property, including his computer, as part of the investigation into Peake’s allegations.<sup>182</sup> In early 2004, however, a federal district court ordered Mink’s possessions returned after the district attorney’s office announced it had decided not to prosecute him.<sup>183</sup> Mink later filed a lawsuit against the Colorado attorney general, the local district attorney, and a deputy district attorney, alleging that his Fourth Amendment rights had been violated by the search and that his First Amendment rights were violated by the “imminent threat” of a criminal defamation charge.<sup>184</sup>

After several years of procedural skirmishes and appeals, the U.S. Court of Appeals for the Tenth Circuit concluded in 2010 that Mink had “plausibly alleged that [the defendants] violated [his] clearly established constitutional rights” under the Fourth Amendment.<sup>185</sup> In a later court

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*Criminal Libel Search Warrants*, SILHA BULL., Summer 2011, at 37, <http://silha.umn.edu/assets/pdf/Summer2011Bulletinprimary.pdf>.

<sup>178</sup> File, *supra* note 177, at 37.

<sup>179</sup> *Id.*; *Mink*, 482 F.3d at 1249.

<sup>180</sup> *Mink v. Knox*, 613 F.3d 995, 1018 (10th Cir. 2010).

<sup>181</sup> Colo. Rev. Stat. § 18-13-105 (repealed 2012).

<sup>182</sup> *Suthers*, 482 F.3d at 1249.

<sup>183</sup> *Knox*, 613 F.3d at 999.

<sup>184</sup> *Id.*; *see also* File, *supra* note 177.

<sup>185</sup> *Knox*, 613 F.3d at 1011.

proceeding on June 3, 2011, Judge Lewis Babcock of the U.S. District Court for the District of Colorado agreed with the Tenth Circuit's ruling that there was no probable cause to issue a warrant related to a violation of Colorado's criminal defamation statute because "no reasonable reader" of *The Howling Pig* "would believe that the statements in that context were said by Professor Peake in the guise of Junius Puke, nor would any reasonable person believe that they were statements of fact as opposed to hyperbole or parody."<sup>186</sup> Mink eventually agreed to a \$425,000 settlement of his lawsuit against the deputy district attorney in December 2011.<sup>187</sup> But to achieve this, Mink had been forced to initiate a civil rights lawsuit regarding the search of his home, and spend several years in litigation in order to fight the possibility of a criminal defamation charge. The criminal defamation statute was subsequently repealed by the Colorado legislature in a bill signed by Governor John Hickenlooper on April 13, 2017.<sup>188</sup>

Significantly, throughout the years of proceedings, the U.S. Court of Appeals for the Tenth Circuit had declined to rule on the facial unconstitutionality of Colorado's criminal defamation statute. In a 2007 decision, the appellate court held that Mink lacked standing to make a First Amendment challenge, and his claim that the statute was unconstitutional was moot because the district attorney declined to initiate a prosecution.<sup>189</sup> The appellate court wrote:

At the time the original complaint was filed . . . police had conducted a search of Mink's residence, seized his computer and papers, and were retaining them pending further investigation. Attempts by Mink's counsel to dissuade the district attorney from charging him had yet to bear fruit. Thus, Mink appeared to have a legitimate basis for alleging a credible fear of future prosecution when he brought the suit.

Nonetheless, we conclude Mink lacks standing under our case law. First, based on his review of controlling [U.S.] Supreme Court precedents, the district attorney disclaimed an intent to prosecute immediately after the lawsuit was filed. . . . No charges were ever filed against Mink and the district attorney publicly announced he would not prosecute well before his office filed an answer or motion to dismiss. Where a plaintiff only

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<sup>186</sup> Mink v. Knox, No. 84-cv-08023-LTB-CBS, 2011 WL 2174401, at \*5 (D. Colo. 2011).

<sup>187</sup> Chris Healy, *Eight Year Howling Pig Litigation Ends in \$425K Settlement*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Dec. 14, 2011), <https://www.rcfp.org/browse-media-law-resources/news/eight-year-howling-pig-litigation-ends-425k-settlement>.

<sup>188</sup> *Colorado Repeals Criminal Libel Law*, IFEX (April 20, 2012), [https://www.ifex.org/united\\_states/2012/04/20/colorado\\_repeal](https://www.ifex.org/united_states/2012/04/20/colorado_repeal).

<sup>189</sup> *Suthers*, 482 F.3d at 1249; see also Brief for the United States Court of Appeals as Amicus Curiae, *Suthers*, No. 04-1496 (482 F.3d 1244), [http://silha.umn.edu/assets/pdf/mink\\_v\\_buck\[1\].pdf](http://silha.umn.edu/assets/pdf/mink_v_buck[1].pdf).

seeks prospective relief, standing is defeated when there is evidence the government will not enforce the challenged statute against the plaintiff.

Second, it is significant Mink filed an amended complaint after the district attorney disclosed his intent not to prosecute. The sequence of events confirms Mink had no “injury in fact” for prospective relief when he filed his amended complaint. Any threat against Mink at the time was “hypothetical,” not “actual and imminent.”<sup>190</sup>

The Tenth Circuit’s dismissal of the First Amendment claim implied that prosecutorial discretion mitigates the potential harms that enforcement of criminal defamation statutes can create, even in situations when a speaker’s property is searched and seized based on the exercise of constitutionally protected expression. However, even if it might be an effective deterrent in some instances, such discretion has limits.

In Kansas, the editor and the publisher of *The New Observer*, a free-circulation tabloid, were convicted of criminal defamation in 2002 after reporting that Kansas City, Kansas Mayor Carol Marinovich and her husband, a judge, did not live in the county where they held office, as required by law.<sup>191</sup> During the case, the presiding judge refused to allow a local district attorney to prosecute because of the contentious history his office had with the defendants and as a result, the district attorney sought a private attorney, David Farris, from outside of the county to act as a special prosecutor.<sup>192</sup> During his closing argument, Farris told the jury, “you can’t print a lie. That’s a crime in the state of Kansas and it’s a misdemeanor—some of us wish it was a felony.”<sup>193</sup> The jury convicted the editor and the publisher, who were each fined \$700 and placed on one year of unsupervised probation.<sup>194</sup> Significantly, the Kansas criminal defamation statute facially complied with *Garrison* because the Kansas state legislature had added an “actual malice” requirement in 1995.<sup>195</sup> This case demonstrates that relying on prosecutorial discretion alone is not sufficient to mitigate the threat that criminal defamation has on journalists’ and others’ free expression.<sup>196</sup>

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<sup>190</sup> *Suthers*, 482 F.3d at 1254-55.

<sup>191</sup> *Kansas v. Carson*, No. 01-CR-301 (Kan. Dist. Ct. Wyandotte Co. July 17, 2002; *see also* Jane E. Kirtley, *Overkill in Kansas*, AM. JOURNALISM REV. (Sept. 2002), <http://ajrarchive.org/article.asp?id=2606>.

<sup>192</sup> Kirtley, *supra* note 191.

<sup>193</sup> *Id.*

<sup>194</sup> John W. Dean, *A Case in Kansas Asks Whether Libel Should Ever be Prosecuted*, CNN (Dec. 9, 2002, 12:24 PM), <http://edition.cnn.com/2002/LAW/12/09/findlaw.analysis.dean.defamation>.

<sup>195</sup> *Id.*

<sup>196</sup> Lisby, *supra* note 15, at 435.

In many cases, journalists who are charged and convicted of criminal defamation are later exonerated. The types of sentences they initially faced vary, but on appeal, a court may overturn the conviction, or governmental authorities may pardon the journalist, such as in Panama,<sup>197</sup> Ecuador,<sup>198</sup> and Serbia.<sup>199</sup> One high-profile example in which a court overturned the conviction of journalists on charges of criminal defamation took place in Germany. In August 2010, German freelance journalists Thomas Datt and Arndt Ginzl were convicted of criminal defamation arising from two articles published in the daily newspaper *Die Zeit* and the newsmagazine *Der Spiegel* in 2008.<sup>200</sup> The articles investigated alleged links between former high-ranking judicial officials, including judges and prosecutors, in the state of Saxony and a brothel. The scandal was known as the *Sachsensumpf* (Saxony Swamp).<sup>201</sup> In the article appearing in *Die Zeit*, titled “Voreiliger Freispruch” (“Early Release”), Datt and Ginzl criticized the police investigation into the scandal.<sup>202</sup>

The journalists based the story largely on interviews with former prostitutes from the brothel, one of whom had allegedly positively identified a judge to police in 2000, but the identification was never entered into evidence.<sup>203</sup> Datt and Ginzl presented evidence supporting this claim, and also asked rhetorically whether the investigating officers had been under internal pressure to protect the judge.<sup>204</sup> Although the two officers later said they were not offended by the article, the police commissioner nevertheless sought criminal defamation charges.<sup>205</sup> In the article published

<sup>197</sup> *Freedom in the World*, FREEDOM HOUSE (2011), <https://freedomhouse.org/report/freedom-world/2011/panama>; see also COMM. TO PROTECT JOURNALISTS, *supra* note 11.

<sup>198</sup> *Despite Pardon, Correa Does Lasting Damage to Press*, COMM. TO PROTECT JOURNALISTS (Feb. 27, 2012); see also William Neuman, *President of Ecuador to Pardon Four in Libel Case*, N.Y. TIMES (Feb. 27, 2012), <http://www.nytimes.com/2012/02/28/world/americas/president-of-ecuador-to-pardon-four-in-libel-case.html>; COMM. TO PROTECT JOURNALISTS, *supra* note 11, at 95.

<sup>199</sup> *Serbia: Seemo Welcomes Presidential Pardon in Serbia for Imprisoned Author of Reader's Comment*, SOUTH EAST EUR. MEDIA ORG. (Jul. 8, 2012), <http://seemo.org/news/seemo-welcomes-presidential-pardon-in-serbia-for-imprisoned-author-of-eeader%E2%80%99s-comment/453>; see also ORG. FOR SEC. AND COOP. IN EUR., *supra* note 11, at 206.

<sup>200</sup> See ORG. FOR SEC. AND COOP. IN EUR., *supra* note 11, at 104; see also *On Trial For Criminal Defamation, German Freelance Journalists Faced “Existential Threat”*, INT'L PRESS INST. (Sept. 11, 2014), <http://ipi.media/on-trial-for-criminal-defamation-german-freelance-journalists-faced-existential-threat>.

<sup>201</sup> *Id.*

<sup>202</sup> Thomas Datt and Arndt Ginzl, *Voreiliger Freispruch*, ZEIT (last updated June 27, 2008, 3:18 PM), <http://www.zeit.de/online/2008/27/sachsensumpf-jasmin>.

<sup>203</sup> ORG. FOR SEC. AND COOP. IN EUR., *supra* note 11, at 104.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

in *Der Spiegel*, titled “Dreckige Wäsche” (“Dirty Laundry”), the journalists further criticized the investigation and one of the judges tied to the scandal, who filed criminal defamation charges against the journalists.<sup>206</sup>

In August 2010, Datt and Ginzel were convicted of criminal defamation under Criminal Code Article 186.<sup>207</sup> The lower court in Dresden sentenced the journalists to pay fines of €2,500 each, finding that the rhetorical question in the first article had “damage[ed] the honour” of the officers.<sup>208</sup> However, in December 2012, the Dresden Regional Court overturned the ruling, finding that the question raised by the journalists was sufficiently grounded in fact.<sup>209</sup> The Regional Court also rejected the charges brought in relation to the second article, finding that the story concerned a matter of public interest.<sup>210</sup> The court cited constitutional jurisprudence, which provides that “an honour-offending media report can also be allowed if it is later proven to be untrue even if already at the moment of publishing there remain doubts about the reliability of the material used.”<sup>211</sup>

Although the case in Germany was resolved within the country’s courts, in some cases, the EU Court of Human Rights has overturned convictions that had been upheld by appeals courts and/or Supreme Courts, such as in Finland,<sup>212</sup> Hungary,<sup>213</sup> and Poland.<sup>214</sup>

Throughout the world, journalists facing charges of criminal defamation are subject to consequences such as financial penalties, imprisonment, or being barred from practicing journalism. It is true that many of the cases found in our examination resulted in no formal charges, or the charges were dropped. In other cases, courts or government officials sometimes overturned convictions before journalists’ formal punishment was imposed. Nevertheless, the mere possibility of such consequences

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<sup>206</sup> *Id.*; see also *On Trial For Criminal Defamation, German Freelance Journalists Faced “Existential Threat”*, *supra* note 200; Thomas Datt and Arndt Ginzel, *Dreckige Wäsche, Dirty Laundry DER SPIEGEL* (Jan. 21, 2008), <http://www.spiegel.de/spiegel/print/d-55508009.html>.

<sup>207</sup> ORG. FOR SEC. AND COOP. IN EUR., *supra* note 11, at 101; see also Strafgesetzbuch [StGB] [Crim. Code], § 186, <https://www.lewika.org/term/15005/german-criminal-code> (Ger.).

<sup>208</sup> *Id.*; see also *On Trial For Criminal Defamation, German Freelance Journalists Faced “Existential Threat”*, *supra* note 200.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Ristamäki and Korvola v. Finland*, App. No. 66456/09 Eur. Ct. H.R. (2013); see also ORG. FOR SEC. AND COOP. IN EUR., *supra* note 11, at 92.

<sup>213</sup> *Uj v. Hungary*, App. No. 23954/10 Eur. Ct. H.R. (2011); see also ORG. FOR SEC. AND COOP. IN EUR., *supra* note 11, at 114.

<sup>214</sup> *Ziemiński v. Poland*, App. No. 1799/07 Eur. Ct. H.R. (2016).

threatens journalists and other advocates, potentially chilling their free speech and limiting press freedoms.

#### V. COMBATTING DEFAMATION LAW IN ITS MOST WEAPONIZED FORM

Criminal defamation law has been a persistent feature of societies for millennia, with roots in ancient Babylonia<sup>215</sup> and the Roman Empire.<sup>216</sup> In England, the Court of the Star Chamber adopted common law criminal defamation rules after the development of the printing press in the 15th century.<sup>217</sup> The rules were initially designed to protect the monarchy from criticism, but they were also applied to defamatory statements about private individuals in non-political contexts.<sup>218</sup> Common law criminal defamation laws were still in place in England during the 19th century, and were later enforced in the North American colonies.<sup>219</sup> Many justified the continued use of criminal defamation law as a way to avert breaches of the peace, such as duels or other vigilante acts, undertaken by those who felt their dignity or honor had been impugned.

The threat of widespread dueling may not be realistic today, but governments still claim legitimate concerns about maintaining a peaceful society as a pretext to censor or punish speech. The spread of “fake news” could potentially provide an additional pretext to do so.

For the purpose of this argument, fake news is defined as statements that are demonstrably false and disseminated with the deliberate intent to deceive. And, indeed, widespread and pervasive false information online has led to potentially dangerous offline situations. For example, a man was arrested in late 2016 after he carried an assault rifle and fired shots into a Washington, D.C. pizzeria after reading false allegations online that Hillary Clinton and associates used the restaurant to operate a child sex ring.<sup>220</sup> In

<sup>215</sup> Gregory E. Stevens, *Criminal Libel After Garrison*, in *RETHINKING CRIM. LAW* (George P. Fletcher ed., 1991).

<sup>216</sup> Elena Yanchukova, *Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions*, 41 *COLUM. J. TRANSNAT'L L.* 861, 863 (2003).

<sup>217</sup> Van Vechen Veeder, *The History and Theory of the Law of Defamation*, 3 *COLUM. L. REV.* 546, 547 (1903).

<sup>218</sup> Jane E. Kirtley, *Criminal Defamation: An “Instrument of Destruction”*, in *ORG. FOR SEC. AND CO-OPERATION IN EUROPE, ENDING THE CHILLING EFFECT: WORKING TO REPEAL CRIMINAL LIBEL AND INSULT LAWS* 89 (Ana Karlsreiter & Hanna Vuokko ed., 2004).

<sup>219</sup> The 1735 acquittal of John Peter Zenger was the most famous criminal libel prosecution in colonial America. See *The Trial of John Peter Zenger*, in *THREE TRIALS: ZENGER, WOODFALL & LAMBERT: 1765-94*, at 46 (Stephen Parks ed., 1974).

<sup>220</sup> Faiz Siddiqui & Susan Svrluga, *N.C. man told police he Went to D.C. pizzeria with gun to investigate conspiracy theory*, *WASH. POST* (Dec. 5, 2016),

2017, social media users in Myanmar used false information and out-of-context photographs to describe the Rohingya people, who have been targeted by the Myanmar military for what U.S. officials described as “ethnic cleansing,”<sup>221</sup> as terrorists and to justify violence against them.<sup>222</sup> Governments could point to these examples as justification for retaining criminal defamation provisions on the books.

The examples of cases in the United States and around the world demonstrate that the threat of criminal defamation charges continues to be a significant deterrent to free speech. Rather than keeping the peace, criminal defamation could become the most potent form of “weaponized defamation” and could act as an “instrument of destruction” for free expression and the public’s right to know.<sup>223</sup> Government officials and prominent figures can and will use it to target their critics. Particularly alarming is a trend of public officials seeking to delegitimize the institutional press’ role as a watchdog of the government by appropriating the term “fake news.” For example, rather than using the term in the context of intentional falsehoods meant to deceive, U.S. President Donald Trump has labeled reports he dislikes as “fake news,” both as a shield to defend himself against criticism and as a sword to strike at the legitimacy of reporting carried out by prominent news organizations.<sup>224</sup> Evidence suggests Trump’s accusations that media organizations are purveyors of fake news have undermined trust in the press among large sections of American public.<sup>225</sup>

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<https://www.washingtonpost.com/news/local/wp/2016/12/04/d-c-police-respond-to-report-of-a-man-with-a-gun-at-comet-ping-pong-restaurant>.

<sup>221</sup> Mark Landler, *Myanmar’s Crackdown on Rohingya Is Ethnic Cleansing, Tillerson Says*, N.Y. TIMES (Nov. 22, 2017), <https://www.nytimes.com/2017/11/22/us/politics/tillerson-myanmar-rohingya-ethnic-cleansing.html>.

<sup>222</sup> *In Myamar, Fake News Spread on Facebook Stokes Ethnic Violence*, PUBLIC RADIO INT’L (Nov. 1, 2017), <https://www.pri.org/stories/2017-11-01/myanmar-fake-news-spread-facebook-stokes-ethnic-violence>; Megan Specia & Paul Mozur, *A War of Words Puts Facebook at the Center of Myanmar’s Rohingya Crisis*, N.Y. TIMES (Oct. 27, 2017), <https://www.nytimes.com/2017/10/27/world/asia/myanmar-government-facebook-rohingya.html>.

<sup>223</sup> See *Garrison v. Louisiana*, 379 U.S. 64, 83 (1964) (Douglas, J., concurring).

<sup>224</sup> Ronnell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. 567, 589 (2017); Steve Coll, *Donald Trump’s “Fake News” Tactics*, NEW YORKER (Dec. 11, 2017), <https://www.newyorker.com/magazine/2017/12/11/donald-trumps-fake-news-tactics>; Jonathan Peters, *Trump Twitter spreadsheet tracks “a perpetual campaign against the press”*, COLUM. JOURNALISM REV. (Dec. 21, 2017), [https://www.cjr.org/united\\_states\\_project/trump-twitter-spreadsheet-press-attacks.php](https://www.cjr.org/united_states_project/trump-twitter-spreadsheet-press-attacks.php).

<sup>225</sup> See Poynter Inst. for Media Studies, *You’re Fake News!: The 2017 Poynter Media Trust Survey*, Poynter Journalism Ethics Summit, at 2 (2017), <https://poyntercdn.blob.core.windows.net/files/PoynterMediaTrustSurvey2017.pdf> (reporting the results of a survey finding that only 19 percent of Republicans express “a great deal” or “a fair amount” of trust and confidence in media reporting).

Outside the United States, other government officials have taken note of Trump's attempts to delegitimize critics and the press.<sup>226</sup> Syrian President Bashar Assad declared an Amnesty International report about human rights violations at a Syrian prison as fake news in February 2017.<sup>227</sup> During an October 2017 interview on BBC One's *The Andrew Marr Show*, Spanish Minister of Foreign Affairs Alfonso Dastis described pictures and reports of Spanish police officers responding aggressively at polling stations during the Catalonia independence referendum as "alternative facts" and fake news.<sup>228</sup> In Myanmar, a state security minister said in December 2017 that the assertion of the mere existence of the Rohingya people was fake news.<sup>229</sup> In April 2018, Malaysia adopted an "anti-fake news" law that created criminal punishments for anyone who shows, creates, or disseminates "news, information, data and reports [that] are wholly or partly false."<sup>230</sup> The law was passed in advance of an upcoming national election that observers characterized as a referendum on Prime Minister Najib Razak, who had been accused of being involved in a multi-billion dollar corruption scandal involving government funds.<sup>231</sup> Prominent officials in Turkey,<sup>232</sup> Russia,<sup>233</sup> Libya,<sup>234</sup> and Poland,<sup>235</sup> among others, have also used the phrase to criticize the press.<sup>236</sup>

<sup>226</sup> See Steven Erlanger, *Fake News, Trump's Obsession, Is Now a Cudgel for Strongmen*, N.Y. TIMES (Dec. 12, 2017), 5:03 AM, <https://www.nytimes.com/2017/12/12/world/europe/trump-fake-news-dictators.html>; Jason Schwartz, *Trump's Fake News Mantra a Hit with Despots*, POLITICO (Dec. 8, 2017), <https://www.politico.com/story/2017/12/08/trump-fake-news-despots-287129>.

<sup>227</sup> Zamira Rahim, *Syria's Assad Brushes Off Amnesty Report on Prison Executions as Fake News*, TIME (Feb. 10, 2017), [http://time.com/4666806/assad\\_syria-amnesty-international](http://time.com/4666806/assad_syria-amnesty-international).

<sup>228</sup> *Spain FM: Many Police Violence Pictures Fake*, BBC (Oct. 22, 2017), <http://www.bbc.com/news/av/world-europe-41712725/spain-fm-many-police-violence-pictures-fake>; James Badcock, *Spanish minister: Police Violence Videos Against Catalonia Referendum Supporters are Fake News*, TELEGRAPH (Oct. 22, 2017), <http://www.telegraph.co.uk/news/2017/10/22/spanish-minister-says-videos-police-violence-fake-news>.

<sup>229</sup> Hannah Beech, *No Such Thing as Rohingya: Myanmar Erases a History*, N.Y. TIMES (Dec. 2, 2017), <https://www.nytimes.com/2017/12/02/world/asia/myanmar-rohingya-denial-history.html>.

<sup>230</sup> Henry Koh, *The Real News on Malaysia's Fake News Law*, ASIA TIMES (Apr. 17, 2018), <http://www.atimes.com/real-news-malaysias-fake-news-law/>.

<sup>231</sup> Hannah Beech, *As Malaysia Moves to Ban Fake News, Worries About Who Decides the Truth*, N.Y. TIMES (April 2, 2018), <https://www.nytimes.com/2018/04/02/world/asia/malaysia-fake-news-law.html>.

<sup>232</sup> Dorian Jones, *Turkish Opposition Claims Erdogan's Family Hid Money Offshore*, VOICE OF AMERICA (Nov. 28, 2017), <https://www.voanews.com/a/turkey-opposition-claims-receptayyip-erdogan-family-hid-money-offshore/4140478.html>.

<sup>233</sup> Neil MacFarquhar, *With Big Red Stamp, Russia Singles Out What It Calls Fake News*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/world/europe/russia-fake-news-media-foreign-ministry-.html>.

Invocation of the term “fake news” to delegitimize the press, coupled with active use of criminal defamation laws worldwide, create an environment that could significantly undermine global press freedom. Civil society and other freedom of expression advocates must continue to push governments to repeal criminal defamation laws, despite official reluctance to do so.<sup>237</sup> As of 2017, 42 of the 57 participating states in the Organization for Security and Co-operation in Europe (OSCE) still retain criminal defamation laws.<sup>238</sup> Throughout the Americas, Jamaica is the only country that has fully repealed its criminal defamation laws.<sup>239</sup> Since 2016, high courts in Zimbabwe and Kenya decriminalized defamation, but criminal defamation laws remain widespread in other countries in Africa.<sup>240</sup> Press advocates’ continued pressure on governments to repeal criminal defamation laws is a necessary first step to combat the threat of powerful figures using fake news as a sword and shield against rigorous reporting.

Intergovernmental organizations, as well as international agreements, compacts, and treaties, should also be critical of criminal defamation laws. Existing international agreements have focused on enshrining protections for free expression,<sup>241</sup> but commitments by international bodies to

<sup>234</sup> Patrick Wintour, *‘Fake News’: Libya seizes on Trump tweet to discredit CNN slavery report*, GUARDIAN (Nov. 28, 2017, 4:26 PM), <https://www.theguardian.com/world/2017/nov/28/libya-slave-trade-cnn-report-trump-fake-news>.

<sup>235</sup> John Bowden, *Polish President Knocks Fake News over Wife’s Trump Handshake*, THE HILL (July 6, 2017), <http://thehill.com/homenews/news/340934-polish-president-knocks-fake-news-over-wifes-trump-handshake>.

<sup>236</sup> See *Predators of Press Freedom use Fake News as a Censorship tool*, REPORTERS WITHOUT BORDERS (March 17, 2017), <https://rsf.org/en/news/predators-press-freedom-use-fake-news-censorship-tool>; Uri Friedman, *The Real-World Consequences of Fake News*, ATLANTIC (Dec. 23, 2017), <https://www.theatlantic.com/international/archive/2017/12/trump-world-fake-news/548888/>.

<sup>237</sup> See, e.g., Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, United Nations Gen. Assembly, U.N. Docs., at 20 (May 16, 2011), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/132/01/PDF/G1113201.pdf?OpenElement>; WAN-IFRA, *Declaration of Table Mountain: Abolishing Insult Laws and Criminal Defamation in Africa and Setting a Free Press Higher on the Agenda*, WORLD ASS’N OF NEWSPAPERS & NEWS PUBLISHERS (Jun. 6, 2007), [http://www.wan-ifra.org/sites/default/files/field\\_article\\_file/Declaration%20of%20Table%20Mountain%20Eng%20text.pdf](http://www.wan-ifra.org/sites/default/files/field_article_file/Declaration%20of%20Table%20Mountain%20Eng%20text.pdf); PEN Int’l, *Stifling Dissent, Impeding Accountability: Criminal Defamation Laws in Africa* (2017), <http://pensouthafrica.co.za/wp-content/uploads/2017/11/Stifling-Dissent-Impeding-Accountability-Criminal-Defamation-Laws-in-Africa.pdf>; Comm. to Protect Journalists, *supra* note 11; Int’l Press Inst., *supra* note 11.

<sup>238</sup> ORG. FOR SEC. AND COOP. IN EUR., *supra* note 11, at 8.

