

# JOURNAL OF INTERNATIONAL MEDIA & ENTERTAINMENT LAW

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Volume 8, Number 1

2018-2019



## SYMPOSIUM

FAKE NEWS AND “WEAPONIZED DEFAMATION”:  
GLOBAL PERSPECTIVES

## EDITOR’S NOTE

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Fake News and Freedom of the Media  
*Andrei Richter*

A Federal Shield Law That Works: Protecting Sources, Fighting Fake  
News, and Confronting Modern Challenges to Effective Journalism  
*Anthony L. Fargo*

Combating Russian Disinformation in Ukraine:  
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**Mission Statement:** The *Journal of International Media & Entertainment Law* is a semi-annual publication of 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. The *Journal* provides a forum for exploring the complex and unsettled legal principles that apply to the production and distribution of media and entertainment in an international, comparative, and local context. The legal issues surrounding the creation and dissemination of news and entertainment products on a worldwide basis necessarily implicate the laws, customs, and practices of multiple jurisdictions. The *Journal* examines the impact of the Internet and other technologies, the often-conflicting laws affecting media and entertainment issues, and the legal ramifications of widely divergent cultural views of privacy, defamation, intellectual property, and government regulation.

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**SYMPOSIUM  
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## Editor's Note

This issue is entirely devoted to articles from our 2018 symposium conference, entitled *Fake News and "Weaponized Defamation": Global Perspectives*, which drew scholars and practitioners to a packed lecture hall at Southwestern Law School in Los Angeles, California. Organized in partnership with the *Southwestern Law Review* and *Southwestern International Law Journal*, the symposium's Call for Papers yielded submitted abstracts from more than 100 scholars and practitioners from every corner of the world. Thirteen of the accepted articles were selected for publication in the Journal, the first four of which are published herein.

The first article, "Fake News and Freedom of the Media," by Dr. Andrei Richter, analyzes recent initiatives to curtail fake news at the United Nations, the World Conference of International Telecommunications Union, the European Union, and before the European Court of Human Rights. Special attention is paid to the policy deliberations that resulted in the 2017 Joint Declaration on fake news announced by the U.N. and other treaty organizations, which Richter helped negotiate in his capacity as the Representative on Freedom of the Media at the Organization of Security and Co-operation in Europe.

Professor Anthony Fargo's article proposes a federal shield law for the United States that could serve as a model for the American states in need of revisions to their laws and for nations around the globe that lack source protections. The proposed shield law would define journalists as persons engaged in fact-based reporting and opinion writing in any medium for distribution to the public. The proposal would bar federal investigators from fishing through telephone or internet service provider data in search of journalists' and suspected sources' e-mail, social media, and calling patterns. To address national security issues or imminent lawlessness, the government would have to prove to a judge that a discernible or imminent threat existed.

Professor Monroe Price and media lawyer Adam Barry write about the Internews initiative in Ukraine, which brings together international and Ukrainian experts to encourage governmental restraint against speech curbs and to create consensus-based standards and guidelines on free speech and media during conflict. Ultimately, Ukraine's media, civil society and government must find a way forward to balance free speech and national

security concerns in response to an avalanche of false and damaging propaganda from Russian government-controlled channels.

Professor Jelena Surculija Milojevic writes about media legislation in complement with the journalism profession's Code of Ethics in the Republic of Serbia. Milojevic posits that Serbia's national courts misconstrue the terms "defamation" and "public figure" in ways that are inconsistent with the decisions made by the European Court of Human Rights. The paper also examines the non-legal power of the profession-based Press Council to protect one's reputation, and the rise of Serbian social networking as a tool to weaponize defamation by those in power.

In the coming months, the Journal will be publishing nine more fake news and weaponized defamation articles revised from papers delivered at our 2018 conference. For those who cannot wait, you can learn more about what happened at *Fake News and "Weaponized Defamation": Global Perspectives* by going to [www.swlaw.edu/globalfakenewsforum](http://www.swlaw.edu/globalfakenewsforum).

In Volume 7:2, three paragraphs from an archived article were appended to Jonas Nordin's Introduction "The Swedish Freedom of Print Act of 1776." The Journal regrets the error, and it has been corrected in electronic editions. As always, your comments, suggestions, and feedback of any kind are welcome.

Professor Michael M. Epstein  
Supervising Editor

# FAKE NEWS AND FREEDOM OF THE MEDIA

Andrei Richter\*

## ABSTRACT

The notion of “fake news” has gained great currency in intergovernmental policies and regulation. At the same time no general approach on how to deal with the phenomena behind the notion has been found so far. Some believe “fake news” is the old media practice of disseminating “false information” that was somewhat dealt with by the League of Nations in the 1930s. Others see “fake news” as a new threat and challenge to democracy and international order. This article will differentiate disinformation and fake news notions and link the latter with the current spread of manipulation in the media.

Further, this article will summarize the modern response to “fake news.” The most recent provisions of the UN, EU and Council of Europe (including the European Court of Human Rights) acts will be analyzed. The decisions that aim to curtail “fake news” will be reviewed from the perspective of international commitments on freedom of expression and freedom of the media.

## I. INTRODUCTION

We all have entered a new world of the media with a speed unheard of in human history. The current media environment means not just the non-stop appearance and development of new media platforms, products of convergence of traditional legacy media with the internet and mobile telecommunications. The process is accompanied by the revolutionary new approaches that media outlets should take towards the reader and/or viewer, to their own finances and business models, to the ever-increasing and louder

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\* Andrei Richter is a Fellow at Center for Media, Data and Society, School of Public Policy, Central European University (Budapest) and the Senior Adviser of the Organization for Security and Co-operation in Europe’s (OSCE) Representative on Freedom of the Media (Vienna, Austria). The analysis and opinions expressed are the author’s own and do not necessarily reflect those of the OSCE.

than ever user-generated content, to gate-keeping and news-aggregation. The media outlets have lost the ability to control the public dissemination of information, and thus to set the public agenda. They have lost the privilege of access to confidential sources who now fully use the anonymity that internet provides, such as the “black boxes.” Today media tools allow politicians and other individuals to bypass traditional media. For example, through tweets, and investigative media blogs.

At least in the short perspective it all leads to weakening of professional media entities and places heavier burden on professional journalists. Thereby, bringing about an unlimited growth in online media which does not necessarily adhere to professional standards of journalism. That creates a situation when legitimate expressions of personal views are merged with false or doctored information, hate campaigns against individuals, often in a political context, with the objective of sewing insecurity and fear that result in harming democratic political processes. The advance of new forms of digital media, as was noted by the European Parliament, have posed serious challenges for quality journalism. These challenges include a decrease in critical thinking among audiences making them more susceptible to disinformation and manipulation.<sup>1</sup>

The most recent developments in the dissemination models for media content, mostly online, have brought about the notion of “fake news,” which subsequently gained great currency in intergovernmental and national policies and regulation.

Some believe it is an old media practice of disseminating “false information” that has been in existence since the media was established and journalism became a profession.<sup>2</sup> Others see it as a brand new threat and challenge to democracy and international order. At the same time no general normative, institutional, and judicial framework on how to deal with the phenomena behind the notion of “fake news” has been found so far.

Using the comparative legal method, this article will analyze sources of international law to determine their approaches to addressing the dissemination of false information or “fake news.” This methodological approach provokes relevant sources that are often not observable if the focus is on individual international organizations or covenants. Comparative studies can reveal the continuity and discrepancies of legal responses in

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1. *See Resolution on EU Strategic Communication to Counteract Propaganda Against it by Third Parties*, EUR. PARL. DOC. PV 23/11/2016 - 10.6 (2016).

2. Robert G. Parkinson, *Fake news? That's a Very Old Story.*, WASH. POST, Nov. 25, 2016, [https://www.washingtonpost.com/opinions/fake-news-thats-a-very-old-story/2016/11/25/c8b1f3d4-b330-11e6-861652b15787add0\\_story.html?utm\\_term=.3497739aeb9d](https://www.washingtonpost.com/opinions/fake-news-thats-a-very-old-story/2016/11/25/c8b1f3d4-b330-11e6-861652b15787add0_story.html?utm_term=.3497739aeb9d).

various contexts that all claim to share common global values of free speech and free media.

## II. ENVIRONMENT AND DEFINITIONS

The current ecosystem of false information online is characterized by Syed as a set of the following distinct features: filters – communities – amplification – speed – profit incentives.<sup>3</sup>

### A. *Filters*

As Syed observes, “an obvious feature of online speech is that there is far too much of it to consume.”<sup>4</sup> Syed continues stating that “the networked, searchable nature of the internet yields two interrelated types of filters” which are categorized as “manual filters,” or “explicit filters.”<sup>5</sup> “Explicit filters” include search terms or Twitter hashtags, which can be used to prompt misinformation. “Implicit filters” are things like algorithms that either watch one’s movements or change based on how one manually filters which explains the way platforms decide what content to serve an individual user in order to maximize his/her attention to the online service.<sup>6</sup>

### B. *Communities*

Filters can create feeds that are insular “echo chambers,” reinforced by a search algorithm.<sup>7</sup> Syed notes that individuals easily produce information, shared in online communities built around affinity, political ideology, hobbies, etc. Through developing their own narratives, these communities create their own methods to produce, arrange, discount, or ignore new facts.<sup>8</sup> These narratives allow communities to make, as Syed observes, “cloistered

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3. Nabiha Syed, *Real Talk About Fake News: Towards a Better Theory for Platform Governance*, 127 YALE L.J. F. 337, 346-53 (2017).

4. *Id.*

5. *Id.*

6. *Id.*

7. Syed refers here to Cass R. Sunstein & Adrian Vermeule, *Conspiracy Theories: Causes and Cures*, 17 J. POL. PHIL. 202 (2009); and also Daniel J. Isenberg, *Group Polarization: A Critical Review and Meta-Analysis*, 50 J. PERSONALITY & SOC. PSYCHOL. 1141 (1986) (explaining the interaction between group polarization and other social psychological phenomena). *But see* Richard Fletcher & Rasmus Kleis Nielsen, *Are News Audiences Increasingly Fragmented? A Cross-National Comparative Analysis of Cross-Platform News Audience Fragmentation and Duplication*, 67 J. COMM. 476 (2017) (finding no support for the idea that online audiences are more fragmented than offline audiences).

8. Joshua Green, *No One Cares About Russia in the World Breitbart Made*, N.Y. TIMES, July 15, 2017, <http://nytimes.com/2017/07/15/opinion/sunday/no-one-cares-about-russia-in-the-world-breitbart-made.html>.

and potentially questionable decisions about how to determine truth—an ideal environment to normalize and reinforce false beliefs.”<sup>9</sup>

### C. Amplification

Syed notes that this process happens in two stages: “first, when fringe ideas percolate in remote corners of the internet, and second, when they seep into mainstream media.”<sup>10</sup> As Syed further observes, the amplification dynamic matters for fake news in two ways:

First, it reveals how online information filters are particularly prone to manipulation—for example, by getting a hashtag to trend on Twitter, or by seeding posts on message boards—through engineering the perception that a particular story is worth amplifying. Second, the two-tier amplification dynamic uniquely fuels perceptions of what is true and what is false.<sup>11</sup>

### D. Speed

As Syed notes, “platforms are designed for fast, frictionless sharing.”<sup>12</sup> Frictionless sharing, as Syed notes, accelerates the amplification cycle and aids in maximum persuasion. Syed continues stating that

memes are a convenient way to package this information for distribution: they are easily digestible, nuance-free, scroll-friendly, and replete with community-reinforcing inside jokes.<sup>13</sup>

Syed also notes that, automation software, called “bots,” are credited with circulating misinformation, because of how well they can trick algorithmic filters by exaggerating a story’s importance.<sup>14</sup>

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9. Syed, *supra* note 3.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* citing Joseph Bernstein, *Never Mind the Russians, Meet The Bot King Who Helps Trump Win Twitter*, BUZZFEED NEWS, Apr. 5, 2017, [https://www.buzzfeed.com/josephbernstein/fromutahwithlove?utm\\_term=.uuqR8aQBo#.ry1zRKOMD](https://www.buzzfeed.com/josephbernstein/fromutahwithlove?utm_term=.uuqR8aQBo#.ry1zRKOMD); Robyn Caplan & Danah Boyd, *Who Controls the Public Sphere in an Era of Algorithms? Mediation, Automation, Power, Data & Society*, DATA & SOCIETY, May 15, 2016, [https://datasociety.net/pubs/ap/MediationAutomationPower\\_2016.pdf](https://datasociety.net/pubs/ap/MediationAutomationPower_2016.pdf) (discussing the power of social media outlet algorithms in “nudging” voters); Marc Fisher et al., *Pizzagate: From Rumor, to Hashtag, to Gunfire in D.C.*, WASH. POST, Dec. 6, 2016, [http://www.washingtonpost.com/local/pizzagate-from-rumor-to-hashtag-to-gunfire-indc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c\\_story.html](http://www.washingtonpost.com/local/pizzagate-from-rumor-to-hashtag-to-gunfire-indc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c_story.html) (detailing the spread of the “Pizzagate” misinformation campaign); Philip Howard et al., *Junk News and Bots during the U.S. Election: What Were Michigan Voters Sharing Over Twitter?*, OXFORD INTERNET INST., Mar. 26, 2017, <http://comprop.oxi.ox.ac.uk/research/working-papers/junk-news-and-bots-during-the-u-s-election-what-were-michigan-voters-sharing-over-twitter/> (discussing the ability of “computational

### E. Profit Incentives

Syed states that “social media platforms make ‘fake news’ uniquely lucrative.” Syed notes that:

Advertising exchanges compensate on the basis of clicks for any article, which creates the incentive to generate as much content as possible with as little effort as possible. False news, sensationalist in its nature, fits these up-front economic incentives.<sup>15</sup>

Syed finds two noteworthy elements to this “uptick:” First, the mechanics of advertising on these platforms such as cheap distribution means more money.<sup>16</sup> Second, the appearance of advertisements and actual news appear almost identical on these platforms which “further muddies the water between what is financially motivated and what is not.”<sup>17</sup>

The first known mentions of the phrase “fake news” trace back to the 19<sup>th</sup> century, but its use mostly remained dormant until the 2016 US presidential election campaign.<sup>18</sup> Still the Google Books search tool shows that there was no significant number of mentions of the term until the 1990s.<sup>19</sup> The usage of the term on the internet skyrocketed in fall 2016, and it was picked as word of the year, first, for 2016, by the Australian Macquarie Dictionary and then, for 2017, by the UK-based Collins Dictionary, which said usage of the term increased 365 percent in 2017.<sup>20</sup>

propaganda” to distribute large amounts of misinformation over social media platforms); Philip N. Howard & Bence Kollanyi, *Bots, #StrongerIn, and #Brexit: Computational Propaganda during the UK-EU Referendum*, COMPROM Research Note 2016.1 (2016), <https://arxiv.org/pdf/1606.06356.pdf> (discussing the use of Twitter bots); Jared Keller, *When Campaigns Manipulate Social Media*, ATLANTIC, Nov. 10, 2010, <https://www.theatlantic.com/politics/archive/2010/11/when-campaigns-manipulate-social-media/66351/> (detailing how political campaigns can use social media to trick algorithmic filters on search engines); J.M. Porup, *How Mexican Twitter Bots Shut Down Dissent*, VICE, Aug. 24, 2015, [https://motherboard.vice.com/en\\_us/article/z4maww/how-mexican-twitter-bots-shut-down-dissent](https://motherboard.vice.com/en_us/article/z4maww/how-mexican-twitter-bots-shut-down-dissent) (reporting on the use of twitter bots to attack government critics).

15. Syed, *supra* note 3.

16. *Id.*

17. *Id.*

18. *The Real Story of 'Fake News'*, MERRIAM WEBSTER, <https://www.merriam-webster.com/words-at-play/the-real-story-of-fake-news> (last visited May 3, 2018). See also Forum on *Who started the expression 'fake news'?*, ENGLISH LANGUAGE & USAGE STACK EXCH., Mar. 13, 2017, <https://english.stackexchange.com/questions/378178/who-started-the-expression-fake-news> (last visited May 3, 2018).

19. “Fake News” Phrase Search, GOOGLE BOOKS NGRAM VIEWER, [https://books.google.com/ngrams/graph?content=%22fake+news%22&year\\_start=1986&year\\_end=2017&corpus=15&smoothing=0&share=&direct\\_url=t1%3B%2C%22%20fake%20news%20%22%3B%2Cc0](https://books.google.com/ngrams/graph?content=%22fake+news%22&year_start=1986&year_end=2017&corpus=15&smoothing=0&share=&direct_url=t1%3B%2C%22%20fake%20news%20%22%3B%2Cc0) (last visited May 3, 2018).

20. Elle Hunt, *'Fake news' named word of the year by Macquarie Dictionary*, GUARDIAN, Jan. 24, 2017, <https://www.theguardian.com/australia-news/2017/jan/25/fake-news-named-word-of-the-year-by-macquarie-dictionary>; Julia Hunt, *'Fake news' named Collins Dictionary's official Word of the Year for 2017*, INDEPENDENT, Nov. 2, 2017,

There appears to be no consistent, clear, and straightforward definition of the term “fake news.”<sup>21</sup> Just months ago the word started being used as a catch-all term, Jeremy Peters of the New York Times wrote, “against any news they see as hostile to [someone’s] agenda.”<sup>22</sup> The most prominent use of the term in that meaning was by then US President-elect Donald Trump at a press conference claiming that “[CNN is] terrible. ... You are fake news,” although CNN follows high standards on accuracy in reporting.<sup>23</sup>

The London’s Guardian emphasizes that

[s]trictly speaking, fake news is completely made up and designed to deceive readers to maximise traffic and profit. But the definition is often expanded to include websites that circulate distorted, decontextualised or dubious information through – for example – clickbait headlines that don’t reflect the facts of the story, or undeclared bias.<sup>24</sup>

The word “fake” most probably originates in Low English (criminal slang) from the 17th century, where it was taken from to colloquial and then to mainstream language.<sup>25</sup> Today some dictionaries still do not include the term partly because of the self-explanatory nature of it.<sup>26</sup> Still, “fake news” is defined by Cambridge Dictionary as “false stories that appear to be news, spread on the internet or using other media, usually created to influence political views or as a joke,” and by Macquarie Dictionary as “disinformation and hoaxes published on websites for political purposes or to drive web

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<http://www.independent.co.uk/news/uk/home-news/fake-news-word-of-the-year-2017-collins-dictionary-donald-trump-kellyanne-conway-antifa-corbynmania-a8032751.html>.

21. Martin Moore, *Written Evidence Submitted by the Centre for the Study of Media, COMMUNICATION AND POWER, KING’S COLLEGE LONDON (FNW0089)* (2017), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/culture-media-and-sport-committee/fake-news/written/48248.html>.

22. Margaret Sullivan, *It’s Time to Retire the Tainted Term ‘Fake News,’* WASH. POST, Jan. 8, 2017, [https://www.washingtonpost.com/lifestyle/style/its-time-to-retire-the-tainted-term-fake-news/2017/01/06/a5a7516c-d375-11e6-945a76f69a399dd5\\_story.html?utmterm=.8a8b4e01515d](https://www.washingtonpost.com/lifestyle/style/its-time-to-retire-the-tainted-term-fake-news/2017/01/06/a5a7516c-d375-11e6-945a76f69a399dd5_story.html?utmterm=.8a8b4e01515d).

23. *Trump Calls CNN “Fake News”* (video), N.Y. TIMES (2016) <https://www.nytimes.com/video/us/politics/100000004865825/trump-calls-cnn-fake-news.html?mcubz=0>; *‘Fake news’: Trump Tweets glee as Three CNN Journalists Resign over Russia Story*, GUARDIAN, Jan. 27, 2017, <https://www.theguardian.com/media/2017/jun/27/three-cnn-journalists-resign-over-retracted-trump-russia-story>.

24. Elle Hunt, *What is Fake News? How to Spot It and What You Can Do to Stop It*, GUARDIAN, Dec. 17, 2016, <https://www.theguardian.com/media/2016/dec/18/what-is-fake-news-pizzagate>.

25. Anatoly Liberman, *“A fake etymology of the word “fake,” with deep thoughts on “Fagin” and other names in Dickens,*” OUPBLOG, Aug. 23, 2017, <https://blog.oup.com/2017/08/fake-fagin-etymology/>.

26. “Fake News” is omitted from both the Oxford Dictionary and the Merriam-Webster Dictionary, the latter explains its decision to omit the term. See MERRIAM WEBSTER, *supra* note 18.



traffic / the incorrect information being passed along by social media.”<sup>27</sup> A professor of journalism proposes the following definition: “topical information that is false by design and is disseminated through social media.”<sup>28</sup> Other scholars define it as “news articles that are intentionally and verifiably false, and could mislead readers.”<sup>29</sup> And, “media reports based on deliberately doctored or fabricated evidence.”<sup>30</sup>

Facebook emphasizes that “[e]veryone keen to address the problem of ‘fake news’ should proceed carefully because it is challenging to draw clear lines between hoaxes, satire and opinion.”<sup>31</sup>

Some media professionals prefer to consider the term a misnomer and avoid its use. Joanne Lipman, Editor-in-Chief of the USA Today Network, which comprises over a hundred local media organizations, instituted a rule to not use that phrase because it is not correct. She believed that rather “false information” and “propaganda” are appropriate.<sup>32</sup>

Indeed, “fake news” is a descendant of propaganda, false rumors, and political manipulation.<sup>33</sup> A recent review of 34 scholarly articles published

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27. CAMBRIDGE DICTIONARY, “Fake News” Definition, <http://dictionary.cambridge.org/us/dictionary/english/fake-news> (last visited May 3, 2018); Elle Hunt, ‘Fake News’ Named Word of the Year by Macquarie Dictionary, *GUARDIAN*, Jan. 24, 2017, <https://www.theguardian.com/australia-news/2017/jan/25/fake-news-named-word-of-the-year-by-macquarie-dictionary>.

28. Brian Cathcart, “Written evidence submitted by Brian Cathcart,” UK PARLIAMENT: CULTURE MEDIA AND SPORT COMMITTEE (FNW0050), Mar. 2017, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/culture-media-and-sport-committee/fake-news/written/48065.html>.

29. Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. OF ECON. PERSPECTIVES 213 (2017).

30. New Political Comm’n Unit, “Written Evidence submitted by New Political Communication Unit – Royal Holloway, University of London,” UK PARLIAMENT: CULTURE MEDIA AND SPORT COMMITTEE (FNW0066), Mar. 2017, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/culture-media-and-sport-committee/fake-news/written/48178.html>.

31. “Written evidence submitted by Facebook,” UK PARLIAMENT: CULTURE MEDIA AND SPORT COMMITTEE (FNW0121), Mar. 2017, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/culture-media-and-sport-committee/fake-news/written/49394.html>.

32. *Trump and the Media: Media's Challenge of Trump's Daily Attacks*, CNN TRANSCRIPTS, Dec. 24, 2017, <http://transcripts.cnn.com/TRANSCRIPTS/1712/24/rs.01.html>.

33. Allcott & Gentzkow, *supra* note 29. See also Edson C. Tandoc, Jr., Wei Lim Zheng & Richard Ling, *Defining “Fake News”: A Typology of Ccholarly Definitions*, *DIGITAL JOURNALISM*, at 2, Aug. 30, 2017; Open University, “Written evidence submitted by the Open University,” UK PARLIAMENT: CULTURE MEDIA AND SPORT COMMITTEE (FNW0092), Mar. 2017, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/culture-media-and-sport-committee/fake-news/written/48251.html>; Google, “Written evidence submitted by Google,” UK PARLIAMENT: CULTURE MEDIA AND SPORT COMMITTEE (FNW0123), Mar. 2017, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/culture-media-and-sport-committee/fake-news/written/68824.html>. See also Wikipedia which lists a

between 2003 and 2017 allowed Tandoc, et. al. to determine six ways to define “fake news”: satire, parody, fabrication, manipulation, propaganda, and advertising. These definitions are based on two dimensions: levels of facticity and deception.<sup>34</sup>

One way to categorize these meanings is shown in the table below.<sup>35</sup> The recent usage of the term focuses on the categories marked in red, but the study by Tandoc, et. al. shows that the term has been used in different meanings in the past by scholars. This also reinforces an opinion that “fake news” has no coherent meaning.

A typology of fake news definitions

Level of facticity	Author's immediate intention to deceive	
	High	Low
High	Native advertising Propaganda	News satire
Low	Manipulation Fabrication	News parody

In his turn, Wardle placed “fake news” in the following seven compartments:

1. Satire or parody (no intention to cause harm but has potential to fool).
2. False connection (when headlines, visuals of captions don't support the content).
3. Misleading content (misleading use of information to frame an issue or an individual).
4. False content (when genuine content is shared with false contextual information).
5. Imposter content (when genuine sources are impersonated).
6. Manipulated content (when genuine information or imagery is manipulated to deceive).
7. Fabricated content (new content is 100% false, designed to deceive and do harm).<sup>36</sup>

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number of fake news stories from the past with their respective sources, [https://en.wikipedia.org/wiki/Fake\\_news](https://en.wikipedia.org/wiki/Fake_news) (last visited May 4, 2018).

34. Edson C. Tandoc Jr., Wei Lim Zheng & Richard Ling, *supra* note 33.

35. *Id.* at 12.

36. Claire Wardle, *Fake News. It's complicated.*, FIRST DRAFT, Feb. 16, 2017, <https://firstdraftnews.com/fake-news-complicated/>.

Disinformation, misinformation, and propaganda all have somehow similar meanings as “fake news.” Important factors to separate the terms are, however, the intent and motivation of the speaker, and the media used to disseminate the narrative.

Definitions of “disinformation” range from “false information deliberately and often covertly spread (as by the planting of rumors) in order to influence public opinion or obscure the truth” (Merriam-Webster), and “false information spread in order to deceive people” (Cambridge), to “false information which is intended to mislead, especially propaganda issued by a government organization to a rival power or the media” (Oxford).<sup>37</sup> The origins of the term apparently trace back to the Russian neologism “dezinformatsiya.”<sup>38</sup>

In its turn, “misinformation” means “incorrect or misleading information” (Merriam-Webster), “wrong information, or the fact that people are misinformed/information intended to deceive” (Cambridge), or “false or inaccurate information, especially that which is deliberately intended to deceive” (Oxford).<sup>39</sup>

The definition of “propaganda” is more ambiguous: while “fake news” is always *false*, propaganda might be true.<sup>40</sup> However, the aim to influence people’s opinion connects the terms (contrasted with misinformation which might be used for an honest mistake).<sup>41</sup> “Fake news” undoubtedly remains today a major tool of propaganda.

There are no results in either of the above dictionaries (Merriam-Webster, Cambridge, Oxford) for another term close in meaning, “false information,” a reason for this perhaps lies in the self-explicatory nature of the phrase.

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37. MERRIAM WEBSTER, Definition of “Disinformation,” <https://www.merriam-webster.com/dictionary/disinformation> (last visited May 3, 2018); CAMBRIDGE DICTIONARY, Definition of “Disinformation,” <http://dictionary.cambridge.org/dictionary/english/disinformation> (last visited May 3, 2018); OXFORD DICTIONARY, Definition of “Disinformation,” <https://en.oxforddictionaries.com/definition/disinformation> (last visited May 3, 2018).

38. According to Russian sources, the first office to design and implement disinformation campaigns (through the press in particular) was *Dezinformburo*, established by the Soviets in 1923. See Evgeniy Zhirnov, *Dezinformburo: 80 Years of Soviet Disinformation Service* [Дезинформбюро: 80 лет советской службе дезинформации], KOMMERSANT DAILY, Jan. 13, 2003, at 7, <https://www.kommersant.ru/doc/358500>.

39. MERRIAM WEBSTER, Definition of “Misinformation,” <https://www.merriam-webster.com/dictionary/misinformation> (last visited May 3, 2018); CAMBRIDGE DICTIONARY, Definition of “Misinformation,” <http://dictionary.cambridge.org/dictionary/english/misinformation> (last visited May 3, 2018); OXFORD DICTIONARY, Definition of “Misinformation,” <https://en.oxforddictionaries.com/definition/misinformation> (last visited May 3, 2018).

40. Cathcart, *supra* note 28.

41. See *Propaganda and Freedom of the Media*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE 31-38 (Vienna, 2015), <http://www.osce.org/fom/203926>.

What are the important differences between “fake news” and other similar terms? While disinformation implies a thoughtful action to mislead and confuse, misinformation primarily refers to honest mistakes (although it might as well be used for deliberate falsity). Based on the definitions cited above, “fake news” is closer to disinformation and disinformation-based propaganda as they mostly imply an intent to deceive and mislead.<sup>42</sup>

Disinformation and “fake news” remain somewhat different, however, as the former generally refers to large-scale, orchestrated political and military actions to deceive people, while “fake news” might be sporadic and applied as part of a more general mosaic, often aimed at confusing population or arguing that there is no truth in the media, or elsewhere in the world. It may run for other reasons, such as a careless desire to earn revenue from online advertising.<sup>43</sup>

The most significant distinction between “fake news” and more traditional terms seems to be the fact that explains the recent boom in the use of this notion. “Fake news” is special both to disinformation and misinformation by its use of the media, as it is primarily spread on social media and elsewhere on the internet; the other terms do not postulate the way of dissemination.<sup>44</sup>

### III. INTERNATIONAL LAW AND POLICY

The problem of how to counteract the dissemination of false reports and information has naturally existed since the birth of the press. The desire to find a solution raises with the growth of media influence, intensified today with the role that social media plays in informing the public.

#### A. *United Nations*

One of the recurring issues within the United Nations at its dawn was the maintenance of peace and the building of friendly relations among States. The use of false and distorted reports – a basic instrument of political propaganda – was considered a major threat to peace and a deterrent to the

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42. Alison Wakefield, “Written evidence submitted by Dr. Alison Wakefield, Institute of Criminal Justice Studies, University of Portsmouth,” UK PARLIAMENT: CULTURE MEDIA AND SPORT COMMITTEE (FNW0103), Mar. 2017, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/culture-media-and-sport-committee/fake-news/written/48275.html>.