<sup>239</sup> COMM. TO PROTECT JOURNALISTS, *supra* note 11, at 11.

<sup>240</sup> PEN Int’l, *supra* note 237.

<sup>241</sup> See, e.g., United Nations General Assembly, *The Universal Declaration of Human Rights*, Art. 19, U.N. Docs. (Dec. 10, 1948).

specifically target criminal defamation laws for removal are also necessary and can be effective. For example, the African Commission on Human and Peoples' Rights adopted a resolution in 2010 calling on countries to "repeal criminal defamation laws or insult laws which impede freedom of speech."<sup>242</sup> In 2013, the Pan-African Parliament adopted the "Midrand Declaration on Press Freedom in Africa" and committed to a campaign for greater press freedom in the continent.<sup>243</sup> PEN Africa reported in 2017 that these efforts, along with a 2014 African Court of Human and Peoples' Rights (ACtHPR) decision finding criminal defamation sanctions interfere with journalists' freedom of expression, have resulted in progress toward the repeal of criminal defamation provisions in several African countries.<sup>244</sup> Although PEN Africa contends that further progress is still necessary,<sup>245</sup> these results suggest that international cooperation can play an important role in combatting criminal defamation worldwide.

Along with repealing of criminal defamation laws, countries should recognize that freedom of expression and the public's right to know can conflict with other legitimate values, such as individual dignity and reputation.<sup>246</sup> As a result of this tension, criminal defamation laws could be used, not only to address genuinely damaging expression, but to target and suppress the opposition news media. Moreover, as the examples from the United States show, criminal defamation may also be used to settle scores arising from private disputes when individuals discover they have been the subject of false information disseminated to the public. If they may have no hope of recovering a monetary award in a civil proceeding, victims may turn to criminal complaints as a way to clear their names, at least in part to avoid the expenses related to civil litigation.<sup>247</sup> Even if a plaintiff is successful in a civil suit, the defendant may have limited means to compensate for the reputational injuries the false statements caused.<sup>248</sup> But as a criminal complainant, the same individual might have the satisfaction of knowing that criminal penalties were imposed. Although we did not

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<sup>242</sup> ACHPR, 169: Resolution on Repealing Criminal Defamation Laws in Africa, African Commission on Human and Peoples' Rights (Nov. 24, 2010), <http://www.achpr.org/sessions/48th/resolutions/169>.

<sup>243</sup> See PEN Int'l, *supra* note 237, at 2.

<sup>244</sup> *Id.* at 10-11.

<sup>245</sup> *Id.* at 11.

<sup>246</sup> See, e.g., Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1321 (1992) ("It is a commonplace that robust free speech systems protect speech not because it is harmless, but despite the harm it may cause.").

<sup>247</sup> Pritchard, *supra* note 21, at 335-36.

<sup>248</sup> Daniel J. Solove, THE HARM TO REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 123-24 (2007).

examine international criminal defamation cases involving purely private disputes, we surmise that such cases are likely to happen with at least as much regularity as in the United States.

Governments should develop legal frameworks to replace criminal defamation penalties with affordable and accessible civil litigation options for ordinary individuals whose reputations have been tarnished through the dissemination of deliberately false and defamatory information. These frameworks also must include robust protections to ensure journalists and news organizations do not become easy targets for government officials and public figures seeking to silence criticism. The legal protections should clearly define the elements of defamation and the available defenses to defamation claims,<sup>249</sup> allow truth as an absolute defense to defamation claims,<sup>250</sup> require government officials and public figures to prove “actual malice” before recovering damages for defamation,<sup>251</sup> place limits on civil awards so that monetary damages are proportionate with harm, and ensure that legal costs are not disproportionately expensive so that wealthy and powerful individuals are the only ones with access to judicial systems.<sup>252</sup> Governments should also consider establishing legal environments that encourage media self-regulation processes that would allow victims to repair their reputations without filing lawsuits.<sup>253</sup> These types of protections can help strike a fair balance between the right to free expression and personal reputation, while also ensuring that criminal penalties are not used merely to forestall legitimate debate.

## VI. CONCLUSION

U.S. Supreme Court Justice Douglas’ observation that criminal defamation laws are “instruments of destruction”<sup>254</sup> to free expression remains as true today as it was in 1964. The continued viability of these laws perpetuates an environment in which journalists, news organizations, and other advocates face not only possible civil liability, but harassment, imprisonment, or crippling fines, simply for reporting the news. Both in mature democracies and more repressive regimes, the threat of prosecution

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<sup>249</sup> PEN Int’l, *supra* note 237, at 58.

<sup>250</sup> Org. for Sec. & Co-operation in Europe Parliament Assembly, *Minsk Declaration and Resolutions Adopted by the OSCE Parliamentary Assembly at the Twenty-Sixth Annual Session*, at 16(2017), <http://www.oscepa.org/documents/all-documents/annual-sessions/2017-minsk/declaration-25/3555-declaration-minsk-eng/file>.

<sup>251</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

<sup>252</sup> INT’L PRESS INST., *supra* note 11, at 7.

<sup>253</sup> *Id.*

<sup>254</sup> *Garrison v. Louisiana*, 379 U.S. 64, 83 (1964) (Douglas, J. concurring).

for criminal defamation is a powerful way for government officials and prominent figures to target and silence their critics, and to stifle robust debate about issues of public importance.

In an environment where the powerful are increasingly labeling unflattering or inconvenient news reports as fake, confidence in legacy media has eroded. This benefits those in positions of authority. If the electorate can be convinced that the news media or other watchdogs are knowingly fabricating and disseminating false information for the purpose of misleading the public, it is easier for governments to argue that civil damages are insufficient to protect legitimate reputational and public interests, and that they must act to provide alternative criminal penalties.

In February 2016, while a candidate for President of the United States, Donald Trump promised he would “open up libel laws” to make it easier for public officials and public figures to sue the press.<sup>255</sup> He repeated this threat (in the form of a question, in a Twitter post) as President in March 2017, when he was displeased with coverage by the “failing @nytimes.”<sup>256</sup> It might seem improbable that Trump would actually seek to create a federal criminal libel law. But in a topsy-turvy world where partisan versions of “alternative facts” take on the veneer of truth<sup>257</sup> and documented facts are labeled as “fake,” it is conceivable that anyone who “outrage[s] the sentiments of the dominant party,” as Douglas posited, could be “deemed a libeler” worthy of prosecution under criminal defamation law—the 21st Century equivalent of seditious libel.<sup>258</sup> That is a tool any vindictive leader would be delighted to wield as a means of consolidating authority and suppressing dissent.

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<sup>255</sup> Hadas Gold, *Donald Trump: We're going to open up libel laws*, POLITICO (Feb. 26, 2016), <https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866>; Callum Borchers, *Donald Trump vowed to open up libel laws to make suing the media easier. Can he do that?*, WASH. POST (Feb. 26, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/02/26/donald-trump-vows-to-open-up-libel-laws-to-make-suing-the-media-easier-heres-how-he-could-do-it/>; Casey Carmody, *Media Face Several Challenges During President Trump's First Months in Office*, SILHA BULL., Winter/Spring 2017 at 1, <https://drive.google.com/file/d/0B0mMM90VIGU9R05Xa0t6UEhfelk/view>.

<sup>256</sup> Taylor Lorenz, *Trump threatens to change libel laws to go after NY Times*, THE HILL (March 30, 2017, 11:07 AM), <http://thehill.com/blogs/ballot-box/326486-trump-threatens-to-change-libel-laws-to-go-after-ny-times>; Adam Liptak, *Can Trump Change Libel Laws?*, N.Y. TIMES (March 30, 2017), <https://www.nytimes.com/2017/03/30/us/politics/can-trump-change-libel-laws.html>.

<sup>257</sup> See, e.g., Assoc. Press, *Kellyanne Conway's alternative facts flub tops list of 2017's notable quotes*, N.Y. POST (Dec. 12, 2017), <https://nypost.com/2017/12/12/kellyanne-conways-alternative-facts-flub-tops-list-of-2017s-notable-quotes>.

<sup>258</sup> *Garrison*, 379 U.S. at 82 (Douglas, J. concurring).

Yet those who fear criticism reveal fundamental weakness. Experience teaches us that, in the end, a government that is subject to robust debate is not diminished, but strengthened, as indeed are its people. “Fake news” may seem threatening to those in power, but the way to combat fake news is to encourage more speech, not less. Surely there is no better time for criminal defamation to meet the same fate as seditious libel: consigned to the ash heap of history.



# STEMMING THE TIDE OF FAKE NEWS: A GLOBAL CASE STUDY OF DECISIONS TO REGULATE

By Amy Kristin Sanders,<sup>\*</sup> Rachael L. Jones,<sup>\*\*</sup> and Xiran  
Liu<sup>\*\*\*</sup>

*“[I]t is so difficult to draw a clear line of separation between the abuse and the wholesome use . . . of the press, that as yet we have found it better to trust the public judgment, rather than the magistrate, with the discrimination between truth & falsehood. And hitherto the public judgment has performed that office with wonderful correctness.”*

—Thomas Jefferson<sup>1</sup>

## I. INTRODUCTION: THE RISE OF FAKE NEWS IN THE ERA OF SOCIAL MEDIA

“Rogue Amazon Drone Attempts To Deliver BOMB To White House.”<sup>2</sup> “Pink water comes from taps in Canada town.”<sup>3</sup> “Clinton Campaign Chairman . . . Involved in Satanic [Rituals].”<sup>4</sup> Certainly, headlines like these can’t be true. Can they?

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<sup>\*</sup> J.D./Ph.D., Associate Professor at the Moody College of Journalism at the University of Texas.

<sup>\*\*</sup> J.D., Research Fellow for the Brechner Center for Freedom of Information at the University of Florida.

<sup>\*\*\*</sup> Graduate Student at the London School of Economics.

<sup>1</sup> Letter from Thomas Jefferson to Marc Auguste Pictet (Feb. 5, 1803), in 39 THE PAPERS OF THOMAS JEFFERSON, 13 November 1802–3 March 1803, at 456-457 (Barbara B. Oberg ed., Princeton University Press 2012), <http://founders.archives.gov/documents/Jefferson/01-39-02-0391>.

<sup>2</sup> Tom Florer, *Rogue Amazon Drone Attempts to Deliver BOMB to White House*, DAILY CHRONICLE (Oct. 25, 2017), <http://www.thedailychronicle.co.uk/2017/10/25/rogur-amazon-drone-attempts-deliver-bomb-white-house>.

<sup>3</sup> “Pink Water Comes from Taps in Canada Town,” SKYNEWS (Mar. 8, 2017), <https://news.sky.com/video/pink-water-comes-from-taps-in-canada-town-10794539>.

<sup>4</sup> Dan Evon, *Fact Check: Was Clinton Campaign Chairman John Podesta Involved in Satanic 'Spirit Cooking'?*, SNOPE (Nov. 4, 2016), <https://www.snopes.com/john-podesta-spirit-cooking>.

In the era of “Fake News,” readers often do not know what to believe. Around the globe, fake news has had real-world impact; for example, in early 2017, protestors gathered outside the White House in Washington, D.C. demanding the American government investigate an unfounded Internet rumor.<sup>5</sup> The same rumor, which claimed the existence of a child-sex ring in a local pizza parlor and connected high-level Democratic political figures, including Hillary Clinton, led an armed North Carolina man to storm the Comet Ping Pong Pizzeria in December 2016, in an insane quest for evidence of child sex abuse.<sup>6</sup> Now known as “Pizzagate,” the rumor stemmed from articles boasting fake information about the Clinton campaign and the D.C. pizza joint.<sup>7</sup> When alt-right political pundits, such as Infowars founder Alex Jones, caught wind of the story, it went viral and led to the incident that occurred during the December 2016 and the 2017 protests. Despite an apology from Jones for his role in spreading the now-proven-false rumor, protestors still gathered in the American capital insisting that the story was legitimate.<sup>8</sup>

Given the interconnectedness of our Global Village,<sup>9</sup> fake news has the ability to spread quickly and have lasting impact. During recent elections in France, fake news caught the attention of voters and candidates alike, with President Emmanuel Macron vowing to take action.<sup>10</sup> Macron isn't alone; noting the potential impact of fake news, numerous world leaders have voiced their concerns, including the UK's Theresa May, Germany's Angela Merkel, and Israel's Benjamin Netanyahu.<sup>11</sup> United States President Donald Trump repeatedly lashes out at what he has dubbed the “fake news media.”<sup>12</sup>

<sup>5</sup> Michael E. Miller, *Protesters Outside White House Demand 'Pizzagate' Investigation*, WASH. POST (Mar. 25, 2017), <https://www.washingtonpost.com/news/local/wp/2017/03/25/protesters-outside-white-house-demand-pizzagate-investigation>.

<sup>6</sup> Faiz Siddiqui & Susan Svlruga, *N.C. Man Told Police He Went to D.C. Pizzeria with Gun to Investigate Conspiracy Theory*, WASH. POST (Dec. 5, 2016), <https://www.washingtonpost.com/news/local/wp/2016/12/04/d-c-police-respond-to-report-of-a-man-with-a-gun-at-comet-ping-pong-restaurant>.

<sup>7</sup> Cecilia Kang, *Fake News Onslaught Targets Pizzeria as Nest of Child-Trafficking*, N.Y. TIMES (Nov. 21, 2016), <https://www.nytimes.com/2016/11/21/technology/fact-check-this-pizzeria-is-not-a-child-trafficking-site.html>.

<sup>8</sup> Miller, *supra* note 5.

<sup>9</sup> MARSHALL McLuhan, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* (Gingko Press dig. ed. 2013).

<sup>10</sup> Scott Neuman, *France's Macron Says He Wants Law to Combat Fake News*, NPR (Jan. 4, 2018), <https://www.npr.org/sections/thetwo-way/2018/01/04/575580790/frances-macron-says-he-wants-law-to-combat-fake-news>.

<sup>11</sup> Joe Concha, *Netanyahu Attacks US Media as 'Fake News'*, HILL (May 8, 2017), <http://thehill.com/homenews/media/332340-netanyahu-attacks-us-media-as-fake-news>.

<sup>12</sup> Rebecca Morin, *Trump Accuses 'Fake News' Media of Making Up Sources*, POLITICO (May 28, 2017), <https://www.politico.com/story/2017/05/28/trump-fake-news-media-238894>.

But what is the answer to combatting the spread of misinformation? And who should decide whether something is truthful?

To begin, it is important to understand the origins of fake news itself, including its motivations. Many commenters have suggested that social media has led to the rise of the Fake News movement.<sup>13</sup> However, such a view ignores much of fake news' history. A 2017 article in Politico Magazine traces the roots of fake news back to Gutenberg's invention of the printing press, relaying fictitious stories of Jews drinking the blood of Christian children in the late 1400s.<sup>14</sup> In fact, history has given a name to the various types of fake news for centuries.<sup>15</sup> As newspapers grew in popularity, so did the circulation and platform for fake news. Examples of similar fake news movements were seen in Italy in 1522<sup>16</sup> and in seventeenth-century France.<sup>17</sup> Still, it has continually been the audience's job to decipher truth from hyperbole. As Robert Darnton noted: "Although news of this sort could whip up public opinion, sophisticates knew better than to take it literally. Most of it was fake, sometimes openly so. A footnote to a scandalous item in *Le Gazetier cuirasse* read: 'Half of this article is true.' It was up to the reader to decide which half."<sup>18</sup>

In his article for *The Economist*, Tom Standage relays the story of how the *New York Sun*'s circulation more than doubled after it printed the story of a renowned British astronomer having witnessed "giant man-bats."<sup>19</sup> The deception, concocted by the editor, ensured the increase in readership and as a result, revenue as well. To this day, economic motivation is one of the chief drivers of the creation of fake news. The BBC recently published the story of a Macedonian teen who earned 1800 Euros off fake news content the first

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<sup>13</sup> Claire Wardle & Hossein Derakhshan, *How Did the News Go 'Fake'?* *When the Media Went Social*, GUARDIAN (Nov. 10, 2017), <https://www.theguardian.com/commentisfree/2017/nov/10/fake-news-social-media-current-affairs-approval>; Benedict Carey, *How Fiction Becomes Fact on Social Media*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/health/social-media-fake-news.html>.

<sup>14</sup> Jacob Soll, *The Long and Brutal History of Fake News*, POLITICO (Dec. 18, 2016), <https://www.politico.com/magazine/story/2016/12/fake-news-history-long-violent-214535>.

<sup>15</sup> Robert Darnton, *The True History of Fake News*, N.Y. REVIEW OF BOOKS (Feb. 13, 2017), <http://www.nybooks.com/daily/2017/02/13/the-true-history-of-fake-news>.

<sup>16</sup> In 1522, the Italian "*pasquinde*" emerged after Pietro Aretino attempted to sway the outcome of a pontifical election by posting scurrilous writings about candidates in Rome's Piazza Navona. *Id.*

<sup>17</sup> During the seventeenth century, the French "*canard*" ruled the roost by poking fun at Marie Antoinette and others through political propaganda. *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Tom Standage, *The True History of Fake News*, ECONOMIST (June/July 2017), <https://www.1843magazine.com/technology/rewind/the-true-history-of-fake-news>.

month he started producing it.<sup>20</sup> The young entrepreneur shared tales of friends making thousands per day creating and sharing fake news.<sup>21</sup>

A second primary motivation behind the creation and sharing of fake news can be found in the actions of Pietro Aretino, whose goal was to peddle influence.<sup>22</sup> Like the InfoWars story on “Pizzagate,” Aretino’s pasquinades were designed to affect the outcome of an election. It is this motivation—more than a publisher’s desire for economic prosperity – that is driving the world’s leaders and influential players to propose the regulation of fake news. This desire to upend political and social stability around the world surely calls into question the role of fake news in a democratic society.

Thus, there has never truly been a shortage of false information. Whether it is to impact politics—insixteenth-century Italy or twenty-first-century America—or to make money—by Yellow Journalists Hearst and Pulitzer in the 1890s<sup>23</sup> or 2017’s Macedonian teenagers,<sup>24</sup> fake news has been a constant companion to truthful information in our society. But history—along with Thomas Jefferson’s writings—suggests that the public has readily discerned the truth despite an onslaught of falsities. What has changed, then, in our modern era that inhibits our ability to distinguish between fact and fiction? And, furthermore, what can be done about it?

This Article examines recent legal and regulatory actions aimed at stemming the tide of fake news around the world. It argues that government regulation of fake news runs contrary to the principles of freedom of expression enshrined within democratic values. As an alternative, it encourages regulation from within the industry in combination with a greater emphasis on media literacy around the world.

## II. GLOBAL ATTEMPTS TO REGULATE FAKE NEWS

As the tide of anger-inspiring websites continues to churn out false reports en masse, sending shockwaves through the Internet, political leaders around the globe are debating the development of policies and practices aimed at curbing the spread of sensationalist and often made-up “fake news” stories that are influencing their citizens.

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<sup>20</sup> Emma Jane Kirby, *The City Getting Rich from Fake News*, BBC (Dec. 5, 2016), <http://www.bbc.com/news/magazine-38168281>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Yellow Journalism*, PBS, [http://www.pbs.org/crucible/frames/\\_journalism.html](http://www.pbs.org/crucible/frames/_journalism.html).

<sup>24</sup> Samantha Subramanian, *Inside the Macedonian Fake-News Complex*, WIRED (Feb. 15, 2017), <https://www.wired.com/2017/02/veles-macedonia-fake-news>.

Countries have adopted various approaches in the battle against what some have called the “fake news epidemic,”<sup>25</sup> all of which tend to fall into three main categories. Under the first approach, a number of countries are calling for, or funding, private sector initiatives to more carefully scrutinize content on the Internet. Similarly, other nations have developed initiatives that authorize government agencies to scrutinize and report fake news content. Finally, some countries have opted to regulate fake news through legislative means by enacting or enforcing laws that impose fines or jail time on parties who are responsible for the creation or dissemination of fake news.

Although the focus of this Article centers on the legislative means of regulating fake news, often the most extreme and controversial approach, the other two approaches must also be addressed. Not surprisingly, all three regulatory schemes have been met with resistance from law professors, civil society, and others’ concerns about the impact of such a crackdown on freedom of expression.<sup>26</sup>

#### A. Private Sector Efforts

The most prominent private sector attempts at regulation have come from social media platforms—i.e., Ground Zero for the spread of fake news today. U.S. companies Facebook and Twitter have garnered the most headlines for their attempts to regulate fake news content on their sites.<sup>27</sup> With more than two billion monthly active users,<sup>28</sup> Facebook, along with many other social media platforms, has changed how the public consumes information—including fake news and other content.<sup>29</sup> Through a combination of careless news consumption and the remarkable speed of post sharing, social media’s low cost and wide reach provides an unbeatable platform for the spread of fake news. As a result, Americans witnessed the manipulation of public opinion through the dissemination of fake news via

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<sup>25</sup> *Hillary Clinton Warns of ‘Fake News Epidemic’*, BBC (Dec. 9, 2016), <http://www.bbc.com/news/world-us-canada-38258967>.

<sup>26</sup> *French Opposition, Twitter Users Slam Macron’s Anti-Fake-News Plans*, REUTERS (Jan. 5, 2018), <https://www.reuters.com/article/us-france-macron-fakenews/french-opposition-twitter-users-slam-macrons-anti-fake-news-plans-idUSKBN1EU161>.

<sup>27</sup> Alex Hern, *Twitter May Introduce Feature to Let Users Flag ‘Fake News,’* GUARDIAN (June 30, 2017), <https://www.theguardian.com/technology/2017/jun/30/twitter-could-introduce-feature-to-let-users-flag-fake-news>.

<sup>28</sup> As of the third quarter of 2017.

<sup>29</sup> Carol D. Leonnig, Tom Hamburger & Rosalind S. Helderman, *Russian Firm Tied to Pro-Kremlin Propaganda Advertised on Facebook During Election*, WASH. POST (Sept. 6, 2017), [https://www.washingtonpost.com/politics/facebook-says-it-sold-political-ads-to-russian-company-during-2016-election/2017/09/06/32f01fd2-931e-11e7-89fa-bb822a46da5b\\_story.html](https://www.washingtonpost.com/politics/facebook-says-it-sold-political-ads-to-russian-company-during-2016-election/2017/09/06/32f01fd2-931e-11e7-89fa-bb822a46da5b_story.html).

social media during the 2016 U.S. Presidential election.<sup>30</sup> One example was the widespread circulation of an article from the fake website denverguardian.com with the headline, “FBI agent suspected in Hillary email leaks found dead in apparent murder-suicide.”<sup>31</sup> Facebook, one of the world’s largest companies by market capitalization,<sup>32</sup> eventually joined the fight against fake news after its platform drew significant scrutiny even though founder Mark Zuckerberg initially rebuffed claims that his company must take responsibility for the site’s content.<sup>33</sup>

Since the United States election, Facebook has experimented with multiple approaches to combat fake news, with most efforts ultimately having little impact. Zuckerberg’s company took action shortly after allegations arose linking the spread of fake news on Facebook with the outcome of the presidential election.<sup>34</sup> Kicking off a series of initiatives, Facebook targeted 30,000 fake accounts in the lead-up to the French election in an effort to debunk false claims. It ran full-page ads in French newspapers, offering guidance to French voters on spotting fake news the weeks preceding the election.<sup>35</sup>

Other efforts by Facebook were greeted with more critical responses, including efforts aimed at helping users identify fake content on its own platform. Facebook experimented with various methods of promoting

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<sup>30</sup> For example, one of the most popular fake news posts that circulated online was an article from the fake website denverguardian.com, which presented the headline, “FBI agent suspected in Hillary email leaks found dead in apparent murder-suicide.” Election coverage also saw the resurgence of a 2014 fake headline from the “conservative, libertarian, free market and pro-family” blog WesternJournalism.com that claimed Florida democrats voted to enact Sharia law, <http://www.politifact.com/florida/statements/2014/may/08/blog-posting/florida-democrats-just-voted-impose-sharia-law-wom>. More examples of fake news stories from the 2016 can be found in a discussion on *PolitiFact* at <http://www.politifact.com/truth-o-meter/article/2016/dec/13/2016-lie-year-fake-news>. See also Hunt Allcott & Matthew Gentzkow, *Social Media & Fake News in the 2016 Election*, 31 J. ECON. PERSPECTIVES 211-36 (2017), [https://www.aeaweb.org/full\\_issue.php?doi=10.1257/jep.31.2](https://www.aeaweb.org/full_issue.php?doi=10.1257/jep.31.2).

<sup>31</sup> Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSPECTIVES 211-36 (2017), [https://www.aeaweb.org/full\\_issue.php?doi=10.1257/jep.31.2](https://www.aeaweb.org/full_issue.php?doi=10.1257/jep.31.2).

<sup>32</sup> Sean Illing, *Why “Fake News” is an Antitrust Problem*, VOX (Sept. 23, 2017), <https://www.vox.com/technology/2017/9/22/16330008/facebook-google-amazon-monopoly-antitrust-regulation>.

<sup>33</sup> Kurt Wagner, *Mark Zuckerberg Admits He Should Have Taken Facebook Fake News and The Election More Seriously: ‘Calling That Crazy Was Dismissive and I Regret It,’* RECODE (Sept. 27, 2017), <https://www.recode.net/2017/9/27/16376502/mark-zuckerberg-facebook-donald-trump-fake-news>.

<sup>34</sup> Mike Isaac, *Facebook Considering Ways to Combat Fake News, Mark Zuckerberg Says*, N.Y. TIMES (Nov. 19, 2016), <https://www.nytimes.com/2016/11/20/business/medim/facebook-considering-ways-to-combat-fake-news-mark-zuckerberg-says.html>.

<sup>35</sup> Seth Fiegerman, *Facebook’s global fight against fake news*, CNN (May 9, 2017, 10:35 AM), <http://money.cnn.com/2017/05/09/technology/facebook-fake-news/index.html>.

content created by fact-checking organizations and groups who followed the principles outlined by the International Fact Checking Network, including giving these stories special placement in its News Feed.<sup>36</sup> Another initiative was aimed at optimizing algorithms to promote comments containing the word “fake” to prominent positions under the Shared News feature.<sup>37</sup> Other changes included providing publisher information to the users,<sup>38</sup> and employing “trust indicators,” which were used by more than 75 news organizations to display an icon showing how a story was reported and the credentials of the reporters.<sup>39</sup>

But the “Disputed” flag was perhaps the most controversial of Facebook’s changes. Designed to flag certain stories identified as fake and provide users with links to articles giving additional facts or context to explain why the original article was questionable, the “Disputed” flag drew significant criticism.<sup>40</sup> In December 2017, Facebook announced it was ending the program.<sup>41</sup> Rather than encouraging media literacy and critical consumption, data suggests the program suffered from a number of shortcomings. The process of tagging articles was time-consuming, resulting in the continued sharing of many fictitious articles before they were properly tagged.<sup>42</sup> In some instances, properly tagged fake news articles went viral as a reaction to the perception that Facebook was attempting to silence certain groups or views.<sup>43</sup> Concerns also arose about Facebook’s potential bias, with some claiming the social media platform was targeting stories that did not agree with certain ideologies. In one instance, Facebook was accused of

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<sup>36</sup> Craig Silverman, *Facebook Is Turning To Fact-Checkers To Fight Fake News*, BUZZFEED (Dec. 15, 2016, 9:59 AM), <https://www.buzzfeed.com/craigsilverman/facebook-and-fact-checkers-fight-fake-news>.