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

44. Cathcart, *supra* note 28.

institution of a productive dialogue among countries.<sup>45</sup> At that time the United Nations, in preparation to its Conference on Freedom of Information adopted a Resolution of its General Assembly, invited the Governments of States Members to,

study such measures as might, with advantage, be taken on the national plane to combat, within the limits of constitutional procedures, the diffusion of false or distorted reports likely to injure friendly relations between States.<sup>46</sup>

The majority of democracies then replied that false information is usually counteracted by official denials and press conferences, while the governments should assure the availability of a multiplicity of unfettered sources of news and information. Provided the peoples of a democracy have access to sufficient information from diverse sources, they are competent to distinguish the true from false and the wise from stupid, and on the basis of their judgment to form their own opinions and make their own decisions.<sup>47</sup>

When deliberating what would become Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR) and the never opened for signature or ratification *Convention on Freedom of Information* the Drafting Committee of the Commission on Human Rights submitted a particular provision.<sup>48</sup> The provision suggested that the right to freedom of expression – which carries with it duties and responsibilities – may be subject to restrictions with regard to “the systematic diffusion of deliberately false or distorted reports which undermine friendly relations between peoples and States.”<sup>49</sup> The United States of America voiced opposition to this particular provision, though the issue of whether false news published with the intention of disrupting international peace was to be addressed in the ICCPR would resurface throughout the long drafting process. In particular, the United States and its allies saw that this limitation would require unacceptable censorship in order to determine what the true facts were. The US delegate in particular stated that “[t]he prosecution of offenders [of this restriction]

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45. Ambeyi Ligabo, *Civil and Political Rights, Including the Question of Freedom of Expression*, REPORT OF THE SPECIAL RAPPORTEUR, U.N. Doc. E/CN.4/2005/64, Dec. 17, 2004, 17.

46. See UNITED NATIONS, “Measures to Counteract False Information” in FREEDOM OF INFORMATION; A COMPILATION (Lake Success, V1, 1950).

47. *Id.* at 204-05, 211, 214, 217.

48. A draft Convention appeared on the agenda of each regular session of the U.N. General Assembly from 1962 to 1980. See Ligabo, *supra* note 45.

49. MICHAEL G. KEARNEY, THE PROHIBITION OF PROPAGANDA FOR WAR IN INTERNATIONAL LAW 84 (Oxford University Press, 2007).

would not cure the evil. The cause of objectionable reports was political and could not be decided by tribunals.”<sup>50</sup>

The provision on false reports was narrowly voted down in 1950 in the UN Commission on Human Rights (6:5 with four abstentions).<sup>51</sup> In further discussions, now within the Third Committee of the UN General Assembly (1952) a ban on “dissemination of slanderous rumours which undermined relations between States” was reintroduced as part of the prohibition of war propaganda and incitement to national, racial or religious hatred, though also not for long.<sup>52</sup> The drafters of the European Convention on Human Rights also considered the above UN’s language, but they too opted not to incorporate it.<sup>53</sup>

Post-World War II both Articles 19 and 20 of the *International Covenant on Civil and Political Rights* (ICCPR) are a good reminder of both the essence of freedom of expression and the responsibilities that its exercise carries alongside. The former says:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (order public), or of public health or morals.<sup>54</sup>

Article 20 stipulates:

1. Any propaganda for war shall be prohibited by law.

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50. *Commission on Human Rights, Sixth Session Provisions Concerning Freedom of Information in the Draft Covenant on Human Rights*, U.N. ECONOMIC AND SOCIAL COUNCIL, U.N. Doc. E/CN.4/360, May 2, 1950.

51. KEARNEY, *supra* note 49, at 85, 89-90.

52. *Id.* at 116.

53. Tarlach McGonagle, “Fake News”: *False Fears or Real Concerns?*, 35 NETHERLANDS Q. OF HUMAN RIGHTS 203-09 (2017).

54. United Nations, *International Covenant on Civil and Political Rights*, INT’L COVENANT ON HUMAN RIGHTS, (adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of Dec. 16, 1966), Mar. 1976.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.<sup>55</sup>

Relevant UN human rights bodies have made it clear that criminalizing “false” news is inconsistent with the right to freedom of expression. For example, commenting on the domestic legal system of Cameroon, the UN Human Rights Committee stated that “the prosecution and punishment of journalists for the crime of publication of false news merely on the grounds, without more, that the news was false, [is a] clear violation of Article 19 of the Covenant.”<sup>56</sup>

On another occasion, the UN Human Rights Committee pointed that the sections of the media law dealing with false information unduly limited the exercise of freedom of opinion and expression as provided for under Article 19 of the Covenant. In this connection, the Committee was

concerned that those offences carried particularly severe penalties when criticism was directed against official bodies as well as the army or the administration, [. . .] a situation which inevitably resulted in self-censorship by the media when reporting on public affairs.<sup>57</sup>

On yet another occasion, the UN Human Rights Committee reiterated that false news provisions “unduly limit the exercise of freedom of opinion and expression.”<sup>58</sup> It has taken this position even with respect to laws which only prohibit the dissemination of false news that causes a threat of public unrest.<sup>59</sup>

In 2000, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression urged all Governments to ensure that “press offenses are no longer punishable by terms of imprisonment, except in cases involving racist or discriminatory comments or calls to violence.”<sup>60</sup> He singled out such offences as publishing or

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55. *Id.* Among the countries that made reservations in relation to Art.20 were Belgium, Denmark (as recently as 2014), Finland, France, Iceland, Ireland, Lichtenstein, Luxemburg, Netherlands, Norway, Sweden, Switzerland and the USA.

56. *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee*, Cameroon, INT'L COVENANT ON CIVIL AND POLITICAL RIGHTS, U.N. Doc. CCPR/C/79/Add.116, Nov. 1999, ¶ 24.

57. *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee*, Tunisia, INT'L COVENANT ON CIVIL AND POLITICAL RIGHTS, U.N. Doc. CCPR/C/79/Add.43, Oct. 1994.

58. [19th Annual] *Report of the Human Rights Committee*, UNITED NATIONS, U.N. Doc. A/50/40, Oct. 3, 1995, at § 89.

59. *Id.*

60. Abid Hussain, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, COMMISSION ON HUMAN RIGHTS, U.N. Doc. E/CN.4/2000/63, Jan. 18, 2000, at §205.

broadcasting “false” or “alarmist” information, where “prison terms are both reprehensible and out of proportion to the harm suffered by the victim [...] as punishment for the peaceful expression of an opinion constitutes a serious violation of human rights.”<sup>61</sup>

Finally, in 2017 the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression together with 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 Special Rapporteur on Freedom of Expression and Access to Information issued a Joint declaration on freedom of expression and “fake news,” disinformation and propaganda (to be reviewed below).<sup>62</sup>

### B. *Right of Correction or Reply*

Related to the issue of false information in the context of international organizations is the debate and conclusions reached at different fora on the right to correction or reply as both a defense from information attacks from one state against another and as a human right.

The right is a controversial issue in the field of media law. While it may be provided in the Constitution of Greece, former Yugoslav Republic of Macedonia, Portugal, Slovenia, Turkey and Ukraine, there is no general right of reply in the U.K. or U.S.<sup>63</sup> The controversy surrounding the right of reply in relation to freedom of the media is that, on the one hand, it might be limiting free speech because it requires the media outlets to provide time and space for a correction that is unacceptable to their editorial line. On the other, it can be viewed as expanding freedom of expression by fostering a public debate and by providing a greater flow of information.

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61. *Id.*

62. *Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, March 3, 2017, <https://www.osce.org/fom/302796>.

63. DAVID THÓR BJÖRGVINSSON, *The Right of Reply*, in FREEDOM OF EXPRESSION: ESSAYS IN HONOUR OF NICOLAS BRATZA 163, 166-67 (Wolf Legal, 2012); see also Kyu Ho Youm, *The Right of Reply and Freedom of the Press: An International and Comparative Perspective*, 76 GEO. WASH. L. REV. 1017, 1017-21 (2008).



In early 1950s a French initiative led the UN General Assembly to adopt the *Convention on the International Right of Correction* aimed to maintain peace and friendly relations among nations.<sup>64</sup> It considered that,

as a matter of professional ethics, all correspondents and information agencies should, in the case of news dispatches transmitted or published by them and which have been demonstrated to be false or distorted, follow the customary practice of transmitting through the same channels, or of publishing, corrections of such dispatches

(both the “correspondents” and “information agencies” were broadly defined therein).<sup>65</sup>

The Convention acknowledged the impracticality to establish an international procedure for verifying the accuracy of media reports that might lead to the imposition of penalties for the dissemination of false or distorted reports. However, it did prescribe that if a contracting State’s international relations or “national prestige or dignity” suffers from false or distorted by a news dispatch, it has the right to submit its version of the facts to those States where such dispatch has been disseminated, with a copy to the journalist and media outlet concerned to enable a correction. Then, within five days, the recipient State is obliged to release the correction to the media operating in its territory. In case of failure to do so, the correction will be given appropriate publicity by the UN Secretary-General.

Nevertheless, the Convention on the International Right of Correction has rarely been enforced in the past years. Thus, it is not clear how effectually it has served its original purpose.<sup>66</sup>

While the individual’s right to reply or correction did not enter the universal documents on human rights, regional conventions pay some respect to its existence. The 1969 *American Convention on Human Rights*, stipulates in Article 14 (“Right of Reply”) that:

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.
2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.
3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have

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64. UNITED NATIONS, *Convention on the International Right of Correction*, in TREATY SERIES 191 (New York, Vol. 435, 1953) (entered into force on August 24, 1962), (the Convention has 12 signatories and 17 parties).

65. *Id.* at 194.

66. Youm, *supra* note 63 at 1023-24.

a person responsible who is not protected by immunities or special privileges.<sup>67</sup>

The problem with the above provisions might include the presumed automatic nature of the right of reply if any “inaccurate” statements – or ideas [*sic*] are disseminated. Interestingly enough, the right to refute ideas stands only in the English official translation, while the Spanish original or other translations of the norm do not contain the word.<sup>68</sup> Still the Inter-American Commission on Human Rights held an advisory opinion that the right of reply applies only to statements of facts, not expression of opinion.<sup>69</sup>

It is important to watch the possible phenomena of interpretation of this Convention by the Inter-American Court of Human Rights, competent with respect to matters relating to the fulfilment of the commitments made by the States Parties, of the “right to truth.” Kearney sees a possibility that taken its existing jurisprudence on this right in relation to the families of persons who “disappeared” during dictatorships it can be spread to the area of freedom of expression, as the current restrictions to the freedom in Article 13 (5) have “historically been premised on falsities, manipulation of the truth, and the withholding of information.”<sup>70</sup>

A Council of Europe instrument, the 1989 *European Convention on Transfrontier Television*, envisioned in its Article 8 (“Right of reply”):

1. Each transmitting Party shall ensure that every natural or legal person, regardless of nationality or place of residence, shall have the opportunity to exercise a right of reply or to seek other comparable legal or administrative remedies relating to programmes transmitted by a broadcaster within its jurisdiction [...]. In particular, it shall ensure that timing and other arrangements for the exercise of the right of reply are such that this right can be effectively exercised. The effective exercise of this right or other comparable legal or administrative remedies shall be ensured both as regards the timing and the modalities.

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67. *American Convention on Human Rights “Pact of San Jose, Costa Rica,”* ORGANIZATION OF AMERICAN STATES, Nov. 22, 1969, [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm).

68. *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Conv. on Human Rights*, STANDING SENATE COMM. ON HUMAN RIGHTS, May 2003, Part IV (B)(3), <https://sencanada.ca/Content/SEN/Committee/372/huma/rep/rep04may03part1-e.htm>.

69. Youm, *supra* note 63 at 1025.

70. See KEARNEY, *supra* note 49 at 180: “Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.” *Id.* at 180 n.352.

2. For this purpose, the name of the programme service or of the broadcaster responsible for this programme service shall be identified in the programme service itself, at regular intervals by appropriate means.<sup>71</sup>

According to the Convention's *Explanatory Report* a right of reply within the meaning of the Convention is a right exercised by a natural or legal person in order to correct inaccurate facts or information, in cases where such facts or information concern him/her or constitute an attack on his/her legitimate rights (especially in regards to his or her dignity, honor or reputation). The modalities of exercise of this right are determined by the transmitting party: right of reply, right of correction, right of rectification, right of recourse to special bodies or procedures. A right of reply or other comparable legal or administrative remedies are transfrontier in character. Therefore, they may be exercised equally by nationals and non-nationals, residents and non-residents of Parties to the Convention.<sup>72</sup>

A basis for this provision is the 1974 Council of Europe *Resolution on the Right of Reply*.<sup>73</sup> Its aim was to:

provide the individual with adequate means of protection against the publication of information containing inaccurate facts about him, and to give him a remedy against the publication of information, including facts and opinions, that constitutes an intrusion in his private life or an attack on his dignity, honour or reputation, whether the information was conveyed to the public through the written press, radio, television or any other mass media of a periodical nature.<sup>74</sup>

In practice this called for natural and legal persons irrespective of nationality or residence (with the exclusion of the state and other public authorities) to have an effective possibility for the correction, without undue delay, of incorrect facts relating to them which they have a justified interest in having corrected, such corrections being given, as far as possible, the same prominence as the original publication.

In 2004 the Council of Europe revised its 30-year-old right-of-reply resolution to reflect technological changes and the online media.<sup>75</sup> It recommended that the governments of the member states should examine

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71. *European Convention on Transfrontier Television*, COUNCIL OF EUROPE, May 5, 1989, Art. 8, <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007b0d8>.

72. *Explanatory Report to the European Convention on Transfrontier Television*, COUNCIL OF EUROPE, 1989, ¶¶ 168-70, <https://rm.coe.int/16800cb348>.

73. *Res. (74) 26: On the Right of Reply – position of the Individual in Relation to the Press*, COUNCIL OF EUROPE COMM. OF MINISTERS, July 2, 1974, <https://rm.coe.int/16805048e1>.

74. *Id.*

75. *Rec (2004) 16 [1]: On the Right of Reply in the New Media Environment*, COUNCIL OF EUROPE COMMITTEE OF MINISTERS, Dec. 15, 2004, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805db3b6](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805db3b6).

and, if necessary, introduce in their domestic law or practice a right of reply or any other equivalent remedy, which allows a rapid correction of incorrect information in online or off-line media along the lines of eight particular minimum principles. The right of reply in its view should protect any legal or natural person from any information presenting inaccurate facts concerning that person and affecting his or her rights, while the dissemination of opinions and ideas must remain outside the scope of the Recommendation.

Most recently the need of the Member States of the Council of Europe to recognize in their national law and internal practice a right of reply or any other equivalent remedy to allow a rapid correction of incorrect information in online and offline media was reiterated in its Parliamentary Assembly's resolution aimed to address challenges of online media and journalism.<sup>76</sup>

The existing limited case law of the European Court of Human Rights proves that reply and rectification need to be separated, the right of reply applies not only to private individuals, but also to public authorities, and that the right does not give an unfettered right of access to the media in order to put forward one's opinions.<sup>77</sup>

The European Union's *Directive on Audiovisual Media Services* followed the path set by the Council of Europe by providing a clear-cut right of reply in television broadcasting. Its Chapter IX, Article 28 prescribes in particular that:

Without prejudice to other provisions adopted by the Member States under civil, administrative or criminal law, any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies. Member States shall ensure that the actual exercise of the right of reply or equivalent remedies is not hindered by the imposition of unreasonable terms or conditions. The reply shall be transmitted within a reasonable time subsequent to the request being substantiated and at a time and in a manner appropriate to the broadcast to which the request refers.<sup>78</sup>

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76. Res. 2143 (2017): *Online Media and Journalism: Challenges and Accountability*, PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE, Jan. 25, 2017, ¶ 12(1)(3), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23455&lang=en>.

77. Björgvinsson, *supra* note 63 at 173-75; see also András Koltay, *The Right of Reply in a European Comparative Perspective*, 54 ACTA JURIDICA HUNGARICA 73, 75-76 (2013).

78. *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)*, OFFICIAL JOURNAL OF THE EUROPEAN UNION, Mar. 10, 2010, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32010L0013&from=EN>.

Another EU document, a non-binding recommendation of the European Parliament and of the Council of the EU finds that “the right of reply is a particularly appropriate remedy in the on-line environment because it allows for an instant response to contested information and it is technically easy to attach the replies from the persons affected” and says that “it is appropriate for the right of reply or equivalent remedies to apply to on-line media, and to take into account the specific features of the medium and service concerned.”<sup>79</sup>

### C. European Union

The European Parliament, in its landmark 2016 resolution on EU strategic communication to counteract propaganda, laid certain policy foundations to both anti-EU propaganda and disinformation in legacy and social media. The link between *propaganda* and *disinformation* was seen therein in the following way:

propaganda against the EU comes in many different forms and uses various tools... with the goal of distorting truths, provoking doubt, dividing Member States, engineering a strategic split between the European Union and its North American partners and paralysing the decision-making process, discrediting the EU institutions and transatlantic partnerships... in the eyes and minds of EU citizens and of citizens of neighbouring countries, and undermining and eroding the European narrative based on democratic values, human rights and the rule of law.<sup>80</sup>

The link between propaganda and disinformation is seen also in the thesis that the former can only be fought by rebutting the latter and making use of positive messaging and information.<sup>81</sup>

The Resolution also made a distinction between *criticism*, on the one hand, and *propaganda or disinformation*, on the other, by pointing to “the context of political expression, instances of manipulation or support linked to third countries and intended to fuel or exacerbate this criticism.” Under the circumstances such narratives should provide grounds to question the reliability of messages.<sup>82</sup>

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79. *Recommendation of the European Parliament and of the Council: on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry*, OFFICIAL JOURNAL OF THE EUROPEAN UNION, Dec. 20, 2006, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006H0952:EN:HTML>.

80. *Res. 2016/2030 (INI)*, EUROPEAN PARLIAMENT, November 23, 2016, ¶ 1 (issuing a resolution on EU Strategic communication to counteract propaganda against it by third parties).

81. *Id.* at ¶ 46.

82. *Id.* at ¶ 40.

The Resolution described the current situation as a growing, systematic pressure upon Europeans to tackle information, disinformation and misinformation campaigns and propaganda from countries and non-state actors (such as transnational terrorist and criminal organizations) in its neighborhood, which are intended to undermine the very notion of objective information or ethical journalism, casting all information as biased or as an instrument of political power, and which also target democratic values and interests. The European Parliament saw that targeted information warfare, once extensively used during the Cold War, is back as an integral part of modern hybrid warfare, defined as

a combination of military and non-military measures of a covert and overt nature, deployed to destabilise the political, economic and social situation of a country under attack, without a formal declaration of war.<sup>83</sup>

Therefore, the European Parliament encouraged legal initiatives and a “truly effective strategy” to be developed at the international and nation levels to provide more accountability when dealing with disinformation. Apparently, these legal efforts should provide and ensure a framework for quality journalism and variety of information by combating media concentrations, which have a negative impact on media pluralism.<sup>84</sup>

Among other initiatives the Resolution urged to develop media literacy and quality journalism education, strengthen the role model of public service media, etc.

It specifically called for reinforcement of the East StratCom task force, EU’s main office to combat propaganda and disinformation, including through “proper staffing and adequate budgetary resources.”<sup>85</sup> Even earlier, in 2015, the European Council asked the EU High Representative, Federica Mogherini, to submit an action plan on strategic communication to address Russia’s ongoing disinformation campaigns. As a result, the EEAS’s East StratCom task force was set up in September 2015. It relies heavily on volunteers to collect the disinformation stories (over 3,000 disinformation examples since 2015) it presents and explains in its weekly newsletters, as part of its efforts.<sup>86</sup>

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83. *Id.* at ¶ D.

84. *Id.* at ¶¶ 35, 46 & 48.

85. *See*, “Questions and Answers about the East Stratcom Task Force,” EUROPEAN UNION EXTERNAL ACTION, Nov. 8, 2017, [86. Naja Bentzen, ‘Fake news’ and the EU’s response, EUROPEAN PARLIAMENTARY RESEARCH SERVICES, April 2017, \[http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/599384/EPRS\\\_ATA%282017%29599384\\\_EN.pdf\]\(http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/599384/EPRS\_ATA%282017%29599384\_EN.pdf\); \*See also\*, Federica Mogherini, High Rep’ve for Foreign Affairs, European Union, Speech at “Hybrid threats and the EU: State of play and future](https://eeas.europa.eu/headquarters/headquarters-homepage_en/2116/%20Questions%20and%20Answers%20about%20the%20East%20StratCom%20Task%20Force; Res. 2016/2030 (INI), supra note 80 at ¶¶ 27, 42.</a></p></div><div data-bbox=)

Countering disinformation may not be enough. Just recently the External Action of the EU noted that:

Unfortunately, experience tells us that when a fake news is out, it is already too late [to counter it]. Reacting is very important, but it is even more crucial to make sure that the real news reaches the broadest possible audience, both inside and outside our Union. So our first duty is to talk about what we are doing, to explain with the maximum of transparency our policies, spread the real stories about the positive impact that our European action has on the lives of so many people.<sup>87</sup>

Following the work of the *High Level Expert Group on Fake News and Online Disinformation* in early 2018, the European Commission came up with a Communication to the EP and the Council titled “Tackling online disinformation: a European Approach”. In its own words, the Communication “presents a comprehensive approach” aimed at responding to this phenomenon in the digital world by promoting transparency and prioritising “high-quality information, empowering citizens against disinformation, and protecting” democracies and policy-making processes in the EU.<sup>88</sup>

The debate within the EU on “fake news” is very much focused on the issue of liability of internet intermediaries for dissemination of provocative information. A point of reference here is the 2000 *Directive on electronic commerce* of the European Parliament and of the Council which firmly spoke, in its Section 4, that the “information society service providers” were not to be liable for mere conduit, caching, or hosting, nor were they obliged to monitor the information which they transmitted or stored in particular with the aim to actively seek facts or circumstances indicating illegal activity.<sup>89</sup> These rules apply under certain conditions of non-interference and passive provision of information society services (Art. 12). Such information society services provide a wide range of economic activities which take place online, such as those offering online information or commercial communications, or those providing tools allowing for search, access and retrieval of data; they also include services consisting of the transmission of information via a

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progress” Conference, Oct. 2, 2017, [https://eeas.europa.eu/headquarters/headquarters-homepage/33141/speech-high-representative-vice-president-federica-mogherini-conference-hybrid-threats-and-eu\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/33141/speech-high-representative-vice-president-federica-mogherini-conference-hybrid-threats-and-eu_en).

87. *Id.*

88. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Tackling online disinformation: a European Approach”. COM/2018/236 final. 26 April 2018.

89. *Directive 1000/31/EC: on certain legal aspects of information society services, in particular electronic commerce in the Internal Market*, THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION, June 8, 2000, at Art. 11 § 4, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0031&from=EN>.

communication network, in providing access to a communication network or in hosting information provided by a recipient of the service.<sup>90</sup>

The above provisions of the “Directive on electronic commerce” do not affect the possibility for a court or administrative authority, in accordance with the EU Member States' national legal systems, of requiring the service provider to terminate or prevent an infringement or establishing a system for removal or disabling of access to illegal information (Art. 14). National law may indeed establish obligations for the providers to promptly inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service (Art. 15).

#### D. Council of Europe

Article 10 (“Freedom of expression”) of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights, or ECHR) reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. 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 preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>91</sup>

The issue of false information was a subject of the Resolution 2143 (2017) of the Parliamentary Assembly of the Council of Europe (PACE) “Online media and journalism: challenges and accountability.”<sup>92</sup> The

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90. Television and radio broadcasting are not information society services as they are not provided at individual request. By contrast, services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by email are information society services. The use of email or similar individual communications for instance by natural persons acting outside their trade, business or profession is neither an information society service.

91. *European Convention on Human Rights*, COUNCIL OF EUROPE, 1950 (as amended by Protocol No. 14 (CETS n. 194), Art. 10, [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf)).

92. *Res. 2143 (2017)*, *supra* note 76.



Resolution referred to an undefined line “between what could be considered a legitimate expression of personal views in an attempt to persuade readers and disinformation or manipulation.” It noted with concern the growing number of online media campaigns designed to misguide sectors of the public through intentionally biased or false information, hate campaigns against individuals and also personal attacks, often in a political context, with the objective of harming democratic political processes.<sup>93</sup>

The Resolution suggested a number of steps to be taken by the national authorities, such as inclusion of media literacy in the school curricula, support to awareness-raising projects and targeted training programs aimed at promoting the critical use of online media; and support to professional journalistic training.<sup>94</sup>

Even before, in another of its resolutions, PACE while acknowledging that the internet “belongs to everyone; therefore, it belongs to no one and has no borders” and that there is the need to preserve its openness and neutrality, noted that internet also “intensifies the risk of biased information and manipulation of opinion.”<sup>95</sup> Therefore it “must not be allowed to become a gigantic prying mechanism, operating beyond all democratic control” or “a *de facto* no-go area, a sphere dominated by hidden powers in which no responsibility can be clearly assigned to anyone.”<sup>96</sup> The Parliamentary Assembly recommended to the member States of the Council of Europe considering actions that would prevent the risk of information distortion and manipulation of public opinion, mostly through coherent regulations and/or incentives for self-regulation concerning the accountability of the internet operators.<sup>97</sup>

#### E. *European Court of Human Rights*

The overall bulk of the case law of the European Court of Human Rights (ECtHR), established by the European Convention on Human Rights, that relates to dissemination of false information is mostly about the restrictions or penalties imposed by the national authorities for the protection of the reputation or – to a lesser degree – the right to respect for private and family life of others.

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93. *Id.* at ¶ 6.

94. *Id.* at ¶ 12.1.

95. *Id.*

96. *Res. 1970 (2014): Internet and Politics: the impact of new information and communication technology on democracy*, PARLIAMENTARY ASSEMBLY, Jan. 29, 2017, ¶¶ 12, 14, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20447&lang=en>.

97. *Id.* at ¶ 19.9.

The national law in the member states of the Council of Europe generally says that defamatory accusations should be factually false or ungrounded in order to be found by a court liable. A defamatory statement may be declared null and void if the defendant has not succeeded in proving its truthfulness. In order for defamation to constitute a violation of law, it is generally imperative that the information was false, i.e. it was untrue. At the same time, a remedy may only be used when the allegedly defamatory statement consists of facts, since the truthfulness of value judgments is not susceptible of proof. If a statement is found to be defamatory, the person who made it may be ordered to pay compensation to the aggrieved party.

The relevant case law of the ECtHR reveals numerous complaints on a possible violation by the restrictions or penalties of the applicant's right to freedom of expression (under the above-cited Article 10 of the ECHR), evaluates if the interference with the right to freedom of expression was indeed prescribed by law and was necessary in a democratic society, pursued a legitimate aim and was proportionate to it. The case law usually takes into account the role of the press in a democratic society, public interest factor and possible status of the defamed person as a public figure whose limits of acceptable criticism are wider than as regards a private individual. In addition, the ECtHR is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.<sup>98</sup> Subject to paragraph 2 of Article 10, freedom of expression is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society."<sup>99</sup>

The ECtHR has repeatedly noted that the safeguard afforded by Article 10 to journalists in relation to their factual reporting on issues of general interest is subject to the proviso that they are acting in *good faith* in order to provide *accurate and reliable information* in accordance with the *ethics of journalism*, that includes an ordinary obligation to verify factual statements.<sup>100</sup> For example, in the *Goodwin* case, the ECtHR noted that the central rationale for the shielding of journalists' confidential sources was to

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98. See *Prager and Oberschlick v. Austria*, App. No. 15974/0, 313 EUR. CT. H.R., § 38 (1995).

99. See *Jersild v. Den.*, 298 EUR. CT. H.R., §31 (1994); see also *Steel and Morris v. the U.K.*, App. No. 68416/01, EUR. CT. H.R., §87 (2005).

100. See *Goodwin v. U.K.*, App. No. 17488/90, EUR. CT. H.R., § 39 (1996); *Fressoz and Roire v. Fr.*, App. No. 29183/95, EUR. CT. H.R., §54 (1999); *Bladet Tromso and Stensaas v. Nor.*, App. No. 21980/93, EUR. CT. H.R., § 65 (1999).

strengthen “the vital public-watchdog role” of the media and not to adversely affect its ability “to provide accurate and reliable information.”<sup>101</sup>

At the same time, the ECtHR noted that disinformation *per se* does not fall outside protected freedoms:

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... place an unreasonable restriction on the freedom of expression...<sup>102</sup>

Despite the dominance of defamation and privacy case law, there are several judgments of the European Court of Human Rights that relate to the topic of the article by evaluating false statements in a political speech that is not related to reputation or private life.

For example, in a decision of admissibility of an application to the ECtHR (*Bader v. Austria*, 1995) the applicant, an Austrian professor, claimed that the public broadcaster ORF disseminated biased information on the need of the country’s EU accession which was incompatible with its obligation of objectivity under the national Broadcasting Act.<sup>103</sup> Bader, therefore, requested to annul the results of the EU accession referendum held earlier same year.

However the European Commission of Human Rights (which until 1998 served as a buffer between applicants and the ECtHR) found that the applicant was not actually affected by the claimed violation of his right to information and had formed his opinion on the referendum purpose irrespective of the possible bias in ORF; it noted that the right to freedom to receive information “basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him” and Article 10 of the ECHR did not, in general, embody an obligation on Governments to impart information to the individual. The Commission could not find grounds for the allegation that any alleged insufficiency of information provided by the Austrian authorities in relation to the above referendum prevented the applicant from the effective exercise of his right to freedom of thought. Thus, the application was found inadmissible.

In a judgment on the 2008 case of *Balsytė-Lideikienė v. Lithuania* the ECtHR reviewed an application of the editor and publisher of “Lithuanian Calendar – 2000.”<sup>104</sup> The applicant complained that her right to free

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101. *Goodwin v. U.K.*, App. No. 17488/90, Eur. Ct. H.R., § 39 (1996).

102. *Salov v. Ukraine*, 65518/01, Judgment, 06/09/2005 ¶ 113.

103. *Id.*

104. *Balsytė-Lideikienė v. Lith.*, App. No. 72596/01, EUR. CT. H.R. (2008).

expression was violated by the national authorities that had seized and destroyed the calendar she had published and banned its further distribution. The seizure of the calendar copies happened after the national authorities (a parliamentary committee and the office of the Prime Minister) requested an investigation into possible violation of the national law through its distribution in bookstores. A particular reason was that the back cover of “Lithuanian calendar 2000” contained a map of the Republic of Lithuania, where the neighboring territories of the Republic of Poland, the Russian Federation and the Republic of Belarus were falsely marked as “ethnic Lithuanian lands under temporary occupation.” Moreover, the Foreign Ministry of Lithuania received diplomatic notes from the Russian Embassy and the Embassy of Belarus. The national courts found neither calls for violence, nor expressions of hatred against the ethnic groups or the superiority of the Lithuanians over other nationals in the calendar, while the negative statements about the Jewish population were not found as anti-Semitic. However, the courts referred that the publication had caused negative reactions from part of society as well as from the diplomatic representations of some neighboring States.