<sup>37</sup> Jane Wakefield, *Facebook's fake news experiment backfires*, BBC (Nov. 7, 2017), <http://www.bbc.com/news/technology-41900877>.

<sup>38</sup> Tom Huddleston Jr., *Facebook's Latest Attempt at Fighting Fake News Is to Provide Publisher Info*, FORTUNE (Oct. 5, 2017), <http://fortune.com/2017/10/05/facebook-test-more-info-button-fake-news>.

<sup>39</sup> Mike Snider, *Facebook, Google, Twitter and media outlets fight fake news with "trust indicators,"* USA TODAY (Nov. 16, 2017), <https://www.usatoday.com/story/tech/news/2017/11/16/facebook-google-twitter-and-media-outlets-fight-fake-news-trust-indicators/869200001>.

<sup>40</sup> *Id.*

<sup>41</sup> Thuy Ong, *Facebook Found a Better Way to Fight Fake News*, VERGE (Dec. 21, 2017), <https://www.theverge.com/2017/12/21/16804912/facebook-disputed-flags-misinformation-newsfeed-fake-news>.

<sup>42</sup> Sam Levin, *Facebook Promised to Tackle Fake News. But the Evidence Shows It's Not Working,* GUARDIAN (May 16, 2017), <https://www.theguardian.com/technology/2017/may/16/facebook-fake-news-tools-not-working>.

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

ignoring fake news that had an anti-abortion slant.<sup>44</sup> Further, the “Disputed” flags were appended to individual articles, which failed to prevent users from spreading other versions of the same fake news article.<sup>45</sup>

Even after a “Disputed” flag was placed on a story, there was no guarantee that readers would take the time to look for truthful information. A 2016 study conducted by Yale University showed that news tagging on social media does not correct misinformation conveyed by fake news headlines or the temper impact that such misinformation has on readers.<sup>46</sup> Despite some of these best efforts, the task of reducing fake news through social media has proved to be a difficult—arguably unwinnable—task. As Facebook itself concluded, there is no “silver bullet” approach to fake news.<sup>47</sup>

In response to concerns about fake news, Twitter—along with Facebook and Google—announced in November 2017 it would employ “trust indicators” to assist users in evaluating content on its site.<sup>48</sup> However, it provided no additional information beyond the generic agreement to participate. Even the Trust Project’s own website failed to mention Twitter’s subsequent involvement, noting that 10 sites – none of which include major social media platforms—have displayed and tested the “Trust indicators.”<sup>49</sup>

Private sector organizations and individuals, like the International Fact Checking Network, have also stepped up to voluntarily participate in the battle against fake news. In Ukraine, a group of lecturers, graduates and students from Kyiv’s Mohyla Journalism School operate the highly respected Stopfake.org, a fact-checking website focused on denouncing dubious claims made by Russian-backed media organizations.<sup>50</sup> These include false claims

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<sup>44</sup> Rossalyn Warren, *Facebook Is Ignoring Anti-Abortion Fake News*, N.Y. TIMES (Nov. 10, 2017), <https://www.nytimes.com/2017/11/10/opinion/facebook-fake-news-abortion.html>.

<sup>45</sup> Sam Levin, *Facebook Promised to Tackle Fake News. But the Evidence Shows It’s Not Working*, GUARDIAN (May 16, 2017), <https://www.theguardian.com/technology/2017/may/16/facebook-fake-news-tools-not-working>.

<sup>46</sup> Gordon Pennycook and David G. Rand, *The Implied Truth Effect: Attaching Warnings to A Subset of Fake News Stories Increases Perceived Accuracy of Stories Without Warnings*, Yale University Research Paper, 2016; see also Jason Schwartz, *Tagging fake news on Facebook doesn’t work, study says*, POLITICO (Sept. 12, 2017), <https://www.politico.eu/article/tagging-fake-news-on-facebook-doesnt-work-study-says>.

<sup>47</sup> *Is Facebook Losing the Battle Against Fake News? Facebook Has Hired Fact Checkers, But Critics Say this is Not Enough*, HUFFINGTON POST, (Oct. 31, 2017), [http://www.huffingtonpost.co.za/2017/10/31/is-facebook-losing-the-battle-against-fake-news\\_a\\_23261493](http://www.huffingtonpost.co.za/2017/10/31/is-facebook-losing-the-battle-against-fake-news_a_23261493).

<sup>48</sup> Seth Fiegerman, *Facebook, Google, Twitter to Fight Fake News with ‘Trust Indicators’*, CNN (Nov. 16, 2017), <http://money.cnn.com/2017/11/16/technology/tech-trust-indicators/index.html>.

<sup>49</sup> The Trust Project, <https://thetrustproject.org> (last visited May 25, 2020).

<sup>50</sup> Scott Roxborough, *How Europe is Fighting Back Against Fake News*, HOLLYWOOD REPORTER (Aug. 21, 2017), <http://www.hollywoodreporter.com/news/how-europe-is-fighting-back-fake-news-1030837>.

that the Ukrainian government is run by neo-Nazis, for example. Elsewhere, websites such as Snopes.com—perhaps the web’s premier fact-checking site—have continued to debunk rumors and other misinformation circulating on the Internet.<sup>51</sup> Snopes certainly is not alone; The Tampa Bay Times operates Politifact, and the Annenberg Public Policy Center at the University of Pennsylvania runs FactCheck.org. Launched in September 2015, the Poynter Institute’s International Fact Checking Network takes the form of a coalition, enlisting the help of fact checkers worldwide.<sup>52</sup> Ultimately, though, it seems these piece-meal, private efforts are no match for the large-scale fake news industry well-versed in taking advantage of the speed and reach of social media.

### *B. Non-Legislative Efforts by Governments*

In addition to private-sector efforts to stem the tide of fake news, many European countries are taking more official actions. Often aimed at concerns about the political impact of fake news, these efforts have taken two primary forms: legislative and non-legislative mandates. Non-legislative mandates, the topic of this section, include government initiatives that use the coercive powers of the state—absent the legislative deliberative process—to police the creation and spread of fake news.

Several governments have created special units within their auspices that are designed to investigate fake news. Often, these agencies are intended to address the undue influence posed by fictitious content in the months and weeks leading up to election cycles.<sup>53</sup> One of the most influential efforts started in the Czech Republic, where officials expressed concern about potential interference with the 2017 parliamentary and presidential elections.<sup>54</sup> There, the “alternative news business” has thrived, with populist-inspired sites working to stir general discontent among voters.<sup>55</sup> “It seems to me that the overall effort is more to foment mistrust in institutions, in traditional parties, in sort of traditional institutional sources of authority. It doesn’t seem to me that there would be a unified or orchestrated effort

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<sup>51</sup> Michelle Dean, *Snopes and the Search for Facts in a Post-Fact World*, WIRED (Sept. 20, 2017), <https://www.wired.com/story/snopes-and-the-search-for-facts-in-a-post-fact-world>.

<sup>52</sup> *Fact-Checking*, POYNTER INSTITUTE, <https://www.poynter.org/channels/fact-checking>.

<sup>53</sup> Anisah Shukry, *Malaysia Gears Up for Election as Najib Targets ‘Fake News,’* BLOOMBERG (Jan. 5, 2018), <https://www.bloomberg.com/news/articles/2018-01-05/malaysia-gears-up-for-election-as-najib-targets-fake-news>.

<sup>54</sup> Rob Cameron, *Fake news: Czechs Try to Tackle Spread of False Stories*, BBC (Feb. 2, 2017), <http://www.bbc.com/news/world-europe-38808501>.

<sup>55</sup> Emily Schultheis, *The Czech Republic’s Fake News Problem*, ATLANTIC (Oct. 21, 2017), <https://www.theatlantic.com/international/archive/2017/10/fake-news-in-the-czech-republic/543591>.

[among the sites] to support this or that political party or movement.”<sup>56</sup> Nonetheless, political leaders openly expressed concern.<sup>57</sup> In response to concerns raised in a national security audit, the Interior Minister established the Centrum Proti Terorismu a Hybridnim Hrozbam (Centre Against Terrorism and Hybrid Threats), which began operations in early 2017.<sup>58</sup> Interestingly, the government asserts it was not created as a law enforcement agency or intelligence service.<sup>59</sup> Instead, its stated mission is to “inform about serious cases of disinformation and . . . provide expert opinions for the public and government institutions.”<sup>60</sup>

Finland announced plans in early 2017 to build a similar center, in partnership with nine EU countries,<sup>61</sup> including the United States and NATO.<sup>62</sup> The European Centre of Excellence for Countering Hybrid Threats, was designed to unify efforts to fight disinformation and fake news by consolidating expertise and resources.<sup>63</sup> Like the Czech Republic, many of the countries involved “have been particularly concerned over what they say are Russia’s aggressive disinformation campaigns and systematic spreading of false news on their countries.”<sup>64</sup> Envisioned more as a strategic hub to centralize efforts to combat fake news and cyber hacks, the center’s mission does not formally include law enforcement or surveillance mandates.<sup>65</sup>

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

<sup>57</sup> James Shotter, *Czechs Fear Russian Fake News in Presidential Election*, FINANCIAL TIMES (Jan. 8, 2018), <https://www.ft.com/content/c2b36cf0-e715-11e7-8b99-0191e45377ec>.

<sup>58</sup> CENTRE AGAINST TERRORISM & HYBRID THREATS, <http://www.mvcr.cz/cthh/clanek/centre-against-terrorism-and-hybrid-threats.aspx> (last visited May 15, 2020).

<sup>59</sup> “Given the competencies of the Ministry of the Interior, the Centre will monitor threats directly related to internal security, which implies a broad array of threats and potential incidents relative to terrorism, soft target attacks, security aspects of migration, extremism, public gatherings, violation of public order and different crimes, but also disinformation campaigns related to internal security. Based on its monitoring work, the Centre will evaluate detected challenges and come up with proposals for substantive and legislative solutions that it will also implement where possible. It will also disseminate information and spread awareness about the given issues among the general and professional public.” *Id.*

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

<sup>61</sup> The countries include Britain, Finland, France, Germany, Latvia, Lithuania, Poland and Sweden, along with the United States. See Jari Tanner, *New Center to Combat Disinformation to be Built in Finland*, ASSOCIATED PRESS (Apr. 11, 2017), <https://www.apnews.com/d5b1763ae5ad463ba8bc4ff5fa23816>.

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

<sup>63</sup> Hilary Lamb, *‘Hybrid Threat’ Centre to be Built in Finland to Counter Fake News*, ENGINEERING & TECH. (Apr. 12, 2017), <https://eandt.theiet.org/content/articles/2017/04/hybrid-threat-centre-to-be-built-in-finland-to-counter-fake-news>.

<sup>64</sup> See Tanner, *supra* note 61.

<sup>65</sup> The functions of Hybrid CoE include the following: “to encourage strategic-level dialogue and consulting between and among Participants, the EU and NATO; to conduct research and analysis into hybrid threats and methods to counter such threats; to develop doctrine, conduct training and arrange exercises aimed at enhancing the Participants’ individual capabilities, as well

Although the center officially launched operations in September 2017 with three additional countries participating, few accounts of its efforts or successes have been publicized.

### *C. Legislative Efforts by Governments*

The third—and arguably most troubling—approach to the regulation of fake news involves legislative efforts by governments around the world. Throughout Europe and Asia, governments have enacted or begun to enforce laws penalizing—and often criminalizing—the creation and distribution of fake news. The legislative proposals, some of which have recently taken effect as law, have drawn harsh criticism from attorneys, legal scholars and other civil society groups because of the chilling effect they are likely to have on freedom of expression.

Germany’s enactment of a law aimed at penalizing social media platforms who fail to stop the spread of fake news has garnered significant attention worldwide. The law, titled *Netzwerkdurchsetzungsgesetz* and known as NetzDG, was passed in 2017, and Germany began enforcing it January 1, 2018.<sup>66</sup> The law authorizes fines of up to 50 million Euros against social media platforms who fail to remove “obviously illegal” content, including hate speech and fake news within 24 hours of being notified.<sup>67</sup> Content that is not obviously illegal must be removed within 7 days of notification. Additionally, individuals responsible for removing content could be held liable for up to five million Euros in penalties under the new regime.<sup>68</sup> Although the law was designed to target Facebook, Twitter and YouTube, it could also impact Reddit, Tumblr, Vimeo, Flickr and Russian platform VK, all of which are popular in Germany.<sup>69</sup> Companies will be

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as interoperability between and among Participants, the EU and NATO for countering hybrid threats; to engage with and invite dialogue with governmental and non-governmental experts from a wide range of professional sectors and disciplines; and to involve, or cooperate with, communities of interest (COI) focusing on specific activities that may constitute hybrid threats, on methodologies for understanding these activities, and on ways to adjust organizations to better address such threats effectively.” *Memorandum of Understanding: On the European Centre of Excellence for Countering Hybrid Threats*, HYBRID COE, 2 (Dec. 6, 2016), <https://www.hybridcoe.fi/wp-content/uploads/2017/08/Hybrid-CoE-final-Mou-110417-1.pdf>. (last visited May 26, 2020)

<sup>66</sup> *Germany Starts Enforcing Hate Speech Law*, BBC (Jan. 1, 2018), <http://www.bbc.com/news/technology-42510868>.

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

<sup>68</sup> *Germany Approves Plans to Fine Social Media Firms Up to €50M*, GUARDIAN (June 30, 2017), <https://www.theguardian.com/media/2017/jun/30/germany-approves-plans-to-fine-social-media-firms-up-to-50m>.

<sup>69</sup> *Id.*

required to publish biannual reports outlining reported complaints and their resolution.<sup>70</sup>

Although Germany's new law is by far the "boldest step" taken by a Western democracy, other countries, such as the Philippines, Ireland and France, have undertaken similar legislative moves. In June 2017, Filipino senator Joel Villanueva filed a bill aimed at curtailing fake news.<sup>71</sup> The bill titled "Penalizing Malicious Distribution of False News and Other Related Violations" cites the German law in support of the effort in the Philippines. The act defines fake news as content that would intend "to cause panic, division, chaos, violence, and hate, or those which exhibit a propaganda to blacken or discredit one's reputation."<sup>72</sup> The bill established penalties of 5 million Pesos (approximately \$100,000USD) and up to 5 years in prison for private citizens while fines and jail sentences for public officials found guilty are increased two-fold.<sup>73</sup> Media platforms would face up to 20 million Peso fines or 10 years in prison for failing to remove fake news.<sup>74</sup> In a surprising announcement, Philippine President Rodrigo Duterte condemned the proposed law, saying the measure amounted to censorship.<sup>75</sup> Duterte objected to fake news laws citing that they violate the freedom of expression.

French President Emmanuel Macron became the latest Western leader to take on fake news when he called for additional regulation. French politicians, like those in many European countries, have expressed concern about political manipulation through fake news or advertisement on social media. During Macron's new year speech to journalists, he promised a new law to impose tougher rules on social media companies and place limits on political ads in an effort to limit undue political influence.<sup>76</sup> Short on specifics, Macron emphasized the need for transparency in sources of

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<sup>70</sup> *Id.*

<sup>71</sup> Eimor P. Santos, *Bill Filed vs. Fake News: Up to P10M Fine, 10-Year Jail Time for Erring Public Officials*, CNN PHILIPPINES (June 22, 2017, 7:30 PM), <http://cnnphilippines.com/news/2017/06/22/senate-bill-fake-news-fines-government-officials.html>.

<sup>72</sup> Senate of the Philippines, [https://www.senate.gov.ph/lis/bill\\_res.aspx?congress=17&q=SBN-1492](https://www.senate.gov.ph/lis/bill_res.aspx?congress=17&q=SBN-1492) (last visited May 15, 2020).

<sup>73</sup> Santos, *supra* note 71.

<sup>74</sup> Stanley Cabigas, *Philippine Senator Moves to Criminalize 'Fake News' — Could this Lead to Censorship?*, GLOBAL VOICES (July 7, 2017, 3:57 PM), <https://advox.globalvoices.org/2017/07/07/philippine-senator-moves-to-criminalize-fake-news-could-this-lead-to-censorship>.

<sup>75</sup> Pia Gutierrez, *Duterte Says Proposed Law vs. 'Fake News' Won't Pass*, ABS-CBN NEWS (Oct. 4, 2017), <http://news.abs-cbn.com/news/10/04/17/duterte-says-proposed-law-vs-fake-news-wont-pass>.

<sup>76</sup> Yasmeen Serhan, *Macron's War on 'Fake News'*, ATLANTIC (Jan. 6, 2018), <https://www.theatlantic.com/international/archive/2018/01/macrons-war-on-fake-news/549788>.

apparent news content.<sup>77</sup> He also expressed support for placing limits on the amount spent on political ads during elections.<sup>78</sup> Macron emphasized the need to protect democracy:

“Thousands of propaganda accounts on social networks are spreading all over the world, in all languages, lies invented to tarnish political officials, personalities, public figures, journalists. If we want to protect liberal democracies, we must have strong legislation.”<sup>79</sup> He went further in addressing the impetus for his proposed change, citing “destabilization attempts by television channels controlled or influenced by foreign states.”<sup>80</sup> Initially, however, it seemed his proposal would be more limited in scope than Germany’s sweeping law. As a candidate, Macron who was affected by fake news during the election cycle, so it should not be surprising that he emphasizes the time period leading up to voting.<sup>81</sup> One of the boldest measures he proposed included “an emergency legal action,” which would allow authorities to remove fake news content or even block a website from publishing during election seasons. Macron’s plan quickly received critical responses, including from opposition leader Marine Le Pen who questioned: “Who will decide if a piece of news is fake? Judges? The government?”<sup>82</sup>

Just a month earlier, the Irish Republican Party, known as Fianna Fáil, introduced a groundbreaking bill to regulate fake news in Ireland’s parliament, known as the Dáil.<sup>83</sup> It introduced the bill despite earlier warnings from the country’s information minister that there was no legal way to restrict fake news.<sup>84</sup> The bill targets individuals who use bots to spread false political information via social media, declaring the act punishable by five years in prison or fines of up to 10,000EUR.<sup>85</sup> The “Online Advertising and Social

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<sup>77</sup> Emmanuel Macron: *French President Announces ‘Fake News’ Law*, BBC (Jan. 3, 2018), <http://www.bbc.com/news/world-europe-42560688>.

<sup>78</sup> Melanie Ehrenkranz, *France’s President Macron Wants to Block Websites During Elections to Fight ‘Fake News’*, GIZMODO (Jan. 3, 2018, 11:13 AM), <https://gizmodo.com/frances-president-macron-wants-to-block-websites-during-1821770692>.

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

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

<sup>81</sup> Sebastian Shukla & Melissa Bell, *France to Crack Down on ‘Fake News’*, CNN (Jan. 3, 2018), <http://edition.cnn.com/2018/01/03/europe/macron-france-fake-news-law/index.html>.

<sup>82</sup> Charles Bremmer, *Macron’s War on Fake News From Russia Angers Le Pen*, TIMES (Jan. 5, 2018), <https://www.thetimes.co.uk/article/macrons-war-on-fake-news-from-russia-angers-le-pen-0s8tg0kqv>.

<sup>83</sup> *Irish Parliament to Debate Bill Proposing Jail Time for Spreading Fake News*, RUSSIA TODAY (Dec. 4, 2017), <https://www.rt.com/news/411910-irish-politician-fake-news-law>.

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

<sup>85</sup> Daniel Funke, *In Ireland, Lawmakers Are Trying to Criminalize the Use of Bots To Spread Political Misinformation*, POYNTER INST. (Dec. 8, 2017), <https://www.poynter.org/fact-checking/2017/in-ireland-lawmakers-are-trying-to-criminalize-the-use-of-bots-to-spread-political-misinformation>.

Media (Transparency) Bill 2017,” outlaws the use of bots to create 25 or more online presences in an attempt to sway political debate.<sup>86</sup> In addition, to increase transparency, the bill mandates the identification of publishers and sponsors of political advertising online.<sup>87</sup>

The bill was proposed based on concerns of the use of bots to spread fake news—similar to incidents surrounding Brexit and the 2016 U.S. presidential election—could impact the Irish political climate.<sup>88</sup> Although Fianna Fáil and James Lawless, who authored the bill, acknowledge that Irish politics have not been heavily affected by fake news, he cautioned that Ireland should be aware of the “new form of hybrid information warfare which is underway on social media.”<sup>89</sup>

Ireland is not the only country whose battle against fake news has been justified on the basis of transparency in political advertising. Fianna Fáil’s proposal in Ireland largely mirrored the Honest Ads Act, a bill aimed to increase transparency in online political advertising in the United States. Similar versions of the bill, with bipartisan support, were introduced in both houses of Congress in October 2017. The proposed law would apply to any site with at least 50 million unique monthly visitors in the previous 12 months.<sup>90</sup> As a result, it would primarily impact Facebook and Twitter, though they are not named in the bill. The Honest Ads Act would require companies to keep copies of political ads and make them publicly available as well as maintain records of media buyers and rates charged for ads for no less than four years.<sup>91</sup> It would apply to anyone who spends \$500 or more on political ads. Like the Irish bill and other attempts to regulate fake news, the Honest Ads Act was introduced in response to Facebook’s Russia-linked ads scandal, where millions of Americans saw politically divisive Russian-

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<sup>86</sup> Online Advertising and Social Media (Transparency) Bill 2017 (Act No. 150/ 2017) (Ir.) <http://www.oireachtas.ie/documents/bills28/bills/2017/15017/b15017d.pdf>.

<sup>87</sup> *New Bill Will Help Make Political Advertising on Social Media More Transparent - Fianna Fail*, EVENING ECHO (June 6, 2017, 7:09 PM), <http://www.eveningecho.ie/oneaday/New-bill-will-help-make-political-advertising-on-social-media-more-transparent-Fianna-Fail-e17403a9-afd8-4273-9365-266b65be3d85-ds>.

<sup>88</sup> Frances Mulraney, *Sharing “Fake News” in Ireland Could Soon be Illegal, with \$10k Fine Attached*, IRISH CENTRAL (Dec. 17, 2017), <https://www.irishcentral.com/news/politics/fake-news-ireland>.

<sup>89</sup> Kevin Doyle, *Five Years in Jail for Spreading 'Fake News' Under FF Proposal*, INDEPENDENT (Jan. 8, 2018, 2:30 AM), <https://www.independent.ie/irish-news/politics/five-years-in-jail-for-spreading-fake-news-under-ff-proposal-36375745.html>.

<sup>90</sup> Luis Gomez, *What is the Honest Ads Act and Can it Stop Fake Political Ads on Social Media?*, SAN DIEGO UNION-TRIBUNE (Oct. 31, 2017, 6:06 PM), <http://www.sandiegouniontribune.com/opinion/the-conversation/sd-what-is-honest-ads-act-can-it-stop-fake-political-ads-twitter-facebook-20171031-htmlstory.html>.

<sup>91</sup> Colin Lecher, *Senators announce new bill that would regulate online political ads*, VERGE (Oct. 19, 2017, 1:31 PM), <https://www.theverge.com/2017/10/19/16502946/facebook-twitter-russia-honest-ads-act>.

purchased ads on Facebook.<sup>92</sup> Unlike the Irish proposal, the Honest Ads Act does not contain criminal penalties.

Aside from the Honest Ads Act, legislative movements to punish and regulate fake news<sup>93</sup> have gained little traction in the United States because of the significant constitutional hurdles presented by the First Amendment.<sup>94</sup> However, one state law targeting fake news appeared to have been quietly enacted. In March 2017, a California lawmaker introduced legislation targeting fake news, but abruptly canceled scheduled hearings.<sup>95</sup> The proposed bill, called the California Political Cyberfraud Abatement Act, would have made it “unlawful for a person to knowingly and willingly make, publish or circulate on an Internet Web site . . . a false or deceptive statement designed to influence the vote.”<sup>96</sup> The bill was tabled without a public hearing shortly after the Electronic Frontier Foundation publicly criticized it.<sup>97</sup> Although it subsequently received no media attention, the California Legislative Information site recorded an amended version of the bill as being passed 40-0 in the California Assembly on September 11, 2017, and approved by California Governor Jerry Brown on October 12, 2017.<sup>98</sup> The amended bill broadens the definitions of political cyber-fraud and political Web site to arguably proscribe legal freedom of expression protected by the First Amendment. Based on the EFF critique, the new law would likely face significant legal hurdles if challenged in court. As recently as 2012, the U.S. Supreme Court reiterated First Amendment protection for false speech in

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<sup>92</sup> David Ingram, *Facebook says 10 million U.S. users saw Russia-linked ads*, REUTERS (Oct. 2, 2017, 8:06 AM), <https://www.reuters.com/article/us-facebook-advertising/facebook-says-10-million-u-s-users-saw-russia-linked-ads-idUSKCN1C71YM>.

<sup>93</sup> Jason Silverstein, *TV viewers keep asking the FCC to punish CNN for Trump coverage even though it can't*, N.Y. DAILY NEWS (Sept. 13, 2017), <http://www.nydailynews.com/news/politics/tv-viewers-fcc-punish-cnn-trump-coverage-article-1.3493595>.

<sup>94</sup> Andrew Blake, *California 'fake news' bill falters amid free speech concerns*, WASH. TIMES (Mar. 29, 2017), <http://www.washingtontimes.com/news/2017/mar/29/california-fake-news-bill-falters-amid-free-speech>.

<sup>95</sup> *Cyber Fraud Bill Would Make 'Fake News' Against the Law*, CBS L.A. (Mar. 31, 2017, 10:46 AM), <http://losangeles.cbslocal.com/2017/03/31/cyber-fraud-bill-would-make-political-fake-news-against-the-law>.

<sup>96</sup> Anthony L. Fisher, *Fake news is bad. Attempts to ban it are worse*, VOX (July 5, 2017, 10:24 AM), <https://www.vox.com/the-big-idea/2017/7/5/15906382/fake-news-free-speech-facebook-google>.

<sup>97</sup> Dave Maas, *Cal. Bill to Ban Fake News Would be Disastrous for Political Speech*, ELECTRONIC FRONTIER FOUNDATION (Mar. 28, 2017), <https://www.eff.org/deeplinks/2017/03/california-bill-ban-fake-news-would-be-disastrous-political-speech>.