However, the appellate instance attested that the comments in the calendar were based on the ideology of extreme nationalism, which rejected the idea of civil society's integration and endorsed xenophobia, national hatred and territorial claims. It emphasized that the breach of the administrative law committed by the applicant was not serious, and that it had not caused significant harm to society's interests. Therefore, it affirmed an imposition on the applicant of an administrative warning and the confiscation of the publication.

In the ECtHR the Lithuanian Government argued, in particular, that by withdrawing the publication from distribution and imposing an administrative warning on the applicant, the authorities had sought to prevent the spreading of ideas which might violate the rights of ethnic minorities living in Lithuania as well as endanger Lithuania's relations with its neighbors.

In its judgment the ECtHR had particular regard to the general situation of the Republic of Lithuania. It took into account the Government's explanation as to the context of the case that after the re-establishment of the independence of the Republic of Lithuania in 1990 the questions of territorial integrity and national minorities were sensitive. The ECtHR also noted that the publication received negative reactions from the diplomatic representations of the Republic of Poland, the Russian Federation and the Republic of Belarus. As to the language of the publication it held that the applicant “expressed aggressive nationalism and ethnocentrism” thus “giving

the Lithuanian authorities cause for serious concern.” The ECtHR found no breach of Article 10 of the ECHR.

In another case the applicants, employees of the Soviet Novosti Press Agency (NPA) bureau in Switzerland, complained of being victims of the decision of the nation’s collective executive head of government and state, the Federal Council, to close their employer (M.S. and P.S. v. Switzerland).<sup>105</sup> The decision was made on the constitutional provision that entitled to expel foreigners who constitute danger for the security of the state. This decision was based on the conclusions of a 25-page police report and conclusions of the Federal Attorney-General, all classified confidential. Apparently, the conclusions said that the report demonstrated that from the beginning the NPA bureau in Bern was not about providing information but “operated as a centre of disinformation, subversion and agitation.”<sup>106</sup> The conclusions also said as follows:

The activities engaged in to influence the political decision-making process in our country clearly constitute an interference in Swiss internal affairs. They violate Swiss sovereignty and compromise our relations with other countries.<sup>107</sup>

The ECtHR noted that the closing of the NPA was not intended to punish the applicants but to prevent certain activities. In dismissing the application, it said the closing “might possibly be an infringement of the fundamental rights of the agency but not those of the applicants.”<sup>108</sup>

In yet another case against Switzerland that came from the national regulator’s ban to use particular satellite dishes enabling to watch Soviet TV, a violation of Article 10 was found. The State’s interference was not “necessary in a democratic society.”<sup>109</sup> The concurring opinion of Judge De Meyer said in particular: “The freedom to see and watch and to hear and listen is not, as such, subject to States’ authority.”<sup>110</sup>

#### F. OSCE Representative on Freedom of the Media

In a very few cases the OSCE Representative on Freedom of the Media (RFOM) dealt with particular instances of the effect of “fake news” on media freedom. For example, on 15 March 2010 Dunja Mijatović, the RFOM at that time, issued a press release in relation to a panic-spreading fake report carried

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105. Predecessor to the current information agency called *Rossiya Segodnya* [Russia Today], RUSSIA TODAY, [http://xn--c1acb12abdlkab1og.xn--p1ai/about\\_us/](http://xn--c1acb12abdlkab1og.xn--p1ai/about_us/).

106. M.S. and P.S. v. Switz., App. No 10628/83, EUR. CT. H.R. (1985).

107. *Id.*

108. *Id.*

109. Autronic AG v. Switz., App. No. 12726/87, EUR. CT. H.R. (1990).

110. *Id.*

on by Georgia's privately owned *Imedi* television channel, which said that President Saakashvili had been assassinated and that Russian troops were advancing toward Tbilisi.<sup>111</sup> The point of the RFOM's statement was to underline that this particular issue is about irresponsible journalism and the impact it may have on media freedom and security:

Broadcasters and other media outlets ought to behave responsibly and not mislead the public by spreading false information. This is of particular importance in Georgia and other countries whose societies may be more prone to alarm due to recent armed conflicts.<sup>112</sup>

This incident, said the OSCE Representative on Freedom of the Media, showed that self-regulation principles and mechanisms, which are an essential tenet of freedom of speech, need to be expeditiously enhanced and strengthened.<sup>113</sup>

In 2017 the topic for the 19<sup>th</sup> annual joint declaration by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the 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 was chosen to be "*On freedom of expression and "fake news," disinformation and propaganda.*"<sup>114</sup>

The free speech rapporteurs took note of the growing prevalence of disinformation (sometimes referred to as "false" or "fake news") and propaganda in legacy and social media, fueled by both States and non-State actors, and the various harms to which they may be a contributing factor or primary cause. The rapporteurs expressed their concern that disinformation and propaganda are often designed and implemented so as to mislead a population, as well as to interfere with the public's right to know and the right of individuals to seek and receive, as well as to impart, information and ideas of all kinds, regardless of frontiers, protected under international legal guarantees of the rights to freedom of expression and to hold opinions.<sup>115</sup> They emphasized that some forms of disinformation and propaganda may

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111. Dunja Mijatovic, Press Release: OSCE media freedom representative calls on Georgian broadcasters to abide by ethical standards of journalism, OSCE REPRESENTATIVE ON FREEDOM OF THE MEDIA, Mar. 15 2010, <http://www.osce.org/fom/51949>.

112. *Id.*

113. *Id.*

114. *Joint Declaration on Freedom of Expression and "Fake News," Disinformation and Propaganda*, FOM.GAL/3/17, Mar. 3, 2017, <https://www.osce.org/fom/302796?download=true>.

115. *Id.*

harm individual reputations and privacy, or incite to violence, discrimination or hostility against identifiable groups in society.<sup>116</sup>

They also highlighted the importance of unencumbered access to a wide variety of both sources of information and ideas, and opportunities to disseminate them, and of a diverse media in a democratic society, including in terms of facilitating public debates and open confrontation of ideas in society, and acting as a watchdog of government and the powerful.<sup>117</sup> Moreover, they acknowledged that the human right to impart information and ideas is not limited to “correct” statements, that the right also protects information and ideas that may shock, offend and disturb, and that prohibitions on disinformation may violate international human rights standards, while, at the same time, this does not justify the dissemination of knowingly or recklessly false statements by official or State actors.<sup>118</sup> In this context they welcomed and encouraged civil society and media efforts aimed at identifying and raising awareness about deliberately false news stories, disinformation and propaganda.<sup>119</sup>

The 2017 Joint Declaration specifically referred to the role played by the internet and other digital technologies in supporting individuals’ ability to access, as well as disseminate information and ideas. Both enable responses to disinformation and propaganda, while also facilitating their circulation.<sup>120</sup>

The rapporteurs agreed therein on a number of ground laying general principles in regard to responses to disinformation and propaganda. They would include specific standards on disinformation comprised of (1) a call to abolish general prohibitions on the dissemination of information based on vague and ambiguous ideas (such as “false news” or “non-objective information”) as incompatible with international standards for restrictions on freedom of expression, and (2) a call to State actors not to make, sponsor, encourage or further disseminate statements which they know or reasonably should know to be false (disinformation) or which demonstrate a reckless disregard for verifiable information (propaganda).<sup>121</sup> Here the rapporteurs point to the difference they see between “disinformation” and “propaganda.” Moreover, the State actors were urged, in accordance with their domestic and international legal obligations and their public duties, to ensure that they disseminate reliable and trustworthy information, including about matters of

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116. *Id.* at 1-2.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at § 2.

public interest, such as the economy, public health, security and the environment.<sup>122</sup>

A positive obligation to promote a free, independent and diverse communications environment, including media diversity, was put forward by the Joint Declaration as a key means of addressing disinformation and propaganda. That would include such measures as providing support for the production of diverse, quality media content; prohibiting undue concentration of media ownership; and rules requiring media outlets to be transparent about their ownership structures.<sup>123</sup>

In this context the Governments were called to establish clear regulatory frameworks for broadcasters to be overseen by a body which is protected against political and commercial interference or pressure and tasked to promote a free, independent and diverse broadcasting sector. They were also urged to ensure the presence of strong, independent and adequately resourced public service media, which operate under a clear mandate to serve the overall public interest and to set and maintain high standards of journalism.<sup>124</sup>

The freedom of expression mandates urged the Governments to take measures to promote media and digital literacy, including by covering these topics as part of the regular school curriculum and by engaging with civil society and other stakeholders to raise awareness about these issues. They should also consider other measures to promote equality, non-discrimination, intercultural understanding and other democratic values, including with a view to addressing the negative effects of disinformation and propaganda.<sup>125</sup>

Specific recommendations to the journalists and media outlets included support of effective systems of self-regulation whether at the level of specific media sectors (such as press complaints bodies) or at the level of individual media outlets (ombudsmen or public editors) which include standards on striving for accuracy in the news, including by offering a right of correction and/or reply to address inaccurate statements in the media. They were called to consider including critical coverage of disinformation and propaganda as part of their news services in line with their watchdog role in society, particularly during elections and regarding debates on matters of public interest.<sup>126</sup>

In conclusion, the Joint Declaration noted that all stakeholders – including intermediaries, media outlets, civil society and academia – should

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122. *Id.*

123. *Id.* at § 3(d).

124. *Id.* at §§ 3(b) - (c).

125. *Id.* at §§ 3(e) - (f).

126. *Id.* at § 5.



be supported in developing participatory and transparent initiatives for creating a better understanding of the impact of disinformation and propaganda on democracy, freedom of expression, journalism and civic space, as well as appropriate responses to these phenomena.<sup>127</sup>

#### IV. CONCLUSIONS AND RECOMMENDATIONS

The activity of the media to intentionally disseminate disinformation has been in the focus of international organizations for many years. Their main concern was a possibility that false news reports would harm international relations and cause wars. Fake news phenomenon is a continuation of the same threat, but with some distinct new features.

Those new features relate to the means of dissemination of the untrue stories, where the principal instruments are now internet and other telecommunications.

These new vehicles for lies allow for a historically high level of information attacks with the participation of thousands of “information soldiers” (trolls) and automatic bots do their job 24/7. Fake news cannot be stopped at the state borders for technological reasons.

These lanes of communication generally exclude a possibility to grant the right of reply or to ensure even the minimum journalistic rules, such as division of facts and opinions. Moreover, the nature of anonymous internet allows hiding the ownership of lies at a scale that pales the current standards for media transparency, even the least effective ones.

Disinformation and propaganda hit at the core of the prestige and respect the independent media enjoys in a democratic society. Therefore, journalists are also victims of intentionally false and manufactured biased news, though in most cases they are not their authors.

The overall aim of this “fake news” activity is not necessarily to make one believe in lies but to persuade that everyone lies and there is no truth, or perhaps, there are “alternative truths” or “alternative facts.”

Taken together “fake news” establish a fake cloud of vivid “pluralist truth,” which does not need proofs, knowledge, experts or even logic. Such “pluralist truth” is hard to be counteracted in a legal sense as it finds protection in the international and national standards on free speech. It is hard to be counteracted by the state authorities as this would mean violation of the very principles of free market of ideas and media pluralism. It is also problematic to be counteracted by the governments as it would mean another

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127. *Id.* at § 6.

blow to the freedom of internet and online world, as well as an attempt to introduce censorship.

Historically the democracies have committed to respond to deliberate cross-border disinformation that is dangerous to peace and international co-operation through more openness of the governments, wider access of the population to diversified sources of information, right of reply, transparency of the media ownership and support for public service broadcasting. Dissemination of false and distorted reports – even systematic and intentional, even in the narrow cases of them undermining international peace – have not been recognized as a reason for restrictions of free expression.

Discussion shows that there is no effective legal prescription that would establish a separate tort or crime of disinformation *per se*.

At the same time, those who engage, through the media, in propaganda for wars of aggression, in advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence should not be shielded by their right to freedom of expression. Such propaganda and advocacy widely use disinformation as its instrument, therefore judicial initiatives to provide more accountability in this context should be encouraged.

A possible legal avenue of specific legal regulation of disinformation might emerge from a study on the applicability of existing national mechanisms that restrict misleading advertising to the cases of “misleading news”.

Legal requirements of transparency for websites with news content will be an important effort to strengthen the quality of journalism online. Such transparency of the media should be primarily aimed at informing the public of the sources of information (and perhaps their finances), rather than be limited to the authorities’ perusal alone.

Currently, “fake news” is more and more viewed as part of the transnational information warfare and hybrid wars. The governments look for additional concerted efforts to counter this wide-spreading activity. While strategically nothing new has yet happened in the international approach to false news, there are trends to be watched and studied.

They include calls to establish barriers to spreading of dangerous lies on social platforms. Under challenge is the principle that information service providers, as intermediaries, should never be held liable for the third-party content relating to their services. Attempts are aimed to achieve greater transparency over the algorithms used by information service providers that manage and curate information, making their terms of use in line with human rights standards and encouraging to develop ethical quality standards regarding due diligence of their media services. Additionally, it is considered

an important step to set up alert mechanisms against those who regularly post insulting or inflammatory text (“trolls”), with a view to excluding them from their forums.

There is a stronger focus on media and online literacy projects. Expansion of fact-checking platforms in the reporting process, to enable them with a possibility to provide the audience with an access to the professional media criticism facilitates, more generally, such literacy. It might be important that media literacy programmes include a *media freedom literacy* component, while internet literacy programmes should include an *online freedom* component. While public authorities and politicians might be media-savvy, they often lack a firm understanding of, and respect for, the role that the independent and pluralistic media and internet freedom play in an open and democratic society.

New initiatives are also put forward to support quality professional journalistic education and training in order to produce eminent journalistic analyses and high editorial standards, which would also promote the international values of freedom of expression and media plurality. A practical way to strengthen quality journalism could be the establishment of national and, perhaps, international syndicates of quality media outlets with high professional standards and effective self-regulation. They could serve as an economic model to support quality media operating within different markets and with no competition between them.

Efforts are made, at least in Europe, to strengthen the role of independent and sustainable public service media (PSM) online. The aim is to make them the backbone of traditional journalism with its professional standards, in particular through an exercise of the due editorial diligence with regard to user-generated or third-party content published on their internet portals. In front of the tide of “fake news” the public service media are encouraged to be the barrier for lies and manipulation. The role of the PSM involves their obligation not to shy away from covering the whole range of issues of public interest, including false news and relevant problems if those come into the focus of the public’s attention. Strengthening the PSM’s fact-checking in the reporting process enables them to provide the audience with access to professional media critique and more generally – to facilitate media and internet literacy.



# A FEDERAL SHIELD LAW THAT WORKS: PROTECTING SOURCES, FIGHTING FAKE NEWS, AND CONFRONTING MODERN CHALLENGES TO EFFECTIVE JOURNALISM

Anthony L. Fargo\*

## I. INTRODUCTION

Covering government and politics is rarely easy for journalists even in the best of times. Officials want to hide information that would make them look bad. Candidates and party leaders try to “spin” coverage to favor their side. Sources with potentially important news to share often have hidden or not-so-hidden agendas that could cast doubt on their veracity.

Recent months certainly have not been the best of times for journalists. The President of the United States has labeled mainstream news outlets as “enemies of the people.”<sup>1</sup> President Trump and his most ardent supporters frequently call any news that portrays the administration unfavorably “fake news.”<sup>2</sup> Public trust in the news media is low, especially among those aligned with the President’s party.<sup>3</sup> President Trump and his attorney general have announced that they are going to get tough on people who leak classified or sensitive information to the press, which could chill potential news sources and, if leakers are prosecuted, possibly lead to journalists being subpoenaed to identify their sources or face contempt citations.<sup>4</sup>

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1. Michael M. Grynbaum, *Trump Calls Media the “Enemy of the American People,”* N.Y. TIMES, Feb. 18, 2017, at A15.

2. Steve Coll, *Donald Trump’s “Fake News” Tactics,* NEW YORKER, Dec. 11, 2017, <https://www.newyorker.com/2017/12/11/donald-trumps-fake-news-tactics>.

3. Michael Barthel, *Americans’ Attitudes About the News Media Deeply Divided Along Partisan Lines,* PEW RESEARCH CENTER, May 10, 2017, <http://www.journalism.org/2017/05/10/americans-attitudes-about-the-news-media-deeply-divided-along-partisan-lines/>. *But see* Mathew Ingram, *People Distrust the Media in General but Trust the Media They Like,* FORTUNE, May 24, 2017, <http://fortune.com/2017/05/24/trust-media/>.

4. Joe Pompeo, *In the Trenches of Trump’s Leak War,* VANITY FAIR, Aug. 29, 2017, <https://www.vanityfair.com/news/2017/08/donald-trump-leak-war-reporter-fear>.

With the press unpopular and the White House and Senate all under the control of one party, it is somewhat quixotic to suggest that now would be a good time for Congress to pass a shield law protecting journalists in federal proceedings. But political winds tend to change, and when they do, it would be useful for journalists and their supporters to have a plan.

In December 2018, a bill was pending in the House of Representatives to create such a law, but it died as the year ended.<sup>5</sup> Previous attempts to pass a federal shield law have failed, most recently in 2013.<sup>6</sup> From journalists' perspectives, that could be a blessing in disguise. The bills introduced to create a shield law between 2005 and 2013 were similar and also exception-filled. Some of the exceptions, such as for national security purposes, were probably unavoidable in a post-9/11 world but were rather broad.

Additionally, Congress struggled with the problem of defining who would be protected by the shield law, particularly after WikiLeaks began exposing secret documents purloined from private companies and the U.S. government.<sup>7</sup> Faced with the specter of possibly shielding WikiLeaks as well as the *Washington Post*, members of Congress tried to write an airtight definition of "journalist" before giving up on the shield.

Any new attempt to pass a federal shield law will have to confront the problems of the old proposals and some new ones as well. How could Congress protect "real" journalists from facing jail time or fines for refusing to identify sources without also potentially protecting purveyors of "fake news?" Also, a recent report by UNESCO, based on a global study of how news sources are protected, found that most laws around the world are outdated in how they identify "journalists" and what they protect those journalists and their sources from, often ignoring threats such as mass surveillance and data breaches that could expose sources without journalists knowing.<sup>8</sup>

Using the recent House proposal and the most recent Senate proposal as jumping-off points, this Article will examine the need for a federal shield law and recommend what should be included in such a law. Part II will examine the history of the journalist's privilege in federal and state law, focusing primarily on how the current haphazard system of limited protection for journalists in the federal legal system has developed. Part III will examine the 2017 bill and previous attempts to pass a shield law in Congress. Part IV will explore the more recent issues that were not adequately addressed in previous shield bills and the issues raised by the UNESCO report. This

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5. Free Flow of Information Act, H.R. 4382, 115th Cong. (2017) (hereinafter, "H.R. 4382").

6. See *infra* Part III.

7. See *infra* notes 97-98 and accompanying text.

8. Julie Posetti, *Protecting Journalism Sources in the Digital Age* (2017), UNESCO SERIES ON INTERNET FREEDOM, <http://unesdoc.unesco.org/images/0024/002480/248054E.pdf>.

Article will close with an analysis of how a shield law could be drafted that would be most favorable to journalists and sources. Although the analysis will favor journalists as a starting position for negotiation, it also will suggest that they may need to make concessions to fears about fake news (and fake sources), including the possibility that they may have to swear that their sources exist before they can be shielded.

## II. THE DEVELOPMENT OF AMERICAN PRIVILEGE LAW

It would be hard to find one case that embodies all of the frustrating elements of U.S. journalist's privilege law as well as the case of James Risen.<sup>9</sup> Risen, a *New York Times* reporter and author covering matters of national security before and after the 2001 terrorist attacks in New York and Washington, D.C., wrote a book based on his reporting that included classified information, attributed to unnamed sources, about a failed American attempt to disrupt Iran's nuclear program.<sup>10</sup> Federal investigators concluded that Jeffrey Sterling, a disgruntled former CIA employee, was a likely source of the Iran story and persuaded a federal grand jury to indict him on charges related to disclosing government secrets.<sup>11</sup>

Although the government had enough evidence from phone and e-mail records to get an indictment, its evidence against Sterling was circumstantial.<sup>12</sup> Risen received a subpoena demanding his presence at Sterling's trial to answer questions about whether Sterling was a source for the Iran information.<sup>13</sup> Shortly after, a familiar pattern began to play itself out in the media and in the courts. Risen, of course, had no intention of identifying Sterling as his source.<sup>14</sup> Journalists, particularly those covering sensitive beats like national security, believe that revealing a confidential source is likely to deter future sources from revealing important information to the media, and by extension, the public.<sup>15</sup> The Society of Professional Journalists' Code of Ethics, which is a model for many news organization ethics codes, confronts this belief by discouraging journalists from granting anonymity to sources, while recognizing that sometimes it is necessary; the

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9. *United States v. Sterling*, 724 F.3d 482 (4th Cir. 2013) (hereinafter "*Sterling*").

10. JAMES RISEN, *STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION* (2006).

11. *Sterling* at 490.

12. *Id.* at 489.

13. *Id.* at 490.

14. *See, e.g.*, Matt Apuzzo, *Reporter Wins a 7-Year Fight Not to Testify*, N.Y. TIMES, Jan. 13, 2015, at A1.

15. *See, e.g.*, Christine Haughney, *Press Sees Chilling Effect in Justice Dept. Inquiries*, N.Y. TIMES, May 25, 2013, at A13.

Code says journalists must “keep [their] promises.”<sup>16</sup> Risen sought a court order to quash the subpoena and a protective order to prevent the government from bothering him further.<sup>17</sup>

Judge Louise Brinkema of the U.S. District Court for the Eastern District of Virginia found in Risen’s favor.<sup>18</sup> Judge Brinkema concluded that journalists are protected by a qualified privilege based on the First Amendment’s press clause.<sup>19</sup> The court determined that the government had not shown that Risen’s evidence was necessary in the presence of strong circumstantial evidence that Sterling was Risen’s source.<sup>20</sup>

The government appealed, and a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit ruled 2-1 to reverse Judge Brinkema’s decision.<sup>21</sup> The majority determined that no constitutional journalist’s privilege existed in a federal criminal trial court in the wake of *Branzburg v. Hayes*, a 1972 Supreme Court ruling on the existence of a constitutional journalist’s privilege, and the Circuit’s own precedent.<sup>22</sup> The majority also rejected a bid by Risen to recognize a common-law privilege based on the widespread adoption of privilege statutes in the states, recognition of a constitutional privilege by most federal circuit courts, and the existence of Rule 501 of the Federal Rules of Evidence, which instructed courts to use their best judgment based on common law in recognizing privileges.<sup>23</sup> More problematic for Risen, perhaps, was the majority’s determination that no qualified privilege, if it existed, would have saved him from testifying because circumstantial evidence, however strong, was not an adequate substitute for the kind of direct evidence of guilt he could provide.<sup>24</sup>

However, the third judge on the three-judge appellate panel dissented, arguing that a privilege of the sort Risen asserted did exist and would have been enough to save him from testifying because the circumstantial evidence against Sterling made Risen’s testimony duplicative.<sup>25</sup>

Four federal judges, examining the same facts and precedent, split more or less evenly on what it all meant. This, in a nutshell, is the history of the journalist’s privilege issue in federal courts since *Branzburg*.

Because it remains the only opinion from the Supreme Court about the existence of a journalist’s privilege, *Branzburg* often gets the most attention

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16. SPJ Code of Ethics, <https://www.spj.org/ethicscode.asp> (last visited Dec. 4, 2018).

17. *United States v. Sterling*, 818 F. Supp. 2d 945, 947 (E.D. Va. 2011).

18. *Id.*

19. *Id.*

20. *Id.* at 960.

21. *Sterling* at 482.

22. *Branzburg v. Hayes*, 408 U.S. 665 (1972) (hereinafter “*Branzburg*”).

23. *See infra* notes 76-77, 63-66 and accompanying text; FED. R. EVID. 501.

24. *Sterling* at 505.

25. *Id.* at 526-30 (Gregory, J., dissenting).



from judges and scholars pondering the existence or scope of the privilege. But disputes between journalists and officials prying into their sources far predate 1972.

There is some debate about who was the first journalist in the United States to refuse to reveal the identity of a confidential source to authorities. Some legal scholars and historians say that John Peter Zenger, whose famous prosecution and subsequent acquittal for criminal libel in 1735 is credited with inspiring post-Revolution protections for free speech, deserves the title for refusing to name the benefactors who bankrolled his colonial New York paper and provided the content that got him in trouble.<sup>26</sup> Others attribute the beginning of the practice of American journalists refusing to disclose sources to James Franklin, who defied colonial authorities' efforts to force him to name the authors of articles in his Pennsylvania newspaper in the 1760s.<sup>27</sup>

The first person in post-Revolution America who was jailed for refusing to reveal a source and who resembled what modern Americans would recognize as a reporter was John Nugent of the *New York Herald*, who was detained in the Capitol jail for ten days in 1848 for refusing to reveal who provided him with a copy of a treaty being considered by the U.S. Senate.<sup>28</sup> At that time, treaties were secret until voted upon, and Nugent was found in contempt of Congress after publishing the details of the treaty and refusing to name his source.<sup>29</sup>

The Nugent episode was the start of a long period in which authorities and news organizations periodically clashed over whether journalists could be compelled to name sources of controversial stories. For about 100 years, journalists largely avoided using the First Amendment as a shield against official demands, instead arguing that the standards of their profession required them to keep promises they made to sources.<sup>30</sup> The position of the authorities can perhaps best be summed up by an oft-quoted phrase from *United States v. Bryan* in 1950: in a legal proceeding whose goal is to find the truth, "the public has a right to every man's evidence."<sup>31</sup>

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26. See, e.g., Sandra Davidson & David Herrera, *Needed: More Than a Paper Shield*, 20 WM. & MARY BILL RTS. J. 1277 (2012); Scott J. Street, *Poor Richard's Forgotten Press Clause: How Journalists Can Use Original Intent to Protect Their Confidential Sources*, 27 LOY. L.A. ENT. L. REV. 463 (2006).

27. See, e.g., Kara A. Larsen, Note: *The Demise of the First Amendment-Based Reporter's Privilege: Why the Current Trend Should Not Surprise the Media*, 37 CONN. L. REV. 1235 (2005); Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515 (2007).

28. Aaron David Gordon, *1 Protection of News Sources: The History and Legal Status of the Newsman's Privilege 185-88* (1971) (unpublished dissertation, University of Wisconsin) (on file at Indiana University's Wells Library).

29. *Id.*

30. TIMOTHY GLEASON, *THE WATCHDOG CONCEPT* (1990).

31. *United States v. Bryan*, 339 U.S. 323, 331 (1950).

As Aaron David Gordon documented in his exhaustive dissertation on the journalist's privilege in 1971, these occasional clashes between journalists and authorities often resulted in findings of contempt against journalists and/or their employers but few disclosures of sources.<sup>32</sup> The disputes also often led to lobbying by news organizations and press associations for shield laws to protect journalists from future threats of jail time or fines for contempt, such as the long effort by Maryland journalists in the 1890s that led to the passage of the nation's first state shield law.<sup>33</sup> There were also calls for passage of a federal shield law as early as the 1920s, but the disputes were too few and far between to create any sort of groundswell of support for federal legislation.<sup>34</sup> Another obstacle was that influential legal scholars were hostile to the idea of expanding the number of professionals eligible to claim privileges beyond lawyers, doctors and clergy members. John Henry Wigmore, perhaps the leading early twentieth century authority on evidentiary rules, stated in a 1909 treatise that privileges should only be judicially recognized if they met four conditions:

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.<sup>35</sup>

Wigmore found most privileges advocated by professionals, including journalists, lacked at least one of those elements.<sup>36</sup>

In 1958, an entertainment columnist for a New York newspaper became the first journalist to argue that the press clause of the First Amendment protected her right to refuse to name a confidential source. Marie Torre had written an article about a dispute between singer and actress Judy Garland and the CBS television network over a planned show starring Garland.<sup>37</sup> The article quoted an unnamed CBS executive suggesting that Garland was to

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32. Gordon, *supra* note 28, at 184-287.

33. See Dean C. Smith, *The Real Story Behind the Nation's First Shield Law: Maryland, 1894-1897*, 19 COMM. L. & POL'Y 3 (2014).

34. See Dean C. Smith, *Journalist Privilege in 1929: The Quest for a Federal Shield Law Begins*, 3 U. BALT. J. MEDIA L. & ETHICS 126 (2012).

35. JOHN WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (McNaughton rev. ed. 1961).

36. *Id.*

37. *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958).

blame for problems with getting the show on the air.<sup>38</sup> When Garland sued CBS for breach of contract and defamation, she subpoenaed Torre to learn the identity of her source, and Torre refused to provide the identity, citing the First Amendment.<sup>39</sup>

The U.S. Court of Appeals for the Second Circuit eventually ruled against Torre, finding that because her information “went to the heart” of Garland’s lawsuit, she had to reveal the source.<sup>40</sup> The opinion was notable for reasons that did not become obvious until later; it was written by Judge Potter Stewart, who would later be named to the Supreme Court in 1958, and it did not dismiss the idea that the First Amendment might protect journalists from revealing sources in some situations.<sup>41</sup>

No one could have predicted in 1958 that the relationship between the press and the government soon would undergo a shift that would make Torre’s pioneering legal argument more significant. The changes that have swept through the news industry in the last half-century are mostly beyond the scope of this Article, but the shift in how many journalists saw their role in informing the public (from being glorified stenographers for government pronouncements to skeptical and critical “watchdogs” of officialdom) is relevant in understanding why subpoenas to the press increased, along with resistance, and led to an inevitable clash in the U.S. Supreme Court.<sup>42</sup>

By the early 1970s, the number of subpoenas issued to the media nationwide had increased from about one or two a year to seventy-five or more, according to some estimates.<sup>43</sup> Observers have stated that the increase stemmed from official alarm over widespread racial, economic, and social unrest, and journalists’ increasing reliance on non-official sources in “radical” movements that officials were unsuccessful in infiltrating.<sup>44</sup> Simply put, authorities wanted to know what various groups were planning, and journalists sometimes appeared to know more than the authorities did.

The situations that led the three reporters, whose cases were consolidated in *Branzburg v. Hayes*, to the Court are symbolic of the increasing tensions between journalists and government officials.<sup>45</sup> Paul Branzburg, a reporter for the *Courier-Journal* in Louisville, Kentucky, was subpoenaed by two state grand juries after publishing stories based on interviews with drug

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38. *Id.* at 547.