<sup>98</sup>A.B. 1104, 2017-2018 Leg. Reg. Sess. (Cal. 2017), Legislative Info., [https://leginfo.ca.gov/faces/billVersionsCompareClient.xhtml?bill\\_id=201720180AB1104](https://leginfo.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201720180AB1104).

*United States v. Alvarez*, a case involving false claims about being awarded a military medal.<sup>99</sup>

In contrast, legislative efforts to punish fake news in China were among the first worldwide, with the country revising its criminal laws in October 2015. But the crackdown on rumor-mongering started even earlier, with the nation detaining bloggers in 2013 as part of its effort to maintain control over public opinion.<sup>100</sup> More recently, in November 2017, Chinese President Xi Jinping authorized the military's launch of a website where members of the public can report fake news.<sup>101</sup> Unsurprisingly, these moves were met with little public resistance and hardly attracted attention domestically and internationally. The government revised Article 291 of China's Criminal Law to address particular types of fake news, but the language used was noticeably vague. The new provision targets anyone who "fabricates or deliberately spreads on media, including on the Internet, false information regarding dangerous situations, the spread of diseases, disasters and police information, and who seriously disturb social order."<sup>102</sup> Although further regulation of fake news garnered criticism from human rights organizations as restricting free speech, the amendments to China's Criminal Law did not sound alarm among Chinese citizens living in an environment largely hostile to free speech. Similar to other countries discussed, China's rationale for the regulation was geared toward ensuring internal stability within its borders.

### III. FREEDOM OF EXPRESSION AS A DEMOCRATIC VALUE IN MODERN SOCIETY

The importance of information in modern society is undisputed; as the Internet continues to connect the modern world in ways previously only dreamed of, existing societies have morphed into information states that rely on the collection and use of information.<sup>103</sup> Thriving democracies need information to survive; democracy requires that its electorate be well-

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<sup>99</sup> *United States v. Alvarez*, 567 U.S. 709 (2012) (striking down the Stolen Valor Act, which criminalized false statements about being awarded military medals).

<sup>100</sup> Chris Buckley, *Crackdown on Bloggers is Mounted by China*, N.Y. TIMES (Sept. 10, 2013), <http://www.nytimes.com/2013/09/11/world/asia/china-cracks-down-on-online-opinion-makers.html>.

<sup>101</sup> *Chinese Military Sets Up Website to Report Leaks, Fake News*, HINDU (Nov. 19, 2017, 11:31 AM), <http://www.thehindu.com/news/international/china-military-sets-up-website-to-report-leaks-fake-news/article20555153.ece>.

<sup>102</sup> *China: New Ban on 'Spreading Rumors' About Disasters*, HUMAN RIGHTS WATCH (Nov. 2, 2015), <https://www.hrw.org/news/2015/11/02/china-new-ban-spreading-rumors-about-disasters>.

<sup>103</sup> Jack Balkin, *The First Amendment is an Information Policy*, 41 HOFSTRA L. REV. 1, 4 (2012).

informed,<sup>104</sup> and the “right to know” has become a standard that furthers the goals of governmental accountability and democratic self-governance.<sup>105</sup> As Justice Hugo Black noted, “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, [and] that a free press is a condition of a free society.”<sup>106</sup> After all, a democratic government derives its legitimacy from the consent of the governed. For that consent to be meaningful, citizens must be informed not only about what their government is doing, but also about newsworthy events that may affect their daily lives, the behavior of individuals whom they may elect into political office, and the activity of nations around the world.

However, control over the flow information must exist in a delicate balance. On one hand, democratic regimes must be careful to ensure that the fear of sensationalism, terrorism, or similar threats do not lead to overly-authoritative regulation that frustrates the principles of free expression.<sup>107</sup> On the other hand, these same governments have a vested interest<sup>108</sup> against the dissemination of information that may lead citizens down a disastrous path or pose a threat to national security.<sup>109</sup> The freedom of expression (and with it the rights encapsulated in the First Amendment of the United States Constitution)<sup>110</sup> is then caught in a battle over infrastructure and contrasting interests: there is a constant question of whether regulation is necessary and who, exactly, should be permitted to determine or apply any regulation.<sup>111</sup>

The dawn of Internet speech has only complicated the matter. Where previously issues of speech and press existed on newsstands and at street protests, social media’s emergence as a formidable platform for speech has changed how the world communicates. It has also caused attorneys and legislators alike to question how existing law should apply to emerging media. Tech companies have considered this, too; because the First Amendment, in practice, covers a host of values that serve as the foundation

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<sup>104</sup> Thomas Jefferson, Letter to Richard Price, Jan. 8, 1789, <http://www.loc.gov/exhibits/jefferson/60.html>.

<sup>105</sup> Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People’s Elusive ‘Right to Know’*, 72 MD. L. REV. 1, 9 (2012).

<sup>106</sup> *Associated Press v. United States*, 361 U.S. 1, 20 (1945).

<sup>107</sup> Balkin, *supra* note 103, at 5.

<sup>108</sup> *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 593 (1980) (Rehnquist, J., dissenting).

<sup>109</sup> In *Associated Press v. United States*, Justice Black noted that “[i]t would be strange . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom.” *Associated Press*, 361 U.S. at 20.

<sup>110</sup> The First Amendment guarantees the right of free speech, press, petition, assembly, and religion. U.S. CONST. AMEND. I.

<sup>111</sup> Balkin, *supra* note 103, at 7.

for the social practices regarding free speech,<sup>112</sup> American-based platforms—such as Google and Facebook—have allowed First Amendment principles to permeate their content policies and regulatory approaches.<sup>113</sup> At first blush, one might scoff at this, resting on the fact that private companies are exempt from much of First Amendment doctrine. However, when the vastness of Internet speech is considered, we see that the power to issue threats in favor of—or against—censorship in our modern information society rests not only in the hands of the government, but also—if not more so—in the hands of social media companies.<sup>114</sup>

Before addressing those questions, though, the “why” of the matter must be determined: Why do we (or should we) be wary of such regulation—especially when we have seen multiple instances where online speech, including fake news, has wrought havoc on elections,<sup>115</sup> individuals,<sup>116</sup> and companies<sup>117</sup> alike? The answer is simple: freedom of expression—be it online, in print, or spoken word—is a fundamental democratic principle that we cannot risk eroding.

In this section, we will examine the current democratic values through which we view the freedom of speech and expression, the “marketplace of ideas” theory and the concept of autonomy and democratic self-governance. Ultimately, we argue that the current models for fake news regulation are incompatible with these doctrines.

### A. Marketplace Theory

Arguably one of the most well-known theories on free expression, the “marketplace of ideas” was first introduced into the First Amendment canon

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<sup>112</sup> Nabihya Syed, *Real Talk About Fake News: Towards a Better Theory of Platform Governance*, 127 YALE L.J. FORUM 337, 338 (2017).

<sup>113</sup> Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 26 (2018).

<sup>114</sup> See Syed, *supra* note 112, at 356; Balkin, *supra* note 103, at 5.

<sup>115</sup> See Hunt Allcott and Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSPECTIVES 211 (2017).

<sup>116</sup> Dainel Funke, *A satirical fake news site apologized for making a story too real*, POYNTER (Nov. 30, 2017), <https://www.poynter.org/news/satirical-fake-news-site-apologized-making-story-too-real>; see *What is Cyberbullying*, CYBERBULLYING RESEARCH CENTER, <https://cyberbullying.org/what-is-cyberbullying>; see also Lyrissa Lidsky and Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying*, 77 MO. L. REV. 693 (2012)

<sup>117</sup> Online reviews from social media-based platforms, such as Yelp, have caused businesses to gain and lose business—and engage in ferocious litigation. See Michael Luca & Georgios Zervas, *Fake It Till You Make It: Reputation, Competition, and Yelp Review Fraud*, <http://people.hbs.edu/mluca/FakeItTillYouMakeIt.pdf>; Patricia Clark, *Yelp's Newest Weapon Against Fake Reviews: Lawsuits*, BLOOMBERG BUSINESS WEEK (Sept. 9, 2013), <http://www.businessweek.com/articles/2013-09-09/yelps-newest-weapon-against-fake-reviews-lawsuits>.

in 1919.<sup>118</sup> Stemming from the work of John Milton and John Stuart Mill,<sup>119</sup> the marketplace theory asserts that the answer to “bad” speech is “more speech”;<sup>120</sup> specifically, the marketplace theory posits that through societal engagement with a number of ideas, the best and most truthful statements rise to the forefront and prevail over false or misleading speech. Thus, the marketplace thrives when multiple, competing opinions are expressed freely for broad audiences.<sup>121</sup> This theory, supported by Justice Holmes’ famous dissent in *Abrams v. United States*,<sup>122</sup> lifts the freedom of expression to that of a fundamental right based on its ability to lead us to the discovery of truth.<sup>123</sup>

However, the marketplace theory is often critiqued as flawed for several reasons.<sup>124</sup> First, in some instances, the oversimplification of information can lead to a gross misunderstanding (or understatement) of the issue at hand. In other instances, truth becomes one of many factors or social values that go into the debate; a powerful argument can persuade the masses over a truthful one where it best suits the popular argument. Another critique of the marketplace centers on desirability and agreement. The marketplace can allow truth to be determined by a consensus; where many voices are permitted to chime in, consensus over agreeable statements (i.e., those which support a particular viewpoint) may triumph over facts.

When considering the marketplace theory in the fake news debate, it is easy to dismiss its importance because of these critiques. In fact, it can be argued that when it comes to online speech—such as fake news—the marketplace provides an excellent foundation for the right to free expression with little instruction on how to adapt it for the changing forms of speech.<sup>125</sup>

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<sup>118</sup> In *Abrams v. United States*, Justice Oliver Wendell Holmes stated in his dissent that, “[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .” *Abrams v. United States*, 250 U.S. 656, 630 (1919). Since then, the phrase and concept of the marketplace has frequently been used in U.S. Supreme Court jurisprudence. See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981); *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 592 (1980); *Red Lion Broadcasting, Co. v. FCC*, 395 U.S. 367, 390 (1969).

<sup>119</sup> See John Milton, *AREOPAGITICA; A SPEECH OF MR. JOHN MILTON FOR THE LIBERTY OF UNLICENSED PRINTING* (1644); John Stuart Mill, *ON LIBERTY* (1859).

<sup>120</sup> See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“[T]he remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.”).

<sup>121</sup> Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U.L. REV. 54, 68, 69 (1989).

<sup>122</sup> *Id.*

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

<sup>124</sup> Syed, *supra* note 112, at 340-42.

<sup>125</sup> See Syed, *supra* note 112, at 341.

When the marketplace theory was developed, there were far fewer individual voices contributing to the conversation. In a society in which allegiance to political belief may trump fact, how can the marketplace theory thrive if truth can be determined by consensus?

The answer ultimately comes from the marketplace itself. As the effects of fake news are felt worldwide, people are springing into action to combat it by using their own speech. As discussed in Section II, *supra*, private organizations and individuals have volunteered time and energy to provide information and platforms that combat fake news in the marketplace.<sup>126</sup> In the same vein, major players in the legacy media—along with reputable emerging media sources—have launched their own fact-checking platforms that help readers decipher certain statements in real time, closing a gap that fake sources often rush to fill.<sup>127</sup> Social media users, too, are prone to call out “fake news” through comments on the shared fake news content of other users or by providing factual information to correct the posted falsity. Although this method is not always successful, the truth is reiterated in the marketplace, allowing it to gain traction. These steps toward truth help clarify the ever-blurry line between fact and opinion, reiterating that the public can, in fact, be trusted with the “discrimination between truth and falsehood” as Thomas Jefferson once put it.<sup>128</sup> Even on the smallest of scales, the marketplace tends to correct itself—even when the odds are against it.

### B. *Democratic Self-Governance*

Another popular theory on free expression, democratic self-governance takes the focus away from the cacophony of the masses and draws focus to the individual’s personal views of his or her role in society. Under this theory, the freedom of speech serves as a necessary part of democracy in that it allows citizens to engage in and consume speech that helps shape their personal ideologies and actions. The self-governance theory was famously championed by American scholar and philosopher Alexander Meiklejohn, whose 1948 text on the theory remains a bulwark for the freedom of expression. The self-governance theory maintains that citizens must have access to all information deemed pertinent to their decision-making, including access to data, opinion, records, criticisms, or similar.<sup>129</sup> The theory posits that because citizens of a democracy are, indeed, its rulers, then

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<sup>126</sup> *Supra* notes 44-47.

<sup>127</sup> See *Politics: Fact Checker*, NPR, <https://www.npr.org/sections/politics-fact-check> (last visited May 25, 2020); see also Glenn Kessler, *Fact Checker: The Truth Behind The Rhetoric*, WASH. POST, <https://www.washingtonpost.com/news/fact-checker/> (last visited May 25, 2020).

<sup>128</sup> Jefferson, *supra* note 1.

<sup>129</sup> See *supra* notes 9-11.

nothing should inhibit the free-flow of information; rather, channels for expression should be open to all views in order for citizens to hear and understand all sides of any given issue so that they may “vote intelligently.”<sup>130</sup>

In a fiery concurrence, Justice Louis Brandeis launched this theory headlong into First Amendment doctrine in 1927.<sup>131</sup> Noting that the freedom of speech serves as the ultimate bedrock of democracy, Brandeis stated:

[T]he final end of [a] state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary . . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty[.]<sup>132</sup>

Thus, Brandeis reiterated that the “intensely individualist” role of speech is a necessity for a healthy citizenry.<sup>133</sup>

Because the freedom to speak is an “indispensable means” of the discovery of political truth, it follows that the self-governance theory affords the greatest protections for political speech.<sup>134</sup> It also provides broad protection for speech concerning government officials, primarily because the criticism and election of public officials is perhaps the “most common form” and effective method of political activity and self-awareness.<sup>135</sup> Because the government responds to the will of the people, Robert Post argued that “individuals from diverse traditions and communities must attempt to communicate with each other if they wish to participate in that dialogue

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<sup>130</sup> Ashutoush Bhagwat, *Free Speech Without Democracy*, 49 U.C. DAVIS L. REV. 59, 108 (2015).

<sup>131</sup> See *Whitney v. California*, 274 U.S. 357, 377 (1927). The importance of this concurrence cannot be understated for the imposition of the self-governance theory on First Amendment doctrine. See Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 682 (1988).

<sup>132</sup> *Id.*

<sup>133</sup> Brian C. Murchison, *Speech and the Self-Governance Value*, 14 WM. & MARY BILL RTS. J. 1251, 1261 (2006). While the theory of self-governance appears to apply solely to democracies at first blush, it has been argued that this theory is applicable to autocracies or other non-democratic nations. Consider that approximately 95% of existing constitutions have provisions that provide at least a small measure of protection for free expression. Thus, even non-democratic regimes find value in the idea of a “well-informed citizenry”—even where the motives behind informative actions may serve to benefit the State. See Bhagwat, *supra* note 130, at 63-64.

<sup>134</sup> Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961).

<sup>135</sup> Solum, *supra* note 121.

which will ultimately direct the actions of the entire nation.”<sup>136</sup> Considering this, the self-governance theory of free expression seemingly bolsters the argument against the regulation of speech and content—even fake news content.

A major point in the argument against fake news stems from the fact that it plays a proven role in the political process.<sup>137</sup> However, those who share questionable news content from fake news sites do so frequently as a method of promoting a specific factual view. For example, referring back to the “Pizzagate scandal” from Section I, *supra*, the fake news story that ultimately started the rumor stemmed from a group of citizens who opposed the democratic presidential platform based on personal political beliefs.<sup>138</sup> Although the outcome (and rumor) are decidedly farfetched and volatile, the rush to share and post the story on social media can be attributed to the political effect of the story rather than then source. Because reports of this nature affect the citizenry’s understanding of the political climate (and actions or motives of certain political factions), censoring this sort of content hinders the doctrine of self-governance in free expression. Rather than jump to a regulation of questionable speech, we must first allow this principle to work. For an individual to embark on the “discovery of truth,” he or she must be afforded the chance to see and hear all potential arguments, opinions, facts, and thoughts on a significant matter.<sup>139</sup> Only after one has had the chance to sift through the available information—no matter how bizarre—can one determine what is pertinent and true so that he or she may “vote intelligently.”<sup>140</sup>

Attempts to enact legislation or regulations that curtail the flow of free information frustrate this theory of self-governance. Regulation inevitably stifles certain opinions, regardless of their truth or falsity, hindering the political conversation. It also opens the door to further regulation that may affect other forms of speech; because the “fake news” label has expanded to encompass numerous types of undesirable, or “fake” content,<sup>141</sup> and because so much of the fake news debate rests on the opinions and beliefs of readers—which are, in many cases, immoveable—regulation risks subsuming content that citizens need to properly form their own personal views. To maintain the

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<sup>136</sup> Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 635-36 (1990).

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

<sup>138</sup> *See supra* notes 9-11.

<sup>139</sup> *Id.*

<sup>140</sup> Bhagwat, *supra* note 130.

<sup>141</sup> Angie Drobnic Holan, “*The Media’s Definition of Fake News vs. Donald Trump’s*,” PolitiFact (Oct. 18, 2017), <http://www.politifact.com/truth-o-meter/article/2017/oct/18/deciding-whats-fake-medias-definition-fake-news-vs>.

crucial idea of self-governance, we must seek methods that bolster the citizenry's ability to digest information rather than eliminate a channel of expression. The risks of regulation are simply too great; rather than place limitations on the political and expressive content available to citizens, we should consider arming them with the skills to hone their ability to engage in democratic self-governance.<sup>142</sup>

#### IV. EDUCATION VS. REGULATION: THE IMPORTANCE OF A LEARNED CITIZENRY

More than ever, challenges to freedom of expression increasingly threaten the fabric of our societies. As part of the Knight First Amendment Institute's Emerging Threats series, law professor Tim Wu recently argued that changes in the expressive environment have decreased the scarcity of speech and placed greater emphasis on attracting the attention of the audience.<sup>143</sup> As a result, he argued, the emerging threats are the ones that target listeners directly while undermining speech indirectly. Wu correctly identified variants of fake news as being chief among these emerging threats. Like Wu, we argue that the First Amendment alone cannot protect our democracy from these emerging threats. In fact, as the pace of technological change quickens, our legal system's ability to legislate meaningful change only lessens. Instead, we believe education—rather than regulation—to be the key weapon in the war against fake news. We are not alone; a number of the proposed solutions emanating out of Yale University's Fighting Fake News workshop favor various aspects of education over regulation.

As the workshop drew to a close, nearly all participants agreed on one overarching conclusion: that reestablishing trust in the basic institutions of a democratic society is critical to combat the systematic efforts being made to devalue truth. In addition to thinking about how to fight different kinds of "fake news," we need to think broadly about how to bolster respect for facts.<sup>144</sup>

At the outset, this education must include both content consumers and creators. Although media literacy is key to helping audiences evaluate the content they consume, better education of content creators—at all levels of

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

<sup>143</sup> Tim Wu, *Is the First Amendment Obsolete?* (Nov. 1, 2017), <https://ssrn.com/abstract=3096337>.

<sup>144</sup> *Fighting Fake News Workshop Report*, Information Society Project & Floyd Abrams Institute for Freedom of Expression (Mar. 7, 2017), [https://law.yale.edu/system/files/area/center/isp/documents/fighting\\_fake\\_news\\_-\\_workshop\\_report.pdf](https://law.yale.edu/system/files/area/center/isp/documents/fighting_fake_news_-_workshop_report.pdf).

schooling—is also essential to the role of truthful content in a democratic society.

Certainly, we do not believe these concepts to be novel in their nature – educators have, for years, called for greater curricular emphasis in both areas. More recently, though, it seems that society believes our “digital natives” arrive on the scene fully equipped with the skills they need to navigate the information-rich world in which we live.<sup>145</sup> Unfortunately, nothing could be further from the truth.<sup>146</sup> Anecdotal evidence from teachers’ organizations,<sup>147</sup> librarians’ associations,<sup>148</sup> and scholarly research from various corners of the world<sup>149</sup> suggests our young people are in need of media literacy just as their parents’ and grandparents’ generations did. These warnings correlate with Danah Boyd’s 2014 book, *It’s Complicated: The Secret Lives of Networked Teens*, where she argues we falsely assume that digital natives understand the influences of technology on their lives and identity development.<sup>150</sup> But where do we start? And what kinds of lessons will help stem the tide of fake news?

A 2016 study by researchers at Stanford University found that students—ranging in age from middle school to university, enrolled in poorly funded public inner-city schools and posh suburban private schools, having matriculated to large land-grant public universities or selective almost-Ivies—“are easily duped” online.<sup>151</sup> The study, which collected more than 7,000 responses, asked students to undertake a series of age-appropriate online tasks aimed at evaluating their media literacy, such as distinguishing an ad from a news story, understanding that a chart contained information from an advocacy organization or evaluating the source of a website that presents only one side of a controversial issue. Their findings were troubling: More

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<sup>145</sup> Marie Puybaraud, *Digital Natives: A Tech-Savvy Generation Enters the Workplace*, WORK DESIGN MAGAZINE (Feb. 1, 2012), <https://workdesign.com/2012/02/digital-natives-a-tech-savvy-generation-enters-the-workplace>.

<sup>146</sup> Alia Young, *Digital Natives, Yet Strangers to the Web*, ATLANTIC (Apr. 21, 2015), <https://www.theatlantic.com/education/archive/2015/04/digital-natives-yet-strangers-to-the-web/390990>.

<sup>147</sup> MacKenzie Masten, *15 Resources for Teaching Media Literacy*, ASCD IN SERVICE (Sept. 27, 2017), <http://inservice.ascd.org/15-resources-for-teaching-media-literacy/>.

<sup>148</sup> Marcus Banks, *Fighting Fake News: How Libraries Can Lead the Way on Media Literacy*, AMERICAN LIBRARIES (Dec. 27, 2016), <https://americanlibrariesmagazine.org/2016/12/27/fighting-fake-news>.

<sup>149</sup> Charlie Beckett, *Digital Natives and Media Literacy: New Report*, POLIS: JOURNALISM AND SOCIETY AT THE LSE (Feb. 27, 2010), <http://eprints.lse.ac.uk/77723>.

<sup>150</sup> DANAH BOYD, *IT’S COMPLICATED: THE SECRET LIVES OF NETWORKED TEENS* (Yale Univ. Press 2014).

<sup>151</sup> *Evaluating Information: The Cornerstone of Civic Online Reasoning*, Stanford History Education Group (Nov. 2016), <https://stacks.stanford.edu/file/druid:fv751yt5934/SHEG%20Evaluating%20Information%20Online.pdf>.

than 80 percent of the middle school students could not distinguish the ads from the news stories online. Forty percent of the high school students believed an unlabeled photo of deformed daisies on a photo-sharing platform supported a headline claiming to have evidence of toxic conditions near the Fukushima nuclear plant in Japan. Nearly all of the results suggest the same conclusion—digital natives do not have the skills necessary to evaluate information and separate fact from fiction.

A recent opinion piece in *The Hindu* came to similar conclusions, asserting the global need for media literacy in schools. It noted the lack of media literacy programs in schools: “Unfortunately, media education has been the concern of only some NGOs and not educational institutions. In the past few decades, media education training programs were conducted only by some social action groups that were involved in creating awareness among the general public about media.”<sup>152</sup>

Moreover, many organizations now include both the creation of media content as well as the consumption of media content as a fundamental aspect of media literacy. The National Association for Media Literacy in Education concludes that media literacy includes “the ability to access, analyze, evaluate, create and act using all forms of communication.”<sup>153</sup> Similarly, Common Sense Media suggests citizens must know how to “think critically,” be a “smart consumer of products and information,” identify “point of view,” “create media responsibly,” understand the “role of media in our culture” and identify an “author’s goal.”<sup>154</sup>

Professional groups, including the Alliance for a Media Literate America and the Association for Media Literacy, emphasize the need for continued media literacy education to develop informed and responsible citizens. Many media literacy educators agree on a core set of principles—advanced by researchers in the field—that citizens must understand to function effectively in a democratic society. Among them:

- Media are constructions
- Media representations construct reality.
- Media have commercial purposes.
- Audiences negotiate meaning.

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<sup>152</sup> Albert P. Rayan, *A Case for Media Literacy in School*, HINDU (Jan. 6, 2018), <http://www.thehindu.com/education/making-a-case-for-media-literacy-in-school/article22382765.ece>.

<sup>153</sup> *Media Literacy*, NATIONAL ASSOCIATION OF MEDIA LITERACY, <https://namle.net/publications/media-literacy-definitions> (last visited May 15, 2020).

<sup>154</sup> *What Is Media Literacy and Why Is It Important?*, COMMON SENSE MEDIA, <https://www.commonsensemedia.org/news-and-media-literacy/what-is-media-literacy-and-why-is-it-important> (last visited May 15, 2020).

- Each medium has its own forms, conventions, and language.
- Media contain values and ideologies.
- Media messages may have social consequences or effects.<sup>155</sup>

These principles focus not only on the informed consumption of content—a citizen's role as an audience member—but also on the responsible creation of content—the digital citizen's role as a member of the media.

## V. CONCLUSION

The passage of time has not eradicated the production of fake news in our society, and it is equally unlikely that the passage of laws regulating fake news will either. History suggests that citizens were once able to adequately separate fact from fiction—clearly recognizing that it was unlikely a renowned astronomer has spotted giant “man-bats.” Instead of attempting to legislate against fake news—a daunting task in the face of rapid technological change—society's greatest efforts must be focused on educating citizens so they can identify it. Doing so will uphold the principles of free expression, prevent the spread of fictitious content, and could even encourage more citizens to undertake some of the private sector efforts discussed above to combat fake news—either by identifying and alerting others to its existence, participating in fact-checking efforts or even responsibly creating their own content to add to the discussion. As Justice Louis Brandeis said, “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.”<sup>156</sup> In the battle against fake news, we have to overcome falsity with fact—not turn to censorship and regulation.

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<sup>155</sup> GAIL E. HALEY & DAVID M. CONSIDINE, *VISUAL MESSAGES: INTEGRATING IMAGERY INTO INSTRUCTION* (2ded. 1999).

<sup>156</sup> *Whitney*, 274 U.S. 357, at 377.

# LEGAL RESPONSIBILITY FOR FALSE NEWS

Tommaso Tani\*

In 2016 and 2017, the debate about *false news* reached its peak, leading several authors to a new specific legal categorization that explored a new limitation on freedom of speech. This article starts with an analysis of different frameworks (from the U.S. and Europe) that can be applied to design such limitations as well as their philosophical origins. Then, it demonstrates that if a proper definition is set, there is no room for the law to step in prescribing responsibility for false news; hence, digital intermediaries as well are exempted from any obligation to monitor, remove, or flag false information.