39. *Id.* at 547-48.

40. *Id.* at 550.

41. Anthony Lewis, *Ohioan Is Chosen for Burton’s Post on Supreme Court*, N.Y. TIMES, Oct. 8, 1958, at A1; *Garland*, 259 F.2d at 549-50.

42. *See, e.g.*, Michael Schudson, *The Sociology of News* 80-82 (2d ed. 2011).

43. Achal Mehra, *Newsmen’s Privilege: An Empirical Study*, 59 JOURNALISM Q. 560 (1982).

44. *See, e.g.*, Margaret Sherwood, Comment, *The Newsmen’s Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CAL. L. REV. 1198 (1970).

45. *Branzburg*, at 665.

dealers and users.<sup>46</sup> Earl Caldwell, a correspondent for the *New York Times*, was covering the Black Panthers, a controversial civil rights group, when he was subpoenaed by a federal grand jury in California looking into alleged Black Panther threats against authorities.<sup>47</sup> Paul Pappas, a Massachusetts television journalist, was subpoenaed by a Massachusetts grand jury after he spent several hours in the headquarters of a Black Panthers offshoot in New Bedford after a night of racial disturbances.<sup>48</sup>

The three privilege cases had one thing in common: all of the journalists had allegedly either witnessed or been told directly about criminal activity by their sources.<sup>49</sup> The cases also came from three different types of jurisdictions: Kentucky had a shield law, Massachusetts did not, and Caldwell was subpoenaed by a federal grand jury.<sup>50</sup>

In *Branzburg's* case, the Kentucky Court of Appeals twice refused to quash the subpoenas he faced, despite the existence of a relatively absolute state shield law, by finding that he was not so much a reporter protecting sources as an eyewitness to criminal behavior.<sup>51</sup> Pappas also lost his appeals all the way up to the Massachusetts Supreme Judicial Court, which noted the lack of a statutory shield and declined to create a common-law privilege.<sup>52</sup> Caldwell, however, won his appeal in the U.S. Court of Appeals for the Ninth Circuit, which found that the government had not made an adequate showing that his testimony was needed that would obviate the harm to his source relationships.<sup>53</sup>

The Supreme Court took it as a given that newsgathering deserved “some” First Amendment protection, lest the freedom of expression be “eviscerated,” but the protection did not extend to giving journalists a right that other citizens did not have to defy valid grand jury subpoenas.<sup>54</sup> The majority also expressed concerns about how to define a class of “journalists” who had extraordinary First Amendment protection as opposed to other communicators who did not.<sup>55</sup> Another concern was that recognizing a qualified privilege would mire courts in determining who deserved the

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46. *Id.* at 667-71. See also Paul M. Branzburg, *The Hash They Make Isn't to Eat*, COURIER-JOURNAL, Nov. 15, 1969, at A1; Paul M. Branzburg, *Rope Turns to Pot: Once an Industry, Kentucky Hemp Has Become a Drug Problem*, COURIER-JOURNAL & TIMES, Jan. 10, 1971, at A1.

47. *Branzburg*, at 675-77; see also Earl Caldwell, *Declining Black Panthers Gather New Support from Repeated Clashes with Police*, N.Y. TIMES, Dec. 14, 1969, at 69.

48. *Branzburg*, at 672-75.

49. *Id.* at 691.

50. *Id.* at 667-79.

51. *Id.* at 668-71; see also *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1970); *Branzburg v. Meigs*, 503 S.W. 2d 748 (Ky. 1971); KY. REV. STAT. § 421.100 (LexisNexis 2005; Supp. 2016).

52. *Branzburg*, at 673-75; see also *In re Pappas*, 266 N.E. 2d 297 (Mass. 1971).

53. *Branzburg*, at 679; see also *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970).

54. *Branzburg*, at 681, 690.

55. *Id.* at 704-05.

protection and whether the government had made its case for requiring the journalist to testify.<sup>56</sup>

Justice Lewis Powell's heavily scrutinized concurring opinion noted the "limited nature" of the majority opinion he had joined while also suggesting journalists should have recourse if they believed they were being harassed by subpoenas of dubious purpose or dubious relevance to an active investigation.<sup>57</sup> The concurrence was brief both in words and reasoning, leaving later courts to try to trick out its meaning.

Justice William Douglas' dissent chastised both the majority and the journalists, the former for failing to adequately protect journalists and the latter for seeking only a qualified privilege.<sup>58</sup> Justice Douglas argued that journalists should have an absolute privilege against government subpoenas to protect their constitutionally guaranteed role in informing the public.<sup>59</sup>

Justice Potter Stewart, who as an appellate judge had written the Second Circuit opinion in 1958 that denied Marie Torre protection from disclosing her source, wrote a dissent in *Branzburg* joined by Justices William Brennan and Thurgood Marshall that, arguably, was the most important opinion in the case. Justice Stewart criticized the majority's "crabbed view" of the First Amendment and expressed concern about the damage the decision would do to the free flow of information.<sup>60</sup> He wrote that it was logical for reporters to need to maintain confidential relationships with sources in order to do their jobs effectively.<sup>61</sup> However, unlike Justice Douglas, he did not see the need for an absolute privilege. Instead he advocated for a qualified privilege that would allow journalists to protect their sources' identities unless the government could clearly and convincingly show that the information it sought was critically important to its investigation, that the information was relevant to the investigation, and that the information could not be obtained elsewhere.<sup>62</sup>

This so-called "Stewart three-part test" became the standard many federal courts used in deciding subsequent cases because, as odd as it may seem, most federal circuit courts of appeal determined that *Branzburg* either endorsed or allowed a First Amendment privilege in situations other than valid grand jury subpoenas.<sup>63</sup> A few circuits even extended the privilege to

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56. *Id.* at 705-06.

57. *Id.* at 709-10 (Powell, J., concurring).

58. *Id.* at 713 (Douglas, J., dissenting).

59. *Id.* at 721.

60. *Id.* at 725 (Stewart, J., dissenting).

61. *Id.* at 728.

62. *Id.* at 743.

63. *See, e.g.*, *United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986); *LaRouche v. National Broadcast. Co.*, 780 F.2d 1134 (4th Cir. 1986); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *Miller v.*

non-confidential information such as interview notes, unpublished photographs, and outtakes from broadcast news stories.<sup>64</sup> Only the Sixth Circuit has refused to recognize any privilege for journalists, while the Seventh Circuit has leaned hard in that direction without explicitly rejecting a privilege in all circumstances.<sup>65</sup>

The 2003 Seventh Circuit decision in *McKevitt v. Pallasch* marked a turning point of sorts in journalists' success against efforts to force them to disclose sources.<sup>66</sup> Justice Richard Posner's opinion for a unanimous three-judge panel rejected the bid of several reporters to avoid turning over interview tapes with a key prosecution witness to the defense in a Northern Ireland terrorist trial.<sup>67</sup> The opinion also questioned in dicta how other federal courts could have found support for a privilege from *Branzburg*, particularly for protection of non-confidential material.<sup>68</sup>

The extent to which Judge Posner's decision raised doubts about the privilege among other federal judges is unclear – *McKevitt* has rarely been cited by other circuits – but journalists soon began to have trouble concealing sources and keeping themselves out of jail.<sup>69</sup> A more likely factor in the number of high-profile losses is that many of the cases involved grand jury or special prosecutor investigations that led to easy analogies with the core finding of *Branzburg*. A few examples:

1. Jim Taricani, a Rhode Island television reporter, was sentenced to six months in detention for refusing to disclose his source for a sealed videotape of an alleged corrupt act by a Providence city official. Taricani was found guilty of criminal contempt of court even after his source, an attorney for a defendant in the corruption case, came forward.<sup>70</sup>
2. Judith Miller, a reporter for the *New York Times*, served eighty-five days in jail for refusing to tell a special prosecutor who leaked the name of a Central Intelligence Agency operative to her in an apparent political retaliation against the operative's husband, a Bush administration critic. She

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Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980); *Riley v. Chester*, 612 F.2d 708 (3d Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972).

64. *Gonzales v. National Broadcast. Co.*, 194 F.3d 29 (2d Cir. 1998); *v. Shoen*, 48 F.3d 412 (9th Cir. 1995); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980).

65. *In re Grand Jury Proceedings Storer Communications, Inc.*, 810 F.2d 580 (6th Cir. 1987); *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003).

66. *McKevitt*, 339 F.3d 530.

67. *Id.* at 531.

68. *Id.* at 532-33.

69. *But see In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004).

70. *Id.*; *see also In re Special Proceedings*, C.A. No. 01-47 (D.R.I. Dec. 9, 2004).

was released after her source, Vice President Dick Cheney's chief of staff, allowed her to use his name.<sup>71</sup>

3. Two reporters for the *San Francisco Chronicle* were ordered to reveal their source for a secret grand jury report about steroid use in professional baseball. They were spared jail when their source came forward.<sup>72</sup>

4. Josh Wolf, a freelance videographer in San Francisco, set the record for most time incarcerated for contempt by a journalist after he refused to give federal investigators the unedited tape of footage he shot during a protest in which a police officer was injured and a police car was damaged. His nearly eight months in jail ended when he and prosecutors reached an agreement that kept him from having to testify before a grand jury.<sup>73</sup>

5. Four journalists were ordered to reveal to former government nuclear scientist, Wen Ho Lee, the sources within federal agencies who leaked information to them about Lee's alleged involvement in espionage. The reporters escaped contempt penalties when, in an unprecedented move, their employers joined with the government to pay a settlement to end Lee's Privacy Act lawsuit against the government.<sup>74</sup>

6. Toni Locy, a former *USA Today* reporter, faced bankruptcy when a federal district court judge ordered her to pay, from her own funds, up to \$45,500 in fines if she did not reveal her sources for stories about Steven Hatfill. Mr. Hatfill was eventually cleared years after being named a "person of interest" in the mailing of deadly anthrax to journalists and politicians. While her appeal was pending, Hatfill and the government reached a substantial settlement and her testimony was no longer needed.<sup>75</sup>

The series of cases that journalists were losing had two potentially positive effects for the media; they spurred Congress members to introduce bills to create a federal shield law, and they inspired several state legislatures to pass shield laws as well. As of this writing, forty states have statutes that,

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71. See *In re Grand Jury Subpoena* (Miller), 397 F.3d 964 (D.C. Cir. 2005); David Johnston & Douglas Jehl, *Times Reporter Free From Jail; She Will Testify*, N.Y. TIMES, Sept. 30, 2005, at A1.

72. See *In re Grand Jury Subpoenas* (Fainaru-Wada), 438 F. Supp. 2d 1111 (N.D. Cal. 2006); Bob Egelko & John Koopman, *Lawyer Enters Guilty Plea as BALCO Leaker*, S. F. CHRON., Feb. 16, 2007, at A1.

73. See *Wolf v. United States (In re Grand Jury Subpoena)*, 201 Fed. Appx. 430 (9th Cir. 2006); Jesse McKinley, *8-Month Jail Term Ends as Maker of Video Turns Over a Copy*, N.Y. TIMES, Apr. 4, 2007, at A9.

74. See *Lee v. Department of Justice*, 413 F.3d 53 (D.C. Cir. 2005); Adam Liptak, *News Media Pay in Scientist Suit*, N.Y. TIMES, June 3, 2006, at A1.

75. See *Hatfill v. Mukasey*, 539 F. Supp. 2d 96 (D.D.C. 2008); Scott Shane & Eric Lichtblau, *Scientist Is Paid Millions by U.S. in Anthrax Suit*, N.Y. TIMES, June 28, 2008, at A1.

to various extents, protect journalists from revealing sources and other newsgathering-related information<sup>76</sup> or state court rules that do the same.<sup>77</sup>

For a variety of reasons, the effort to pass a federal shield law did not succeed. The next section will examine the efforts made between 2005 and the present day to pass a bill.

### III. PAST AND PRESENT EFFORTS TO PASS A FEDERAL SHIELD LAW

The cases discussed above that resulted in journalists being jailed, fined, or threatened with jail or fines spurred senators and representatives from both major political parties to introduce legislation to protect journalists' ability to promise sources' anonymity. While the legislative activity from 2005-2013 was notable for how close it came to success, as well as why it did not, this was not the first time that Congress attempted to pass a shield law.

First Amendment scholar Dean Smith has traced the first serious effort to pass a federal shield law to 1929, at a time when only one state – Maryland – had a shield statute on the books.<sup>78</sup> Legislative activity heated up considerably after the *Branzburg* decision in 1972, with dozens of bills introduced over the course of several sessions of Congress but, ultimately, none of the bills were passed.<sup>79</sup>

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76. ALA. CODE § 12-21-142 (LexisNexis Pub. 2012; Supp. 2016); ALASKA STAT. §§ 09.25.300-09.25.390 (2016); ARIZ. REV. STAT. ANN. § 12-2237 (2016); ARK. CODE ANN. § 16-85-510 (2005; Supp. 2015); CAL. EVID. CODE § 1070 (West 2009; Supp. 2017); COLO. REV. STAT. § 13-90-119 (2014; Supp. 2016); CONN. GEN. STAT. § 52-146t (2013; Supp. 2017); DEL. CODE ANN. tit. 10, §§ 4320-4326 (2013; Supp. 2016); D.C. CODE §§ 16-4701-16-4704 (2001; Supp. 2017); FLA. STAT. § 90.5015 (2011; Supp. 2017); GA. CODE ANN. § 24-5-508 (2013; Supp. 2016); 735 ILL. COMP. STAT. §§ 5/8-901 to 5/8-909 (West 2003; Supp. 2017); IND. CODE §§ 34-46-4-1 to 34-46-4-2 (2008; Supp. 2016); KAN. STAT. ANN. §§ 60-480 to 60-485 (2005; Supp. 2016); KY. REV. STAT. ANN. § 421.100 (LexisNexis 2005; Supp. 2016); LA. REV. STAT. ANN. §§ 45:1451 to 45:1459 (Thomson Reuters 2015; Supp. 2017); ME. REV. STAT. tit. 16, § 61 (2006; Supp. 2016); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (LexisNexis 2013; Supp. 2016); MICH. COMP. LAWS ANN. § 767.5a (2000; Supp. 2017); MINN. STAT. §§ 595.021 to 595.025 (West 2010; Supp. 2017); MONT. CODE ANN. §§ 26-1-901 - 26-1-903 (2016); NEB. REV. STAT. §§ 20-144 to 20-147 (LexisNexis Pub. 2015; Supp. 2016); NEV. REV. STAT. § 49.275 (LexisNexis Pub. 2012; Supp. 2016); N.J. STAT. ANN. §§ 2A:84A-21 to 2A:84A-21.13 (West 2011; Supp. 2017); N.Y. CIV. RIGHTS LAW § 79-h (West 2009; Supp. 2017); N.C. GEN. STAT. § 8-53.11 (Thomson Reuters 2016); N.D. CENT. CODE § 31-01-06.2 (2010; Supp. 2015); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (LexisNexis 2014); OKLA. STAT. ANN. tit. 12, § 2506 (West 2009; Supp. 2017); OR. REV. STAT. §§ 44.510 - 44.540 (2015); 42 PA. CONS. STAT. ANN. § 5942 (West 2013; Supp. 2017); R.I. GEN. LAWS §§ 9-19.1-1 to 9-19.1-3 (2012; Supp. 2016); S.C. CODE ANN. § 19-11-100 (1985; Supp. 2012); TENN. CODE ANN. § 24-1-208 (West 2010).

77. N.M. CODE R. § 11-514 (Thomson Reuters 2017); UTAH R. EVID. 509 (LexisNexis Pub. 2017).

78. Smith, *supra* notes 33 and 34.

79. Jason M. Shepard, *After the First Amendment Fails: The Newsmen's Privilege Hearings of the 1970s*, 14 COMM. L. & POL'Y 373 (2009).



Starting in 2005, when the Judith Miller case was in the news, no fewer than fifteen bills have been introduced in the two houses of Congress, including the most recent in 2017, House Bill 4382 (H.R. 4382).<sup>80</sup> Introduced in November 2017 by Reps. Jamie Raskin (D-Maryland) and Jim Jordan (R-Ohio), the bill was identical to earlier versions of the bill introduced in the House that passed in two sessions of Congress.<sup>81</sup>

H.R. 4382 would prevent a covered person from being forced to testify or reveal “any document related to information obtained or created” while engaging in journalism unless a court determined that there were no other reasonable alternative sources and, in criminal investigations or prosecutions, it was reasonable to believe a crime had been committed and the information sought was “critical to the investigation or prosecution or to the defense against the prosecution.”<sup>82</sup> In a matter other than a criminal investigation or prosecution, the person seeking the information would have to prove that it was “critical to the successful completion of the matter.”<sup>83</sup>

If a confidential source would be revealed by disclosure, a court could order disclosure if it determined that it was necessary to prevent a terrorist act or identify a terrorist, to prevent death or serious injury, to identify someone who had disclosed a trade secret, “individually identifiable health information,” or nonpublic personal information, or to identify someone who had leaked classified information whose disclosure caused or would cause “significant and articulable harm to the national security,” and that the public interest would be better served by disclosing the source.<sup>84</sup> The bill would limit disclosure by requiring that it not be “overbroad, unreasonable, or oppressive” and, when possible, limited to verifying published information and its accuracy. It also would be narrowly tailored as to subject matter and time period and required to avoid the production of irrelevant information.<sup>85</sup>

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80. H.R. 4382. *See also* Free Flow of Information Act, S. 340, 109th Cong. (2005); Free Flow of Information Act, H.R. 581, 109th Cong. (2005); Free Speech Protection Act, S. 369, 109th Cong. (2005); Free Flow of Information Act, H.R. 3323, 109th Cong. (2005); Free Flow of Information Act, S. 1419, 109th Cong. (2005); Free Flow of Information Act, S. 2831, 109th Cong. (2006); Free Flow of Information Act, H.R. 2102, 110th Cong. (2007); Free Flow of Information Act, S. 1267, 110th Cong. (2007); Free Flow of Information Act, S. 2035, 110th Cong. (2007); Free Flow of Information Act, S. 448, 111th Cong. (2009); Free Flow of Information Act, H.R. 985, 111th Cong. (2009); Free Flow of Information Act, H.R. 2932, 112th Cong. (2011); Free Flow of Information Act, H.R. 1962, 113th Cong. (2013); Free Flow of Information Act, S. 987, 113th Cong. (2013) (hereinafter “S.987”).

81. Free Flow of Information Act, H.R. 1962, 113th Cong. (2013); H.R. 2932, 112th Cong. (2011); H.R. 985, 111th Cong. (2009) (enacted); 155 CONG. REC. H4209 (2009); H.R. 2102, 110th Cong. (2007) (enacted); 153 CONG. REC. H11537 (2007).

82. H.R. 4382 § 2(a)(1) & (2)(A).

83. *Id.* at § 2(a)(2)(B).

84. *Id.* at § 2(a)(3) & (4).

85. *Id.* at § 2(c).

The House bill contained an exception for eyewitness observations and criminal or tortious conduct by the covered person.<sup>86</sup> Another exception would prevent journalists from seeking protection under the federal shield law in state or federal cases involving civil defamation, slander, or libel.<sup>87</sup>

The bill would apply the same conditions for overcoming the privilege to subpoenas issued to communication service providers doing business with covered persons. It would require that a covered person be given notice of the subpoena at the time it was served on the provider and that the covered person have a chance to respond. However, notice of the subpoena could be delayed if a court determined “by clear and convincing evidence” that notice would “pose a substantial threat to the integrity of a criminal investigation.”<sup>88</sup>

The definition of “covered person” would include someone “who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes” news about events of public interest “for a substantial portion of the person’s livelihood or for substantial financial gain.” The definition would also include “a supervisor, employer, parent, subsidiary, or affiliate” of a covered person.<sup>89</sup> The term would not include a foreign power or an agent of that power, a foreign terrorist organization, a specially designated terrorist, or any other terrorist organization.<sup>90</sup>

“Journalism” would be defined as the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.<sup>91</sup>

H.R. 4382 would protect journalists from being forced to reveal information they have gathered or the identities of sources unless there was a compelling need for that information in relation to a criminal case, or the information would prevent death or physical harm, identify a terrorist, reveal the leaker of a trade secret, reveal the leaker of personal information about health or other matters, or came from a leak of classified information posing a clear threat to national security. The bill would also require that journalists be given a chance to fight subpoenas sent to their communication service providers, such as telephone companies or e-mail providers, but notice to journalists that their information was being sought could be delayed if the notice was shown to jeopardize a criminal investigation. Covered persons could include anyone in any medium, but only if they were making a living

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86. *Id.* at § 2(e).

87. *Id.* at § 2(d).

88. *Id.* at § 3.

89. *Id.* at § 4(2).

90. *Id.* at § 4(2)(A)-(E).

91. *Id.* at § 4(5).

from journalistic activity, which could exclude some bloggers and citizen journalists who otherwise would fit the definition.

While the bill would have brought consistency to federal law on the journalist's privilege, its many exceptions and qualifications raise questions about whether journalists pursuing highly sensitive stories would be much better off than they are now.

No companion Senate bill was introduced. Although the early Senate bills tended to be identical to House versions, that began to change in later sessions of Congress. The primary reason appears to be the revelations of classified documents about the wars in Afghanistan and Iraq and diplomatic messages by WikiLeaks.<sup>92</sup> By the time the last Senate version was approved by the Senate Judiciary Committee in 2013, becoming the third Senate bill to win committee approval but not full Senate approval, there were key differences with the House bills.<sup>93</sup> The final Senate bill introduced and approved by the Judiciary Committee in 2013 illustrates the differences in approaches between the two houses of Congress, most notably in defining a "covered person."

Senate Bill 987 as amended and approved in committee referred to "covered journalist" instead of "covered person" and said such a person should be associated with an entity that disseminated news

by means of newspaper, nonfiction book, wire service news agency, news website, mobile application, other news or information service (whether distributed digitally or otherwise), news program, magazine or other periodical (whether in print, electronic, or other format), through television or radio broadcast, multichannel video programming distributor ... or motion picture for public showing.<sup>94</sup>

Alternatively, the covered journalist could be a person who gathered news with the intent to distribute it to the public and would have been subject to the earlier definition for "any continuous one-year period within the 20 years prior to the relevant date" or any three-month period over the previous five years. A person could also qualify for protection if she had "substantially contributed" to a medium defined above within five years of the relevant date or if she was a student journalist at a college or university.<sup>95</sup> There was no mention of an income requirement. "Relevant date" was defined as the date

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92. See Free Flow of Information Act, S. 340 & H.R. 581, 109th Cong. (2005); Free Flow of Information Act, S. 1267 & H.R. 2102, 110th Cong. (2007); Charlie Savage, *After Afghan War Leaks, Revisions in a Shield Bill*, N.Y. TIMES, Aug. 4, 2010, at A12.

93. See 153 CONG. REC. S13192 (2007) (reporting S. 2035 out of committee); 155 CONG. REC. S13032 (2009) (reporting S. 448 out of committee).

94. S. 987, § 11(1)(A)(i)(I)(aa).

95. *Id.* at § 11(1)(A)(i)(II)(cc)(AA)-(CC).

on which the covered journalist obtained or created the protected information at issue in a case.<sup>96</sup>

The bill included the same disqualifications for foreign powers and terrorists as in H.R. 4382 but added one: a person or entity whose principal function, as demonstrated by the totality of such person or entity's work, is to publish primary source documents that have been disclosed to such person or entity without authorization.<sup>97</sup>

Presumably, this would have eliminated from shield law protection WikiLeaks or similar sites that primarily made documents available without editing. However, the bill also specifically empowered judges to use their discretion to find that a person who did not fit the definition of covered journalist should still be protected under the law if doing so would serve the interest of justice and "protect lawful and legitimate news-gathering activities."<sup>98</sup>

The Senate bill used language similar to H.R. 4382 in defining the limits of protection for journalists and their sources in regard to criminal activity. Exceptions to the presumption of confidentiality would have also included eyewitness observations or participation in criminal activity.<sup>99</sup> Other exceptions included situations in which the subpoenaed information would "stop, prevent, or mitigate death, kidnapping, serious bodily harm, crimes against minors, or '[i]ncapacitation of critical infrastructure.'"<sup>100</sup> However, there was no mention of exceptions for health-related information or trade secrets.

The 2013 Senate bill also carved out an exception for leaks of classified information, if such information would prevent or mitigate an act of terrorism or other acts that would pose a "significant and articulable harm to national security."<sup>101</sup> However, a journalist could still protect a source of classified information if the information did not pose such a harm. The bill would have required a court to give deference to the government in determining the severity of the threat from leaked classified material.<sup>102</sup>

Despite the obvious attempts to appease critics who feared that WikiLeaks would be protected from disclosing sources, the bill never reached a vote on the Senate floor. No bills to create a federal shield law were introduced in the 114th Congress.

During the years that Congress debated the various shield bills, several hearings were held in which House and Senate members heard testimony for

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96. *Id.* at § 11(8).

97. *Id.* at § 11(1)(A)(iii)(I).

98. *Id.* at § 11(1)(B).

99. *Id.* at § 3(a).

100. *Id.* at § 4.

101. *Id.* at § 5(a).

102. *Id.* at § 5(c).

and against passing a bill.<sup>103</sup> The Senate Report on S. 987, the last of the shield bills to date to get much attention from Congress, does an adequate job of synthesizing congressional views and hearing testimony about that bill and previous bills and will be summarized here to avoid repetition.

The Senate Judiciary Committee's report on S. 987, released on November 6, 2013, after the committee voted to approve the bill and send it to the full Senate, contained a majority view and two minority views by bill opponents. The majority noted that decisions of lower federal courts post-*Branzburg* had created a "confusing collage" that had, the committee argued, discouraged sources from going to the media with information about corporate or government wrongdoing. The report said that the shield law was needed to "clarify the law in this area."<sup>104</sup>

The report said that the need for the shield law "has never been more pressing than now" because of an increase in the number of government-issued subpoenas in recent years, including a rise in the number of subpoenas related to leak investigations.<sup>105</sup> Discussing recent cases, such as the one involving James Risen, the committee said that the outcome might have been the same if the shield law had been in place, but at least judges would have had a "predictable balancing test" to apply.<sup>106</sup> The law was needed, the senators said, to avoid "a return to the late 1960s, when subpoenas to reporters had become not only frequent but virtually *de rigeur*."<sup>107</sup> The committee also noted that journalists had testified that highly publicized cases of reporters being held in contempt of court or turning over confidential information had risked "creating a broad chilling effect."<sup>108</sup> The committee also expressed concern that the federal government's use of subpoenas had "ebbed and flowed" over the years, lending their use "the taint of politicization."<sup>109</sup>

Much of the rest of the majority report was devoted to recounting the history of the shield legislation in the Senate over the years and defending provisions of the 2013 bill. Notably, the report stated that the bill would require judges to give appropriate deference to the government in national security matters, but would also require a specific showing of likely damage so that a prosecutor would not "be able to hide behind an overbroad and

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103. Transcripts of Congressional hearings are available from the Government Printing Office at <https://www.gpo.gov/fdsys/browse/collection.action?collectionCode=CHRG> (last visited Dec. 4, 2018).

104. S. REP. NO. 113-118, at 3 (2013).

105. *Id.* at 5.

106. *Id.* at 6.

107. *Id.* at 6-7.

108. *Id.* at 8-9.

109. *Id.* at 9.

unreasonable claim of harm.”<sup>110</sup> The majority view also defended the definition of “covered journalist” as drawing a “clear and administrable line” between “actual journalists” and “those who would try to hide behind the cloak of journalism in order to harm our country – a scenario which has never occurred.”<sup>111</sup>

Opponents of the bill filed two minority views, the first by Senator (later Attorney General) Jeff Sessions (R-Alabama) and Senator John Cornyn (R-Texas). Sessions and Cornyn warned that the bill would “seriously impede important criminal investigations and prosecutions” into terrorist activity and threats to national security. They cited what they called the “proliferation of the most damaging leaks of classified information in our country’s history” in recent years, including published reports on terrorist “kill lists,” the existence of secret prisons in Europe for alleged Al-Qaeda operatives, and administration concerns about Iraq’s prime minister.<sup>112</sup>

Sessions and Cornyn also argued, citing comments from intelligence officials and others, that the bill was a solution in search of a problem. They said that the Attorney General’s subpoena guidelines were “powerfully protective” (perhaps too much so) and, if “faithfully adhered to,” more than adequate to ensure that the government did not “unlawfully or unfairly intrude on the press’s right to legitimately report on issues of public controversy.”<sup>113</sup>

The two senators also criticized the process required by the bill for overcoming the privilege as “burdensome and time-consuming,” so much so that the bill’s language could “derail a critical, fast-moving investigation.”<sup>114</sup> They also found it troublesome that in a leak investigation, the government would have to “contextualize” the leak for a court in order to show harm to national security, thus introducing more sensitive information into the record and exacerbating the harm associated with the leak.<sup>115</sup> The committee, they wrote, had placed “protecting a leaker’s identity ahead of the safety and security of the country,” a move they said would likely encourage more leaks of sensitive information.<sup>116</sup>

Noting that the committee had attempted to write a definition of “covered journalist” that would exclude persons merely posing as journalists to harm American interests, Cornyn and Sessions said the definition still seemed to cover “almost anyone.” While the definition excluded persons or organizations linked to terrorism, the senators argued that it would still

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110. *Id.* at 19.

111. *Id.* at 22 n. 33.

112. *Id.* at 25.

113. *Id.* at 27.

114. *Id.* at 34.

115. *Id.* at 34-35.

116. *Id.* at 35.

protect “terrorist media” such as *Russia Today*, *Al Jazeera*, and China’s *People’s Daily*. “It is not difficult to anticipate the scenarios under which the robust protections of S. 987 would be easily abused by those who wish to harm our safety and national security.”<sup>117</sup>

A second, much shorter, minority view was added by Senators Cornyn, Sessions, Ted Cruz (R-Texas) and Mike Lee (R-Utah).<sup>118</sup> Oddly enough, given the concerns expressed by Cornyn and Sessions about the definition of “covered journalist,” the second minority view argued that the definition was too narrow. The four senators argued that the bill amounted to a form of government licensing by favoring some “forms of media” over others, which they said was “inimical to the First Amendment.”<sup>119</sup>

#### IV. INTERNATIONAL PERSPECTIVES ON THE JOURNALIST’S PRIVILEGE

The debate over whether, and to what extent, to protect journalists from being forced to reveal their confidential news sources is not just an American problem. Many countries recognize a right to protect sources through statutes or common law. Cataloging the various national laws is beyond the scope of this Article. Instead, this Article will focus on international tribunals and organizations with jurisdiction or authority to recommend or enforce legal actions across borders.