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\* Privacy and Media Consultant and Researcher, Law and Digital Technologies graduate, eLaw, Center for Law and Digital Technologies, Leiden, The Netherlands. The author would like to thank Professors Jan Oster and Wouter Hins for the helpful comments and reviews; Alan Sears for the invaluable support and suggestions; and finally, the staff of the *International Journalism Festival* for the constant and precious contributions. This article is based on the Advanced LL.M. Thesis the author submitted in fulfillment of the requirements of the Master of Laws: Advanced Studies Programme in Law and Digital Technology degree, Leiden Law School (Leiden University).

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#### I. INTRODUCTION: AIM, SCOPE AND METHODOLOGY

In the final months of 2016 during the midst of the U.S. Presidential campaign and elections, an important debate came out about “false/fake news,” “relative facts,” and “post-truth.” Those words ended up being named “word of the year” by Oxford Dictionaries.<sup>1</sup> The discussion was so strong that in several countries—Italy among them—there have been proposals to create specific laws, as well as a European authority (or a network of authorities), that could fight false news.<sup>2</sup> In 2015, the European Union established the East StratCom Task Force, a team with the precise goal to debunk and check information campaigns conducted by Russia.<sup>3</sup> In 2017, the Russian Foreign Ministry launched a website with the intent to flag what they consider “false news.”<sup>4</sup> Germany’s Justice Minister even proposed fines as

<sup>1</sup> Alison Flood, ‘Post-truth’ Named Word of the Year by Oxford Dictionaries, *GUARDIAN* (Nov. 15, 2016), <https://web.archive.org/web/20170714093147/https://www.theguardian.com/books/2016/nov/15/post-truth-named-word-of-the-year-by-oxford-dictionaries>.

<sup>2</sup> James Politi, *Italy Antitrust Chief Urges EU to Help Beat Fake News*, *FINANCIAL TIMES* (Dec. 29, 2016), <https://www.ft.com/content/e7280576-cddc-11e6-864f-20dcb35cede2>.

<sup>3</sup> *Questions and Answers About the East StratCom Task Force*, EUROPEAN UNION EXTERNAL ACTION (Nov. 26, 2015), <https://eeas.europa.eu/headquarters/headquarters-homepage/2116/questions-and-answers-about-the-east->

<sup>4</sup> The Ministry of Foreign Affairs of the Russian Federation, *Published Materials that Contain False Information About Russia*,

high as 50 million euros for social networks that do not remove defamatory and false news.<sup>5</sup> This issue gained particular relevance and concern throughout the media because of the new digital ecosystem in which news circulates today. The Digital News Report 2017 by the Reuters Institute for the Study of Journalism reported that over the half of U.S. citizens asked say they use social media as a source of news each week.<sup>6</sup> Facebook is by far the most important network for news but, inconsistently, a survey from BuzzFeed News and Ipsos Public Affairs found that 54% of the people who use Facebook as a news source trust news on the platform “only a little” or “not at all.”<sup>7</sup>

What is missing in the current debate is a proper legal analysis of what false news is: is this a new category of speech, or is it something that always existed? Are the existing laws on limitation of speech already adequately dealing with false news or should legislators step in to write new rules? Finally, is false news harmful? These questions are the starting point of my analysis and require looking back to the foundation of freedom of speech in order to be appropriately answered.

First, in Section II, two main approaches to freedom of expression will be briefly illustrated, one from the U.S. and one from Europe, starting with the background philosophical doctrines that strongly influenced them: Plato, Protagoras, Rousseau, Milton and Mill. Second, in Section III, the fundamental definition of false news will be deduced: it is only via a perfect understanding of its scope that it is possible to further assess the role that the law should have. Thus, three key aspects of the false news issue will be analyzed: (i) falsity, truthfulness and proof; (ii) insincerity—the point of view of the speaker; and (iii) the scope of the definition of false news. The last section will outline a scenario in which the remaining areas between

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<https://web.archive.org/web/20170617155119/http://www.mid.ru/en/nedostovernie-publikacii>.  
(last visited May 17, 2020).

<sup>5</sup> Anthony Faiola & Stephanie Kirchner, *How do You Stop Fake News? In Germany, with a Law*, WASH. POST (Apr. 5, 2017), [https://web.archive.org/web/20170617155351/https://www.washingtonpost.com/world/europe/how-do-you-stop-fake-news-in-germany-with-a-law/2017/04/05/e6834ad6-1a08-11e7-bcc2-7d1a0973e7b2\\_story.html](https://web.archive.org/web/20170617155351/https://www.washingtonpost.com/world/europe/how-do-you-stop-fake-news-in-germany-with-a-law/2017/04/05/e6834ad6-1a08-11e7-bcc2-7d1a0973e7b2_story.html).

<sup>6</sup> Nic Newman et al., *Reuters Institute Digital News Report 2017*, REUTERS INST. FOR THE STUDY OF JOURNALISM (2017), [https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital%20News%20Report%202017%20web\\_0.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital%20News%20Report%202017%20web_0.pdf).

<sup>7</sup> IPSOS Public Affairs, *IPSOS Public Affairs: BuzzFeed Facebook News* (Mar. 28, 2017), <https://assets.documentcloud.org/documents/3559451/Ipsos-Buzzfeed-News-Facebook-News-Survey-Topline.pdf>.

irrelevant information can define false news and false criminalized speech, where the law is not yet present—and where it should not be.

In Section IV, a *legally identifiable harm* will be introduced as a trigger for liability in spreading false news, similar to that found in defamation or hate speech cases. Indeed, it will be shown how the European approach and the public interest are not the correct ways to assess the lawfulness of false news. Conversely, it seems to be more appropriate to measure responsibility based on the harm inflicted to third parties. The main differences between false news and other criminalization of freedom of speech, namely defamation, hate speech, and genocide denial, will be briefly illustrated.

Finally, in Section V, an outline of the European approach to the liability of digital intermediaries will be given and will explain why such responsibility cannot be prescribed for the sharing of false news. At the end of my analysis, once it is assessed how false news (according to my definition) is something not yet taken into account by current regulations, it will finally be possible to answer the main question: to what extent should the law prescribe responsibility for false news, and subsequently, what is the role of digital intermediaries?

To answer this final question properly, I will refer, for the first part, to literature about freedom of expression, and I will explore the main philosophical doctrines, including some of the best comparative studies that have been made between the U.S. and European doctrines. In this section, pertinent case law will also be described; first, from the Supreme Court of the United States, with general cases about the relationship between falsity and the First Amendment, and then with one specific example of responsibility for false news. Then, the European Court of Human Rights will be used as a benchmark for the European approach: cases will be analyzed that clearly illustrate how, according to the European Convention on Human Rights, more limitations of freedom of speech are allowed. Lastly, a case specifically dealing with spreading false news will be discussed. In the third and fourth sections, academic articles on freedom of speech and its limitations, a few recently published articles about false news, and existing laws on defamation, hate speech and genocide denial will primarily be discussed. In the last section, the European approach will always be referenced within the frameworks of the laws of the European Union and the European Convention on Human Rights. Finally, in Section V, European legislation, with several cases from both the Court of Justice of the European Union and the European Court of Human Rights, will be pulled together to paint a fuller picture on digital intermediaries' liability for third-party content.

## II. TRUTH AND FALSITY IN FREEDOM OF EXPRESSION

### A. *Philosophy and Freedom of Expression*

#### 1. From Plato to Rousseau: The Argument from Democracy

Answering the question of whether a potential responsibility for spreading false news exists first requires one to understand what can be defined as a falsity and to what extent this definition exists.

As it might reasonably seem, this problem is particularly hard to discern and has yet to be solved. One thing that immediately appears clear is how truth is deeply linked with freedom of expression. This begs the following question: is everyone free to say whatever he or she thinks, no matter if it is true or false?

To give more strength to the link between truth and freedom of expression, it is significant to introduce the idea of *parrhesia* (παρρησία) as it was known in ancient Greece; Plato in particular referenced this idea. In modern English, it translates as “boldness” or, more pertinently, as “freedom of speech,”<sup>8</sup> but the original idea contains much more than what is in our modern conception of this human right. Indeed, the correlation between the freedom for everyone to express their thoughts is intrinsically related to the expression of the truth for Plato. Further, we are able to trace *parrhesia* back to the central idea that freedom of expression should not be considered as an absolute right, but rather it should be recognized only to the extent to which it is useful and utilized towards what is best for democracy and society. The idea of *parrhesia*, in its positive meaning, represents the will of the one who wants to speak the truth. Indeed, “*parrhesiazesthai*,” in the Greek verbal form, means “to tell the truth.” Leaving aside the internal reasoning of the speaker about how he is convinced of the truthfulness of his opinions, *parrhesia* can be defined as the verbal activity in which the speaker chooses to speak frankly and clearly and it, together with *isegoria* (the equal right of speech) and *isonomia* (the equal participation of all citizens in the exercise of power) represented one of the pillars of the Athens’ democracy.<sup>9</sup>

But Plato’s—and his disciples’—thoughts become interesting when, especially after the fourth century B.C., *parrhesia* began to also be mentioned with a pejorative meaning; it was used “as a characterization of the bad democratic constitution where everyone has the right to address himself to

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<sup>8</sup> *Parrhesia*, MERRIAM-WEBSTER ENGLISH DICTIONARY (2020 online edition).

<sup>9</sup> Michel Foucault, *Discourse and Truth: The Problematization of Parrhesia* (1999) <http://www.naturalthinker.net/trl/texts/Foucault,Michel/Foucault%20-%20Discourse%20and%20truth.pdf>.

his fellow citizens and to tell them anything—even the most stupid or dangerous things for the city.”<sup>10</sup> At a certain point, *parrhesia* revealed hazards for the democracy: if every opinion has the same value as the others, it is now more difficult to access the truth, if not sometimes impossible. Moreover, an additional problem arose; the difficulty of differentiating falsehood from truth. What we should take from this part of Plato’s philosophy, and that later on will form part of the communitarianism doctrine, is the underlying idea that absolute freedom of speech could be harmful to the peaceful existence of citizens and democracy; indeed, general freedom within a society cannot be intended as absolute freedom. On the contrary, an individual might enjoy freedom but still be subject to bonds imposed by social order.<sup>11</sup> Jean-Jacques Rousseau indicated that in a democracy such freedom and duties might coexist; “a subject is . . . free insofar as his individual will is in harmony with the ‘collective’ (or ‘general’) will expressed in the social order.”<sup>12</sup> Freedom of expression for the French philosopher is seen as a contribution to the common good, as part of the duties of a citizen that, contributing to the *volonté générale*, will also seek his own liberty.<sup>13</sup> This is the core of the rationale for freedom of expression defined as the *argument from democracy*.

Consequently, not all ideas are equal and not all ideas deserve the same protection: there are people who can speak the truth, the *parrhesiastes*—who, not surprisingly, are philosophers. Hence, it is possible to understand where the idea that some speeches are more valuable than others has its basis. If Plato’s principle was used to answer the main research question of this article, there would be a certain margin of appreciation in which it is possible to condemn a piece of news because it is false. This is *per se* harmful for society and democracy, without any need to investigate further to find a real and quantifiable harm to someone or something. “Even if [it] does not cause harm. . . it has to be limited because it is incompatible with democracy itself;” the argument from democracy indeed aims to create a better environment for citizens to exercise their rights and their abilities.<sup>14</sup>

Rousseau’s contribution is contained in his book, *The Social Contract*, where he theorized a new collective dimension of human rights—among which is freedom of expression—which are seen as tools “serving to carry

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

<sup>11</sup> HANS KELSEN, GENERAL THEORY OF LAW AND STATE 285 (1945).

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

<sup>13</sup> JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT: ON PRINCIPLES OF POLITICAL RIGHT (G. D. H. Cole Trans., 1762).

<sup>14</sup> David van Mill & Edward Zalta, *Freedom of Speech*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter 2016).

out popular sovereignty and to contribute to the common good.”<sup>15</sup> The human individual is deprived of importance in order to empower the new entity of citizen. The public discussion hence gains value—and more protection—when it is oriented to enhance the overall experience of the community, when, as it would be defined in current times, it is of *public interest*. This principle will come to be of pivotal importance in the European doctrine of freedom of expression: public interest is one of the lenses through which speech is judged as sufficiently valuable for protection. This criterion has a crucial role when assessing the legitimacy of any form of expression—if it is not possible to find a proper public interest under which, for example, news, can be protected, it is likely for others’ rights to prevail.<sup>16</sup>

From this perspective, it is possible to impose a limitation—if intended *ex-ante*—or a responsibility—*ex-post*—on a subject who spreads false news: a falsehood is of no interest to the community, but rather it can be harmful to the common good. Hence, not surprisingly, legislators and courts that adopt this approach will be less inclined to grant the protection of freedom of expression to such content, leaving room for criminalization and sanctions.

## 2. Protagoras, Milton and Mill: The Argument from Truth

During the golden age of Athens’ democracy, another philosophical doctrine was developed, that may be contrasted with Plato’s writings—and specifically with his idea of freedom of speech. It was presented by a group of individuals collectively called the *Sophists*, whose most notable exponent was Protagoras.<sup>17</sup> This group of philosophers shifted the focus from the object, or what was said, to the subject, or who was speaking, and hence the human being. With his famous sentence “man is the measure of all things,” Protagoras introduced a strong relativism which put man at the center of everything, including values, opinions and judgments. According to his philosophy, “there was no such thing as objectively right or wrong conduct, simply conduct that was ‘profitable’ or ‘useful’ (*khresimos*) and that which was not.”<sup>18</sup> Projecting this paradigm to the false news problem, we can deduce that no argument is intrinsically more valuable than another. Everyone has the possibility to express himself or herself and to convince the

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<sup>15</sup> JAN OSTER, 7 MEDIA FREEDOM AS A FUNDAMENTAL RIGHT, CAMBRIDGE U. PRESS 15, 16 (2015).

<sup>16</sup> For example, the European Court of Human Rights has been open to prior restraints on publications “in cases which demonstrate no pressing need for immediate publication and in which there is no obvious contribution to a debate of general public interest.” See *Mosley v. United Kingdom*, 2011 Eur. Ct H.R. 117; OSTER, *supra* note 15, at 140.

<sup>17</sup> JOHN M. DILLON & TANIA GERGEL, GREEK SOPHISTS (2003).

<sup>18</sup> *Id.*

audience of the truthfulness of his or her statement. It was not a coincidence that the Sophists' school has always been related to the strong role and development of rhetoric and the art of discourse, in which the focus was shifted from the value of the argument to the way in which it was expressed.

Objectivity—truth and falsity—was considered impossible to recognize to the point that its existence was doubted: the best argument would prevail after public discussion. This Sophist approach represents the sprouting of the *marketplace of ideas* theory that Milton first expressed in his *Areopagitica*: “Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.”<sup>19</sup> What the English poet believed is that truth is most likely to emerge in a “free and open encounter,”<sup>20</sup> hence no restriction must be imposed on freedom of expression. Milton wrote this in response to a licensing act promoted by the government in 1643 which could be used to impose prior restraint on authors whose views the government disliked.<sup>21</sup> He opposed the bill, arguing that it is not for the government to express judgment on books' content—on ideas—but truth and falsehood should “grapple” to the point when the truth, or ‘the most convincing idea’ will prevail.<sup>22</sup>

If Milton introduced the concept of the marketplace of ideas, the English philosopher John Stuart Mill was the one who really had embraced it and became the leading light of freedom of expression as an absolute right that cannot be limited. His point of view was radical to the extent that in his opinion “there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered.”<sup>23</sup> Again, no censorship or limitation can be applied to speech: everything has the right to be told; everyone has the right to speak. In his book *On Liberty*, Mill give examples of how, even if only one person had a dissenting opinion from the rest of the humankind, nobody could stop or prevent him from expressing himself.<sup>24</sup> Going back to the central theme of false news, and elaborating on this idea of the English philosopher, no one can be held responsible for spreading falsehood; only through a public discussion that pushes an idea to its logical limit is it possible to reach the full dignity of the human being without sacrificing “the entire moral courage of the human mind.”<sup>25</sup>

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<sup>19</sup> JOHN MILTON, *AREOPAGITICA* 73 (1644).

<sup>20</sup> *Id.* at 58.

<sup>21</sup> Clay Jenkinson, *From Milton to Media: Information Flow in a Free Society*, 58 *MEDIA & VALUES* 3-6 (1992).

<sup>22</sup> OSTER, *supra* note 15, at 16.

<sup>23</sup> JOHN S. MILL, *ON LIBERTY* 32 (1869).

<sup>24</sup> *Id.* at 33.

<sup>25</sup> *Id.* at 60.

Naturally, Mill was well aware that on occasion it may be necessary to control and—in extreme cases—limit the freedom of expression. When people form a community, some rules must be put in place. Thus, he suggested one straightforward and effective principle, known as the *harm principle*. According to this principle, limitations on free speech may exist only when they are intended to prevent other people from being harmed. As he wrote in *On Liberty*, “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others . . . Over himself, over his own body and mind, the individual is sovereign.”<sup>26</sup> This need for control stems from the necessary relationship between two or more persons, but only when someone’s ideas can create damage to another’s personal sphere. If no harm is traceable, no limitations can be imposed. This approach will strongly influence the U.S. freedom of expression doctrine, in which it is unlikely to find rulings against someone’s speech unless it is strongly correlated with someone else’s significant harm. In the following sections, this article will analyze why the *harm principle*—where harm is intended to mean a legally identifiable harm—should be taken into account as the main rule when evaluating an individual’s potential responsibility for spreading false news. If harm is not correlated, no action must be taken.<sup>27</sup>

## B. *Different Points of View: The U.S. vs. Europe*

### 1. The U.S.: First Amendment and Absolute Freedom of Expression

#### (i) *Doctrine and Constitution*

The United States’ approach to freedom of expression has been strongly affected by the ideas of English philosophers John Milton and John Stuart Mill. The First Amendment of the Constitution protects freedom of speech:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech, or of the press*; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.<sup>28</sup>

This provision of the Constitution imposes a negative obligation on the State to not “abridge” freedom of speech; this is a *de facto* prohibition of any kind of interference with the private right to freely express ideas by any means, such as “criminal prosecution or conviction, civil judgment for money

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<sup>26</sup> *Id.* at 22.

<sup>27</sup> *Cf. supra*, Section IV.

<sup>28</sup> *See* U.S. CONST., ART. I, § 1.

damages, or censorship.”<sup>29</sup> Even though a pure absolutist position of this right is difficult to sustain, it is possible to affirm that the U.S.—and the Supreme Court—have historically been less inclined to limit and apply restrictions to freedom of speech than other countries. Indeed, the definition of the “marketplace of ideas” argument for truth, formulated by Justice Holmes in his famous dissenting judgment in the *Abrams* case,<sup>30</sup> has also exercised a significant influence on U.S. free speech jurisprudence:<sup>31</sup> “The best test of truth is the power of thought to get itself accepted in the competition of the market.”<sup>32</sup> This doctrine, originally introduced by John Milton, states that if the public discussion is left without any governmental interference, it “will lead to the discovery of truth” and, eventually, to a benefit for the common good.<sup>33</sup> This approach evidently requires a certain amount of faith in the whole of society to discern the truth from falsehood through the means of public debate or, like Greenawalt perfectly summarized, a confident “optimism that people have some ability over time to sort out true ideas from false ones.”<sup>34</sup>

It appears that definitions of truth and falsehood, even in their own existence, play a crucial role in the U.S. framework surrounding freedom of speech. On one hand, we have already seen that the “marketplace of ideas” theory affirms that truth will be discovered by means of public discussion, so an institution must not assess it. Thus, the state should adopt an agnostic position toward truth and falsehood. The Supreme Court of the United States effectively affirmed this position by stating that, under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend on its influence “not on the conscience of judges and juries, but on the competition of other ideas.”<sup>35</sup> On the other hand, the very goal of public discussion—namely, the discovery and predominance of the truth—implies the existence of an objective truth that must eventually be reached. However, this existence has been highly challenged by academics. Ingber wrote, “[T]oday’s truth, consequently, may become tomorrow’s superstition,” thus arguing that the marketplace will lead not to the

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<sup>29</sup> DOUGLAS M. FRALEIGH & JOSEPH S. TRUMAN, *FREEDOM OF EXPRESSION IN THE MARKETPLACE OF IDEAS* 3 (2010).

<sup>30</sup> *Abrams v. United States*, 250 U.S. 616 (1919).

<sup>31</sup> ERIC BARENDT, *FREEDOM OF SPEECH* 48 (2ded. 2007).

<sup>32</sup> *See Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

<sup>33</sup> Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3-4 (1984). In point of fact, U.S. jurisprudence has reduced the distance between the two doctrines on the marketplace of ideas and the argument from democracy, introducing an “aggregate benefits on society” given by freedom of speech as well as an instrumental meaning for this right.

<sup>34</sup> Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 131 (1989).

<sup>35</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

affirmation of what is ultimately true or best, but rather to the dominating cultural group's sense of what is true or best.<sup>36</sup> Conversely, Greenawalt replied to this concern asserting that the "truth-discovery argument can survive a substantial dose of skepticism about objective truth."<sup>37</sup> According to Greenawalt, rather than affirming the objective truth, the goal of free public discussion is to get *close enough* to the truth. For example, those who think the Holocaust occurred are indeed closer to the truth than those who deny its existence.

(ii) *Case Law*

The Supreme Court of United States has largely ruled in favor of expression on matters related to the First Amendment and has generally been against limitations of the right, allowing only narrow and well-defined exceptions to the protection of freedom of speech. The Court made one of its most important statements in *New York Times Co. v. Sullivan*, where it affirmed the principle that the First Amendment does not "recognize an exception for any test of truth."<sup>38</sup> Even if small exceptions are allowed—as is permitted in cases that concern defamation, fraud, and incitement—the central theme of case law is that speech cannot be scrutinized under the guise of seeking the truth.

The Supreme Court has expressed its opinion on the possibility of excluding false statements—including false news reports—from the protection of the First Amendment. Previously, the Supreme Court had thoroughly defined constitutional provisions as not intending to protect the objective truth, but rather guaranteeing that anyone could be "his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us."<sup>39</sup> The Court then fully applied the principle theorized by Mill that no punishment or limitation can be sustained against a false statement if no demonstrable harm is done to third parties. The government is excluded from giving any kind of judgment on the truthfulness of certain speech. The American Civil Liberties Union precisely summarized this prohibition of truth's assessment in its brief in support of the respondent in *United States v. Alvarez*,<sup>40</sup> explaining that "investing the government with the general power to declare speech to be constitutionally valueless on the

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<sup>36</sup> Ingber, *supra* note 33, at 25, 27.

<sup>37</sup> Greenawalt, *supra* note 34, at 132.

<sup>38</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

<sup>39</sup> *Thomas v. Collins*, 323 U.S. 516, 545 (1945).

<sup>40</sup> *United States v. Alvarez*, 567 U. S. 709 (2012).

grounds of its 'falsity' would give the government sweeping power to control and censor public debate."<sup>41</sup>

The Supreme Court has affirmed the harm principle multiple times in regard to punishment for the publication of false news, including criminal convictions and fines. The Court's opinion is based on the position that false news is still protected under the First Amendment unless they cause harm to others. The Court also clarified that this protection is not meant only to give "breathing space" to true statements, but statements *per se* in their own right. Yet again, the Constitution protects freedom of speech, regardless of the content, as long as no harm is done. In every case in which the protection of the First Amendment was reduced, the Supreme Court has always done so in response to an inflicted harm. There are very few cases, "well-defined and narrowly limited"<sup>42</sup> by this jurisprudence, such as defamation ("calculated falsehood enjoyed no immunity in the case of alleged defamation of a public official concerning his official conduct"<sup>43</sup>) or fraud, when the falsehood is not criminalized itself, but only if and when the statement misleads the listener.<sup>44</sup>

In recent years, one particular case has been brought to attention for its focus on false statements, leading the Supreme Court to affirm once again, and with more clarity, the principle that falsity is still protected by the First Amendment. In June 2012, the Supreme Court ruled in *United States v. Alvarez* that an act which prohibited one to lie about military honor infringed upon speech protected by the First Amendment.<sup>49</sup> In his opinion,<sup>45</sup> Justice Kennedy reaffirmed that false statements have never been an exception to the content-based restriction to freedom of speech. There are only a few categories, such as defamation, obscenity, and fraud that fall within this restriction. In each of these classifications, the restriction is always triggered when harm is caused to someone else. Moreover, Justice Kennedy added that even in cases of fraud and defamation, "falsity alone may not suffice to bring

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

<sup>42</sup> *United States v. Stevens*, 559 U.S. 460, 468-69 (2010).

<sup>43</sup> *Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967).

<sup>44</sup> *United States v. Dunnigan*, 507 U.S. 87, 94 (1993).

<sup>49</sup> *United States v. Alvarez*, 567 U.S. 709 (2012). The *Stolen Valor Act* makes it a crime to falsely claim receipt of military decorations or medals and provides an enhanced penalty if the Congressional Medal of Honor is involved. 18 U.S.C. §§ 704 (b), (c). The Respondent, Mr. Xavier Alvarez, pleaded guilty to a charge of falsely claiming that he had received the Medal of Honor, but reserved his right to appeal his claim that the Act is unconstitutional. The Ninth Circuit reversed, finding the Act invalid under the First Amendment. The Government of the United States appealed the decision of the Circuit Court to the Supreme Court.

<sup>45</sup> *Id.*

the speech outside the First Amendment.”<sup>46</sup> The threat of having a chilling effect on speech would be too big and “inhibit the speaker from making even true statements.”<sup>47</sup>

Thus, the U.S. approach to false statements is extremely clear: in order to prevent any interference and abuse by the government for critical thinking, the protection of the First Amendment for freedom of expression is granted to all speech, regardless of its truthfulness, which ultimately cannot be tested. The only circumstance in which someone can be held responsible for “falsity” is when such falsity causes demonstrable harm to third parties.

## 2. The European Approach to Freedom of Speech and Falsity

### (i) *Principles and Laws*

Europe’s approach to freedom of expression has been strongly influenced by the ancient civic republicanism theory, but that is not its sole source of influence.<sup>48</sup> Strong guidance is derived from the history of those countries that experienced totalitarian dictatorships in the 1920s and 1930s, including Antisemitism, persecution, and genocide.<sup>49</sup> This history relates to different ideologies and circumstances, and encourages European nations to allow certain restrictions on freedom of speech in order to protect the population from the recurrence of nationwide hate and racism. Many countries have adopted laws prohibiting specific kinds of speech; for example, Germany, Austria, and France, have laws against the denial of the Second World War genocides. However, the European Convention on Human Rights (ECHR) sets out the general leading framework. Article 10 of the Convention affirms the principle of freedom of expression and illustrates its potential limits:

The exercise of these freedoms, since it carries with it duties and responsibilities, *may be subject to such formalities, conditions, restrictions or penalties* as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for

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

<sup>47</sup> *Id.*

<sup>48</sup> See BARENDT, *supra* note 31, at Introduction; OSTER, *supra* note 15, at 22; S. Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. MARY BILL RTS. J. 305, 320 (1998).