Treaties and covenants of global and regional organizations that monitor and, to various extents, enforce human rights guarantees generally recognize freedom of expression as a human right that governments should protect.<sup>120</sup> Arguably, the most influential of the free-expression protections is Article 19 of the U.N. Human Rights Commission’s International Covenant on Civil and Political Rights (ICCPR), which states:

Everyone shall have the right to hold opinions without interference.  
Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all

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117. *Id.* at 37.

118. *Id.* at 54.

119. *Id.*

120. G.A. Res. 217 (III) A, *Universal Declaration of Human Rights*, at Art. 19 (Dec. 10, 1948); U.N. HUMAN RIGHTS COMMISSION, *International Covenant on Civil and Political*, U.N. Doc. A/RES/2200/XXI, at Art. 19 (Dec. 16, 1966); COUNCIL OF EUROPE, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, at Art. 10 (Nov. 4, 1950); ORGANIZATION OF AMERICAN STATES, *American Convention on Human Rights*, at Art. 13 (Nov. 22, 1969); AFRICAN UNION, *African (Banjul) Charter on Human and Peoples’ Rights*, OAU Doc. CAB/LEG/67/3 rev. 5, at Art. 9 (June 27, 1981); ASSOCIATION OF SOUTHEAST ASIAN NATIONS, *ASEAN Human Rights Declaration*, at Art. 23 (Nov. 18, 2012).

kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.<sup>121</sup>

However, Article 19 also states that the rights to freedom of opinion and expression carry “special duties and responsibilities” and may be restricted by law “[f]or respect of the rights or reputations of others” and “[f]or the protection of national security or of public order (ordre public), or of public health or morals.”<sup>122</sup>

None of the global or regional covenants and treaties specifically mention a journalist’s right to protect sources. However, clarifying statements by the organizations and decisions by courts that adjudicate disputes about the proper limitations on rights have recognized a journalistic right to protect sources.

For example, in 2011 the U.N. Human Rights Committee published a General Comment on Article 19 based on observations the Committee had made about individual nations’ records on human rights and its decisions on disputes between citizens and their countries over possible violations of Article 19. In a paragraph stating that it was generally impermissible for States to restrict journalists’ freedom to travel to attend meetings or investigate possible human-rights abuses, conflicts, or natural disasters, the Committee also said that States “should recognize and respect that element of the rights of freedom of expression that embraces the limited journalistic privilege not to disclose information sources.”<sup>123</sup>

Media law scholar Edward Carter has stated that *General Comment 34* is significant for three reasons. Because the ICCPR is binding on the 168 countries that have signed it, including the United States, a nation would have to show that an exception to the privilege was necessary and proportional.<sup>124</sup> Also, the comment created a single global standard rather than allowing countries to mold it to their own standards.<sup>125</sup> Finally, the comment would require nations to “respect, protect and fulfill the right” to a privilege.<sup>126</sup>

The Committee’s linkage of journalists’ right to protect sources with the right to move freely in conflict zones was probably not accidental. Although the Committee did not cite it, there is an obvious link between the brief statement of support for protecting sources and an earlier decision by the International Criminal Tribunal for the former Yugoslavia (ICTY) that

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121. U.N. HUMAN RIGHTS COMMISSION, *International Covenant on Civil and Political Rights*, U.N. Doc. A/RES/2200/XXI, at Art. 19(1)-(2) (Dec. 16, 1966).

122. *Id.* at Art. 19 (3).

123. UNITED NATIONS HUMAN RIGHTS COMMISSION, *General Comment 34*, CCPR/C/GC/34, at paragraph 45 (Sept. 12, 2011).

124. Edward L. Carter, “*Not to Disclose Information Sources*”: *Journalistic Privilege Under Article 19 of ICCPR*, 22 COMM. L. & POL’Y 399, 400 (2017).

125. *Id.* at 419.

126. *Id.*



recognized a qualified privilege for war correspondents.<sup>127</sup> The ICTY determined that a *Washington Post* correspondent who covered the war in Bosnia would not have to testify about a story he wrote about a Bosnian official suspected of war crimes.<sup>128</sup> The Appeals Chamber of the ICTY agreed with the reporter, Jonathan Randal, that forcing him to testify could endanger other journalists covering conflicts by making them potential witnesses against combatants.<sup>129</sup> The decision was a watershed moment for recognition of a journalist's privilege on the international stage.<sup>130</sup>

In addition to *General Comment 34*, numerous other reports, statements of principle, and recommendations have been adopted by global and regional organizations in recent years. For example, David Kaye, the United Nations' special rapporteur for freedom of opinion and expression, presented a report to the General Assembly in 2015 calling for strong protections for confidential sources and whistleblowers.<sup>131</sup> Principle 3 of the Chapultepec Declaration, adopted in 1994 at the Organization of American States' Hemisphere Conference on Free Speech, states that "[n]o journalist may be forced to reveal his or her sources of information."<sup>132</sup> The Organization for Security and Co-operation in Europe (OSCE) adopted recommendations in 2011 to protect the safety of journalists that included an encouragement to legislators to create laws to protect confidential sources, among other things.<sup>133</sup> That same year, the Parliamentary Assembly of the Council of Europe adopted a recommendation urging member countries to adopt or improve legislation protecting sources and develop guidelines for intercepting computer data that would also protect journalists' sources.<sup>134</sup>

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127. Prosecutor v. Brdjanin & Talic, Case No. IT-99-36-AR73.9, Appeals Chamber Decision (Int'l Crim. Trib. for the Former Yugoslavia Dec. 11, 2002).

128. *Id.*

129. *Id.* at ¶¶ 42-44.

130. For a thorough examination of the Randal case and its implications, see Kyu Ho Youm, *International and Comparative Law on the Journalist's Privilege: The Randal Case as a Lesson for the American Press*, 1 J. OF INT'L MEDIA & ENT. L. 1 (2006). See also Anastasia Heeger, *Securing a Journalist's Testimonial Privilege in the International Criminal Court*, 6 SAN DIEGO INT'L L.J. 209 (2005); Nia Y. McDonald, Comment, *Under Fire: The Fight for the War Correspondent's Privilege*, 47 HOW. L.J. 133 (2003).

131. *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/70/361 (Sept. 8, 2015).

132. ORGANIZATION OF AMERICAN STATES, *Chapultepec Declaration*, March 11, 1994, <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=60> (last visited Dec. 4, 2018).

133. ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, *Vilnius Recommendations on Safety of Journalists*, June 8, 2011, <http://www.osce.org/cio/78522> (last visited Dec. 4, 2018).

134. COUNCIL OF EUROPE, *Recommendation 1950: The Protection of Journalists' Sources*, Parliamentary Assembly, Jan. 25, 2011, <http://assembly.coe.int/nw/xml/XRef-XML2HTML-EN.asp?field=17943&lang=en> (last visited Dec. 4, 2018).

Additionally, there have been numerous opinions by the European Court of Human Rights, which adjudicates disputes between citizens and their governments over the proper interpretation of the European Convention, that have found that restrictions on journalists' right to protect sources are not "necessary in a democratic society."<sup>135</sup>

While an international recognition of a right to protect sources is, if not consistent across all borders, at least widely held, a recent report from UNESCO suggests that the laws have failed to keep up with new threats to the journalist's privilege universally, including in the United States.

The 2017 report, *Protecting Journalism Sources in the Digital Age*, which was written by Julie Posetti, an Australian journalist and academic, was based on various information collection methods, including surveys, analysis of legal and news websites, qualitative interviews, and panel discussions.<sup>136</sup>

The UNESCO report stated that there were both benefits and drawbacks to the digital environment but focused primarily on the drawbacks. It determined that "the legal frameworks that protect the confidential sources of journalism are under significant strain" from mass and targeted surveillance, data retention policies, and anti-terror and national security laws that are prone to over-reach.<sup>137</sup> The report also noted that the privilege recognized in 121 nations that were part of the study was being "[c]hallenged by questions about entitlement to claim protection" – in other words, "Who is a journalist?" and "What is journalism?"<sup>138</sup>

The report warned of dire consequences if the protection of sources was weakened, including the premature exposure of press investigations, "legal or extra-legal repercussions" for exposed sources, the drying-up of sources, and self-censorship.<sup>139</sup>

UNESCO's report stated that the value of protecting confidential sources "is widely recognized as greatly offsetting instances of journalists abusing the confidentiality privilege to, for example, invent sources."<sup>140</sup> Journalists generally expose and condemn such incidents, the report said.<sup>141</sup> Recognition of the value of protecting sources had led most nations to adopt the standard

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135. See, e.g., Halldórsson v. Iceland, (2017) ECHR 44322/13; Telegraaf Media Nederland Landelijke Media B.V. v. The Netherlands, (2012) ECHR 39315/06; Sanoma Uitgevers B.V. v. The Netherlands, (2010) ECHR 38224/03; Financial Times Ltd. and Others v. United Kingdom, (2009) ECHR 821/03; Tillack v. Belgium, (2008) ECHR 20477/05.

136. Posetti, *supra* note 8 at 14-17.

137. *Id.* at 5.

138. *Id.* at 7.

139. *Id.* at 8.

140. *Id.* at 11.

141. *Id.*

that confidentiality should be the norm and exposure should be the exception.<sup>142</sup>

Turning to specific issues affecting source confidentiality, the report said that anti-terror and national security laws adopted after the Sept. 11, 2001 terrorist attacks in the United States tended to have a “trumping effect” through which the laws took priority over source protection.<sup>143</sup> In some countries, the broad reach of such laws had led to journalists being held criminally liable for publishing leaked information or being targeted for surveillance and harassment.<sup>144</sup> Some states had adopted anti-anonymity or anti-encryption laws in the name of national security that made it difficult to assure sources their identities would be protected.<sup>145</sup>

A second issue of concern in the report was the use of mass surveillance, such as the type exposed by Edward Snowden in the United States, as well as unregulated targeted surveillance.<sup>146</sup> Digital technology has made such surveillance, and the storage of materials obtained through the surveillance, relatively cheap and easy.<sup>147</sup> This trend has been accompanied by laws that expand the number of crimes for which interception of communications is allowed; remove or relax legal limits on surveillance, including allowing warrantless interception; permit the use of invasive technologies such as keystroke monitoring; and increase the demand that users of telecommunications services be identified.<sup>148</sup> All of this means that journalists are fearful that they can no longer protect sources or that sources will reveal themselves through using electronic communication devices and services.<sup>149</sup>

A related issue is data retention by third parties, such as telecommunications companies, internet service providers, search engines, and social media platforms. Many nations now require telecommunications companies to retain records about their clients' use of the services and to turn it over when requested, which in effect may give both governments and private actors access to information about journalists' sources without their knowledge.<sup>150</sup> Also, laws in many nations require that telecommunications companies retain and surrender metadata, defined as “data that defines and

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142. *Id.*

143. *Id.* at 19.

144. *Id.*

145. *Id.* at 21.

146. *See, e.g.*, GLENN GREENWALD, NO PLACE TO HIDE: EDWARD SNOWDEN, THE NSA, AND THE U.S. SURVEILLANCE STATE (Metropolitan Books, 1st ed. 2014).

147. Posetti, *supra* note 8 at 21.

148. *Id.* at 21-23.

149. *Id.*

150. *Id.* at 25.

describes other data.”<sup>151</sup> Metadata includes information about what a person sends and receives, to and from whom, for how long, and on what device, and can also include geolocation information.<sup>152</sup> People who encrypt their communications often forget to also encrypt the metadata, which can leave sources vulnerable to identification.<sup>153</sup>

A fourth issue addressed in the report is the problem of how to define *journalist* or *journalism* at a time when digital tools allow more players and more platforms to enter the market for news and opinion. The report notes that some have called for improvements to whistleblower laws to protect the source more directly, but laws in some nations would still target journalists for publishing leaks even if sources were protected, so the need to define who is entitled to press freedom remains.<sup>154</sup> The report noted that many laws around the world protecting journalists were too narrow in the digital age, often limiting their reach to people working for legacy media organizations or who had considerable publishing credits or proof of substantial income from journalistic endeavors.<sup>155</sup> While not unanimous, many contributors to the report favored laws tied to “acts of journalism” instead of employment or income status, but the report also noted that defining an “act of journalism” is problematic at a time when so much material is produced by so many.<sup>156</sup>

After reviewing materials gathered for the study about the state of confidential-source protection in various regions of the world and individual countries, the report offered eleven principles that could be used to assess legal protections for journalists’ sources and identify areas that needed improvement. The report recommended, among other things, that source protection be recognized as a necessary component of free expression and be made part of each country’s constitution or national law; that it should apply to all “acts of journalism” across all platforms; that it should entail protecting information collected through surveillance and stored; that any exception should be very narrow, necessary, and proportional; that willful violations of source protection should be criminalized; and that source protection should be accompanied by robust whistleblower protection.<sup>157</sup>

While the UNESCO report raises several important issues about the efficacy of existing privileges, it makes fleeting mention of an issue that threatens to cast a shadow on attempts to strengthen privilege law or create a new statutory privilege in the United States: fake news.<sup>158</sup>

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151. *Id.* at 26.

152. *Id.*

153. *Id.* at 24-26.

154. *Id.*

155. *Id.* at 27.

156. *Id.* at 26-28.

157. *Id.* at 132-33.

158. *Id.* at 21.

As Jacob Soll of *Politico* has noted, fake news has a bloody, centuries-long history around the world, from anti-Semitic tales in the twelfth century to Nazi propaganda in Germany before and during World War II.<sup>159</sup> The difference now is that the Internet and social media distribute fake news, which is often hard to tell from real news, farther and faster than was possible only a few decades ago. Famous examples during and after the 2016 U.S. election included reports that an Ohio postal worker had destroyed absentee ballots to hurt President Trump's election chances and reports that an aide to Hillary Clinton had set up a child sex ring in a pizza restaurant, which led an armed man to fire a shot in the restaurant during a confrontation with employees.<sup>160</sup>

For some purveyors of fake news in the United States and elsewhere, distributing phony news stories that are then eagerly shared by readers through social media is a big business. Shortly after the November 2016 election, the *New York Times* reported on several sites run by young people in the nation of Georgia and elsewhere that distributed partially true or completely fake pro-Trump stories to drive traffic and ad revenue from Facebook and other social media to their sites.<sup>161</sup> The easy distribution of fake news on social media is particularly worrisome at a time when up to two-thirds of Americans report getting at least some of their news through social media, with 20 percent reporting they "often" get their news from Facebook, Twitter, and similar sites.<sup>162</sup>

As troublesome as "real" fake news is, there is also the issue of President Trump's frequent criticism of the mainstream news media as purveyors of fake news. While some optimists have suggested that the President's attacks on the media have actually strengthened the media, others have noted that his rhetoric has been picked up by authoritarian leaders in other countries who use the phrase "fake news" to dismiss stories about human-rights violations and other questionable conduct.<sup>163</sup>

Some of President Trump's favorite targets include anonymous sources in news stories critical of his administration, although his aversion to unnamed sources appears to be uneven. Several news organizations noted

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

160. *Id.*

161. Andrew Higgins, Mike McIntire, & Gabriel J.X. Dance, *Websites Hit a "Gold Mine" in Fake News*, N.Y. TIMES, Nov. 26, 2016, at A1.

162. Elisa Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms 2017*, PEW RESEARCH CENTER, Sept. 7, 2017, <http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/>.

163. *See, e.g.*, 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>; Steven Erlanger, *Globe's Autocrats Echo Trump's "Fake News" Cry*, N.Y. TIMES, Dec. 13, 2017, at A1.

that despite his occasional tweets telling his followers to assume that unnamed sources do not exist, he cited a Fox News story based on an unnamed source in a May 2017 tweet defending his adviser and son-in-law Jared Kushner against allegations that he helped set up contacts between President Trump's campaign and Russian operatives.<sup>164</sup>

It is tempting to dismiss the President's "fake news" tweets as politically motivated and so transparent that they cannot be taken seriously. But the confusion created by the existence of documented fake news and the President's media targeting, particularly in regard to unnamed sources, creates at least a perception problem that is likely to make the passage of a federal shield law difficult. Addressing the issue will potentially require a creative and, for the media, unattractive solution, as will be discussed below.

## V. BUILDING A BETTER U.S. SHIELD LAW

The need for a federal shield law is not self-evident, certainly not to those who agree with President Trump that the news media regularly traffic in "fake news" and are the "enemies of the people." But a strong case exists for such a law when one considers the confusion left in *Branzburg's* wake that was evident in the *Risen* case, as well as the inconsistency that has developed in federal appellate circuits about the privilege.

The 2017 House bill, previous proposed legislation, and the UNESCO report all offer guidance on how to write an effective shield law. Also, state shield laws provide ideas on statutory construction, although their authority is diminished by inconsistency and the absence of a need to address issues that Congress cannot ignore, such as national security.

The following observations about what an ideal shield law should contain draw on all of those sources. The purpose of this section is to sketch out a bill that would be most favorable to journalists and aid them in the important work that they do in a democratic society. Such a bill is probably not feasible because of concerns about damaging other interests. The discussion below will acknowledge some of those concerns that appear unavoidable while leaving others to the imaginations of media critics.

### A. *How Strong Should Protection Be?*

In *Branzburg*, both the majority and one of the dissenters suggested that only an absolute privilege would suffice to reassure sources that they would not be unmasked in a grand jury probe. The majority noted that the reporters

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164. Ryan Bort, *Trump Defends Kushner with Story Citing Unnamed Sources*, NEWSWEEK, May 30, 2017, <http://www.newsweek.com/trump-defends-kushner-retweet-fox-news-unnamed-sources-617577>.

involved in the consolidated cases were seeking only a qualified privilege but said such a privilege would create uncertainty about when the privilege would apply. “If newsmen’s confidential sources are as sensitive as they are claimed to be,” the Court said, “the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem.”<sup>165</sup> Justice Douglas, in his dissent, agreed, but for different reasons. While the majority raised the issue of the absolute privilege to highlight what it saw as the unworkability of any privilege, Justice Douglas suggested that an absolute privilege was what the First Amendment required. Attacking both the government and the *New York Times* for asserting that journalists’ rights should be balanced against other interests, he wrote that he believed “that all of the ‘balancing’ was done by those who wrote the Bill of Rights.”<sup>166</sup> Because the First Amendment was written in absolute terms, he added, the writers “repudiated the timid, watered-down, emasculated versions of the First Amendment which both the Government and the New York Times advance in the case.”<sup>167</sup>

While an absolute shield is probably politically impossible, the majority and dissent in *Branzburg* raise a logical point. If the purpose of a shield law is to encourage sources to communicate with journalists on matters of public importance, a qualified privilege would likely discourage sources from disclosing information. Even if an absolute privilege is not possible, the circumstances that would compel a journalist to name a source should be as narrow as possible.

There is precedent for providing more robust protection to confidential sources in earlier versions of the shield law that Congress considered in 2005-06. For example, H.R. 581 and S. 340, which were identical, provided qualified protection for non-confidential material but absolute protection for the identities of confidential sources. The bills stated that no federal government body could compel the disclosure of “any document” from a “covered person” unless a court had, “by clear and convincing evidence,” determined that the government had failed to obtain the information sought “from all persons from which such testimony or document could reasonably be obtained other than a covered person.”<sup>168</sup> In a criminal investigation or prosecution, the court would also have to find that “there [were] reasonable grounds to believe a crime [had] occurred” and the information sought was “essential to the investigation, prosecution, or defense.”<sup>169</sup> In a matter other

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165. *Branzburg*, at 702 (1972).

166. *Id.* at 713 (Douglas, J., dissenting).

167. *Id.*

168. Free Flow of Information Act, S. 340, 109th Cong. § 2 (a)(1) (2005); Free Flow of Information Act, H.R. 581, 109th Cong. § 2 (a)(1) (2005).

169. S. 340 at § 2(a)(2)(A).

than a criminal case, the court would have to find the information sought was “essential to a dispositive issue of substantial importance to that matter.”<sup>170</sup> If a covered person was required to provide information, the bills stated that disclosure should be limited to verification of the information’s accuracy and be “narrowly tailored” both in subject matter and time period.<sup>171</sup>

H.R. 581 and S. 340 would also have provided absolute protection against the forced disclosure of the identity of someone “who the covered person [believed] to be a confidential source” and any information that could lead to the source’s unmasking.<sup>172</sup>

Another bill introduced in the 109th Congress, S. 369, also would have provided absolute protection to confidential sources. The bill provided that no federal entity of any branch of government could compel a covered person to disclose the source of any information “whether or not the source [had] been promised confidentiality” or any information gathered but not published, including “notes; outtakes; photographs or photographic negatives; video or sound tapes; film; or other data, irrespective of its nature.”<sup>173</sup> The provision against forced disclosure would have also applied to “a supervisor, employer, or any person assisting a person covered” by the previous language, and any information obtained in violation of the bill’s provisions would be inadmissible in any proceeding of any branch of government.<sup>174</sup>

Compelled disclosure of news or information, but not the source, would be permitted, however, if a court found, after allowing the covered person notice and an opportunity to be heard, that clear and convincing evidence showed that the news or information was “critical and necessary to the resolution of a significant legal issue,” there were no alternative means of obtaining the information, and there was “an overriding public interest in the disclosure.”<sup>175</sup>

The approach taken in the 2005 bills would, from a journalist’s perspective, be preferable to the exception-filled approaches taken in H.R. 4382 and the Senate’s last version of the shield law bill, S. 987 in 2013.<sup>176</sup> H.R. 4382 would allow the shield to be pierced in criminal cases if there were no reasonable alternative sources and the information was critical to the defense or prosecution<sup>177</sup> and in civil cases if the information sought was

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170. *Id.* at § 2(a)(2)(B).

171. *Id.* at § 2(b).

172. H.R. 581 at § 4.

173. Free Speech Protection Act, S. 369, 109th Cong. § 3 (a) (2005).

174. *Id.* at § 3(b)-(c).

175. *Id.* at § 4(a).

176. H.R. 4382; S. 987.

177. H.R. 4382 at § 2(a)(1) & (2)(A).



critical to the completion of the litigation.<sup>178</sup> A judge could also order disclosure to prevent or punish terrorism, prevent death or bodily harm, or unmask someone who leaked a trade secret, personally identifiable health information, other personal information, or classified information that would pose a clear threat to national security.<sup>179</sup> There are also exceptions for eyewitness observations, criminal or tortious conduct by a journalist, and libel and slander suits.<sup>180</sup>

S. 987 in 2013 did not include the exceptions for health information, other personal information, or trade secrets, but did provide exceptions for the prevention or mitigation of death, kidnapping, bodily harm, crimes against minors, and threats to critical infrastructure.<sup>181</sup>

The interests protected by the exceptions in H.R. 4382 and S. 987 are important, but the piling on of exceptions would do little to reassure nervous potential sources that their names would remain secret. A better approach would be to use the language from the 2005 bills and, if necessary, a catch-all phrase allowing compelled disclosure of sources if a judge determined that the public interest in disclosure outweighed the public interest in protecting sources. It is not a perfect solution because it still falls short of absolute protection and injects uncertainty into the journalist-source relationship, but it may be necessary in a post-9/11 society.

#### B. *What About Third Parties?*

At least two federal appellate courts have determined that journalists generally do not have standing to intervene when subpoenas are issued to third parties, such as phone companies or Internet service providers, or to require notice that their records are being sought.<sup>182</sup> More recently, a public controversy arose when the Associated Press learned that the government had subpoenaed its phone records in an attempt to identify a source for a sensitive story about a foiled terrorist attack.<sup>183</sup> The controversy led Attorney General Eric Holder to amend the Justice Department's guidelines on press subpoenas to require that notice be given to affected news organizations when subpoenas or warrants were authorized to seek communication or business records from a third party, unless the Attorney General determined that the

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178. *Id.* at § 2(a)(2)(B).

179. *Id.* at § 2(a)(3) & (4).

180. *Id.* at § 2(d).

181. S.987 at § 4.

182. *See* *New York Times Co. v. Gonzales*, 459 F. 3d 160 (2d Cir. 2006); *Reporters Comm. for Freedom of the Press v. AT&T*, 593 F. 2d 1030 (D.C. Cir. 1978).

183. Charlie Savage & Leslie Kaufman, *Phone Records of Journalists Seized by U.S.*, N.Y. TIMES, May 24, 2013, at A1.

notice would clearly and substantially harm an investigation or risk a threat to national security, death, or bodily harm.<sup>184</sup>

Provisions in H.R. 4382 and S. 987, and earlier versions of the shield bills, closely mirror the Attorney General's guidelines. H.R. 4382 would require that the same requirements applied to subpoenas to covered persons apply to subpoenas for communication records related to those persons and that covered persons receive notice of the subpoena. Notice could be delayed, however, if it would harm the integrity of the investigation.<sup>185</sup> S. 987 contained similar language but a more detailed description of exceptions, including setting a specific forty-five-day limit on delayed notice to covered journalists, with extensions possible if a judge determined that they were necessary to protect the integrity of an investigation or to prevent harm to national security or persons.<sup>186</sup>

Such provisions to protect sources from being identified through the perusal of electronic communication records are a step in the right direction but may not be sufficient. The *Risen* case made clear that phone and e-mail records could be enough to tie a source to a journalist without subpoenas being issued to the journalist, so preventing such intrusions would be useful.<sup>187</sup> However, it is not clear how such restrictions on subpoenas to communication service providers would work if the journalist was not connected to a recognized news organization. Also, it is not clear if the provisions in H.R. 4382 or S. 987 would apply to records obtained through the kind of warrantless mass surveillance exposed by Edward Snowden, or whether such mass surveillance is continuing.<sup>188</sup>

It is also worth noting that the government has other ways to obtain communication service provider information other than subpoenas issued through courts of law. The Stored Communications Act, part of the broader Electronic Communication Privacy Act, allows the government to obtain records related to e-mails, cloud storage of data, and other electronic communication through court-issued warrants, administrative subpoenas, or other court orders.<sup>189</sup> Further, a federal agency obtaining such records may require service providers not to disclose for at least ninety days to anyone, including the subscriber whose records are being sought, that the court order exists, if certain "adverse results" could occur, with the delay renewable by court order.<sup>190</sup> Under certain conditions, a preclusion of notice order may be

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184. 28 C.F.R. § 50.10(a)(4) (2017).

185. H.R. 4382, at § 3.

186. S. 987, at § 6.

187. *Sterling*, at 482.

188. Greenwald, *supra* note 146.

189. 18 U.S.C. § 2703(a)-(d) (2012) (LEXIS through Pub. L. No. 115-29).

190. 18 U.S.C. § 2705(a) (2012) (LEXIS through Pub. L. No. 115-29).

granted for an indefinite period determined by a court.<sup>191</sup> Further, the Federal Bureau of Investigation (FBI) may seek toll and transactional records from electronic communication service providers through what are commonly called national security letters, or administrative subpoenas, and require service providers not to disclose to customers the existence of the letters for an indefinite period of time.<sup>192</sup>

Challenges to the non-disclosure provisions of the law have generally come from service providers who argue that the orders violate their free-speech rights because the orders constitute content-based restrictions on speech. The U.S. Court of Appeals for the Ninth Circuit recently upheld the national security letters and non-disclosure provisions.<sup>193</sup> Some challenges to notice-of-preclusion orders regarding warrants and other court orders have been more successful, but not consistently.<sup>194</sup>

The various methods described above for allowing government access to electronic communication records suggest that more robust language is necessary in the shield law to require notice of warrants, national security letters, and other court orders in addition to subpoenas. The 2017 House bill made reference to subpoenas “or other compulsory process” but could be more specific about what types of instruments it affects to make protection stronger and clearer.<sup>195</sup> A model can be found in Canada’s recently enacted Journalistic Sources Protection Act.<sup>196</sup> The act amends the criminal code to require that law enforcement officers who know they are seeking an “object, document or data” related to or possessed by a journalist must apply to a judge for a search warrant.<sup>197</sup> If law enforcement officers obtain a search warrant and later discover that the information sought relates to a journalist, they must then make an application to a judge and also seal the material without examining it until the judge determines whether it can be used.<sup>198</sup>

The Canadian approach would require law enforcers to seek judicial permission to examine third-party records related to journalists (and, by

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191. *Id.* § 2705(b).

192. 18 U.S.C. § 2709(a)-(c) (2012) (LEXIS through Pub. L. No. 115-29).

193. *In re* National Security Letter, 863 F. 3d 1110 (9th Cir. 2017).

194. *See, e.g., In re* Search Warrant Issued to Google, Inc., No. 5:17-mj-532-HNJ, 2017 WL 204448 (N.D. Ala. Sept. 11, 2017) (finding indefinite nondisclosure order unconstitutional and limiting it to 180 days); *United States v. Warrant*, No. 19-mj-041116, 2017 WL 3669564 (D.N.J. Aug. 15, 2017) (denying Google motion to amend indefinite nondisclosure order); *In re* Search Warrant for [Redacted].com, 248 F. Supp. 3d 970 (C.D. Cal. 2017) (finding indefinite nondisclosure order unconstitutional and setting 180-day limit); *Microsoft Corp. v. U.S. Dep’t of Justice*, 233 F. Supp. 3d 887 (W.D. Wash. 2017) (granting in part and denying in part government motion to dismiss service provider’s challenge to law authorizing notice-of-preclusion orders).

195. H.R. 4382, at § 3(b)(1).

196. Journalistic Sources Protection Act, S.C. 2017, c. 22 (Can.).

197. *Id.* at sec. 3, § 488.01(2), R.S.C., 1985, c. C-46.

198. *Id.* at sec. 3, §488.01(9), R.S.C., 1985, c. C-46

extension, their sources) and keep any information obtained before officials knew a journalist was involved under seal until a judge could determine whether the information should be disclosed. The Canadian law's presumption that journalistic source material should be off-limits unless overridingly important sends a stronger protective message to sources than the most recent U.S. proposals.