<sup>49</sup> BARENDT, *supra* note 31, at 319-20.

preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>50</sup>

This right, as formulated in the ECHR and interpreted by the European Court on Human Rights (ECtHR), is anything but absolute. The exercise of this right is determined on a case-by-case basis through complex analysis, and limitations are allowed. The ECtHR evaluates the correct balance between the rights provided by the ECHR and determines whether one or more of those rights prevail according to precise criteria established by case law. For example, limitations on the freedom of speech are accepted in order to protect someone's right to private life, reputation, or national security. The ECtHR specifically listed two main factors that must be taken into account when judging the lawfulness of a limitation: (1) the restriction must be *prescribed by law*, and (2) must be *necessary in a democratic society*. The Court decided in *Sunday Times v. The United Kingdom*<sup>51</sup> that in order to be "necessary," the restriction must follow a "pressing social need" in a set of particular circumstances, be proportionate to the aim pursued, and the reasons for the restriction must be relevant and sufficient.<sup>52</sup>

The wording of the article makes it clear how this freedom must be exercised with "more caution" than under the United States' First Amendment by stating, "*it carries with it duties and responsibilities.*" This indicates that freedom of speech can be limited if certain criteria are not met. The Court has developed factor sets in order to assess which interest should prevail in each case. However, the factor requiring an interest to the public must always be present and is the key difference in the E.U.'s approach to freedom of expression. In the aforementioned case *Sunday Times v. The United Kingdom*, the necessity for a democratic society to limit freedom of expression is determined by taking into account "any public interest aspect of the case."<sup>53</sup> This same factor has been evaluated when freedom of expression is balanced against the right to private life. In yet another case, *Axel Springer Ag v. Germany*,<sup>54</sup> the Court again made a similar point, stating that these two rights "deserve equal respect" and "an initial essential criterion [to balance rights] is the contribution made by photos or articles in the press to a debate of general interest."<sup>55</sup>

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<sup>50</sup> Council of Eur., Eur. Conv. for the Protection of H.R. and Fundamental Freedoms, at Art. 10.

<sup>51</sup> *Sunday Times v. UK* (1979), Application No. 6538/74.

<sup>52</sup> BARENDT, *supra* note 31, at 65.

<sup>53</sup> Council of Eur., *supra* note 50, at § 65.

<sup>54</sup> Case of Axel Springer ag v. Germany, Eur. Ct. H.R. (2012), <http://hudoc.echr.coe.int/eng?i=001-109034>.

<sup>55</sup> *Id.* at § 87, 90.

European countries have always been more inclined to adopt legislation-limiting freedom of speech in order to defend particular interests and to prevent the mistakes of the past. After the Second World War, Europeans were forced to respond to the threat posed by Nazi Germany and totalitarianism.<sup>56</sup> This response eventually developed into a special restriction on speech, as seen in cases of Holocaust denial<sup>57</sup> or hate speech.<sup>58</sup> The ECtHR has dealt with this provision multiple times by assessing whether statements, either verbal or non-verbal, stir up or justify violence, hatred, or intolerance, and whether restrictions are justifiable and necessary under the application of Article 10 of the ECHR.<sup>59</sup> When dealing with laws concerning Holocaust denial and other statements relating to Nazi crimes specifically, the ECtHR and national courts have declared the statements inadmissible. In such cases, the ECtHR found interference of speech justified and necessary because “such statements [were] attacks on the Jewish community and intrinsically linked to Nazi ideology, which was antidemocratic and inimical to human rights.”<sup>60</sup>

<sup>56</sup> Robert A. Khan, *Why Do Europeans Ban Hate Speech? A Debate Between Karl Loewenstein and Robert Post*, 41 HOFSTRA L. REV. 545, 557 (2013).

<sup>57</sup> In the European area, these countries have enacted Holocaust or Genocide denial laws: Austria (Prohibition Act 1947, as amended in 1992), Belgium (Negations Law 1995, as amended up to 2014), Czech Republic (Criminal Code, 2009), France (Penal Code of 1791, as amended up to 2016), Germany (Federal Criminal Code of 1998, as amended up to 2016), Hungary (Criminal Code of 2013), Israel (Denial of Holocaust (Prohibition) Law, 1986), Liechtenstein (Penal Code, 1987), Lithuania, Luxemburg (Penal Code, 1997), Poland (Act on the Institute of National Remembrance –Commission for the Prosecution of Crimes against the Polish Nation, 1998), Romania (Emergency ordinance 31, ratified in 2006), Slovakia (Penal Code, as amended 2001), Spain (Penal Code, 1995), Switzerland (Penal Code, amended in 1994). KANTOR CENTER FOR THE STUDY OF CONTEMPORARY EUROPEAN JEWRY (2010), <https://app.powerbi.com/view?r=eyJrIjoiNjUwYWlzMmItYzhINC00YjBiLWE4NTAtZjc2ZTgwM2JhY2Y1IiwidCI6IjE4MDAwODhjLTlINzgtNDA3MC05MDdjLTgzMDZiMTUzODdlZSIsImMiOiJl9>.

<sup>58</sup> On hate speech, the Council of the European Union issued a Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, which contains a definition of hate speech that every EU Member State shall make punishable. This definition, other than “public incitement to violence or hatred directed against a group of persons or a member of such a group defined on the basis of race, color, descent, religion or belief, or national or ethnic origin,” contains a specific reference to genocide denial: “publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes . . . when the conduct is carried out in a manner likely to incite violence or hatred against such a group or a member of such a group.”

<sup>59</sup> Case of *Perinçek v. Switzerland*, Eur. Ct. H.R. at 88, § 204 (2015), <http://hudoc.echr.coe.int/eng?i=001-158235>.

<sup>60</sup> *Id.* at § 209; *see also* *X. v. the Federal Republic of Ger.* 29 Eur. Comm’n H.R. Dec. & Rep. 194 (1982), <http://hudoc.echr.coe.int/eng?i=001-74463>; *Ochensberger v. Austria*, Eur. Comm’n H.R. Dec. & Rep. (1994), <http://hudoc.echr.coe.int/eng?i=001-1921>; *Walendy v. Germany*, 80-A Eur. Comm’n H.R. Dec. & Rep. 94 (1995), <http://hudoc.echr.coe.int/eng?i=001-86587>; *Remer v. Ger.*, 82-A Eur. Comm’n H.R. Dec. & Rep. 117 (1995), <http://hudoc.echr.coe.int/eng?i=001-2294>;

(ii) *Case Law*

The previous section introduced the most relevant case law produced by the ECtHR regarding potential limitations to the freedom of speech. Even if the geographical scope of the ECHR goes beyond what is traditionally referred to as Europe, the Court represents the best expression of European values and doctrine. Moreover, the ECtHR would eventually override any analysis conducted by a single country's laws. This can be considered, at least in regard to freedom of speech and other rights, the ultimate decision made at the "continental" level. As this article has already illustrated, the Court is generally inclined to justify limitations on speech when deciding cases regarding hate speech and genocide denial. The Court's decision is made on a case-by-case basis, and numerous factors must be properly taken into account. Most noteworthy are the two core factors that require restrictions of speech to be prescribed by law and necessary in a democratic society.

The first case that must be mentioned is *Perinçek v. Switzerland*. This case contains several notable considerations by the ECtHR that are worth discussing. The case "concerned the criminal conviction of a Turkish politician for publicly expressing the view that the mass deportations and massacres suffered by the Armenians in the Ottoman Empire in 1915 and the following years had not amounted to genocide."<sup>61</sup> This historical event constitutes a peculiarity for two main reasons: first, legislation did not typically contain any explicit restriction against genocide denials (see Section IV.B.3 below), and second, genocide on its face, rather than its historical existence, is the issue that courts generally object to.<sup>62</sup> The Court noted that it is not their duty to determine "if the massacres and mass deportations suffered by the Armenian people at the hands of the Ottoman Empire from 1915 onwards could be characterized as genocide within the meaning of that term under international law,"<sup>63</sup> underlining the difference of authority between international courts. The Court concluded Mr. Perinçek's statements were not an incitement of hatred, violence or intolerance. However,

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Honsik v. Austria, 83-A Eur. Comm'n H.R. Dec. & Rep. 77 (1995), <http://hudoc.echr.coe.int/eng?i=001-2362>; National demokratische Partei Deutschlands Bezirksverband München-Oberbayern v. Ger., 84-A Eur. Comm'n H.R. Dec. & Rep. 149 (1995), <http://hudoc.echr.coe.int/eng?i=001-2502>; Marais v. Fr., 86-B Eur. Comm'n H.R. Dec. & Rep. 184 (1996), <http://hudoc.echr.coe.int/eng?i=001-88275>; D.I. v. Germany., Eur. Comm'n H.R. Dec. & Rep. (1996), <http://hudoc.echr.coe.int/eng?i=001-3218>; Nachtmann v. Austria, Eur. Comm'n H.R. Dec. & Rep. (1998), <http://hudoc.echr.coe.int/eng?i=001-4399>.

<sup>61</sup> Press release issued by the Registrar of the Court, Eur. Ct. Hum. Rts., *The Court Delivers its Grand Chamber judgment in the Case of Perinçek v. Switzerland*, Eur. Ct. H.R. 325 (Oct. 15, 2015).

<sup>62</sup> *Id.* at § 6.

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

concerning the matter of public interest, the margin of appreciation granted to national courts is narrowed greatly.<sup>64</sup> The judges pointed out another crucial difference between this case and others concerning situations of Holocaust denial. In other instances, the deniers' statements were seen as *per se* "attacks on the Jewish community and intrinsically linked to Nazi ideology, which was antidemocratic and inimical to human right . . . , as inciting to racial hatred, [Antisemitism] and xenophobia."<sup>65</sup> Mr Perinçek's utterances, however, "could not be seen as having the significantly upsetting effect sought to be attributed to them" and hence, they were not severe enough to justify a criminal conviction.<sup>66</sup> Even though Mr. Perinçek's speech might be seen as offensive, it should not be restricted. Further, this speech is entitled to protection as a matter of public interest and political debate.

Although this article does not provide a complete study of how the Court has interpreted the right provided by Article 10 of the Convention, it is important to focus on one specific case, *Salov v. Ukraine*.<sup>67</sup> This is one of the few cases that confront the problem of dissemination of false news. On the 30th and 31st of October, 1999, Sergey Petrovich Salov disseminated information about the alleged death of the incumbent President, Mr. Leonid D. Kuchmaon, who was running for reelection. He did so by publishing a false statement attributed to the Speaker of the Verkhovna Rada (Parliament) in a special nationwide issue of the Verkhovna Rada newspaper, *Holos Ukrainy* ("Голос України").<sup>68</sup> Mr. Salov was consequently convicted for interfering with the citizens' right to vote by influencing election results by means of fraudulent behavior. He appealed to the ECtHR complaining that the conviction infringed on the right to receive and impart information set out under Article 10. While the first part of the judgment assessed the compatibility of the Ukrainian trial with Article 6 of the Convention, a relevant part of the ruling was dedicated to evaluating the possibility of an interference with freedom of speech. As usual, the Court tested "whether the 'interference' complained of corresponded to a 'pressing social need,' whether it was proportionate to the legitimate aim pursued, and whether the reasons given by the national authorities to justify it [were] relevant and

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<sup>64</sup> "Another principle that has been consistently emphasized in the Court's case-law is that there is little scope under Article 10 § 2 of the Convention for restrictions on political expression or on debate on questions of public interest." *Id.* at § 197.

<sup>65</sup> *Id.* at § 209.

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

<sup>67</sup> *Salov v. Ukr.* (2005), Application no. 65518/01, <https://www.legal-tools.org/doc/9971ef/pdf/>.

<sup>68</sup> *Id.*

sufficient.”<sup>69</sup> Through this test, the Court’s discussion touched, sometimes indirectly, on the lawfulness of false information.

First, the Court decided that the aim pursued by the Ukrainian law when limiting freedom of speech in order to prevent improper influence on democratic elections was legitimate.<sup>70</sup> More precisely, the judgment contained a statement—perhaps expressed too lightly—stating that a legitimate goal for the government would be to “provid[e] the voters with *true information* in the course of the presidential campaign of 1999.”<sup>71</sup> It would be easy for the Court to declare that the newspaper’s article should be described as a “false statement of fact.” In the *Harlanova v. Latvia* case, the court distinguished between “facts” and “value judgments,” stating,<sup>72</sup> “the fact that Mr. Kuchma is not dead is easily verifiable, and it must be said any false news about this circumstance is unlikely to be believed.” What the Court did not foresee is that such a statement implies the government has the ability, or even the right, to assess the truthfulness of a piece of news and to prevent any further dissemination of information that is believed to be false. This is an undeniable major threat to freedom of expression itself (see *infra* Section 4). Even though the judges marginally confront the issue of falsity in this case, the Court appears to make a strong, contradictory, yet acceptable, statement on false information:

Article 10 of the Convention as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression set forth in Article 10 of the Convention.<sup>73</sup>

The Court has not expressed other explicit opinions on the falsehood of a piece of news in situations where it is unlinked from other different types of criminalization like defamation. Thus, this is the only case in which the Court has taken an explicit position on this issue. However, it is possible to understand the value that the ECtHR places upon the dissemination of information, no matter if it is true or false. Limiting speech simply based on the fact that the news “is strongly suspected to be not truthful” would be an unreasonable restriction and dangerously hinder the right to freedom of expression. It is worth repeating that the case at the center of this Court’s assessment was of a particularly easy solution, under two aspects. First, as I

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<sup>69</sup> *Id.* at § 105.

<sup>70</sup> *Id.* at § 186.

<sup>71</sup> *Id.* at § 110.

<sup>72</sup> *Harlanova v. Lat.* (2003), Application no. 57313/00.

<sup>73</sup> Press release issued by the Registrar of the Court, *supra* note 61, at § 113.

have already illustrated, it was far too easy to prove the facts narrated in the article to be wrong. The candidate could have been either alive or dead; the proof was undemanding. As I will describe later, truth and falsity are usually far from being binary concepts; providing evidence for the falsehood of an utterance does not give any information about “what it really is,” only “what it is not.” Second, the Court could easily assess the impact of the false news on the population, clearly connecting the consequences to the actions of Mr. Salov. Indeed, he made and spread only eight copies of the tampered newspaper article—the context is entirely different from the one in which the discussion on false news has developed.

In conclusion, the preceding has attempted to paint the big picture of the European perspective on possible limitations of freedom of speech; according to the rulings of the ECtHR, there is an opportunity for countries to adopt legislation that restricts this right. Moreover, this case is one of the very few examples where the Court has been presented with and then discussed the false news issue. Here, the Court permitted the restriction based upon the context of the specific case, even though the Court found the limitation disproportionate to the aim.

### III. FALSITY AND FALSE NEWS.

#### *A. Three Key Points to Define False News*

The previous sections have briefly illustrated the two main doctrines and their origins when dealing with freedom of expression. On one side, the U.S. approach aims to protect the speaker, and generally opposes content-based restrictions. On the other side lies the European school of thought, where the notion of public interest is very often the criterion upon which speech’s lawfulness is evaluated. Although I focused on pointing out the differences between these two doctrines, they are generally closer than one might imagine; moreover, sometimes these systems even influence each other. Nevertheless, the issues raised in the last year about false news force us to change perspective and analyze truth and falsity from a different point of view.

Historically, the biggest effort of philosophy and academics was either to give truth a definition—and hence objectivity—or to establish that truth itself exists. False news, conversely—and complementarily—requires the focus to shift to the falsehood instead: the problem is not to establish a universally-accepted statement, struggling to reach the best possible idea, but rather to allow or not allow a lie to spread. The problem may seem to arise from the same dispute about the existence of objective truth, but this is not

the case. If the goal is to expose falsity, it is not necessary to affirm and prove the positive statement, but it would be enough to falsify what has been told.

To proceed with the analysis concepts surrounding what I refer to as false news, the three most important aspects must be clarified: (i) falsity, truthfulness, and proof; (ii) the scope of the definition of false news, and (iii) to what extent we should care about the speaker. I will illustrate how the second point will assume particular importance in answering the legal question of responsibility; the idea is to draw a line, using the concept of harm to others, inside of which no one should be held responsible for falsity.

### *B. Falsity, Truthfulness and Proof*

To be clear, the scope of this investigation is to understand if, when the news has already been proven to be false, a subject can be responsible for sharing that kind of content. The problem of defining falsity will also be taken into account, but only to the extent to which authority can be entitled to decide what is true and what is false—indeed, this appears to be the only logical landing spot if we admit the possibility of holding someone responsible for sharing false statements. From one point of view, this seems to be an easy solution in cases where facts can prove with clarity the truthfulness or the falsity of a piece of news, the struggle begins when none of the above can be unquestionably affirmed or refuted.

At this point, it is important to focus on the difference between the usual narrative of the state, which tries to affirm a universal truth, and this peculiar case in which news only has to be falsified. In the first situation, famously represented by Orwell in *1984*, the Ministry of Truth is entitled to establish—from time to time—an official truth. This metaphor is not accurate enough, however; the goal here is rather just to state that a piece of news is not true. In order to do this, it is sufficient to falsify one aspect of the statement, and it does not require the establishment of any other truth. It would be “just not that”—from a Ministry of Truth to a Ministry of Falsity. Leaving aside the metaphors, what changes in the two cases, and remains problematic, is the burden of proof. Almost all legal systems, in their procedural laws, agree upon giving the duty of proving a statement to the person who made it. Conversely, when someone challenges a statement, it is her own burden to demonstrate the falsity. In the false news case then, one would expect no proof from who makes the false statement;<sup>74</sup> on the contrary, it should be

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<sup>74</sup> It should be underlined that this perspective is oriented in favor of the freedom of speech. On the other hand, of course, the discussion may be further developed from an ethical point of view, especially if we consider news and thus journalistic deontology. There should be a duty on the writer to provide the reader with enough evidence that can support the news and always make the best

assumed true unless convincing facts are presented – facts not about the “real truth,” but only on the falsity of that particular piece of news.

Truth and falsity are not a precise binary concept, nor are the two dimensions equally divided; for each utterance, there can be one truth and thousands—maybe infinite—different levels of falsity. Proving a statement as false gives no information about what the truth actually is, only what it is not. Conversely, providing enough evidence in favor of the truthfulness of a statement can lead to the assumption that it is, in fact, true. Finally, while finding a definition of truth has been and still is a substantial topic in philosophy, for this article I will refer to this concept as the correspondence theory. According to this, truth consists of reality;<sup>75</sup> in its simple version, it may be expressed as such: “a statement is true if and only if it corresponds to some facts.” Naturally, many objections have been made against this theory—and against its variants proposed by great philosophers like Wittgenstein, Russel, and Austin. However, given the legal character of this article, the correspondence theory will be sufficient and suitable. Indeed, what the law usually seeks is making a connection with the reality of facts that are ultimately verified by a final arbiter, which is typically the court.

### *C. Scope of the Definition of False News*

The previous section discussed the concepts of truth and falsehood, and how they should be understood. Again, the aim of this paper is not to expressly dictate who decides what is true or what is false, but is instead to explore whether, once falsity has been proven, the statement can still be made without legal repercussions. However, all false news is not equal, and; to answer the question about responsibility, first the definition must be narrowed and the exact scope of the research set. I suggest that false news be defined *by exclusion*. The false news included in this analysis falls in a grey area so far left untouched by legal research. On one extreme, there are false statements that have already been regulated and deemed “unlawful” by legislative regulation, as crime or mere civil responsibility have. This category includes, among others, defamation, illegitimate influencing of the stock markets and hate speech. In each of these cases, a piece of false news is defined as unlawful and a punishment is set. On the other extreme, there are false statements that are completely irrelevant; where the news is

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effort to reach the highest quality possible. Unlikely, as often happens, the public discussion about false news always confuses the two layers, mixing ethics (how a speaker should behave) with law and rights (what a speaker is allowed to do), pushing the solution of the debate—if one exists—farther and farther away.

<sup>75</sup> David Marian, *The Correspondence Theory of Truth*, STAN. ENCYCLOPEDIA OF PHIL. (E.N. Zalta ed., Winter ed. 2010), <https://plato.stanford.edu/entries/truth-correspondence>.

completely deprived of any public interest. These statements include, for example, false information about the breakfast I had this morning or my performances at the gym. This kind of news is what society generally calls a “lie” and where—we mostly agree, credible or not—the law should not interfere.

The remaining category of statements falls between these extremes; where the law has not already intervened yet there are still consequences. This is the most accurate definition that can be given to false news. In the last year, following the media hype about the urgency of fighting fake news, several authors have tried to legally address the problem, but these attempts are predicated on a wrong assumption in the definition. For example, in a recent paper by Klein and Wueller,<sup>76</sup> the analysis is built on a definition of fake news “as the online publication of intentionally or knowingly false statements of fact.”<sup>77</sup> The authors do not differentiate in their categorization. Thus, they merely list possible legal concerns that are already in place, completely missing the point as to if—and to what extent—piece of false news is legally defined.<sup>78</sup>

Several examples—dated before the “post-truth era” media hype—will give more texture to the definition of false news given in the previous paragraph. The first case happened in Germany in 2016 when a thirteen-year-old Russian-German girl claimed to be kidnapped and raped by Middle Eastern or North African migrants.<sup>79</sup> Due to the Russian origins of the girl, the allegations caused significant discussions and demonstrations, which even led the Russian Foreign Minister to strongly criticize German authorities for lack of commitment into the investigations.<sup>80</sup> This news, proven to be false by admission of the same girl, exacerbated the already strong anti-immigration sentiments of much of the German population after

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<sup>76</sup> David Klein & Joshua Wueller, *Fake News: A Legal Perspective*, 20 J. INTERNET L. 5, 6 (2017).

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

<sup>78</sup> The authors explore all possible consequences of false news such as defamation, intentional infliction of emotional distress, and intellectual property violation. Even though it is clear that false news can lead to one of these situations, there is no point in carrying out this analysis because they are listing cases already taken into account by the law. As further proof, in all of the examples they bring, the content is false, but always addressed to someone specific. The real false news issue instead is located *before* the law steps in, in the grey area already mentioned in my definition.

<sup>79</sup> Ben Knight, *Teenage Girl Admits Making Up Migrant Rape Claim that Outraged Germany*, GUARDIAN (Jan. 31, 2016), <https://www.theguardian.com/world/2016/jan/31/teenage-girl-made-up-migrant-claim-that-caused-uproar-in-germany>.

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

the alleged mass sexual assault on the 1st of January, 2016 in Cologne—which also happened to be a partially false piece of news.<sup>81</sup>

Another political example that contains all of the characteristics of this definition of fake news comes not from a single episode but from a precise political strategy adopted by Silvio Berlusconi in the years he spent governing Italy (especially in the years between 2005 and 2011), sometimes reductively labelled “wishful thinking.” Berlusconi was aided in this strategy by his unconventional power over both private and public media outlets,<sup>82</sup> his well-known plan to improve his popular approval rating and his decision to consistently support his statements with empirical data from surveys and polls while denigrating all other sources not in his favor. No matter what the real feeling of the country was, media outlets always reported an increasing support for his policies.<sup>83</sup> In this example—or rather series of similar examples—there is, of course, no direct harm to anyone: Berlusconi’s goal was to slowly capture as many votes as possible by influencing the public opinion.

<sup>81</sup> *Tensions rise in Germany over handling of mass sexual assaults in Cologne*, GUARDIAN (Jan. 7, 2016), <https://web.archive.org/web/20170617160142/https://www.theguardian.com/world/2016/jan/06/tensions-rise-in-germany-over-handling-of-mass-sexual-assaults-in-cologne>. On the other hand, foreign news outlets (almost always right-wing oriented) reported the story dramatically increasing the number of both the assaulters and the victims, in order to encourage anti-immigrant feeling. For example, major Italian news outlet, *Il Giornale*, reported that over 1,000 immigrants raped 80 women. L. Steinmann, *Stupro Di Massa in Germania: Mille Immigrati Violentano 80 Donne*, IL GIORNALE (Jan. 5, 2016), <https://web.archive.org/web/20170617160246/http://www.ilgiornale.it/news/mondo/capodanno-germania-altri-stupri-massa-degli-immigrati-1210201.html>. The same numbers were reported right after by *Libero Quotidiano*, *Corriere.it*, and *Il Fatto Quotidiano*. See *Scena ‘Mostruosa’ La Notte di Capodanno. Stuprate 80 Donne: ‘Da Mille Nordafricani*, *LiberoQuotidiano* (Jan. 5, 2016), <https://web.archive.org/web/20170617160511/http://www.liberoquotidiano.it/news/esteri/11865087/colonia-stupro-80-donne-germania-capodanno-arabi-nordafricani.html>; see also *Colonia, A Capodanno un Migliaio di Uomini Aggredisce Decine di Donne*, *Corriere della Sera* (Jan. 6, 2016), [https://web.archive.org/web/20170617160834/http://www.corriere.it/esteri/16\\_gennaio\\_05/colonia-a-capodanno-migliaio-uomini-aggredisce-decine-donne-1297cedc-b392-11e5-9fa2-487e9759599e.shtml](https://web.archive.org/web/20170617160834/http://www.corriere.it/esteri/16_gennaio_05/colonia-a-capodanno-migliaio-uomini-aggredisce-decine-donne-1297cedc-b392-11e5-9fa2-487e9759599e.shtml); *Colonia: A Capodanno Donne Aggredite da Mille Omini Ubriachi ‘Di Origini Arabe o Nordafricane’*, *Il Fatto Quotidiano* (Jan. 5, 2016), <https://web.archive.org/web/20170617161000/http://www.ilfattoquotidiano.it/2016/01/05/colonia-a-capodanno-donne-aggredite-da-mille-uomini-ubriachi-di-origini-arabe-o-nordafricane/2350525>. As verified by the Italian debunking website *Bufale.net*, the 1,000 immigrants were just the people counted by the police outside the Cologne train station, only one girl has been raped and the police confirmed that no link can be established between the assaulters and the refugees. *Dizinformazione Stupro di Massa in Germania: Mille Immigrati Violentano 80 Donne*, *Bufale.net* (Jan. 5, 2016), <https://www.bufale.net/home/dizinformazione-stupro-di-massa-in-germania-mille-immigrati-violentano-80-donne-bufale-net>.

<sup>82</sup> OSTER, *supra* note 15, at 261.

<sup>83</sup> Nando Pagnoncelli, *Il Sondaggio Americano*, 7 COMUNICAZIONE POLITICA 369 (2006).

Another crucial aspect is that in the current mainstream debate over false news, people tend to include statements that could already generate liability, whether civil or criminal. Conversely, the residual category of statements that do not fall under the scope of any other legal provision must be taken into account because a remedy, even if difficult to achieve, is always provided for statements in the other categories.<sup>84</sup>

*D. Insincerity: The Point of View of the Speaker*

The last aspect to take into account in order to correctly understand the scope of false news is a subjective one, namely the point of view of the speaker. When giving a false statement, the author can either be convinced or unconvinced of what he is saying: the latter being insincerity. Even though it will not affect the truthfulness of the content, sometimes the mindset of the speaker is taken into account in evaluating the lawfulness of the speech. This is the case examined by the U.S. Supreme Court in *New York Times v. Sullivan*,<sup>85</sup> in which it set the rule that in cases of defamation of a public person, the statement must be both false *and* insincere to be criminalized. That is, the speaker must believe, or recklessly disregard, that his or her statement is false—i.e., “actual malice.” In contrast, other national laws (e.g., in the UK<sup>86</sup>, France<sup>87</sup> and Italy<sup>88</sup>) do not require such intent, thus accidental libel is punished as well. Moreover, in the countries where a civil action for defamation exists, the subjective factor is even less important as long as a causal connection can be established between the event and the harm.

Lastly, in any other case in which civil or criminal liability may arise from speech (e.g., violation of privacy, Holocaust denial, etc.), the lawfulness of the statement is evaluated without taking into account the mindset of the speaker.

In conclusion, and having taken the forgoing into account, no importance should be given to the intent of the person who makes the allegedly false statement for two reasons.<sup>89</sup> First, as is explained in the next section, false

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<sup>84</sup> See *Gertz*, 418 U.S. at 339-40.

<sup>85</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>86</sup> Defamation is provided by Article 595 of the Italian Penal Code and it does not require intent. Case law has clarified that even the acceptance of the risk of making a defamatory statement is enough for it to be punished. Defamation Law, Article 595 (Italy).

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

<sup>88</sup> *Id.*

<sup>89</sup> A dissenting opinion was expressed by Spottswood, according to him, under the framework of the First Amendment of the U.S. Constitution, “speech that is false but sincerely believed by its utterer is generally protected by the First Amendment because such speech generally promotes the growth of social knowledge. Insincere speech, however, is excluded from First Amendment

news as defined before, namely as false statements that have consequences but not severe enough to become harmful, and it is useless to question the sincerity or insincerity of the speaker. Second, if my hypothesis of non-liability cannot be accepted, it means that false news is believed to be so harmful that a punishment is actually required. Thus, it must be effectuated regardless of the honesty of the speaker since protected interests are, in any case, at risk no matter the original intention of the speaker.<sup>90</sup> Moreover, in this case the investigation over the state of mind of the actor would reach a point where the questioning would be quite circular and there is no room for this kind of evaluation in a courtroom. The only way to discern such intent would be through the statement—or perhaps confession—of the speaker.

#### IV. LEGALLY IDENTIFIABLE HARM

##### *A. Harm to Others as Criterion for Liability*

##### 1. Public Interest as a Not Suitable Approach

In the previous section, the scope of false news was specified, giving it a definition by exclusion and analyzing its key points. It is now necessary to examine the lawfulness of the false news issue. Two approaches may be used: a purely Millian point of view, in which the only limit to free speech is the harm to others, or, a subtle one, through the viewpoint of civic republicanism and the European doctrine in which the public interest has a strong role. In the latter, speech can lose protection even if it does not cause a direct and quantifiable harm; on the contrary, the role of the content is analyzed, and its judgment depends upon the potential limitation. Moreover, the notion of harm is less strict and more open to less ‘practical’ damages, like incitement to hatred and racism. This section will explain why a “public interest approach” cannot be adopted to solve the false news issue.

Accepting the public interest as a criterion upon which it is possible to limit freedom of speech in cases of false statements naturally implies a value assessment of the news for the community, because “speech is protected only if and insofar as it contributes to finding the truth or the ‘best ideas’ for society in general.”<sup>91</sup> Whether the scrutiny of such content is acceptable and

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protection in almost all cases because it tends to inhibit, rather than promote, the increase of knowledge.” See Mark Spottswood, *Falsity, Insincerity, and the Freedom of Expression*, 16 WM. & MARY BILL OF RTS. J. 1203 (2009), <http://ir.law.fsu.edu/articles/102>.

<sup>90</sup> Yet if the harm is believed to arise from the false news, we will be outside the scope of the definition given earlier: the transition from consequence to harm is exactly the step it takes to go to the case of a different criminalization.

<sup>91</sup> OSTER, *supra* note 15, at 22.

represents the best way to regulate freedom of expression is currently a hot debated topic and remains ongoing among both scholars and courts. However, when approaching the false news issue, the discussion slightly deviates from the 'standard' path and other, more difficult, questions are considered. This difficulty stems from the assessment of the public interest becoming an analysis of falsity and its current role in society.

The first challenge faced if we decide to embrace this reasoning is far from easy: we must determine if a piece of false news may be useful for society. In other words, if falsity may be of any interest to the public. One could simply answer that only truth contributes to society, directly excluding any protection for false news. As will soon be illustrated, this solution implies the necessity of an objective judgment upon the truthfulness of a statement by someone entitled to do so, with all the consequent issues that undoubtedly will arise. By contrast, it has been stated—both by scholars and jurisprudence—that even falsity *per se* might have a positive role in the society. Spottswood, in “*Falsity, Insincerity, and the Freedom of Expression,*” powerfully argues that every false statement can be useful and thus, may be accepted under the public interest theory. The author divides falsity into three categories, based upon the degree of acceptance: “the false proposition is believed by no one or by very few people (other than the speaker); the false proposition is widely believed; or the false proposition is believed by some and disbelieved by others.”<sup>92</sup> The first group is likely to be of no interest to the public, completely irrelevant, as only a very few people believed it. Moreover, it may be extremely useful to others in judging the reliability of the speaker. When we hear someone—even if not an expert—stating that the Earth is flat, we immediately make judgments about his or her discerning ability. Thus, false news of this kind might bring more useful information about the speaker, than actual harm to society. The second group constitutes false statements believed by almost everyone, as more theoretical than real: indeed, the possibility of providing examples in itself would mean that we are aware of the falsity. However, Spottswood argues that even assuming the existence of this, according protection to falsity would mean according protection to what is instead true. The last and more problematic group is comprised of all of the statements in which approximately the same amount of people believes to be both true and false. In this case, the inevitable solution for the Author is going back to Mill’s doctrine: “The false statement is the signal that shows the existence of disagreement, creates the motivation to inquire further into the matter through the tools of argument, and begins

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<sup>92</sup> Spottswood, *supra* note 89, at 1238-41.

the process that leads to a gain in knowledge for both parties.”<sup>93</sup> The conclusion at this point is that, if a debate were possible about whether there is a role for falsity in society, the answer would be in the affirmative. Hence, it is not possible to deny the public interest based solely on the falsehood of the statement; other factors, already identified by various national and international courts, must be taken into account.

As mentioned above, the case of someone making false statements cannot be, in any case, of public interest. In this situation, assessing the relevance of the news would mean assessing its truthfulness; this would again be the “Ministry of Falsity” scenario, in which a government would be entitled to affirm what is true and what is false, leading to unimaginable possibilities of abuse. Because of the obvious and enormous risks that this situation brings, any solution to the false news issue that leads to the point where an authority—regardless of its form and composition—is called to make such a decision should not be considered acceptable. It is evident that giving an authority the power to express judgment on the falsity of a piece of news puts freedom of expression itself in danger.<sup>94</sup> In conclusion, choosing the public interest lens to look at the false news issue is, in all likelihood, not the best choice. Indeed, this road would lead to two different inquiries and two difficult-to-accept conclusions. On the one hand, can falsity be useful to society to some extent, and on the other hand, who is entitled to discern “official” truth from falsehood? My suggestion, by contrast, is to leave the public interest aside and rely solely on the harm-to-others doctrine.

## 2. Harm to Others as Measure of Responsibility

The definition of false news by exclusion for every reasonably false statement spread to the public which falls between what is already punished by the law and what remains completely irrelevant and without consequences for the public and the law has already been given. The question now is whether existing law encompasses every necessary scenario or whether it should be enlarged to also address a portion of this grey area. Perhaps the

<sup>93</sup> *Id.* at 1243.

<sup>94</sup> See Rick Noack, *The Ugly History of ‘Lügenpresse’, A Nazi Slur Shouted at a Trump Rally*, WASH. POST (Oct. 24 2016), <https://web.archive.org/web/20170617161153/https://www.washingtonpost.com/news/worldviews/wp/2016/10/24/the-ugly-history-of-luegenpresse-a-nazi-slur-shouted-at-a-trump-rally>. See, for example, *Kılıçdaroğlu diyor ki, ‘hayır diyenler terörist’ diyormuşuz, yalan söylüyor - Kılıçdaroğlu* [the leader of the Republican's People Party (CHP) which is the main opponent political party in Turkey] *is claiming that we are accusing people, who support "no", as terrorists but he is lying!*, DEMOKRAT HABER (Apr. 2 2017), <https://web.archive.org/web/20170617161356/http://www.demokrathaber.org/siyaset/kilicdaroğlu-diyor-ki-hayir-diyenler-terorist-h82060.html>.

former question should be answered in the affirmative, as governments sometimes restrict freedom of expression too much, partially violating human rights. In the public debate over the past year, false news attracted the attention of legislators toward imposing new restrictions. In the following paragraphs, further evidence will demonstrate that false news does not cause harm sufficient to generate liability, or to switch from a focus on consequences to a focus on harm.

To understand how a false statement is not able to cause such harm, it is useful to split all of the possible cases in which speech can inflict damage into two main categories. According to Schauer's theory, speech is differentiated by whether it causes harm directly to one subject (Speaker → Victim, or "S→V") or via an intermediary hearer (Speaker → Hearer → Victim).<sup>95</sup> The first category is perfectly exemplified by an insult directly addressed to the victim. The second is the classic case of incitement; the speaker pushes the hearer to harm the victim. All the actions that fall in the S→V group are either treated as crimes or generate liability for the speaker. There is no doubt that harm, albeit in most of the cases not physical, directly befalls the victim who is then entitled to claim compensation or request that the speaker be prosecuted.<sup>96</sup> Victim, harm, and causation are the three fundamental elements that justify the criminalization or civil liability of the speaker.

Things become vague and blurred when the intervention of a third-party is introduced; where the intervener and the speaker cause the harm and it has no direct influence on the victim. In these scenarios it may be argued that the speaker is an indispensable party to the action but they are not by themselves sufficient as he or she alone could not have harmed the subject—and this may not have been the speaker's intention either. The debate around this scenario has always been, understandably, around the degree of responsibility of the "inciter" in the unlawful action. Sometimes it can be clear—especially in cases where physical help is provided in committing a crime—in "speech cases" we face a lack of certainty. The mental element of the hearer becomes the most important aspect and more factors must be taken into account such

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<sup>95</sup> Frederick Schauer, *The Phenomenology of Speech and Harm*, 3 ETHICS 103, 635-653 (1993).

<sup>96</sup> Indeed, in much of "speech" crime, the harm is caused onto reputation, dignity, beliefs, and privacy. Emotional distress, pain and suffering, sentimental loss and moral damages are always granted to the victims of these kind of crimes, even when a proper economical loss is completely missing.

as the predisposition of both the speaker and hearer to commit crimes, the role of the incitement, etc.<sup>97</sup>

Still, in this trilateral dynamic, the victim, causation, and the harm are identifiable in all types of already punishable offenses. First, the victim can be a natural as well as a legal person (e.g., in a defamation case), always bearing in mind the necessity of a clearly identifiable subject who has been damaged. Second, causation must be assessed following a case by case analysis—for example, assessing to what extent the speaker caused and was a necessary element of the crime committed by the incitation. Lastly, the harm: in each of these cases, legislators have identified an interest to be protected (e.g. dignity, honor, and reputation in defamation cases, or physical integrity) when the incitement is to commit a crime against someone who, when harmed, would trigger liability. Sometimes, the identification of the damages goes much farther: the existence of a proper harm has been argued in hate speech situations<sup>98</sup> and in laws against Holocaust denial.<sup>99</sup> Nevertheless, all of these provisions have passed muster when scrutinized by international courts including the European Court of Human Rights.

Returning to the issue of false news, bearing in mind the aforementioned definition, it is evident how false news may have consequences not severe enough to cause harm, and thus not be criminalized or impose responsibility. Conversely, Feinberg provides a useful and correct indication of what harm should be sufficient to justify a punishment. He introduced two main components: first, the “setback of interests” of third parties, and second, that this setback be “wrongful.”<sup>100</sup> We can overlook the debated<sup>101</sup> meaning of this last requirement and focus instead on the hindrance of others’ interests. Any kind of false news, as defined above, would never be able to accomplish such a setback: each time we observe a compression of someone’s interests, and therefore a harm, we recognize a situation already foreseen by existing legislation. This happens when a vocal utterance is recognized as a crime (defamation, incitement, etc.) but also, for example, influencing the stock market with false information, as well as when a right to compensation is granted to the victim—from the *Lex Aquilia* of Roman Law to modern tort

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<sup>97</sup> See I.R. Scott, *The Common Law Offence of Incitement to Commit Crime*, 4 ANGLO. AM. LAW REV. 289 (1975).

<sup>98</sup> Robert Kahn, *Why Do Europeans Ban Hate Speech: A Debate Between Karl Loewenstein and Robert Post*, 41 HOFSTRA L. REV. 545 (2012).

<sup>99</sup> Lyrisa Lidsky, *Where’s the Harm?: Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. R. 1091, 1093 (2009).

<sup>100</sup> JOEL FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW, VOL. I, 45-51, 110-14 (1984).

<sup>101</sup> C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 995 (1997).

law, and in every situation in which an unlawful harm is done where the speaker is held liable.

Two main scenarios have been described as consequences of the indiscriminate spreading of false news. In the first scenario, as in the alleged rape in Germany in 2016,<sup>102</sup> the main concern is that falsity will induce, or enhance, racist feelings among the population. No matter how wrong and repulsive these sentiments can be, a false statement cannot be considered the cause of any harm subsequently performed by anyone whose racial hatred has been increased by the news. Moreover, it is clearly impossible to measure and assess this increment to an extent of establishing a threshold for liability. Lastly, it can be demonstrated how this situation does not fall within the scope of the existing norms on hate speech. If we consider the definition given by the Council of the European Union: “public incitement to violence or hatred directed against a group of persons or a member of such a group defined on the basis of race, color, descent, religion or belief, or national or ethnic origin,”<sup>103</sup> this form of false news does not lie within the definition because it lacks incitement. The falsity expressed is about a fact, and the association with racial hatred is a further and potential phase “left” to the public.

The second scenario mentioned as an example above was the influence on political debate. It is a fact that even in ancient Rome, political propaganda was deeply linked with falsity, to the extent that it was almost considered a part of the ‘game’.<sup>104</sup> Since then, political influence has been acutely studied and despite this, the art of influencing constituencies remains an inexact science. The current discourse regarding the influence of false news on electoral results further exemplifies how impossible it is to consider this as a harm that could lead to liability.<sup>105</sup> Furthermore, some restrictive measures already exist in this area in instances where an unlawful influence is sufficiently proven, such as the provisions that prohibit publishing survey results while polls are open on election days,<sup>106</sup> as well as other peculiar

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<sup>102</sup> *Id.* at 986-93.

<sup>103</sup> *Council Framework Decision 2008/913/JHA of November 28 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law*, EUROPEAN UNION: COUNCIL OF THE EUROPEAN UNION (Nov. 28 2008), <http://www.refworld.org/docid/493e8fea2.html>.

<sup>104</sup> Quintus Tullius Cicero, James Carville, *Campaign Tips from Cicero: The Art of Politics, From the Tiber to the Potomac*, 3 FOREIGN AFFAIRS 18, 18-28 (2012).

<sup>105</sup> Nikolov D, Oliveira DFM, Flammini A, Menczer F., *Measuring online social bubbles*, 1 PEER J. COMPUT. SCI. 38 (2015).

<sup>106</sup> A 2012 study by Hong Kong University found that 38 out of 83 countries surveyed had laws prohibiting publications of polls during the electoral campaigns or on election days. See Robert

examples like the one at the center of the *Salov v. Ukraine* ruling by the ECtHR.<sup>107</sup>

To briefly analyze who can be considered a victim of false news, one might note that often—if not usually—this fundamental requirement is missing. Such news indeed rarely involves a specific subject or a restricted group of people to the point that they can claim a violation of their rights. If that were the case, we would again consider, for example, defamation. What remains is a false statement about an unidentified person, a vague group of people often racially identified (e.g., immigrants), or the whole population, etc. If not specifically provided for by the law as a crime, no one is entitled to claim restoration for a setback of his or her interests.

The cornerstone of the false news issue is thus the distinction between *consequence* and *harm*. The latter is a *subset* of the former and it is in the area between these ideas where the concept of false news is defined. Must the law step in every time consequences are generated? This is likely not necessary. Notably, in March 2017, a “*Joint Declaration on Freedom of Expression and ‘Fake News’, Disinformation and Propaganda*” was signed by The United Nations’ (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information.<sup>108</sup>

In the document just mentioned, the parties make an important statement about the criminalization of false news in relation to the definition of hate speech given in Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR), declaring that “[g]eneral prohibitions on the dissemination of information based on vague and ambiguous ideas, including ‘false news’ or ‘non-objective information,’ are incompatible with international standards for restrictions on freedom of expression, as set out in paragraph 1(a), and should be abolished.”<sup>109</sup> Furthermore, it is foolish to pretend that all speech that has a consequence may be limited or criminalized

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Chung, *The Freedom to Publish Opinion Poll Results*, Hong Kong World Assoc. Public Opin. Res. Univ. Hong Kong (2012).

<sup>107</sup> *Id.*

<sup>108</sup> *Freedom of Expression Monitors Issue Joint Declaration on ‘Fake News’, Disinformation and Propaganda*, UNITED NATIONS HUMAN RIGHTS – OFFICE OF THE HIGH COMMISSIONER (Mar. 3, 2017), <https://web.archive.org/web/20170617161524/http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21287&LangID=E>.

<sup>109</sup> JOINT DECLARATION ON FREEDOM OF EXPRESSION AND ‘FAKE NEWS’, DISINFORMATION AND PROPAGANDA art. 2(a) (Mar. 3, 2017).

and harder to find a statement completely devoid of consequences.<sup>110</sup> The quality and magnitude of these consequences should be the measure of potential liability. If the outcomes were so severe as to become harms, the law should step in and limit or punish the speech.

In conclusion, false news may lead to important and long-term consequences, but it should not be limited or restricted unless it results in harm to others. Indeed, there is no sufficient ground to base the limitation or restriction upon, and the remedies would be more harmful than the damage caused by the news itself potentially leading to additional consequences like state censorship and of freedom of speech violations.

## B. *Not False News*

### 1. Defamation

Even though the aim of this article is not to describe in detail all of the ways in which speech could be criminalized, and while false news has already been compared to other cases in which speech is punished more than once, it may be useful to briefly introduce the differences between the most important speech crimes and false news.

False news does not represent a completely separate legal category. On the contrary, we may consider other speech crimes as specific subsets of the false information group, with which they share a common trait, namely falsity. Indeed, every unlawful situation can be seen as consisting of a false statement in addition to a particular factor that triggers criminalization. For example, in cases of defamation, there is a piece of false news *and* a violation of a person's reputation; in cases of hate speech, the factor is given by incitement to hatred, etc. However, even with a common factor, it is possible to draw a line between these two large categories. Of course, it is impossible to take into account and analyze any single piece of legislation enacted in the world. Thus, the focus here is on the bigger picture: exposing the common elements and the most important points of contrast with false news. Furthermore, the European framework is taken as reference because, as explained in previous sections, it is under this schematic where the most advanced and articulated limitations to freedom of expression are visible.

The first type of case analyzed is the most consolidated and most discussed type: defamation. This is probably the first ever effort to

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<sup>110</sup> JOHN L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson, 2d ed., 1975).

criminalize speech. Generally, we divide speech offensive to someone's honor as either *slander* when it refers to a transient form such as through spoken words, or as *libel*, when it is permanently fixed, or written, as in the press. The ECHR specifically considers cases of defamation in its Article 10 (2) listing of possible reasons for limitations, when it includes "for the protection of the reputation or rights of others."<sup>111</sup> It is left to each country to give a specific and practical definition to defamation, and the Court has not provided an express definition in its jurisprudence. Even if it depends on the different implementations found in each state, a possible definition of defamation may essentially be "a civil wrong (a tort or delict) committed by one individual against another or others," sometimes including legal persons as the target of the offense.<sup>112</sup> In some European countries, defamation is also considered a crime and punishable with imprisonment,<sup>113</sup> even though the Court has clearly and repeatedly noted "that the Parliamentary Assembly of the Council of Europe in its Resolution 1577 (2007) urged those Member States which still provide for prison sentences for defamation, even if they are not actually imposed, to abolish them without delay."<sup>114</sup>

The essential elements of defamation are that there must be (1) an individual whose reputation is harmed, (2) an actor, and (3) a statement that provokes the reputational damage. It is general opinion that "only false or untrue allegations or assertions will damage the reputation a person deserves to enjoy among his or her peers or community."<sup>115</sup> Nevertheless, in some judicial systems it is possible to be charged with defamation even if the statement is true. This is the case in Italy, for example, where the Court of Cassation in a seminal judgment asserted that the truthfulness of a statement is only one of the three factors to be taken into account when assessing a defamation case. The other two are the presence of public interest and the correct exposition of the facts; the lack of any one of these factors is enough to constitute defamation.<sup>116</sup>

During the current discussions, it is a common mistake to confuse false news with cases of defamation, which have some overlapping characteristics. Both share the aspect of false information but, when a specific individual is

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<sup>111</sup> Eur. Conv. on H.R. Art. 10.

<sup>112</sup> TARLACH MCGONAGLE, *FREEDOM OF EXPRESSION AND DEFAMATION - A STUDY OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS* 14 (Onur Andreotti, 1st ed., 2016).

<sup>113</sup> Corte di Cassazione, Nov. 14, 2016 ruling— Feb. 1, 2017, n. 4873.

<sup>114</sup> See *Mariapori v. Fin.*, § 69; *Niskasaari and Others v. Fin.*, § 77; *Saaristo and Others v. Fin.*, § 69; and *Ruokanen and Others v. Fin.*, § 50.

<sup>115</sup> McGonagle, *supra* note 112, at 14.

<sup>116</sup> Corte di Cassazione, sez. III Civile, 9 aprile 1998, n. 3679, in *Foro It.* 1998, I, 1834 con nota di Laghezza, <http://www.diritto-civile.it/Proprieta-e-Condominio/Cassazione-civile-sez.-III-09-aprile-1998-n.-3679.html>.

identified and a reputational damage is done, it is no longer false news but rather becomes a proper defamation case. A famous example will help to understand the difference; one of the most quoted stories in false news discussions is one that became known as *Pizzagate*—even Klein and Wueller used this case in their introduction.<sup>117</sup> During the 2016 presidential campaign, a false article circulated a conspiracy theory according to which the candidate Hillary Clinton and other prominent Democratic party political figures were coordinating a child trafficking ring out of a Washington, D.C. pizzeria by the name of Comet Ping Pong.<sup>118</sup> There is no doubt that this was “materially” false news; what went unnoticed is that, since the article identifies precise actors in the falsely alleged crime, it constitutes a proper case of libel. The fact that it is difficult (or impossible) to identify the author—due to the means of publication of the piece in a fake Macedonian news outlet—does not deprive this action of its criminal connotation. A law that condemns this conduct was already in place; this is not false news in the meaning used in this article, but rather a case of defamation. Going back to the two examples given above, it is clear how these examples differ from this kind of criminalization. In the case of the alleged rape, there is no individual whose reputation is harmed, and “immigrants” is not even a specific group of people who could claim damages—it will later be explained how this is not even a case of hate speech. The absence of a proper victim excludes defamation claims. The second example, even if stretched to include the general idea of a political leader faking his popularity, lacks both the reputational damage and the victim.<sup>119</sup>

## 2. Hate Speech

Above, it was illustrated how the European tradition is inclined to admit limitations on freedom of speech more intensely than the United States. The set of laws that prohibit hate speech does indeed traditionally belong to the Old Continent’s doctrine; thus, this is the second category of criminalization that will be compared to false news. Regardless of the widespread presence of laws in several European countries regulating hate

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<sup>117</sup> Klein & Wueller, *supra* note 76.

<sup>118</sup> *Id.* at 5; see also Craig Silverman, *How the Bizarre Conspiracy Theory Behind Pizzagate Was Spread*, BUZZFEED NEWS (May 12, 2016), [https://www.buzzfeed.com/craigsilverman/fever-swamp-election?utm\\_term=.rfNy7EWMK#.eqla7JZY8j](https://www.buzzfeed.com/craigsilverman/fever-swamp-election?utm_term=.rfNy7EWMK#.eqla7JZY8j).

<sup>119</sup> It can be argued that when someone is claiming that a specific individual voted for a candidate different from the one that he or she expressed their preference for could lead to a defamation case. Indeed, some legal systems include in this type of offense to a subject of a specific quality, *per se* not offensive, if that is contrary to his or her public image—e.g., affirming that a subject eats meat when he or she is publicly known as a vegetarian advocate.

speech, there is a lack of consensus on a specific definition between them. An excellent summary of both academic and legal attempts to give a definition has been made by Andrew Sellars in his article “Defining Hate Speech.”<sup>120</sup> For the purposes of this article, the two main definitions that are most valuable for Europe will be taken into account: the Recommendation No. R 97(20) of the Council of Europe,<sup>121</sup> and the European Union Council Framework Decision “on combating certain forms and expressions of racism and xenophobia by means of criminal law.”<sup>122</sup> They both contain key aspects that form a clear distinction between hate speech and false news.

According to the Council of Europe, hate speech is:

Covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.<sup>123</sup>

The European Union, in its Decision, provides that the Member States should punish as criminal offense, every hate speech situation defined as:

Public incitement to violence or hatred directed against a group of persons or a member of such a group defined on the basis of race, color, descent, religion or belief, or national or ethnic origin; . . . publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes . . . when the conduct is carried out in a manner likely to incite violence or hatred against such a group or a member of such a group.<sup>124</sup>

In both definitions, it is possible to outline common traits that are peculiar to hate speech but, as will be explained just below, do not form part of the concept of false news. First of all, deriving from the very idea behind this sensible limitation of speech of protecting minorities, the target of the statement is of particular importance: it must be a group or an individual as a member of the group. Offenses against individuals without any connotation of group identity are not considered acts of hate speech. It is necessary that groups defined as “historically oppressed,”<sup>125</sup> “traditionally

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<sup>120</sup> Andrew F. Sellars, *Defining Hate Speech*, BERKMAN KLEIN CENT. RES. PUBL. 20 (2016).

<sup>121</sup> Recommendation to Members States on “Hate Speech”, No. R 97(20), Committee of Ministers of the Council of Europe (Oct. 30, 1997).