### *C. Who Should Be Protected?*

One of the more contentious issues in shield law construction involves defining who is protected under the law. H.R. 4382 and S. 987 took different approaches to the question. H.R. 4382 would include anyone who engaged in journalistic activity for any medium for a "substantial" portion of the covered person's livelihood,<sup>199</sup> while specifically excluding foreign powers or their agents or anyone believed to be involved in terrorism.<sup>200</sup> S. 987, as amended in committee, did not have the income requirement but was limited primarily to members of mainstream media organizations, such as newspapers, books, wire services, magazines, television and radio programs, and motion pictures, although the definition of "covered journalist" also included persons working for newer media such as websites and mobile applications.<sup>201</sup> Persons associated with foreign powers or terrorism were also excluded in the Senate bill, as were persons who worked for organizations such as Wikileaks that primarily published raw documents obtained without authorization.<sup>202</sup>

Considering the concerns raised by the UNESCO report about outdated definitions of covered persons in privilege laws around the globe, the House definition of covered persons was probably preferable because it did not limit protection to a specific list of legacy media entities.<sup>203</sup> The income requirement, however, is problematic at a time when people not employed by media organizations often create content intentionally, as citizen journalists, or by accidentally being at the right place at the right time with a cell phone or handheld camera. Also, unlike the Senate bill, the House bill failed to make a provision for student journalists and could have excluded them with the income requirement.

State shield laws take a wide variety of approaches to defining who is protected by the laws. Some protect persons working for a specific list of media entities, while others leave the definition of covered person open to

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199. H.R. 4382 at § 4(2).

200. H.R. 4382 at § 4 (2)(A)-(E).

201. S. 987, § 11(1)(A)(i)(I)(aa).

202. *Id.* at § 11 (1)(A)(iii)(I).

203. Posetti, *supra* note 8, at 26-28.

court interpretation. For example, the Texas shield law is similar to S. 987 in providing a long list of types of media organizations covered, including newspapers, wire services, magazines, radio and television broadcasters, cable and satellite providers, and Internet providers.<sup>204</sup> By contrast, the Minnesota shield law refers to a person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public.<sup>205</sup>

In addition to Texas, statutes in Arkansas, Kansas, and Washington state refer to media distributed through the Internet or online.<sup>206</sup>

Both specific and vague language on who is protected by a shield law have advantages and disadvantages. Open-ended definitions do not have to be amended every time a new type of news medium is invented, but they lack predictability for sources dealing with journalists working for non-traditional media. Specific definitions, if broad enough, are more predictable but may not cover new media or even older media that are not mentioned. In regard to the latter point, there have been cases in which people who would be widely recognized as journalists were ruled not to be covered by state shield laws that did not mention the types of media organizations they worked for. In one case, a Michigan court found that a television reporter could not claim protection under the state shield law because it did not mention television.<sup>207</sup> In a diversity jurisdiction case, the U.S. Court of Appeals for the Eleventh Circuit ruled that a magazine reporter was not protected by the Alabama shield law because it did not mention magazines.<sup>208</sup>

Another factor to be considered in judging the “covered person” part of a shield law is the fake news dilemma. Because of that phenomenon, it could be useful to limit protection under the shield law to “fact-based” reporting. An ideal “covered person” section, therefore, would protect a person engaged in fact-based gathering, collecting, photographing, recording, writing, editing, or publishing of information of public interest in any medium of communication disseminated to the public. Exclusions for persons associated with terrorism are probably inevitable, but a provision designed to exclude Wikileaks and similar entities might be problematic and could, arguably, be left out if the shield law was limited to those engaged in fact-based reporting.

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204. TEX. CODE CRIM. PROC. ANN., at Art. 38.11, § 3(1) (West 2009); TEX. CIV. PRAC. & REM. CODE ANN. § 22.021(3) (West 2009).

205. MINN. STAT. ANN § 595.023 (West 2010).

206. ARK. CODE ANN. § 16-85-510 (West 2011); KAN. STAT. ANN. § 60-480(a)(2) (West 2010); WASH. REV. CODE § 5.68.010(5)(a) (West 2007).

207. *In re Contempt of Stone*, 397 N.W. 2d 244, 245 (Mich. Ct. App. 1986). The law was later amended to include television reporters. *See* MICH. COMP. LAWS ANN. § 767.5a (West 1986).

208. *Price v. Time, Inc.*, 416 F.3d 1327 (11th Cir. 2005).

#### D. *What About Fake News?*

Limiting the definition of “covered person” to those engaged in fact-based journalistic activity could be enough to allay fears that a federal shield law would apply to fake news purveyors. An additional safeguard could make passage of a bill more palatable in the current climate, but not without controversy.

This article has attempted to set out a best-case scenario from journalists’ perspective for a federal shield law, while acknowledging that a law most favorable to the press might not be possible. Assuming that legislators could be persuaded to back a law with stronger protections for journalists than recent legislative history would suggest, a concession might be needed. One concession would be a provision in the law permitting judges to require persons seeking protection under the shield law to swear, under penalty of perjury, that their sources exist.

An obvious objection to such a provision would be that it would put journalists in the posture of being presumed to be lying absent a sworn statement. However, the advantage would be that it would reassure courts that persons not associated with traditional media outlets and their codes of ethics are playing by the rules nonetheless.

It should be noted that such a provision is only slightly removed from the default position of many journalists who fight subpoenas to name their sources but agree to testify under oath that their reporting is accurate. For example, James Risen escaped having to identify his sources in court or go to jail for contempt by agreeing to testify that he had multiple sources for his book whom he would not identify.<sup>209</sup> Also, this same approach was already suggested by the 2017 House bill, which would have required that, when possible, testimony or materials that journalists are required to surrender should be limited to only material that would verify the accuracy of published information or “describing any surrounding circumstances relevant to the accuracy of such published information.”<sup>210</sup> Requiring an affidavit swearing that unnamed sources did in fact exist would not seem to be much of a leap by comparison.

Whether journalists would be willing to accept such a provision, or whether it would be adequate to persuade members of Congress to strengthen protections for journalists, is anyone’s guess.

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209. Apuzzo, *supra* note 14.

210. H.R. 4382, at § 2(c).

## VI. CONCLUSION

Efforts to pass a federal shield law in the United States have foundered in recent years, and the issues involved have become more complicated. Concerns about terrorism and shielding leakers of classified information have led to convoluted language and watered-down protection in recent bills considered in Congress. As UNESCO has pointed out, privileges to protect journalists from revealing sources increasingly are outdated in terms of who is protected and often fail to address concerns about new types of surveillance that allow governments to uncover sources without bothering with subpoenas. The specter of fake news, an old problem with new life, raises questions about how to protect legitimate news activities without also protecting those who make up their stories.

Congress has an opportunity to shore up protection for journalists engaged in important public-service reporting and also offer a template to other countries with outdated laws. In order to persuade Congress to pass a bill that would be effective, journalists may have to agree to swear under oath that their sources exist in order to silence those who cry "Fake news!" when they dislike what is being reported. There may be other solutions, but it is hard to see how a bill that would strongly protect journalists from revealing their sources, or having them revealed through covert operations, could pass without some concession from journalists that the difference between fact and fiction is blurrier than ever.





# COMBATING RUSSIAN DISINFORMATION IN UKRAINE: CASE STUDIES IN A MARKET FOR LOYALTIES

Monroe E. Price\* & Adam P. Barry\*\*

## I. INTRODUCTION

This essay takes an oblique approach to the discussion of “fake news.” The approach is oblique geographically because it is not a discourse about fake news that emerges from the more frequently invoked cases centered on the United States and Western Europe, but instead relates primarily to Ukraine. It concerns the geopolitics of propaganda and associated practices of manipulation, heightened persuasion, deception, and the use of available techniques. This essay is also oblique in its approach because it deviates from the largely definitional approach – what is and what is not fake news – to the structural approach. Here, we take a leaf from the work of the (not-so) “new institutionalists,” particularly those who have studied what might be called the sociology of decision-making concerning regulations.<sup>1</sup> This essay hypothesizes that studying modes of organizing social policy discourse ultimately can reveal or predict a great deal about the resulting policy outcomes, certainly supplementing a legal or similar analysis. Developing this form of analysis may be particularly important as societies seek to come to grips with the phenomena lumped together under the broad rubric of fake news. The process by which stakeholders assemble to determine a collective position will likely have major consequences for the

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1. See Julia Black, *New Institutionalism and Naturalism in Socio-Legal Analysis: Institutional Approaches to Regulatory Decision Making*, 19 L. & POL’Y 51, 51-93 (1997); see also Johan From, *Decision-Making in a Complex Environment: A Sociological Institutional Analysis of Competition Policy Decision-Making in the European Commission*, 9 J. EUROPEAN PUB. POL’Y. 219 (2002).

nature of debate on fake news, as it becomes an increasingly important subject.

Attempts at formulating definitional approaches to fake news often produce varying results and a succession of misleading traps.<sup>2</sup> As an example, a recent article provides a succinct categorical description of fake news, which is articulated as, “information that has been deliberately fabricated and disseminated with the intention to deceive and mislead others into believing falsehoods or doubting verifiable facts.”<sup>3</sup> However, this definition, as is true of many, raises as many questions as it tries to answer: Does fake news have to be both deliberately fabricated *and* deliberately disseminated? Are there alternate scenarios in which fabrication itself becomes relative? Do large scale alternative gestalts – varying perceptions of the world at the root of some areas of deep concern – constitute “fakeness”? Can fake news be fake simply by presenting as important matters that are trivial? Must there be an intent both to deceive and mislead? Must the intended deception be for the specific purpose of persuading the target audience to believe a falsehood or doubt verifiable facts? Is government supported or government sponsored fake news especially egregious or harmful? Is propaganda by definition fake news, and when does propaganda, which is often protected speech, morph into “propaganda for war,” which is an area specifically subject to controls under international norms?

Taking a “new institutions” approach requires observing how particular communities (from tight-knit to regional to transnational) seek to cope with dramatically altered ethics of information distribution. Rather than add to the accumulating scholarship about what expressions are included in the definition of fake news, under what auspices, and with what intentions, this essay seeks to explore the relationship between the nature of the inquiry and the process by which the relevant parties negotiate and arrive at a definitional outcome. This is a kind of stakeholder analysis: Who is in the room when public interest groups, governments or societies determine what is and is not fake news and under what auspices? How is the discussion framed and with what results? What is the interaction between great global powers and a nation’s sovereign interest in controlling decision-making within its borders? As a way of grounding this essay, we focus on Ukraine, to gain a

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2. See Tarlach McGonagle, “*Fake News*”: *False Fears or Real Concerns?*, 35 NETH. Q. HUM. RTS. 203, 203-04 (2017).

3. See *id.* at 203-09; see also *The Real Story of ‘Fake News,’* MERRIAM-WEBSTER ONLINE: WHAT WE’RE WATCHING, <https://www.merriam-webster.com/words-at-play/the-real-story-of-fake-news> (last visited Oct. 15, 2018); Callum Borchers, ‘*Fake News*’ has Now Lost all Meaning, WASH. POST THE FIX (Feb. 9, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/02/09/fake-news-has-now-lost-all-meaning/?utm\\_term=.93197785e442](https://www.washingtonpost.com/news/the-fix/wp/2017/02/09/fake-news-has-now-lost-all-meaning/?utm_term=.93197785e442).

glimpse of how actors and stakeholders – states, civil society, scholars and others – interact when faced with the broad, real and significant instance of fake news and seek to develop a set of policies to respond to it. This essay samples both the environment in which discussions occurred and in which the contours of a controversial term are forged and shaped.

Ukraine has become a virulent laboratory for consideration of such issues. To begin to comprehend how fake news as a subject becomes a major preoccupation, it is necessary to have some background on the conflict there. And it is necessary to acknowledge how European and American stakeholder perspectives emerged specifically addressing how the Ukrainian state and media apparatus, as it engaged its civil society, should respond to dramatic Russian initiatives. Russia's recent intervention in Ukraine is a massive subject, so to contextualize the query, we turn to two virtually simultaneous projects relating to fake news and propaganda in Ukraine, projects with differing structures and different recommendations as to ways for stakeholders within Ukraine to respond. Russia and Ukraine have been fighting an information war for years, and there have been many efforts by many stakeholders to recommend that Ukraine take, or not take, specific actions. Many of those efforts could have been selected for a study similar to ours. The projects selected for this essay involve foreign support, citizen involvement, and ambitious efforts to affect public responses to Russian direct information interventions. One of these projects yielded a book called *Words and Wars: Ukraine Facing Kremlin Propaganda*,<sup>4</sup> and was produced primarily in Ukraine and by Ukrainians, and under predominantly European sponsorship. The other project, called *Promoting and Advancing Media Freedom in Ukraine*, featured more European and American expertise, though in conjunction with global experts.<sup>5</sup> The existence of these two projects allows the opportunity to examine somewhat diverging modes of “preparing” Ukraine to respond to the Russian interventions; the two projects provide an opportunity to search out significant variations that arguably influence policy outcomes, variations including the nature of the sponsoring organization, the sources of funding, the participants' professional backgrounds, and the relationship of participants to conflict and war.

There are limitations to this approach. It is far too soon to know whether either of these interventions will influence Ukrainian responses to Russian

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4. ARTEM BABAK ET AL., WORDS AND WARS (2017), [https://issuu.com/internews-ukraine/docs/words\\_and\\_wars](https://issuu.com/internews-ukraine/docs/words_and_wars).

5. INTERNEWS UKR., PROMOTING AND ADVANCING MEDIA FREEDOM IN UKRAINE GUIDELINES (2018), [http://cedem.org.ua/wp-content/uploads/2018/01/Internews\\_FreeMedia\\_2017\\_eng\\_final.pdf](http://cedem.org.ua/wp-content/uploads/2018/01/Internews_FreeMedia_2017_eng_final.pdf). The ancillary documents to the Guidelines, such as the Frequently Asked Questions, are on file with the authors and hereafter shall be referred to as “The Guidelines Materials.”

propaganda or fake news or related issues as reflected in the Ukrainian public sphere. It is also impossible, at this point, to attribute any outcome specifically to structural differences in shaping outputs. Yet there are benefits to asking questions about the sociology of decision-making and the significant range of mechanisms by which stakeholders are assembled to produce significantly different outcomes. The interventions demonstrate how groups or individuals parse the instruments of law, at the national and international levels, to provide a framework for organizing and shaping a national response. And they show that institutions, unsurprisingly, compete for influence by making sparring claims to legitimacy, emphasizing different realities, critiquing existing initiatives and engaging in a process designed to influence the relevant power groups in Ukraine.

As an additional point, this approach is also what might be called a “participatory case study.” Under the auspices of the international non-governmental organization (“NGO”) *Internews*,<sup>6</sup> the authors were part of the international team that worked with local actors and stakeholders in Ukraine on the *Promoting and Advancing Media Freedom in Ukraine* project, as is described in greater detail below. As a result, we are particularly sensitive to labeling because of the similarity of the two programs. This essay will distinguish between what will hereafter be called the “Guidelines Project” (i.e., the *Promoting and Advancing Media Freedom in Ukraine* project) and what will be called the “Words and Wars Project.” Moreover, because of the authors’ involvement with the Guidelines Project, the authors know much more about how that project, as opposed to the Words and Wars Project, was conceptualized and implemented.<sup>7</sup> Nonetheless, we believe that our comparison of the two projects is still valuable in understanding the decision-making that leads to proposals to combat fake news or disinformation.

Each of the two efforts sought to bring public attention to the cauldron of propaganda in which Ukraine currently finds itself. The Guidelines Project’s goal was to build consensus among stakeholders concerning how government, journalists, distributors and media institutions could promote and advance freedom of expression in the midst of the ongoing armed conflict

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6. Founded in the 1980s, Internews is “an international non-profit media development organization with administrative centers in California, Washington DC, and London. [Its] mission is to empower local media worldwide to give people the news and information they need, the ability to connect, and means to make their voices heard.” For the structure of Internews, see PROMOTING AND ADVANCING MEDIA FREEDOM IN UKRAINE GUIDELINES, *supra* note 5; *see also About Us, INTERNEWS*, <https://www.internews.org/about-us> (last viewed October 27, 2018); Ross Howard, *Conflict-Sensitive Journalism: (R)evolution in Media Peacebuilding*, in COMMUNICATION AND PEACE: MAPPING AN EMERGING FIELD 62 (Julia Hoffmann & Virgil Hawkins eds., 2015).

7. Despite our involvement in the Guidelines Project, we attempt to analyze both projects from as objective a perspective as possible, all the while recognizing that our own biases may unconsciously inject themselves.

with Russia. Crucially, the Guidelines Project sought to build consensus in a way that was in accord with international norms concerning freedom of expression during times of conflict. The second project—yielding the taut and pointed *Words and Wars* book—arose from members of the media in Ukraine, Moldova, Belarus, Georgia, Armenia and Azerbaijan who were witnessing firsthand the deleterious effects of Russian's information war in post-Soviet countries. Rather than emphasize consensus grounded in international principles, the Words and Wars Project “endeavoured to describe the elements of the Kremlin’s propaganda mechanism and the way it works . . . , to describe the lessons learned by Ukraine, and [to] formulate[] recommendations that would help stakeholders to take the punch [out] of information warfare.”<sup>8</sup> To understand the differences, it also is necessary to clarify the related, but subtly disparate nature of each project’s sponsoring organization. Internews (formerly Internews Network) and Internews Ukraine are related, but separate, organizations.<sup>9</sup> Internews Ukraine was created when Internews spun off some of its country offices to localize them and make them less dependent on decisions made from the United States. Thus, whereas the Guidelines Project was sponsored with a substantially American umbrella, the Words and Wars Project was sponsored and driven from the area of conflict.

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8. WORDS AND WARS, *supra* note 4, at 11.

9. The two projects are examples of distinctive differences in sponsorship with implications for output. The Guidelines Project was sponsored by Internews, formerly Internews Network, the global organization based in Arcata, CA, Washington D.C., London, and Paris. *About Us*, INTERNEWS, *supra* note 6. The Words and Wars Project was sponsored by Internews Ukraine, an independent Ukrainian, wholly separate organization with a separate board of directors and separate staff. *About Us*, INTERNEWS UKR., <http://internews.ua/about/history> (last visited October 27, 2018). Internews Ukraine was created in the 1990s when Internews, in the wake of post-Soviet independence, considered it strategically wise to have local autonomous entities in some of the newly independent states. *Id.* Several of these offshoots have changed their names and lost the Internews titular association. Armenia is an example, where the formerly known Internews Armenia is now known as *Media Initiatives Center*. *About Us*, MEDIA INITIATIVES CTR., <http://mediainitiatives.am/en/home> (last visited November 28, 2018). Internews Ukraine often functions as a sub-grantee for Internews, but it also gains funding directly from various sources in Europe and the U.S. *Donors and Partners*, INTERNEWS UKR., <http://internews.ua/about/donors-and-partners> (last visited October 27, 2018). Internews Ukraine is under the direction of Ukrainian nationals while Internews itself has an international staff running its Ukrainian efforts and a Ukrainian team. *Our Team*, INTERNEWS UKR., <http://internews.ua/about/team> (last visited October 27, 2018). *But see Key Staff*, INTERNEWS UKR., <https://www.internews.org/key-staff> (last visited October 27, 2018). As a result, Internews Ukraine could be said to reflect Ukrainian popular positions somewhat more closely than Internews—which functions in an international discourse of human rights and media development.

## I. UKRAINE, PROPAGANDA AND FAKE NEWS

A. *The Current Conflict in Ukraine*

It is necessary to begin with some context in terms of Ukraine's recent history. An abundance of academic articles and a stream of journalistic coverage seek to explicate the background circumstances against which the discussions of "fake news," including propaganda, in Ukraine took place during the late Soviet and post-Soviet periods.<sup>10</sup> The status of Ukraine as an independent country and its geopolitical history and relationship with its neighbors have sparked heated debates and wars for decades, if not centuries.<sup>11</sup> Indeed, some linguists believe that even the name "Ukraine" derives from Slavic words that essentially translate to "the borderlands" in English.<sup>12</sup> While the oft-told history of Ukraine is contained in many volumes, for the purposes of this essay, the country's history after the dissolution of the Soviet Union is the most relevant.

Ukraine gained independence in 1991 after the collapse of the Soviet Union and has since been pulled between Russia to the East and Europe to the West. This tension, extensive and pervasive, boiled over in 2013 when then-President Viktor Yanukovich refused to sign an association agreement with the European Union, sparking hundreds of thousands of pro-European Ukrainians to take to the streets in protest.<sup>13</sup> The protests – which became known as the Euromaidan Revolution or Revolution of Dignity – spread

10. See, e.g., Ailsa Chang, 'Rough Translation': What Americans Can Learn From Fake News In Ukraine, NPR (Aug. 21, 2017, 4:57 AM), <https://www.npr.org/2017/08/21/544952989/rough-translation-what-americans-can-learn-from-fake-news-in-ukraine>; Daniel Bruce, Editorial, *How Ukraine Is Tackling Its Huge Fake News Problem*, iNEWS ESSENTIAL DAILY BRIEFING (July 10, 2017), <https://inews.co.uk/opinion/ukraine-tackling-huge-fake-news-problem>; Nolan Peterson, *How Putin Uses Fake News to Wage War on Ukraine*, NEWSWEEK (Apr. 3, 2017, 12:50 AM), <http://www.newsweek.com/how-putin-uses-fake-news-wage-war-ukraine-577430>; Vijai Maheshwari, *Ukraine's Fight Against Fake News Goes Global*, POLITICO (Mar. 12, 2017, 10:30 PM), <https://www.politico.eu/article/on-the-fake-news-frontline>; Andrei Soshnikov, *Inside a Pro-Russia Propaganda Machine in Ukraine*, BBC NEWS (Nov. 13, 2017), <http://www.bbc.com/news/blogs-trending-41915295>; Maria Zhdanova & Dariya Orlova, *Computational Propaganda in Ukraine: Caught Between External Threats and Internal Challenges*, (Computational Propaganda Research Project, Working Paper No. 2017.9, 2017) (Samuel Woolley & Philip N. Howard eds.), <http://comprop.oii.ox.ac.uk/wp-content/uploads/sites/89/2017/06/Comprop-Ukraine.pdf>.

11. See generally ANNA REID, *BORDERLAND: A JOURNEY THROUGH THE HISTORY OF UKRAINE* (2015).

12. Katie Zezima, 'Ukraine' or 'the Ukraine'? It's More Controversial Than You Think, WASH. POST (Mar. 25, 2014), [https://www.washingtonpost.com/news/the-fix/wp/2014/03/25/ukraine-or-the-ukraine-its-more-controversial-than-you-think/?utm\\_term=.af5c2f238aab](https://www.washingtonpost.com/news/the-fix/wp/2014/03/25/ukraine-or-the-ukraine-its-more-controversial-than-you-think/?utm_term=.af5c2f238aab).

13. Jonas Grätz, *Revolution on Euromaidan: Yanukovich Seals His Fate – And Ukraine's?*, FOREIGN AFF. (Dec. 9, 2013), <https://www.foreignaffairs.com/articles/ukraine/2013-12-09/revolution-euromaidan>.

across Ukraine, turned violent, and eventually led to the ouster of President Yanukovich.<sup>14</sup> From the beginning, Russia contended that the events were encouraged and financed by European and American interests, including specific engagement of governments. Propaganda or strategic narratives sprouted everywhere.

Almost immediately after President Yanukovich was ousted and fled Ukraine, pro-Russian militants seized key buildings and the parliament of Crimea, a Ukrainian peninsula in the Black Sea with a Russian-speaking majority.<sup>15</sup> Thereafter, military personnel without insignia (but presumed to be Russian or Russian-supported forces) occupied Crimea and a dubious public vote for independence from Ukraine took place. The vote was not internationally recognized as legitimate, but brought pro-secession results, and was followed by Russia's formal annexation of Crimea in March 2014.<sup>16</sup> Around the same time, protests by pro-Russian and anti-Ukrainian government groups erupted in the industrial east of Ukraine in the Donetsk and Luhansk oblasts, with Russian-supported militants seizing government buildings and announcing the independence of the so-called Donetsk and Luhansk People's Republics in May 2014.<sup>17</sup> The unrest in the east became an armed conflict that had by the beginning of 2018 claimed more than 10,000 lives, including 3,000 civilians, and displaced more than 1.7 million people.<sup>18</sup> Although the warring parties have repeatedly entered into ceasefires, daily fighting continues.<sup>19</sup>

In response to Russia's annexation of Crimea and support of the separatists in Donetsk and Luhansk, Ukraine's allies in the West employed a variety of efforts to support the Ukrainian government and alter Russia's behavior in the conflict. Very quickly after the annexation of Crimea, the United States, the European Union, Canada, Japan and many other countries imposed economic sanctions against individuals, businesses and officials from Russia and Ukraine who were involved in the annexation and/or conflicts in eastern Ukraine.<sup>20</sup> The North Atlantic Treaty Organization, of

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14. Zhdanova & Orlova, *supra* note 10; see also Yuriy Shveda & Joung Ho Park, *Ukraine's Revolution of Dignity: The Dynamics of Euromaidan*, 7 J. EURASIAN STUD. 85 (2016).

15. Zhdanova & Orlova, *supra* note 10.

16. Matt Smith & Alla Eshchenko, *Ukraine Cries 'Robbery' as Russia Annexes Crimea*, CNN WORLD (Mar. 18, 2014, 6:20 PM), <http://www.cnn.com/2014/03/18/world/europe/ukraine-crisis/index.html>.

17. Zhdanova & Orlova, *supra* note 10.

18. *Ukraine and Russia Are Both Trapped by the War in Donbas*, ECONOMIST, May 27, 2017, at 45.

19. Andrew E. Kramer, *Ukraine War Flares Again After a Lull*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/world/europe/ukraine-war-russia.html>.

20. See generally Alison Smale & Michael Shear, *Russia is Ousted From Group of 8 by U.S. and Allies*, N.Y. TIMES (Mar. 24, 2014),

which Ukraine is not a member, also provided financial support to Ukraine, establishing five trust funds designed to build Ukraine's capacity in areas such as Command, Control, Communications and Computers, Cyber Defense and Military Career Management.<sup>21</sup> Moreover, in March 2014 the Organization for Security and Co-operation in Europe ("OSCE") deployed a special monitoring mission of almost 700 unarmed civilian monitors to Ukraine to "gather information and report on the security situation and report on the facts."<sup>22</sup> The United States and European Union also provided Ukraine with billions of dollars in foreign aid.<sup>23</sup> And in December 2017, the United States approved a plan to provide lethal weapons, including anti-tank missiles, to Ukraine.<sup>24</sup>

The West's intervention in Ukraine became a major theme for Russian structuring of the information space. In response to the West's economic sanctions, Russia imposed counter sanctions that banned the "import of

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<https://www.nytimes.com/2014/03/25/world/europe/obama-russia-crimea.html>; For information on U.S. sanctions, see Mark Landler, Anne Lowrey & Steven Lee Myers, *Obama Steps Up Russia Sanctions in Ukraine Crisis*, N.Y. TIMES (Mar. 20, 2014), <https://www.nytimes.com/2014/03/21/us/politics/us-expanding-sanctions-against-russia-over-ukraine.html>. For European Union sanctions, see Bruno Waterfield & Colin Freeman, *EU Leaders Divided Over New Sanctions To Punish Russia for Annexing Crimea*, TELEGRAPH (Mar. 20, 2014, 8:30 AM), <https://www.telegraph.co.uk/news/worldnews/europe/ukraine/10710268/EU-leaders-divided-over-new-sanctions-to-punish-Russia-for-annexing-Crimea.html>. For Canadian sanctions, see Gloria Galloway, *Canada to Impose More Economic Sanctions, Travel Bans Against Russians*, GLOBE & MAIL (last updated Mar. 25, 2017), <https://www.theglobeandmail.com/news/politics/canada-to-impose-more-sanctions-travel-bans-against-russians/article22162907>. Australia's sanctions are explained in *Australia Imposes Sanctions on Russians After Annexation of Crimea from Ukraine*, ABC NEWS (Mar. 19, 2014, 12:33 AM), <http://www.abc.net.au/news/2014-03-19/australia-sanctions-russia-ukraine/5331826>. Norway sanctions: *Norway to Sign Up to EU Sanctions Against Russia*, REUTERS (July 30, 2014), <https://www.reuters.com/article/ukraine-crisis-sanctions-norway/norway-to-sign-up-to-eu-sanctions-against-russia-idUSL6N0Q54OY20140730>; Press Release, Norway Ministry of Foreign Affairs, Norway to Implement New Restrictive Measures Against Russia (Aug. 22, 2014), <https://www.regjeringen.no/en/aktuelt/Norway-to-implement-new-restrictive-measures-against-Russia/id765675>. For Japan's sanctions, see Reuters Staff, *Japan to Impose Sanctions on Russia for Crimea Move*, REUTERS (Mar. 17, 2014, 6:14 PM). Switzerland Sanctions – *Switzerland Steps Up Sanctions Against Russia Over Ukraine*, UNIAN (Mar. 2015, 11:59 PM), <https://www.unian.info/politics/1052853-switzerland-steps-up-sanctions-against-russia-over-ukraine.html>.

21. NORTH ATLANTIC TREATY ORG., FACT SHEET ON NATO'S SUPPORT TO UKRAINE (2016), [https://www.nato.int/nato\\_static\\_fl2014/assets/pdf/pdf\\_2016\\_07/20160627\\_1607-factsheet-nato-ukraine-support-eng.pdf](https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2016_07/20160627_1607-factsheet-nato-ukraine-support-eng.pdf).

22. ORG. FOR SECURITY AND CO-OPERATION IN EUR., SPECIAL MONITORING MISSION TO UKRAINE (2016), <http://www.osce.org/ukraine-smm/116879?download=true>.

23. THE WHITE HOUSE OFFICE OF THE PRESS SEC'Y, FACT SHEET: U.S. ASSISTANCE TO UKRAINE SINCE FEBRUARY 2014 (2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/15/fact-sheet-us-assistance-ukraine-february-2014>.

24. Josh Lederman, *Officials: US Agrees to Provide Lethal Weapons to Ukraine*, AP (Dec. 23, 2017), <https://www.apnews.com/e2d29e7cc9b84b808a928f49875d2bca/Officials:-US-agrees-to-provide-lethal-weapons-to-Ukraine>.



particular kinds of agricultural produce, raw materials and foodstuffs originating in countries that have decided to impose economic sanctions on Russia, Russian businesses or individuals.<sup>25</sup> Russia also imposed a travel ban on dozens of European citizens—many of whom are outspoken critics of the Kremlin.<sup>26</sup>

But barley and bullets were not the only weapons of war in the Ukrainian conflict. Russia has also made information a deliberate and powerful weapon of destabilization in Ukraine, utilizing traditional and emerging forms of media to wage a hybrid war involving deliberate disinformation campaigns to further strategic and military objectives.<sup>27</sup> Russia's tactics vary from creating and distributing false news stories to manufacturing public debates on the internet using false personas.<sup>28</sup> To effectuate Russia's cyberwar in Ukraine the government has adopted tactics that include exploiting "news media and social networking websites to disseminate fake news as well as cyberattacks on governmental agencies and Ukraine's critical infrastructure."<sup>29</sup> In one of the most notorious examples of disinformation, Russian state television Channel One promoted a story detailing how in eastern Ukraine the Ukrainian military "had nailed a 3-year-old, clad in just his underwear, to a wooden board 'just like Jesus,' right before his mother's eye's" for a crime his mother allegedly committed.<sup>30</sup> This crucifixion story was exposed as false, but it continued to be used as a form of blood libel to recruit military personnel by Russia.<sup>31</sup>

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25. David M. Herszenhorn, *Putin Extends Counter Sanctions Against EU*, POLITICO (June 30, 2017 9:29 PM), <https://www.politico.eu/article/putin-extends-counter-sanctions-against-eu>.