<sup>122</sup> *Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law*, 2008/913/JHA, EUROPEAN UNION COUNCIL Framework (Nov. 28, 2008).

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

<sup>124</sup> *Id.*

<sup>125</sup> Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. LAW REV. 2320, 2357-58 (1988).

disadvantaged,”<sup>126</sup> or as a “minority”<sup>127</sup> are targeted. Race, color, religion, and ethnic origins are just some examples of how it is possible to outline such minorities against whom hate speech is addressed. Of course, it is not required for the target to technically represent a minority; what matters is the qualification as group. For example, it is possible—and it actually occurs frequently—to have hate speech against Muslims, even if they represent a large portion of the population.

Nonetheless, the primary difference between hate speech and false news is the content of the statements. To constitute hate speech, the speech should indeed incite violence or hatred, spread and promote racism and xenophobia. This, as explained in previous sections, is a component that cannot be found in false news. As already observed, this can have consequences, and amongst these, it is possible to include an increase of the same negative feelings that hate speech laws intend to prevent. Yet this is only indirectly achieved and false news does not contain that further step that is incitement or promotion of violence. Returning to once again consider the example of the false rape allegation of the thirteen-year-old Russian-German girl described above. At the center of this news there was a group, though not well defined, of immigrants. This could have matched the target requirement for hate speech, as indicated in the definitions cited above. What is missing, however, is the incitement to intolerance or hatred. Obviously, such news would be able to increase the xenophobic sentiment across the population, but this would follow only in a second phase, when and if the reader of the news reacted to the information in the worst way possible. It is also a fact that this kind of news is exploited by some political parties to further support for anti-immigrant policies. Nonetheless, this is not enough to consider these statements as hate speech. It must be said that some authors have rejected any definition based on content. Author Kenneth Ward takes this position, stating that hate speech can be “any form of expression through which speakers primarily intend to vilify, humiliate, or incite hatred against their targets,”<sup>128</sup> anything that is said by the speakers can be punished if there is the “desire to injure their victims.”<sup>129</sup> Relying on speaker’s intent and utilizing vague factors to assess hate speech should not be seen as completely correct; this

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<sup>126</sup> Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 WIS. L. REV. 1425, 1430 (1994).

<sup>127</sup> ALICE E. MARWICK & ROSS MILLER, *Online Harassment, Defamation, and Hateful Speech: A Primer of the Legal Landscape*, CTR. ON LAW AND INFO. POL., at 17 (2014).

<sup>128</sup> Kenneth D. Ward, *Free Speech and the Development of Liberal Virtues: An Examination of the Controversies Involving Flag-Burning and Hate Speech*, 52 U. MIAMI L. REV. 733, 765 (1997).

<sup>129</sup> *Id.*

kind of assessment would be too difficult—if not impossible—to perform and, when done in bad faith, it could lead to abuse and the arbitrary suppression of freedom of speech.

In closing, false news differs from hate speech for its lack of incitement, hatred or any other specific form of “call to action,” against a specific group or minority. False news is indeed a factual falsehood that does not necessarily disseminate hate; someone who might finally build up his or her hatred upon that false information could potentially do this in a successive phase. However, building a cause-effect relationship on this is, as already explained, not possible. Including false news within hate speech criminalization would be much too large of an interference with freedom of expression, and hard to justify—keeping in mind that currently, even the criminalization of hate speech is not believed compatible with the rights granted by the First Amendment of the U.S. Constitution.<sup>130</sup>

### 3. Genocide Denial Laws

At this point, it should already be clear how the two main approaches on limitations to freedom of speech differ greatly from each other when it comes to justifying restrictions of hate speech; however, an even larger gap between the European and U.S. doctrines is displayed in the very peculiar case of genocide denial laws—and, in particular, in instances of Holocaust denial. Even if some countries like France<sup>131</sup> criminalize the denial of every crime against humanity, in the vast majority of the cases, laws refer to the genocide committed by the German National-Socialist regime during the Second World War. Furthermore, since this regulation is historically the first of its kind, it is regarding this specific case that the debate, in both doctrine and courts, has been better and more widely developed. As already explained in the sections on defamation and hate speech, the aim of this thesis is not to

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<sup>130</sup> See *Collin v. Smith*, 578 F.2d 1197, 1201 (7th Cir. 1978) (holding that a neo-Nazi march could not be restrained because “[i]t is, after all, in part the fact that our constitutional system protects minorities unpopular at a particular time or place from governmental harassment and intimidation, that distinguishes life in this country from life under the Third Reich”).

<sup>131</sup> See *Loi du 29 juillet 1881 sur la liberté de la presse* [Law of Jul. 29, 1881 for Freedom of the Press] (explaining that the French Press Act criminalizes more generally every denial of crimes against humanity: “Those who have disputed, by one of the means stated in Article 23A, the existence of one or more crimes against humanity as they are defined by the article of the statute of the international military tribunal, annexed to the London Agreement of 8 August 1945, and which were committed by members of an organization declared criminal by the application of Article 9 of the above mentioned statute or by a person found guilty of such crimes by a French or an international tribunal, will be punished with the penalties foreseen by the sixth paragraph of Article 24.” Criminalization was added on July 13, 1990 with the Gayssot Act, which first introduced a reference to what has been defined as a crime against humanity by the International Military Tribunal enacted by the London agreement of August 8, 1945).

give an overlook of these provisions but to outline the differences of each one of these categories of crime with false news; nonetheless, I will briefly introduce the main traits of this kind of legislation.

The peculiarity of this set of norms is that they constitute *ad hoc* statutes, meaning that they target the denial, in this case, of a specific and well-established event. They were first introduced in those countries which had been directly affected by the Nazi regime: first Israel (1984), then France (1990), Austria (1992), and Germany (1994). Some statutes target genocide in general, while others have an even broader scope and use as a reference rulings made by international courts, treaties, or other decisions of independent bodies.<sup>132</sup> Genocide denial laws are the closest category to false news; indeed, in this case, legislators decided to criminalize any false statement on a fact. The reasoning behind this choice is that regulators had considered these utterances able to “strip from Holocaust victims the fundamental respect to which they are entitled”<sup>133</sup> and thus they are harmful enough to justify a limitation. Both the Human Rights Committee and the ECtHR have considered Holocaust denial to also be an incitement to hatred against the Jewish community.<sup>134</sup> However, it must be specified that the courts took into account the consequential harm that is caused by such statements, stating; “as a consequence, both the Committee and the Court upheld Holocaust denial prohibitions not because the denial of the Holocaust is a lie and *as such* not protected by freedom of expression.”<sup>135</sup> Currently, Holocaust denial finds a general consensus amongst countries,<sup>136</sup> nonetheless, laws prohibiting such speech are not generally accepted and often criticized, especially by those who follow U.S. doctrine. For example, the American philosopher, jurist, and scholar Ronald Dworkin, perfectly expressed that of course “denying that the Holocaust ever existed is a monstrous insult to the memory of all the Jews and others who perished in it” but at the same time “it is implausible that allowing fanatics to deny the Holocaust would substantially increase the risk of fascist violence in

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<sup>132</sup> LUDOVIC HENNEBEL & THOMAS HENNEBEL, GENOCIDE DENIALS AND THE LAW 242 (2011).

<sup>133</sup> Lidsky, *supra* note 99, at 1093.

<sup>134</sup> OSTER, *supra* note 15, at 231.

<sup>135</sup> *Id.*

<sup>136</sup> Hennebel & Hochmann, *supra* note 132, at 122 (citing JUDY AITA, UNITED NATIONS CONDEMNNS DENIAL OF THE HOLOCAUST (2007). “In January of 2007, the United States General Assembly passed a resolution (to coincide with International Holocaust Commemoration Day) condemning Holocaust denial. The resolution – passed by general consensus, with only Iran explicitly dissenting – called on all 192 UN member states to ‘unreservedly reject any denial of the Holocaust as a historical event, either in full or in part, or any activities to this end.’” *Id.*

Germany.”<sup>137</sup> Dworkin then vaguely recalls Milton’s idea on freedom of speech and states that this “Auschwitz lie” should be challenged and refused by public discourse, no matter how hard it may be, otherwise we would be unfairly limiting freedom of speech: “censorship is different. We must not endorse the principle that opinion may be banned when those in power are persuaded that it is false and that some group would be deeply and understandably wounded by its publication.”<sup>138</sup> Nevertheless, Dworkin’s opinion could be challenged in that this case does not involve *opinions* but *facts* that, in spite of what is asserted by deniers, have clearly been proven.<sup>139</sup>

A special mention must go to the French framework, specifically to the Gayssot Act; indeed, this law introduced a significant change in how to refer to the denied event. Instead of “unilaterally imposing history,”<sup>140</sup> by requiring that the Holocaust cannot be denied, the French law refers to the International Military Tribunal (IMT) Charter and decisions. The State delegated to an independent body the decision on what should be identified as a crime against humanity, without detailing a specific truth to be maintained inside the same law.<sup>141</sup>

Now, it is important to identify what really differentiates genocide denial from any other false news. Indeed, the former is nothing more than a subset of the latter; stating that the Holocaust did not happen means giving false information about a fact. Hence, where is the difference? Why is only this case criminalized? Provided that so far nobody has investigated this set of laws from the point of view of false news and that the consensus on it is all but unanimous, a plausible explanation will be given on why it was possible to “promote” a piece of false news to a crime. The key point that allowed legislators to adopt such legislation is the narrowness of it; that’s the reason why we refer to them as *ad hoc* statutes, meaning that their scope includes only specific cases and, contrary to other “standard” regulations, they are not a generic description of the circumstances that can constitute a crime. A peculiar exception is provided by the above-mentioned Gayssot Act because it contains a provision open to any further qualification of a fact as a crime against humanity, first according to the IMT Charter and then to the rulings of the International Crime Court. Nonetheless, the majority of genocide

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<sup>137</sup> Ronald Dworkin, *Should wrong opinions be banned?*, INDEPENDENT (May 27, 1995, 11:02 AM), <https://web.archive.org/web/20170627093221/http://www.independent.co.uk/voices/should-wrong-opinions-be-banned-1621519.html>.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 46. Nonetheless, there are some genocide cases that fall out of the scope of the Gayssot Act; for example, the Armenian genocide of 1915.

<sup>140</sup> *Id.* at 250.

denial laws contain a specification of which cases are believed as true by that legal system and consequently when a punishment may be imposed. This is exactly the principle that makes the criminalization of this kind of false news possible; a consensus on a historical fact and the understanding that its denial can, represent hatred and cause harm—moral harm—to the victims or to their descendants. Acknowledging that a fact is believed as true almost unanimously does not automatically imply that an objective truth exists; at least, it can be seen as the recognition of an *official* truth. It has already been stated more than once in this article that this is something that should be avoided because of the tremendous risks for freedom of speech if a government is allowed to impose its version of the truth; nonetheless, the peculiarity and severity of the facts included within the scope of such legislation make them acceptable for at least the majority of courts and academics. Indubitably, strong debate is still ongoing about this topic and it is far from being solved due to the deep ideological and philosophical roots upon which this peculiar limitation of speech is built, thus it is unlikely to reach complete consensus.

Finally, genocide denial is a small and peculiar subset of false news; it is so narrow, specific, and severe that it was feasible for states to impose a truth and to prohibit falsity about it. If not completely removed, this form of limitation on speech must not be broadened to other cases and should remain only as an extremely specific exception. Indeed, more than hate speech, genocide denial laws are strongly objected to by scholars who support the U.S. doctrine on freedom of speech, in which no truth may be established by the government and the possibility of expressing opinions must be given to everyone, regardless of the content, because only public debate has the power to affirm veracity without compromising human rights.

## V. LIABILITY OF INTERMEDIARIES

### A. *Digital Intermediaries' Liability in the EU Framework*

If the debate on false news started in 2016 and has been at the center of discussion amongst both professionals and academics, it is also because of the important boost that digital intermediaries, and more specifically social networks, gave to the sharing of false information:

Social media platforms . . . have a dramatically different structure than previous media technologies. Content can be relayed among users with no significant third-party filtering, fact-checking, or editorial judgment. An

individual user with no track record or reputation can in some cases reach as many readers as Fox News, CNN, or the New York Times.<sup>142</sup>

Several studies have attempted to understand whether such these dynamics influenced public opinion to the extent of changing the results of elections, and in particular the U.S. presidential election of 2016; however, the different conclusions that these studies have reached are proof of how little certainty can be found on this matter.<sup>143</sup> In this section, an outline will first be given of how digital intermediaries' liability has been designed in the European framework and then it will be shown that no obligation to remove or control content can be imposed on them.

The necessity of bringing clarity over the role—and thus responsibility—of digital intermediaries arose with the development of the Internet and of new possibilities for users to post their own content and thus reach an incredibly vast audience. Intermediaries assumed a fundamental role in communication and became a large part of the ecosystem; the contribution to freedom of expression had been more relevant because they provided individuals with a new efficient medium to express themselves. At the same time, digital intermediaries represented an amplifier for speech crimes that could reach a previously unimaginable target audience, leading to the necessity of striking a balance between complete indemnity for media operators and full liability for content that they did not generate. The most important provision in force is Directive 2000/31/EC (E-Commerce Directive), which basically transposed the concept of “innocent publication” into the European legal system.<sup>144</sup> Indeed, in its section named “Liability of intermediary service providers,” in Articles 12 to 15, the general principle in which a provider that constitutes only a passive medium for communication and, at the same time, has no information about the unlawfulness of the content, should not be considered liable for the user's dissemination is enshrined. More specifically, Articles 12 and 13 deal with providers which merely have a strong technical role in the communication (i.e., “mere

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<sup>142</sup> Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election* 211, NAT'L BUR. OF ECON. RES. (Jan. 2017), <http://www.nber.org/papers/w23089>.

<sup>143</sup> Chung, *supra* note 106; Caitlin Dewey, *Facebook Fake-News Writer: 'I Think Donald Trump is in the White House Because of Me'*, WASH. POST (Nov. 17, 2016), [https://www.washingtonpost.com/news/the-intersect/wp/2016/11/17/facebook-fake-news-writer-i-think-donald-trump-is-in-the-white-house-because-of-me/?utm\\_term=.9aaaad8caf28](https://www.washingtonpost.com/news/the-intersect/wp/2016/11/17/facebook-fake-news-writer-i-think-donald-trump-is-in-the-white-house-because-of-me/?utm_term=.9aaaad8caf28); Hannah J. Parkinson, *Click and Elect: How Fake News Helped Donald Trump Win a Real Election*, THE GUARDIAN (Nov. 14, 2016), <https://www.theguardian.com/commentisfree/2016/nov/14/fake-news-donald-trump-election-alt-right-social-media-tech-companies>; Max Read, *Donald Trump Won Because of Facebook*, N.Y. MAG. (Nov. 9, 2016), <http://nymag.com/selectall/2016/11/donald-trump-won-because-of-facebook.html>.

<sup>144</sup> See Jan Oster, *Communication, Defamation and Liability of Intermediaries*, LEG. STUD., at 10 (Oct. 23, 2014). The authors provide more details about the “innocent publication” principle.

conduit” and “caching” providers), so that they are seen more as “infrastructure”; Article 14 introduces a liability exemption for a content provider which does not have “actual knowledge of illegal activity” and “upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.”<sup>145</sup> Finally, Article 15 excludes a general obligation on providers to monitor content; they cannot be obliged to control all the information they manage and look for illegal content.

The provisions of the Directive were also taken into account by the European Court of Human Rights when it was called to judge several cases on a matter of intermediaries’ responsibility, especially in the two leading cases of *Delfi AS v. Estonia*<sup>146</sup> and *MTE and Index v. Hungary*.<sup>147</sup> In both situations, the Court had to deal with hate speech posted in the comment section of articles published on the applicants’ websites; however, the judges came to different conclusions, even if they had followed the same basic principles. In *Delfi AS v. Estonia*, the Court found that the role of the provider (the news outlet Delfi) was not merely passive or technical and “that the objective pursued by the applicant company was not merely the provision of an intermediary service.”<sup>148</sup> Hence, since the news outlet had a role different from being a mere intermediary and “it was in a position to assess the risks related to its activities and that it must have been able to foresee, to a reasonable degree, the consequences which these could entail,”<sup>149</sup> and thus the Court found the interference of Estonia legitimate in its right to impart information. This judgment has been severely criticized because it appeared to be in contrast with the provision that there is no general obligation to monitor;<sup>150</sup> however, it must be born in mind that it is not the duty of the ECtHR to apply the Directive, but to assess the domestic court’s judgment in accordance with the ECHR, and more specifically in this case, with Article 10. Moreover, other factors led the Court to such a decision, such as the fact that Delfi permitted comments to be posted anonymously, and that they could have foreseen such comments given their past experience, and that the system they put in place was not sufficient enough to filter hate speech content, even if it was directly offensive and not particularly elaborate. The second judgment of *MTE and Index v. Hungary* concerned a very similar case of

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<sup>145</sup> Directive on Electronic Commerce 2000, SI 2000/31/EC, art. 12-15 (Eng.).

<sup>146</sup> *Delfi AS v. Est.*, 64669/09 Eur. Ct. H.R. (2015).

<sup>147</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu ZRT v. Hung.*, 22947/13 Eur. Ct. H.R. (2016).

<sup>148</sup> *Id.* at § 128.

<sup>149</sup> *Id.* at § 129.

<sup>150</sup> *European Court Strikes Serious Blow to Free Speech Online*, ARTICLE 19 (Oct. 14, 2013), <https://www.article19.org/resources/european-court-strikes-serious-blow-free-speech-online>.

anonymous comments posted under an article. In this second ruling, however, the Court saw an illegitimate interference with the right granted by Article 10 of the ECHR and opted for non-liability of the digital intermediary. If the principles upon which the judgment was made are the same, the differences with the *Delfi* case are important enough to justify a different conclusion. First of all, the Court found that in this situation “the incriminated comments did not constitute clearly unlawful speech, and they certainly did not amount to hate speech or incitement to violence;”<sup>151</sup> hence, it was not possible to affirm that the provider had knowledge of the illegal content as in the previously examined case. Another difference the Court found was in the nature of the applicant; MTE was a non-profit organization and the business nature of the website was less evident than in the *Delfi* case. These points, combined with other smaller differences, changed the outcome of a ruling that seemed to concern a fact scenario that was thoroughly similar to *Delfi v. Estonia*—to the extent that some commentators saw the second judgment as an interpretation or even a rewriting of the previous one.<sup>152</sup>

These cases by the ECtHR, when analyzed together with the most significant judgment of the Court of Justice of European Union (CJEU),<sup>153</sup> give a detailed picture of how digital intermediaries’ liability should be evaluated: when the provider has a merely passive or technical role, it cannot be held liable for third parties’ content. Moreover, the “notice and take down” system—also provided by Article 14(1)(b) of the E-Commerce Directive—“could function in many cases as an appropriate tool for balancing the rights and interests of all those involved.”<sup>154</sup> In general, the leading principle that must be followed is the one outlined in Article 15, that there is no general obligation to monitor.

### B. Digital Intermediaries’ Liability for False News

As explained in the previous section, it is not possible to impose liability on digital intermediaries if they are a mere medium of a communication, if they have no knowledge of the illegal content and, if notified, they promptly

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<sup>151</sup> Directive on Electronic Commerce 2000, *supra* note 145, at § 64.

<sup>152</sup> Sophie Stalla-Bourdillon, *MTE v Hungary: Is the ECtHR rewriting Delfi v Estonia?*, PEEP BEEP (Feb. 2, 2016), <https://peepbeep.wordpress.com/2016/02/02/mte-v-hungary-is-the-ecthr-rewriting-delfi-v-estonia/>; *MTE v. Hungary: The ECtHR Rules Again on Intermediary Liability*, EUR. DIG. RTS., (Feb. 10, 2016), <https://edri.org/mte-v-hungary-the-ecthr-rules-again-on-intermediary-liability>.

<sup>153</sup> See Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, 2012; Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, 2011.

<sup>154</sup> Directive on Electronic Commerce 2000, *supra* note 145, at § 91.

removed the unlawful information. However, in the case of false news, what is at the center of attention is not the behavior of the intermediary, but rather the qualification of the content itself. Indeed, this was the conclusion in the previous section of this article with the general principle that false news should not create liability for the author. It logically follows that, if it is not unlawful to publish a piece of false information, if there is no illegality in the content, the intermediary cannot be punished based on that communication. Evidently, there is no ground to impose on the digital intermediary an obligation—and hence a punishment if not fulfilled—to delete, remove, or even flag false content, content that may be inappropriate but not illegal.

However, it may be worth analyzing the case of legislation, still framed within the European Union system, that imposes an obligation to detect and remove false news on social media.<sup>155</sup> The rationale behind this intervention would be to presume the effect of a shared piece of false news to be more severe than the content itself so that only in this successive phase of “publicity” an action should be taken. Leaving out any other issues of legitimacy of such a law that punishes only the sharer of a piece of information and maybe not its author, this regulation would be in evident contrast with what was established both by the ECtHR, the CJEU, and the E-Commerce Directive. First, no “illegal activity or information” is conducted via the services provided by the intermediary, and second, more importantly, the provider would be involved in the difficult and expensive activity of monitoring and fact checking all content that is posted by users. This duty evidently goes against the principles set by Article 15 of the E-Commerce Directive and the case law of both ECtHR and the CJEU, basically placing an obligation on the providers to monitor the information shared via their services—with the monitoring not limited to only illegal information that could be published but now also extended to false news. This activity, other than requiring an unreasonable amount of human, economic, and technical resources, could lead to unexpected and unwanted results;<sup>156</sup> a private company would be entitled (and forced) to express judgment on the truthfulness of all content posted by its users. Some actors have already introduced a proactive tool in order to flag and fact check content. Facebook, for example, signed the Code of Principles of the International Fact-checking

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<sup>155</sup> See Politi, *supra* note 2; ANGELO M. CARDANI, AGCOM, *RELAZIONE ANNUALE 2017 SULL'ATTIVITÀ SVOLTA E SUI PROGRAMMI DI LAVORO* (2017) (discussing that President Mr. Cardani requested an intervention by legislators, after not being able to rely on the digital companies' self-regulation).

<sup>156</sup> Krishna Bharat, *How to Detect Fake News in Real-Time*, NEWCO (Apr. 27, 2017), <https://shift.newco.co/how-to-detect-fake-news-in-real-time-9fd9e0197bfd>. The author discusses the problem of detecting, even evident, false news and does not have an easy solution.

Network (IFCN) at Poynter Institute in October 2016.<sup>157</sup> According to the social network, “if the fact checking organizations identify a story as fake, it will get flagged as disputed and there will be a link to the corresponding article explaining why. Stories that have been disputed may also appear lower in News Feed.”<sup>158</sup>

In conclusion, there is no ground to impose an obligation on digital intermediaries to block, remove, limit or flag false news. Undoubtedly, it is desirable for companies who operate as social networks to adopt measures to maintain a correct and clean environment for their users; nonetheless, this should be carried out within the scope of their independent choices as private companies and in accordance with their terms and conditions. It is also true that new issues of ethics and morals would arise when a private company gains enough power to self-regulate speech at a worldwide level; however, this discussion falls out of the scope of this article and represents another critical topic that should be deeply analyzed.<sup>159</sup>

## VI. CONCLUSION

Over the recent years, false news has been a hot topic for discussion in the journalistic world, as well as for governments and regulators in general; new laws have been approved, and others demanded by those who believe false information to be dangerous and harmful to society. Because of the technical difficulty of finding and punishing the authors of such falsities in the digital environment, attention has shifted to intermediaries, such as social networks. It has required them to be proactive, adopting measures that could prevent the sharing of false news. If on the one hand it is true that false news has found fertile ground to grow and spread on the Internet, on the other hand the such news did not come to bear in 2016; moreover, the necessity of fighting this issue with legislative means is far from being proven necessary.

The common mistake made by several authors—both academic and professional—is to include in their discussion on false news what is already punished by law, such as defamation, hate speech, fraud, and perjury. Thus, the first step is to correctly understand the scope of this issue; hence, this article defined false news as all of the false statements that are in a grey area

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<sup>157</sup> *International Fact-Checking Network Fact-Checkers' Code of Principles*, POYNTER, <https://www.poynter.org/international-fact-checking-network-fact-checkers-code-principles>.

<sup>158</sup> Adam Mosseri, *Addressing Hoaxes and Fake News*, FACEBOOK NEWSROOM (Dec. 15, 2016), <https://newsroom.fb.com/news/2016/12/news-feed-fyi-addressing-hoaxes-and-fake-news>.

<sup>159</sup> See Brett G. Johnson, *Speech, Harm, and the Duties of Digital Intermediaries: Conceptualizing Platform Ethics*, 32 J. MED. ETHICS, 16 (2017) (introducing an excellent starting point for this discussion).

between information irrelevant to the public and falsity that is already punished by law. It was then illustrated how false news produces consequences but not harm; the lack of harm should guide legislators in not adopting measures against the discussed form of falsity. Indeed, it was described how harm to others should be taken as guidance when assessing the necessity of new criminalization or liability, in turn endorsing the standard U.S. approach on freedom of speech.

Finally, the main research question can be answered. To what extent should the law prescribe responsibility for false news, and subsequently, what is the role of digital intermediaries? It is accurate to say that, if correctly understood and defined, law *per se* should not prohibit false news. Any action taken by the state concerning a piece of news that lacks the fundamental elements to be considered an existing crime or generate liability (e.g. defamation, fraud, or hate speech) is to be considered an arbitrary and unjustified interference with freedom of speech. Indeed, the main characteristic of false news is to produce not *harm* but *consequences*; the harm to others framework was utilized to show exactly how this specific kind of falsity lacks the elements to be criminalized and thus limit freedom of speech.

As a direct consequence of this, intermediaries, especially digital ones, cannot be the target of an obligation to block, remove, limit, or flag false news. First, such an obligation cannot be derived from the leading European framework set by the E-Commerce Directive because there is no “illegal activity or information” conducted via the services provided by the intermediaries.<sup>160</sup> Second, if a specific regulation were put in place to create a new obligation, it would hold intermediaries responsible for a content that, as demonstrated, is not unlawful *per se*. Finally, due to the commitment and work that identifying false news practically requires, an obligation of this kind would violate the principle that there is no general obligation to monitor set by Article 15 of the E-Commerce Directive, which without doubt represents a standard in the regulation of the digital environment. Certainly, it is desirable for companies who run services as social networks to adopt measures in order to maintain a correct and clean environment for their users; nonetheless, this should be carried out within the scope of their independent choices as private companies and in accordance with their terms and conditions. It is also true that new issues of ethics and morals would arise when a private company gains enough power to self-regulate speech at a

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<sup>160</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market (“Directive on electronic commerce”).

worldwide level; however, that discussion falls out of the scope of this thesis and represents another critical topic that should be deeply analyzed.



# JOURNAL OF INTERNATIONAL MEDIA & ENTERTAINMENT LAW

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