26. *European Union Anger at Russian Travel Blacklist*, BBC NEWS (May 31, 2015), <http://www.bbc.com/news/world-europe-32949236>.

27. Marie Snegovaya, *Putin's Information Warfare in Ukraine: Soviet Origins of Russia's Hybrid Warfare*, RUSS. REP. I, 9 (Sept. 2015), <http://www.understandingwar.org/report/putins-information-warfare-ukraine-soviet-origins-russias-hybrid-warfare>.

28. See, e.g., Ellen Nakashima, *Inside a Russian Disinformation Campaign in Ukraine in 2014*, WASH. POST (Dec. 25, 2017), [https://www.washingtonpost.com/world/national-security/inside-a-russian-disinformation-campaign-in-ukraine-in-2014/2017/12/25/f55b0408-e71d-11e7-ab50-621fe0588340\\_story.html?utm\\_term=.477ec9328bb7](https://www.washingtonpost.com/world/national-security/inside-a-russian-disinformation-campaign-in-ukraine-in-2014/2017/12/25/f55b0408-e71d-11e7-ab50-621fe0588340_story.html?utm_term=.477ec9328bb7).

29. Julia Summers, *Countering Disinformation: Russia's Infowar in Ukraine*, HENRY M. JACKSON SCH. OF INT'L STUD. (Oct. 25, 2017), [https://jsis.washington.edu/news/russia-disinformation-ukraine/#\\_ftnref4](https://jsis.washington.edu/news/russia-disinformation-ukraine/#_ftnref4).

30. Anna Nemtsova, *There's no Evidence the Ukrainian Army Crucified a Child in Slovyansk*, DAILY BEAST (July 15, 2014, 5:45 AM), <https://www.thedailybeast.com/theres-no-evidence-the-ukrainian-army-crucified-a-child-in-slovyansk>.

31. *Id.*; *Fake: Crucifixion in Slovyansk*, STOPFAKE.ORG (July 15, 2014, 9:44 PM), <https://www.stopfake.org/en/lies-crucifixion-on-channel-one/>; *State-Run News Station Accused of Making Up Child Crucifixion*, MOSCOW TIMES (July 24, 2014), <https://themoscowtimes.com/news/state-run-news-station-accused-of-making-up-child-crucifixion-37289>.

Russia's use of disinformation as another means of war is not a new phenomenon. Indeed, "Russia's modern information warfare adopts Soviet reflexive control to the contemporary geopolitical context."<sup>32</sup> Reflexive control is defined as "a means of conveying to a partner or an opponent specially prepared information to incline him to voluntarily make the predetermined decision desired by the initiator of the action."<sup>33</sup> One of the main differences between Soviet reflexive control and modern Russian disinformation warfare, however, is Russia's use of new technologies that increase the speed, distribution and effectiveness of disinformation campaigns.

### B. *Ukraine's Response to Russian Propaganda and Fake News*

In the last few years, Ukraine has struggled to balance freedom of expression and national security in combating Russia's "hybrid war" strategy and increasing "weaponization of information." For example, in 2014 Ukraine banned fourteen Russian television channels from distributing their content through Ukrainian networks for allegedly "broadcasting propaganda of war and violence."<sup>34</sup> Most of the banned channels were either directly controlled by the Russian state or owned by companies with close links to the Kremlin.<sup>35</sup> However, as the war with Russia has progressed, Ukraine's restrictions on freedom of expression have expanded beyond those organizations and individuals with direct links to the Russian state. In 2017, for example, Ukraine expanded its ban to the independent Russian television station Dozhd (Rain).<sup>36</sup> According to some reports, Dozhd was banned because it "had infringed on Ukraine's sovereignty and territorial integrity when it aired an image showing the boundary with Crimea as the state border, suggesting that Crimea is part of Russia."<sup>37</sup> Dozhd also apparently "violated Ukrainian law by sending reporters to Crimea via Moscow instead of through the Ukrainian-controlled crossing point at the peninsula's northern end."<sup>38</sup> Ukraine has also blacklisted many Russian books and films that are perceived as "glorify[ing] the work of [Russian] government bodies,"

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32. Snegovaya, *supra* note 27, at 10.

33. *Id.*

34. *Ukraine Bans Russian TV Channels for Airing War 'Propaganda'*, REUTERS (Aug. 19, 2014, 10:06AM), <https://www.reuters.com/article/us-ukraine-crisis-television/ukraine-bans-russian-tv-channels-for-airing-war-propaganda-idUSKBN0GJ1QM20140819>.

35. *Id.*

36. Christopher Miller, *Ukraine Bans Broadcasts of Independent Russian TV Station Dozhd*, RADIOFREEEUROPERADIOLIBERTY (Jan. 12, 2017, 3:55 PM), <https://www.rferl.org/a/ukraine-bans-russia-tv-rain-dozhd/28228049.html>.

37. *Id.*

38. *Id.*

positively portraying Russian's security forces or promoting Russian nationalistic messages.<sup>39</sup> Moreover, in April 2017, Ukraine banned Ukrainians' access to several popular Russian websites, including the social networking sites Vkontakte and Odnoklassniki, the search engine Yandex and the email service Mail.ru, all of which, prior to being banned, were among the top ten most popular websites in Ukraine.<sup>40</sup> The Ukrainian government also took the controversial step in 2014 of creating a Ministry of Information Policy for the purported purpose of combating Russian propaganda through affirmative messaging.<sup>41</sup> According to the Ukrainian government, these actions were a response to an avalanche of false and damaging propaganda from Russian government-controlled channels portraying Ukraine as a fascist-controlled disaster zone.<sup>42</sup>

Ukrainian state reactions to Russian disinformation have also targeted individual journalists. In 2015, it was revealed that the Ukrainian government had a sanctions list which banned numerous Russian and Western journalists from entering Ukraine, including highly regarded correspondents from the BBC and Die Zeit, because they had allegedly "commit[ed] criminal offenses against Ukraine" and "creat[ed] real and/or potential threats to Ukraine's national interest."<sup>43</sup> Although some of the journalists were removed from the list after international condemnation,<sup>44</sup> Ukraine has continued to restrict individual journalists' access to Ukraine through deportation and re-entry bans.<sup>45</sup>

Some organizations that are alleged to be affiliated with the Ukrainian government have even gone a step further by threatening the physical safety of journalists with whom they disagree. For example, in 2016, the Ukrainian

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39. *Ukraine Bans Russian Films in Media War*, BBC NEWS (Apr. 21, 2016), <http://www.bbc.com/news/world-europe-36099885>.

40. Alec Luhn, *Ukraine Blocks Popular Social Networks as Part of Sanctions on Russia*, GUARDIAN (May 15, 2017, 12:40 AM), <https://www.theguardian.com/world/2017/may/16/ukraine-blocks-popular-russian-websites-kremlin-role-war>.

41. Maksim Vikhrov, *Ukraine Forms 'Ministry of Truth' to Regulate the Media*, GUARDIAN (Dec. 19, 2014, 12:00 AM), <https://www.theguardian.com/world/2014/dec/19/sp-ukraine-new-ministry-truth-undermines-battle-for-democracy>.

42. *Id.*; Alan Yuhas, *Russian Propaganda Over Crimea the and Ukraine: how does it work?*, GUARDIAN (Mar. 17, 2014, 2:21 PM), <https://www.theguardian.com/world/2014/mar/17/crimea-crisis-russia-propaganda-media>.

43. Liuda Kornievich, *Why Two Spanish Journalists Were Expelled from Ukraine*, HROMADSKIE INT'L (Sept. 1, 2017), <https://en.hromadske.ua/posts/why-two-spanish-journalists-were-expelled-from-ukraine>.

44. *Id.*

45. Natalia Zinets & Dmitry Solovyov, *Ukraine Preparing to Deport Russian Journalist for 'Propaganda'*, REUTERS (Aug. 30, 2017, 5:46 AM), <https://www.reuters.com/article/us-ukraine-crisis-russia-journalist/ukraine-preparing-to-deport-russian-journalist-for-propaganda-idUSKCN1BA1L1>.

website Myrotvorets (which purports to reveal personal information of people who are considered “enemies of Ukraine”) leaked online the hacked personal information of journalists from over 30 international media outlets—including CNN, the BBC and Al Jazeera—who were covering the conflict in eastern Ukraine from territory controlled by the Russian-backed separatists.<sup>46</sup> According to Myrotvorets, these journalists were being punished for “cooperation with terrorists” because they had received their press accreditations from the anti-Ukrainian side of the conflict in eastern Ukraine.<sup>47</sup> Myrotvorets is allegedly “curated” by Ukraine’s security services and “praised” by Ukraine’s Interior Ministry.<sup>48</sup>

A number of other troubling attacks on freedom of expression have occurred in Ukraine since the Russian conflict erupted, including an arson attack on a pro-Kremlin Ukrainian national TV channel Inter,<sup>49</sup> the imprisonment of a journalist who supported defiance of the compulsory draft,<sup>50</sup> the ban of American action film actor Steven Seagal from entering Ukraine for five years based on national security concerns<sup>51</sup> and calls for Ukrainian comedians who mocked President Poroshenko to be banned from performing.<sup>52</sup> Such attacks on the press and free expression have led to a general sense that Ukrainian state officials “have waged a deliberate campaign against the freedom of press, inspired public hate against journalists, and jeopardized the security of reporters working in

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46. Anna Nemtsova, *Malicious Leaks Make Journalists Targets in Ukraine*, DAILY BEAST (Aug. 8, 2016, 1:00 AM), <https://www.thedailybeast.com/malicious-leaks-make-journalists-targets-in-ukraine>.

47. *Id.*

48. India Ashok, *Ukrainian Hackers Leak Personal Information of Thousands of Journalists*, INT’L BUS. TIMES (May 13, 2016, 4:20 PM), <http://www.ibtimes.co.uk/ukrainian-hackers-leak-personal-information-thousands-journalists-1559923>.

49. *Pro-Russia TV Station in Kiev Evacuated After Fire*, GUARDIAN (Sept. 5, 2016, 6:55 AM), <https://www.theguardian.com/world/2016/sep/05/pro-russia-tv-inter-kiev-evacuated-fire-ukraine>.

50. Dan Peleschuk, *Free Speech or Treason? Welcome to Ukraine’s Information War*, PUB. RADIO INT’L (Feb. 11, 2015, 6:15 AM), <https://www.pri.org/stories/2015-02-11/free-speech-or-treason-welcome-ukraine-s-information-war>.

51. *Ukraine Bans Steven Segal as National Security Threat*, CBS NEWS (May 8, 2017, 1:38 PM), <https://www.cbsnews.com/news/ukraine-bans-steven-seagal-as-national-security-threat>.

52. *Sardonic Laughter of Ukraine’s Comedy Actor Zelensky*, 112.INTERNATIONAL (Sept. 13, 2016, 12:45 AM), <https://112.international/article/sardonic-laughter-of-ukraines-comedy-actor-zelensky-9466.html>; *Oleh Lyashko Banning Ukrainian Comedy Actor for a Bad Joke*, 112.INTERNATIONAL (Sept. 12, 2016, 1:22 PM), <https://112.international/society/mp-suggests-banning-ukrainian-comedy-actor-zelensky-9449.html>.

Ukraine.”<sup>53</sup> In some rare instances, journalists perceived as being pro-Russian or anti-Ukrainian have been murdered.<sup>54</sup>

In the midst of the Ukrainian government’s restrictions, many non-governmental or intergovernmental organizations sought to assure that even in difficult and sensitive situations such as the one in Ukraine, media freedom and plurality of opinions would be maintained.<sup>55</sup> For example, when Ukraine first began blacklisting Russian media outlets, the OSCE’s then-Representative on the Freedom of the Media, Dunja Mijatović, called on Ukraine not to ban Russian channels “as it endangers media pluralism and goes against international principles and OSCE commitments.”<sup>56</sup> The OSCE representative criticized Ukraine’s government again in 2015 after Ukraine revoked the accreditation of twelve Russian media outlets and deported a number of Russian journalists, calling the measures to limit Russian media activity in Ukraine “excessive.”<sup>57</sup> Moreover, when Ukrainian President Poroshenko banned a further seventeen journalists from entering Ukraine in June 2016, the NGO Human Rights Watch issued the following statement: “Targeting journalists in this way inevitably encourages censorship.”<sup>58</sup>

Many NGOs criticized Ukraine’s measures restricting freedom of expression by emphasizing Ukraine’s international legal obligations. Ukraine is signatory to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (“ICCPR”) and the European Convention on Human Rights.<sup>59</sup> Additionally, Ukraine’s Constitution enshrines the right to freedom of expression.<sup>60</sup> While

53. Anna Nemtsova, *Malicious Leaks Make Journalists Targets in Ukraine*, DAILY BEAST (Aug. 8, 2016, 1:00 AM), <https://www.thedailybeast.com/malicious-leaks-make-journalists-targets-in-ukraine>.

54. Katya Gorchinskaya & Shaun Walker, *Pro-Russia Journalists Shot Dead in Kiev*, GUARDIAN (Apr. 16, 2015, 9:48 AM), <https://www.theguardian.com/world/2015/apr/16/pro-russia-journalist-shot-killed-ukraine-kiev-oles-buzyna>.

55. To buttress the ability of civil society within Ukraine to think through these questions of deliberation and response, governments and foundations sought ways to be of assistance. *See, e.g., Promoting Freedom of Expression in Ukraine*, RES. FUNDING (Jan. 24, 2018), <https://researchfunding.duke.edu/promoting-freedom-expression-ukraine>.

56. *Banning TV, Radio Broadcasts Poses Threat to Media Freedom in Ukraine*, OSCE Representative Says, OSCE (Feb. 26, 2014), <http://www.osce.org/fom/115832>.

57. *OSCE Denounces Ukrainian Measures Toward Russian Journalists*, RADIOFREEEUROPERADIOLIBERTY (Feb. 26, 2015, 3:23 PM), [www.rferl.org/a/osce-ukraine-media-mijatovic-criticism/26871234.html](http://www.rferl.org/a/osce-ukraine-media-mijatovic-criticism/26871234.html).

58. *Ukraine: 17 Russian Journalists Banned*, HUM. RTS. WATCH (June 1, 2016, 12:00 AM), <https://www.hrw.org/news/2016/06/01/ukraine-17-russian-journalists-banned>.

59. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

60. Article 34 (Ukraine, Dec. 8, 2004).

recognizing that the current conflict with Russia is “very complex” and that in certain circumstances, such as a state of emergency, states can temporarily derogate from certain protections enshrined in international treaties, NGOs like Human Rights Watch and Internews have expressed concern that the Ukrainian government has imposed severe restrictions on the right to freedom of expression, but not claimed derogation to that right under any of the respective treaties.<sup>61</sup>

Europe and the U.S. have also expressed concern over some of Ukraine’s more restrictive measures to combat Russian disinformation. The Council of Europe’s Secretary General stated that, “[b]locking of social networks, search engines, mail services and news web sites goes against our common understanding of freedom of expression and freedom of the media. Moreover, such blanket bans are out of line with the principle of proportionality.”<sup>62</sup> Similarly, a representative of the U.S. Commission on Security and Cooperation in Europe (“U.S. Helsinki Commission”) expressed concern about the safety of journalists in Ukraine and “call[ed] on Ukraine to find a way to protect itself [from Russian aggression] that does not undermine its international obligations and commitments or its constitutional principles.”<sup>63</sup>

### III. THE TWO UKRAINE PROJECTS: GUIDELINES AND WORDS AND WARS

This discussion will now turn to the two projects that are the subject of this essay first adding a few words to the description above. These two projects were efforts by interested parties – stakeholders – to affect the propaganda environment. Each of the projects represented an intervention; the analytical task is to determine an intervention by whom, how structured and with what objectives. Each involved funding by stakeholders external to Ukraine, each involved Ukrainian civil society and each existed in a complex environment of expectations and constraints. As mentioned, the Guidelines Project aspired to form consensus among civil society organizations, but an additional, and explicit objective was important, namely that the consensus guidelines should render repressive actions by Ukraine less likely and actions more consistent with European norms more likely. The title of the project, namely “Promoting and Advancing Media Freedom in Ukraine,” captured

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61. *Ukraine: 17 Russian Journalists Banned*, *supra* note 58; Jeanna Bourgault, Opinion, *The Fight for Free Expression is More Important than Ever*, INTERNEWS (Nov. 21, 2016), <https://www.internews.org/opinion/fight-free-expression-more-important-ever>.

62. *Ukraine: Secretary General Jagland Voices Concern Over Blocking Social Networks and Websites*, COUNCIL EUR. (May 17, 2017), <https://www.coe.int/en/web/secretary-general/-/secretary-general-voices-concern-over-blocking-social-networks-websites-in-ukraine>.

63. ORG. FOR SECURITY AND CO-OPERATION IN EUROPE, COMPILATION OF WRITTEN RECOMMENDATIONS (Sept. 11, 2017), <https://www.osce.org/odihr/342941>.

the notion that concepts of media freedom would be front and central. The initiative was designed to bring together experts with European human rights practices with practitioners from the Ukrainian media community. As mentioned in the Guidelines Project: “The initiative is based on a consensus-based approach that can lead to a recognized national strategy for coping with media freedoms and limits during a potential long-term, low-level conflict such as the one Ukraine is currently experiencing.”<sup>64</sup>

It would be through the implementation process that interaction among stakeholders could be observed. The essence of the project was the collecting of information and the creation of discourse between international “experts” and civil society. One step was the selection of persons who were chosen for expertise in international law and human rights with particular expertise regarding the media. The sponsor, Internews, had picked a coordinator/manager Susan Abbott, who had one of the most extensive careers in supporting media development in the post-Soviet period and, among other tasks, recommended individuals for the project. These included an academic, a former expert at the OSCE Representative on Freedom of the Media and a practitioner who provides communications advice for societies in conflict and harsh transition.

The Guidelines Project contemplated an initial trip to Ukraine to meet with local Ukrainian partners and create a prioritized list of the local partners’ specific concerns with the current media environment. Given this sense of priorities, the experts would then draft guidelines to establish a framework, grounded in international human rights law, for balancing national security with freedom of expression rights. Those guidelines would be presented as a “living document” and discussed at a conference in Kyiv in the fall of 2017 with the hope that the draft guidelines would be revised in ways that would facilitate consensus.

The approach was designed to be a virtual conversation among actors, some specifically denominated, but others certainly affecting the direction of discussions. There was an institutional idealism: norms were to be unearthed and clarified and would be a starting point for consensus. A goal was to further a policy-oriented discussion of how a society—here Ukraine—might conceptualize a particular danger and develop a response. Within the narrow compass for this project, the Guidelines Project built on an intense and long-standing series of discussions, many involving international governmental and nongovernmental agencies. The structure of proceeding would juxtapose the tradition of European practices to the pragmatism of the daily punishing reality. The Guidelines Project also had a built-in tension, a

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64. PROMOTING AND ADVANCING MEDIA FREEDOM IN UKRAINE GUIDELINES, *supra* note 5, at 10.

tension between the articulation of abstract principle and the perceived necessities, in Ukraine, for effective techniques to affect the information environment. The invocation of international norms was designed to have its own impact on the actions of stakeholders.

By pointing to already-existing international norms and commitments, the project's designers sought an outcome that provided better protection to journalists (as well as other speech actors, like NGOs) operating in the territory. As the project evolved, it became apparent that this desired outcome conflicted with some of the local partners' more immediate interests in designing guidelines to combat, or at least dampen the effectiveness of, Russian disinformation techniques, and to counter Russian military aggression in Ukrainian territory. This tension had many manifestations. One particularly sensitive issue was the establishment of guidelines for media professionals performing their duties in conflict areas, like Crimea or eastern Ukraine, "where the risks, challenges and implications require a very specific and tailored normative approach."<sup>65</sup>

The Guidelines Project assumptions included that state authorities had the responsibility to protect national security while respecting international standards. At the same time, states also had the responsibility "to preserve and promote a media environment that properly guarantees pluralism, diversity of opinions, open public debate and prevents undue concentration and control of media organizations either by private actors or the state."<sup>66</sup> In setting up the project, Internews illustrated the tension as follows:

[Media actors] have a special responsibility to perform their activities following the highest professional and legal requirements within a context where militancy impregnates any activity. War is a time when patriotism becomes the currency of engaged citizenship and love of country is a significant feature of the day. Journalists, like their fellow citizens, share this feeling. Personal patriotism, however, can be betrayed when journalists are required to manifest their loyalties by misleading viewers and readers as to battlefield events or by being pressured to modify their watchdog function. Intense partisanship at home is softened during conflict and neutrality becomes under siege. However, the citizenry suffers when it is not receiving a truthful and accurate state of events. A celebration of patriotism can devolve into a claim for unalloyed support and a suppression of necessary criticism.<sup>67</sup>

Not surprisingly, a significant effort of the project was the framing of the international norms. One of the experts, Joan Barata Mir,<sup>68</sup> had long been in

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65. *Id.* at 7.

66. *Id.*

67. *Id.* at 7-8.

68. *Id.* at 29-30.



the position of explaining the architecture of international norms. He contextualized how the exercise of drafting a series of guidelines regarding responses to propaganda and other aspects of fake news needed to take place within the framework and directives already established by a wide range of international standards.<sup>69</sup> In terms of the structure of the project, the emphasis would be on norms morphing into guidelines.<sup>70</sup> Invocation of international documents would bring a brace of institutions and norms to the table.<sup>71</sup> Also important in Barata Mir's drafting of the guidelines were international legal decisions and guidance that established a legal framework within which to discuss Ukrainian responses to Russian disinformation.<sup>72</sup>

The range of stakeholders involved in the Guidelines Project can be seen in outputs that were designed to help achieve project goals. For example, one output consisted of using or identifying recurring questions that arose in meetings between the international experts and the Ukrainian media actors.<sup>73</sup> Asking and approaching these questions could deflect criticisms that the project was merely reasserting international norms that limited national sovereignty; it also allowed the project to reflect local priorities concerning substantive guidelines, marking issues insistently raised by civil society. We focus on these questions and answers here because they deal with the main themes that arose during the Guidelines Project. Examples of such Frequently Asked Questions ("FAQ") are "*What are the current rules regarding the treatment of foreign journalists and foreign press institutions,*"<sup>74</sup> or "*What steps has the European community taken to counter propaganda by foreign journalists.*"<sup>75</sup> A third FAQ pursued the latter question in greater depth: "*How have other countries regulated foreign journalists who promote harmful anti-government propaganda?*"<sup>76</sup> Through this form of posing issues, the project emphasized the connected context in which Ukraine was acting and how significant it would be to consider alternate responses and international practice. In one posed question and answer to the action of other countries, the project identified, as an example of a more comprehensive approach, actions of the 2014 Baltic to Black Sea Alliance ("BBSA"), a regional security alliance founded in 2008 in the wake

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69. *Id.* at 8.

70. *Id.* at 23.

71. *Id.* at 12.

72. See The Guidelines Materials, *supra* note 5.

73. *Id.*

74. *Id.* at 1.

75. *Id.*

76. See The Guidelines Materials, *supra* note 5 at 2-3.

of the Georgia-Russia war.<sup>77</sup> The BBSA had made a series of recommendations to policymakers in the Baltic States, Ukraine, Georgia and Moldova to combat Russian disinformation.<sup>78</sup> The recommendations emphasized the need of member states to promote their own narratives and messages to national and international audiences, and promoted the concept of regional cooperation and joint responses.<sup>79</sup> Specifically, the BBSA recommended:

1. The creation of an alternative Russian-language broadcasting presence;
2. The promotion of alternative voices in Russia;
3. The self-regulation of journalists;
4. The creation of a European Fund for Professional Journalism;
5. The development of strategies to address internet trolling;
6. Regional cooperation to explore regulatory remedies;
7. Regional cooperation to empower media watchdogs; and
8. Regional cooperation to resurrect analytical capacity in understanding Russian policy.<sup>80</sup>

The project explicitly took on the issue of fake news again by looking at it in a comparative context. It pointed out that in 2016, the European Parliament passed a resolution titled “EU strategic communication to counteract propaganda against it by third parties.”<sup>81</sup> The resolution highlighted the hostile propaganda of Russia and non-state actors like ISIS and suggested that member countries invest in awareness raising, education, online and local media, investigative journalism and information literacy.<sup>82</sup> But even here, while noting that individual countries had also taken national measures to counteract propaganda promoted by foreign journalists, these measures might have arguably contravened international protections of freedom of expression. The project noted that in the 2017 French presidential election, for example, Emmanuel Macron’s campaign denied press access and passes to Russian media outlets RT and Sputnik, accusing

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77. BALTIC TO BLACK SEA ALLIANCE, RESPONDING TO RUSSIA’S WEAPONIZING OF INFORMATION, (Sept. 12, 2014), [http://bbsa.lv/wp-content/uploads/2015/10/Recommendations\\_BBSA\\_final.pdf](http://bbsa.lv/wp-content/uploads/2015/10/Recommendations_BBSA_final.pdf).

78. *Id.*

79. *Id.* at 2.

80. *Id.* at 5-8.

81. Anna Elzbieta Fotyga (Rapporteur), Committee on Foreign Affairs, *Report on EU Strategic Communication to Counteract Propaganda Against It by Third Parties*, EUR. PARL. DOC. A8-0290/2016 (Nov. 23, 2016).

82. *Id.*

them of spreading “propaganda” and “misleading information.”<sup>83</sup> The project pointed out that social media companies had also recently begun reevaluating their advertising policies concerning RT and Sputnik in light of alleged Russian interference in the 2016 U.S. presidential election.<sup>84</sup> For example, on October 26, 2017, Twitter announced that it would block all paid advertisement posts by RT and Sputnik.<sup>85</sup>

The Guidelines Project also noted that Ukraine is hardly the first country to face an onslaught of foreign propaganda from within and outside of its borders.<sup>86</sup> The U.S., for example, had employed a variety of countermeasures in the 20th century to counter foreign propaganda, such as the Foreign Agent Registration Act (“FARA”) enacted in 1938 to counter German propaganda in the U.S. before the Second World War.<sup>87</sup> Resuscitated in 2017, FARA was meant to identify any individual or organization that engaged in political or quasi-political activities on behalf of a foreign government or organization.<sup>88</sup> Organizations or individuals that meet the Act’s criteria are required to register as a foreign agent with the U.S. Department of Justice.<sup>89</sup> Penalties for failing to comply with the Act can include a \$10,000 fine or up to five years in prison.<sup>90</sup> FARA recently reemerged in the public spotlight after U.S. commentators began discussing whether Sputnik and RT should be required to register under the Act.<sup>91</sup> The U.S. Congress has also recently debated whether to resurrect a presidentially-appointed Cold War era group designed to counter Russia’s active measures (i.e., political warfare) against foreign countries.<sup>92</sup>

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83. See The Guidelines Materials, *supra* note 5 at 1; see also Benoit Morenne, *Macron Denies Access to 2 Russian Media Outlets in French Campaign*, N.Y. TIMES (Apr. 28, 2017), <https://www.nytimes.com/2017/04/28/world/europe/france-macron-russia-sputnik-rt.html>.

84. See The Guidelines Materials, *supra* note 5 at 1-3.

85. Twitter Public Policy (@policy), *Announcement: RT and Sputnik Advertising*, TWITTER (Oct. 26, 2017), [https://blog.twitter.com/official/en\\_us/topics/company/2017/Announcement-RT-and-Sputnik-Advertising.html](https://blog.twitter.com/official/en_us/topics/company/2017/Announcement-RT-and-Sputnik-Advertising.html).

86. See The Guidelines Materials, *supra* note 5 at 3-4.

87. Foreign Agent Registration Act of 1938, 22 U.S.C. §§ 601-619 (2012).

88. *Id.* at § 612.

89. *Id.* at § 611.

90. *Id.* at § 618.

91. Edward Delman, *When Is a TV Channel a Foreign Agent*, ATLANTIC (Apr. 22, 2015), <https://www.theatlantic.com/international/archive/2015/04/rt-lobbyist-russia-putin-media/390621>; James Kirchick, *RT Wants to Spread Moscow’s Propaganda Here. Let’s Treat It That Way*, WASH. POST (Sept. 20, 2017), [https://www.washingtonpost.com/news/posteverything/wp/2017/09/20/rt-wants-to-spread-moscows-propaganda-here-lets-treat-it-that-way/?utm\\_term=.8d035777922b](https://www.washingtonpost.com/news/posteverything/wp/2017/09/20/rt-wants-to-spread-moscows-propaganda-here-lets-treat-it-that-way/?utm_term=.8d035777922b).

92. See, e.g., H.R. REP. NO. 115-251, at 10 (2018); see also Kalyeena Makortoff, *US Lawmakers Want to Revive Spy-Catching Agency Amid Renewed Russian Threats*, CNBC (June 23, 2016, 8:26 AM), <https://www.cnbc.com/2016/06/23/us-lawmakers-want-to-revive-spy-catching-agency-amid-renewed-russian-threats.html>.

One controversial aspect of the Guidelines Project was the experts' refusal to recommend excluding individuals working for organizations supported by Russia, entities like RT, from the protections that journalists receive and instead deeming such individuals "propagandists." Here, the question was the status of one obvious and superficially appealing way to curb fake news: to require accurate and fair reporting,<sup>93</sup> and to strip those media outlets and press personnel under government direction as not entitled to the full bore of free expression rights.<sup>94</sup> This approach was favored by some members of Ukrainian civil society, including Ukrainian media outlets and NGOs. To refocus the discussion towards international standards, the project pointed out that Ukraine had a variety of more clearly expression-friendly remedies available to it.

As the U.S. had recently asserted by requesting that RT and Sputnik register as foreign agents under FARA, Ukraine could use public registration to disclose media outlets that were effectively operating as political advocacy groups on behalf of a foreign government.<sup>95</sup> This would still permit such media outlets to operate while ensuring that the public was aware of the outlet's sponsors and potential biases.<sup>96</sup> Additionally, Ukraine could restrict expression on the grounds of national security so long as such restrictions were clearly defined, subject to independent review and proportional to the threat faced.<sup>97</sup> While this is a case-by-case analysis, restrictions on content simply because such content is unpopular or politically disfavored should be discouraged.<sup>98</sup>

Because Russian disinformation campaigns have targeted many other post-Soviet countries aside from Ukraine, the Guidelines Project looked to other countries formerly controlled by the Soviet Union to identify what efforts they had taken to specifically counter Russian disinformation and "fake news." Latvia, Lithuania and Estonia are examples of countries that were especially proactive in adopting measures to counter Russian

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93. PROMOTING AND ADVANCING MEDIA FREEDOM IN UKRAINE GUIDELINES, *supra* note 5, at 16.

94. *Id.* at 19-20.

95. Upon a threat of criminal prosecution, RT and Sputnik ultimately registered in November 2017 as foreign agents under FARA. See Nathan Layne, *U.S.-Based Russian News Outlet Registers as Foreign Agent*, REUTERS (Feb. 17, 2018, 7:07 PM), <https://www.reuters.com/article/us-usa-trump-russia-propaganda/u-s-based-russian-news-outlet-registers-as-foreign-agent-idUSKCN1G201H>; see also Megan R. Wilson, *Russian news outlet Sputnik registers with DOJ as foreign agent*, HILL (Nov. 17, 2017 1:15 PM), <https://thehill.com/business-a-lobbying/business-a-lobbying/360912-russian-news-outlet-sputnik-registers-with-doj-as>.

96. Layne, *supra* note 92.

97. PROMOTING AND ADVANCING MEDIA FREEDOM IN UKRAINE GUIDELINES, *supra* note 5, at 18.

98. *Id.*

disinformation.<sup>99</sup> In Lithuania, for example, the Radio and Television Commission temporarily suspended Russian language television channels for, among other things, “inciting war, discord, and hatred towards nations.”<sup>100</sup> Latvia took similar actions against Russian television channels and websites.<sup>101</sup> Estonia, however, adopted a slightly different approach and focused on limiting Russian journalists’ access to government events that might be used to foster disinformation.<sup>102</sup> In some instances, Estonia refused to grant press credentials for government events to Russian journalists who were “promoting hostile subversive activities and propaganda under the cover of press freedom.”<sup>103</sup> This is similar to what the Macron Campaign did during the 2017 French presidential election.<sup>104</sup> While citing these examples from some of Russia’s other neighbors, the Guidelines Project cautioned that although temporary, these restrictions may have not been proportionate to the threats faced and may have run afoul of European freedom of expression protections.

Other comparative examples included multilateral efforts to coordinate and combat disinformation. The EU and the Council of Europe recently launched the Commission to Confront Propaganda, a consultative body for cross-border media complaints,<sup>105</sup> and participants from Armenia, Azerbaijan, Georgia, Moldova, Ukraine, Belarus and Russia attended the first meeting in Kyiv in September 2017.<sup>106</sup> The EU also launched a new website [euvdisinfo.eu](http://euvdisinfo.eu) to “better forecast, address and respond to pro-Kremlin disinformation.”<sup>107</sup> These issues had long been festering and certainly by 2015 the EU was discussing defensive and offensive options to react to the Kremlin’s disinformation campaigns. In particular, some members called for

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99. See Guidelines Project, *supra* note 5 at 3.

100. U.S. Dep’t of State, Bureau of H.R., Country Reports on Human Rights Practice, Lithuania 2016 Human Rights Report 7 (2016); see also Chris Dziadul, *Lithuania Bans Russian Channel*, BROADBAND TV NEWS (Sept. 21, 2018, 8:28 AM), <https://www.broadbandtvnews.com/2017/09/21/lithuania-bans-russian-channel>.

101. U.S. Dep’t of State, Bureau of H.R., Country Reports on Human Rights Practice, Latvia 2016 Human Rights Report 7 (2016).

102. Andrew Rettman, *Estonia Defends Ban on Russian ‘Pseudo Media,’* EUOBSERVER (Aug. 29, 2017, 7:11 PM), <https://euobserver.com/foreign/138825>.

103. *Id.*

104. Thomas Samson, *French Presidential Hopeful Macron Bans Russian-State Media From Campaign Trail*, FRANCE 24 (Apr. 29, 2017), <http://www.france24.com/en/20170429-macron-campaign-drops-accreditation-kremlin-backed-media>.

105. *The First Meeting of the Commission to Confront Propaganda*, COUNCIL EUR. (Sept. 14, 2017), [https://www.coe.int/en/web/freedom-expression/ukraine/-/asset\\_publisher/Mp0TAvzPYSPa/content/the-first-meeting-of-the-commission-to-confront-propaganda?inheritRedirect=false](https://www.coe.int/en/web/freedom-expression/ukraine/-/asset_publisher/Mp0TAvzPYSPa/content/the-first-meeting-of-the-commission-to-confront-propaganda?inheritRedirect=false).

106. *Id.*

107. *About*, EU VS DISINFO, <https://euvdisinfo.eu/about> (last visited Nov. 26, 2018).

EU aid for independent, Russian-language broadcasters to “provide competitive alternatives to the Russian production available in the EU television market.”<sup>108</sup> The U.S. adopted a similar approach in late 2016 after allegations of Russian interference in the U.S. presidential election by enacting the Countering Foreign Propaganda and Disinformation Act, which called for the creation of a Global Engagement Center to, among other things, “lead, synchronize, and coordinate efforts of the Federal Government to recognize, understand, expose, and counter foreign state and non-state propaganda and disinformation efforts aimed at undermining United States national security interests.”<sup>109</sup>

Another contested topic during the Guidelines Project was whether to define the terms propaganda and disinformation. During the project, the international experts and Ukrainian partners struggled over whether to help define propaganda and disinformation, words that have often been used interchangeably to describe Russia’s information campaigns in Ukraine. The thirst for distinctions, for the unearthing of a category of production which could be defined and, therefore regulated, was quite strong. A contemporary European Parliament publication defined propaganda by distinguishing it from disinformation in ways that added a modest degree of clarity.<sup>110</sup> Whereas propaganda is the “systematic dissemination of information, especially in a biased or misleading way, in order to promote a political cause or point of view,”<sup>111</sup> disinformation would be defined as the “dissemination of deliberately false information, especially when supplied by a government or its agent to a foreign power or to the media, with the intention of influencing the policies or opinions of those who receive it.”<sup>112</sup> Propaganda in this rather dominant definition need not be false to fall into this category. However, there has yet to be an agreed upon definition of propaganda (or hate speech for that matter) in international law,<sup>113</sup> even though Article 20 of the ICCPR concerns “propaganda for war.”<sup>114</sup>

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108. Andrew Rettman, *EU to Strike Back at Russian Propaganda*, EUOBSERVER (Mar. 19, 2015, 8:35 PM), <https://euobserver.com/foreign/128071>.

109. Note that the Countering Foreign Propaganda and Disinformation Act was passed as part of the National Defense Authorization Act for Fiscal Year 2017. See National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat 2000 § 1287; U.S. Dep’t of State, Global Engagement Center, <https://www.state.gov/r/gec/>.

110. *Understanding Propaganda and Disinformation*, EUR. PARL. GLANCE 1 (Nov. 2015), [http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/571332/EPRS\\_ATA\(2015\)571332\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/571332/EPRS_ATA(2015)571332_EN.pdf).

111. *Id.*

112. *Id.*

113. *Id.*

114. International Covenant on Civil and Political Rights, *supra* note 59.

Lastly, Internews' Guidelines Project was exclusively funded by resources raised by Internews, an organization with the stated policy of being committed to promoting access to trusted, quality information that empowers people to have a voice in their future and to live healthy, secure, and rewarding lives.<sup>115</sup> In contrast, the Words and Wars Project was funded under the auspices of the Civic Synergy Project, which is co-funded by the European Union and the Ukrainian NGO the International Renaissance Foundation, "to strengthen public participation in the implementation of European integration reforms in Ukraine."<sup>116</sup> The International Renaissance Foundation is an Open Society Foundation, funded by the philanthropist George Soros.<sup>117</sup> The fact that the Words and Wars Project was part of a larger effort to integrate Ukrainian civil society into Europe may explain why its focus was primarily to describe Russian disinformation techniques to partner with an array of Baltic and other states with roots in the Soviet era and recommend policies to combat those techniques, with less emphasis and mention of international freedom of expression standards.<sup>118</sup> In fact, the Words and Wars Project only mentions freedom of expression rights when criticizing Russia's domestic interest restrictions and the suppression of freedom of expression by Russian-backed separatists in eastern Ukraine.<sup>119</sup>

Moreover, the Words and Wars Project justifies the Ukrainian government's restrictions on freedom of expression by explaining that, "[w]ithout sufficient budget funds for counter-propaganda and no support from its own media outlets or cultural projects, Ukraine has been forced to impose restrictions on the broadcasting of Russian propaganda and disinformation on its territory from August 2014 onwards."<sup>120</sup> But, again, this is not surprising since the project was grounded in identifying and analyzing the Kremlin's information warfare tactics and developing counter-measures, rather than utilizing international freedom of expression standards to calibrate the balance between national security and freedom of expression rights, as was the Guidelines Project's goal. Again, the authors of the Words and Wars Project are Ukrainians living amidst the armed and informational conflicts with Russia, whereas the primary authors of the Guidelines Project were based in Europe and the U.S. and largely removed from the day-to-day

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115. *About Us*, INTERNEWS, <https://www.internews.org/index.php/about-us> (last visited Dec. 3, 2018).

116. *About Us*, CIVIC SYNERGY, <https://www.civic-synergy.org.ua/en/civic-synergy-project/> (last visited Nov. 27, 2018).

117. *About Us*, INT'L RENAISSANCE FOUND., <http://www.irf.ua/en/about/irf/> (last visited Nov. 27, 2018).

118. WORDS AND WARS *supra* note 4.

119. *Id.* at 107-109.

120. *Id.* at 54.

hardship of the Ukrainian conflict. In short, the Words and Wars Project had a much more nationalistic tone than the Guidelines Project and appears to be driven by a desire to defeat Russia in what the authors consider an information war.

#### IV. COMPARATIVE ANALYSIS

This has been an effort to examine alternative approaches to shaping a national response to aggressive fake news and propaganda. This essay has suggested that the very structuring or organization of the institution formulating the response will, in large part, influence the outcome and the shape of recommendations. A framework developed in *Free Expression, Globalism and the New Strategic Communication*<sup>121</sup> helps to clearly define this dynamic, where the premise is as follows: that each information context (like Ukraine) is composed of one or more “markets for loyalties” and that major stakeholders (sellers of allegiances) use available techniques to alter or stabilize their strengths within the markets. Governments use their power and authority to increase or decrease the sway of particular competitors. To function strategically, major “sellers of allegiances” engage in a sophisticated diagnostic of the market for loyalties to assess what vulnerabilities there are, what techniques can be most useful and how to orchestrate, camouflage or otherwise describe their efforts. Fake news and propaganda become ways introduced by various stakeholders to alter the information environment to their advantage.

Using this framework within Ukraine, and examining the structuring of the projects, what might be called a “diagnostic” of these markets for loyalties should be first considered, including, as indicated, who the stakeholders are, how they differed and how they differently deploy or characterize force, law, technology, subsidy and negotiation as aspects of a recipe for response.<sup>122</sup> Such a diagnostic would show how each project was an exercise in influencing approaches towards either defensively resisting propaganda arising from Russia or otherwise intervening offensively. The projects each sought to affect attitudes in varying theaters of decision-making: Ukrainian publics or segments thereof; foreign, including even European and American, publics; and domestic and foreign elites and government officials. One can also see the tools that are available to the entities seeking to promote ways to

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121. See MONROE E. PRICE, *FREE EXPRESSION, GLOBALISM AND THE NEW STRATEGIC COMMUNICATION* (Cambridge Univ. Press 2014); MONROE E. PRICE, *MEDIA AND SOVEREIGNTY: THE GLOBAL INFORMATION REVOLUTION AND ITS CHALLENGE TO STATE POWER* (Mass. Inst. of Tech. 2002).

122. Price, *supra* note 119, at 1-18.



engage in the defensive and offensive measures and how the mix of influences arises as a consequence of how the stakeholders utilize such techniques as are available to them to ensure that their perspective gains strength.

In particular, given the factors at play, these two projects demonstrate the comparative importance of invoking international human rights norms as a central aspect of mapping defensive or offensive responses. The diagnostic would indicate which stakeholders are engaged, what their strategies are and what techniques are available to them to counter fake news or propaganda. Here, for example, a diagnostic would indicate the role of NGOs, including the ever more examined histories of the NGOs and their linkages to larger networks. Identifying which stakeholders are represented, who takes the initiative, what interests and relationships lie beneath the more obvious ones – all this may have consequences for the programmatic outcome. The sponsors of the projects play a significant role in this exercise as well. It is generally the case that sponsors, at least sponsors in democratic societies, are at pains to be inclusive of stakeholders; but it is inevitable that they promote or strengthen one stakeholder or another. They deploy or encourage involved interests resulting in a complex matrix that is hardly ever transparent even for the principals themselves.

In the Ukrainian projects, the diagnostic question might be how significant adherence to human rights agenda would limit restrictive measures by the Ukrainian government or even the use of force. “Propaganda” could be reinterpreted as the unique combination of techniques to influence popular attitudes in a specified market for loyalties as used by offensively and possibly used in defense by the host state. To take the techniques identified above, the Russian government subsidized media outlets like RT to create and diffuse its messages through them; it used force to control terrain where it can also substantially control the information space. Ukraine used law to ban certain channels of communication or technology to regulate the use of the internet.<sup>123</sup> The quiver of techniques is crowded and dangerous.

A critical aspect, as has been asserted, is how stakeholders and sponsors address the problem and fashion their contribution. This essay has examined how two NGO-organized projects, both generally designed to confront Russia’s disinformation campaign, resulted in drastically different recommendations to Ukraine regarding how it should confront Russian disinformation. The Guidelines Project architecture was built to ensure

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123. Sabra Ayres, *Ukraine Blocks Popular Russian-Owned Social Media Sites, Saying it's a Matter of National Security*, GUARDIAN (May 18, 2017, 3:45 PM), <https://www.latimes.com/world/europe/la-fg-ukraine-website-ban-20170518-story.html>.

consciousness of international norms as a framework for considering Ukraine's responses to an avalanche of disinformation. The Words and Wars Project was structured in a virtually inverse way to the Guidelines Project, focusing less on international norms as on an analysis of existing Russian initiatives, themes and structures. The Words and Wars Project described the narratives pushed by Russia and the internal structure for producing and diffusing them. It attempted to describe patterns of influence within Ukraine and modes of Ukrainian resistance. It specifically sought to describe the way in which Russian strategic communicators adapted to new technologies and exploited them to extend their influence. It was centrally a diagnostic of strategic communication leading to a set of strategic responses.

Structurally, the point can be made another way: Those involved in the Guidelines Project and the overlapping group of stakeholders in Words and Wars Project, were engaged in many intertwined networks of influence themselves. How they characterized the meaning of international human rights in Ukraine would carry over to other human rights contexts and have consequences widely for such institutions such as OSCE or the European Court of Human Rights. These externalities would affect those engaged in the Guidelines Project more than those engaged in Words and Wars Project, or at least that would be the structural likelihood. Picture a framework where actors, each with a material or political stake in an outcome, seek to influence the outcome. Each actor is subject to many influences and those influences have consequences. Not all actors or stakeholders have equal access to the effective use of the relevant tools.

In addition, the *stated goals of the two initiatives* were different. The Guidelines Project had as an explicit goal building consensus.<sup>124</sup> The Words and Wars Project, in contrast, was more militant and assumed that consensus was not as important as building a meaningful response to Russian disinformation, and doing so quickly and efficiently.<sup>125</sup> In addition, the Guidelines Project was far more centered on recognizing and applying international norms and, indeed, strengthening their relevance.<sup>126</sup> The Ukraine-based Words and Wars approach, in contrast, was more pragmatic about dealing with immediate self-defined crises and, as a consequence, would consider international norms more flexibly. Experts on international norms would be more likely to be keepers of the flame while the groups behind the Words and Wars Project would have a different focus. In this sense, the two approaches reflected different communities of interest. The

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124. PROMOTING AND ADVANCING MEDIA FREEDOM IN UKRAINE GUIDELINES, *supra* note 5, at 9.

125. WORDS AND WARS *supra*, note 4.

126. PROMOTING AND ADVANCING MEDIA FREEDOM IN UKRAINE GUIDELINES, *supra* note 5, at 23.

Guidelines Project was substantially transnational. It was to be a conversation that involved “international experts” and domestic actors, but it was one in which the international experts (hard as they may have worked to make it more dialogical) set the agenda and had a major say, through the guidelines and other outputs, in the vocabulary and framework of response.

One could also compare *outputs as keys to understanding* differences in approaches to fake news and propaganda. By focusing on guidelines, the U.S. initiated project stayed largely at the abstract level. It did so to help achieve consensus, but also because each case that involved a Ukrainian response that could be deemed restrictive (*e.g.*, relating to defining who is a journalist or policing representatives of RT) immediately raised challenges for those defining international norms. The Words and Wars book was designed to be mobilizing as opposed to consensus building. The Words and Wars Project presumed that Ukraine was in a state of emergency and that a zone of “propaganda for war”<sup>127</sup>—a form of expression that can be restricted under international law—existed, whereas the group involved with the Guidelines Project was, for the most part, seeking to avoid characterizations that would more easily justify repressive speech actions by the Ukrainian government. As to the great categories of techniques, force, law, technology and subsidy, the two projects differed. The Words and Wars Project contained more of what has been called *militant democracy* which recognizes outcomes as highly significant and justifying preemptive restrictions, including restrictions on speech, where “necessary” to preserve a democratic society.

This essay’s framework also illuminates the structuring aspects of the two projects. International norms, as they have been most widely interpreted by the OSCE and others, celebrate the right to receive and impart information *regardless of frontiers*, and that has been interpreted as limiting the capacity of one state to restrict signals and information coming from another state. This approach always emphasizes the existence of exceptions—the grounds and processes for restriction—but within the overriding context of a freer flow of information. A project, like the Guidelines Project, pegged to international norms implies this structure for analysis. In contrast, somewhat more sovereignty-based studies, like the Words and Wars effort, are more open to the articulation of national security concerns and celebrate the nation. In summary, fake news and propaganda stand to be the constant

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127. OSCE, THE REPRESENTATIVE ON FREEDOM OF THE MEDIA, PROPAGANDA AND FREEDOM OF THE MEDIA (2015), <https://www.osce.org/fom/203926?download=true>.

accompaniment of increasingly vulnerable political transitions; and the weaponized version of that will remain present in Ukraine. This essay has attempted to help explain how various sponsors and various stakeholders engage in processes that shape public attitudes and help reduce conflict.

# DEFAMATION AS A “WEAPON” IN EUROPE AND IN SERBIA: LEGAL AND SELF- REGULATORY FRAMEWORKS

Jelena Surculija Milojevic\*

This article examines the legal framework for defamation in Europe and in the Republic of Serbia. It offers a possible definition of the term “weaponized defamation.”

In the first part, regional organizations, such as the Council of Europe and European Union, are analyzed to identify their legal framework for defamation. This Article focuses on the legal system of the Republic of Serbia, examined from two points of view - that of media legislation and that of the Journalist’s Code of Ethics, as a self-regulatory framework.

The following section of the article focuses on the decriminalization of defamation in Europe at the end of the 20th and beginning of the 21st century. The paper shows that there are countries where defamation is not a criminal offence anymore, while in some countries defamation still poses a criminal threat to journalists.

The case law of Serbia at the European Court of Human Rights relevant for defamatory statements (Article 10 (2)) and its positions on them are looked at next, after decisions were made by the European Court of Human Rights. This article will illustrate the misunderstanding of the term “defamation” and the frequent lack of understanding of the differing levels of protection for the honor and reputation of a “public figure” in comparison to that of an individual.

The final part of the research focuses on several case studies that may fall into the “weaponized defamation” category as well as the consequences such offenses could have on its victims. The article will deal with the cases in front of national courts: the European Court on Human Rights, and the

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Regulatory Authority for Electronic Media and the Press Council. The article will try to offer an answer to why citizens tend to turn to the Press Council in order to protect their reputation, although it offers only moral consequences and no legal powers, as well as to why national courts have started to take the Journalist’s Code of Ethics as relevant for their judgments.

## I. INTRODUCTION

In this article, the term “*weaponized defamation*” is used for the defamation that fulfils the following criteria: it is constituted for a long time (usually in the form of a long-term campaign in the media), with serious damage to someone’s honour and reputation, or resulting in life-threatening situations and consequences. The cases presented contain at least two out of three conditions, while in some cases (as in *Veran Matic vs. Informer*)<sup>1</sup> all three conditions are fulfilled.

There is a new trend in Serbian tabloid media, where tabloids establish long-term campaigns against opponents. That long-lasting campaign is weaponized in a way that a) lasts for a long period of time,<sup>2</sup> and b) does not allow the other side to express an opinion (either in the form of a right, or a reply, or correction, or in the form of a statement of an opinion). There are two media that lead this trend and have specialized the format—TV Pink and the newspaper *Informer*.<sup>3</sup> There were numerous campaigns that the owner of TV Pink has held against various opponents.<sup>4</sup> One of the first, *Cedomir Cupic v. TV Pink* is analyzed in more depth below.

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1. See пресуду [The Verdict], 6 P.Z. Виши суду београду [Higher Ct. Belgrade] 2017, No. 50/15 (Serb.).

2. A Long Campaign in this case does not reflect only the number of days. As will be presented, a long campaign can be one that only lasts for one day, yet for the entire day in every news broadcast.

3. For example, through open letters that are published in the newspaper *Informer*, Zeljko Mitrovic, the owner and editor of TV Pink, often clashes with various individuals. The editor-in-chief of *Informer* then comes to TV Pink to read his front page freshly printed. See, e.g., Zora Drčelić, *Letters Opened By Zeljko Mitrovic*, VREME (Aug. 25, 2016), <https://Verne.com/cams/view.php?id=1422560>.

4. Those who have been victims of Mitrovic’s open letters include: Dragan Djilas, who was the mayor of Belgrade at the time; Sasa Jankovic, the ombudsman and later the opposition candidate for President of the Republic of Serbia; Bosko Obradovic, leader of the “Dveri” political party, Sasa Radulovic, leader of the “Enough is Enough” political party, Aleksandar Rodic, owner of “Kurir” newspapers, “Danas, newspapers, etc. *Id.* The similar thread running through these cases is that open letters were written by the owner and editor-in-chief of TV Pink, a television station with national coverage in the Republic of Serbia, read several times a day in full (lasting for several minutes) by a speaker of news without any opportunity for the other side to react or respond to it. *Id.*

The tabloid newspaper “*Informer*” utilizes a similar tactic as TV Pink. It directs campaigns against various people, usually public figures, either on its own initiative or by printing a TV Pink campaign in its edition. The case of *Veran Matic v. Informer* is analyzed in the context of *weaponized defamation*, its influence on a person’s private and professional life, as well as the incorporation of both legal and ethical norms by Serbian courts.

Finally, a Press Council<sup>5</sup> is “an independent, self-regulatory body that brings together publishers, owners of print and online media, news agencies and media professionals. It has been established for monitoring the observance of the Journalist’s Code of Ethics, solving complaints made by individuals and institutions related to media content.”<sup>6</sup> One of the defamatory cases that could be identified as “*weaponized*,” which the Press Council dealt with, is *Sreten Ugricic v. Press newspapers*, which is analyzed in this article.

## II. THE THEORETICAL APPROACH TO DEFAMATION

Defamation is one of the permissible restrictions of freedom of expression. Article 10, paragraph 2 of the European Convention on Human Rights prescribes that freedom of expression can be limited due to the protection of honour and reputation of others. Defamation is not easy to define as a legal term.

The most common definition of defamation states that it is “the publication of an untrue statement about a person that tends to lower his reputation in the opinion of right-thinking members of the community or to make them shun or avoid him. Defamation is usually in words, but pictures, gestures, and other acts can be defamatory.”<sup>7</sup> The test of whether someone’s reputation is lower in the opinion of the right-thinking members of the society “has been found satisfied even in cases where the only proper response of a right-thinking person to the publication complained of would in fact be no contempt or disapproval, but sympathy or indifference.”<sup>8</sup>

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5. Founders of the Press Council are Veselin Simonovic, on behalf of the Association of Press Publishers and Electronic Media; Vladan Filipcev for the Association of Independent Local Media “Lokal pres”; Nadezda Gace, for the Independent Journalists’ Association of Serbia (IJAS) and Ljiljana Smajlovic (for the Journalists’ Association of Serbia). See *Founders*, PRESS COUNCIL, <http://www.savetzastampu.rs/english/about-us> (last visited Dec. 15, 2017).

6. *About Us*, PRESS COUNCIL, <http://www.savetzastampu.rs/english/founders> (last visited Dec. 15, 2017).

7. Jonathan Law, A DICTIONARY OF LAW 179 (8th ed. 2015).

8. “The effect of stretching the definition of what is defamatory in this way has been to protect individuals against the publication of some private and personal material.” Michael Tagendhat & Iain Christie, THE LAW OF PRIVACY AND THE MEDIA 357 (Nicole Moreham et al. eds., 3d ed. 2016).

In legal theory there are different approaches in Anglo-Saxon and Continental law. For example, in England, but not in Scotland, there are two types of defamation. The first is “slander” and is spoken (so not in a permanent form), while the other type is “libel” and requires the defamation to be in permanent form.<sup>9</sup> The other characteristic of the English legal system towards defamation is that “Common Law” places greater protection on honor and reputation<sup>10</sup> in comparison to freedom of expression. Therefore, Great Britain is famous for celebrities bringing cases against British tabloids, as they usually win the cases. As the result of such practice, the responsibility of an individual and the media is often equalized.<sup>11</sup>

One of the effective mechanisms that should always be a first step towards the minimalization of the effects of defamation are right of reply and right to correction. Goldberg et. al. state that the right of reply is “one means by which media law addresses our ability to obtain access to the media.”<sup>12</sup> Furthermore, they add that the right of reply may be characterized “either as an element or an individual’s right to freedom of expression or as a derogation from that right,”<sup>13</sup> in terms of ‘protection of the reputation or rights of others’.<sup>14</sup>

Warren and Brandeis looked at defamation from the breach of privacy point of view by saying that “the intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.”<sup>15</sup> Wacks considers that “a violation of privacy is sufficiently distinguishable from an attack on an individual’s reputation to warrant clear separation. ‘The mental injuries suffered by a privacy plaintiff’ in the words of one commentator ‘stem from exposure of the private self to public view. The mental injuries suffered by a defamation victim, by contrast, arise as a consequence of the damage to reputation, either real or perceived. Thus, both torts provide

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9. *Compare Id.*, with David Goldberg et al., *Media Law and Practice* 375 (2010) with Richard Clayton et al., *THE LAW OF HUMAN RIGHTS* 1015 (2009).

10. *Compare*, Clayton, *supra* note 9 at 1014.

11. *Id.*

12. Goldberg, *supra* note 9, at 47.

13. *Id.*

14. European Convention on Human Rights, *Convention for the Protection of Human Rights and Fundamental Freedoms*, art. 10, 213 U.N.T.S. 221 (Nov. 4, 1950) (hereinafter ECHR).

15. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).



redress for 'wounded feelings,' but the source of the harm differs substantially.' Moreover, while there is an obvious overlap between the two wrongs, in the case of defamation 'the injuries result from real or imagined harm to reputation, and objectively determinable interest. In privacy, actions the injuries arise solely from public exposure of private facts.'"<sup>16</sup>

Vodinelic considers that two domains are leading in frequency of breach of the honor and reputation by public expression of opinion and in heaviness of injury caused: "yellow" newspapers and political clash of opinions. In this paper, we will mostly cover the tabloid (yellow) media, bearing in mind that, although they are not openly participating in a political arena, they surely give a great support to the (current) government<sup>17</sup> and therefore their publishing can be looked at through a political lenses, as well.

### III. DEFAMATION: INTERNATIONAL LEGAL FRAMEWORK

#### A. *Council of Europe*

The European Convention on Human Rights prescribes that "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers."<sup>18</sup> However, this human right is not absolute and it can be restricted or subject to other "formalities, conditions or penalties. . . that are prescribed by law and are necessary in a democratic society. . . for the protection of the reputation or rights of others."<sup>19</sup> In order for freedom of expression to be restricted it is necessary that the restriction is prescribed by law, with a legitimate aim and that it is necessary in a democratic society.

The Council of Europe has regulated the issue of defamation within several specific documents. The Parliament Assembly (PACE) adopted two documents on October 4, 2007: *Recommendation 1814 Towards*

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16. Raymond Wacks, *PRIVACY AND MEDIA FREEDOM VII* (2013).

17. "Pink has great political and ideological significance... The fact is that every Government here always chose media with which to advertise and that the current Government chose Pink for your private public service." Interview with Snjezana Milivojevic, Belgrade Faculty of Political Sciences Professor, *Free Europe: Why Is Pink Vucicev a Private Public Service?*, KURIR (Dec. 6, 2015, 8:01 PM), <https://www.kurir.rs/vesti/drustvo/2048047/slobodna-evropa-zasto-je-pink-postao-vucicev-privatni-javni-servis>.

18. ECHR, *supra* note 13, art. 10.

19. *Id.*

decriminalization of defamation<sup>20</sup> and *Resolution 1577 Towards decriminalization of defamation*.<sup>21</sup> In its Recommendation, PACE “urges the Committee of Ministers to instruct the competent intergovernmental committee, the Steering Committee on the Media and New Communication Services (CDMC) to prepare. . . a draft recommendation to member states laying down detailed rules on defamation with a view to eradicating abusive recourse to criminal proceedings.”<sup>22</sup> In the Resolution, there are several layers of requests sent to the member states: that the anti-defamation laws are applied with great caution, with the avoidance of criminal responsibility,<sup>23</sup> that the statements made in the public interest, even if not accurate, “should not be punishable provided that they were made without knowledge of their inaccuracy, without intention to cause harm and that their truthfulness was checked with proper diligence.”<sup>24</sup> Further on, the Resolution condemns the misuse of defamation by public authority in order to hush the media or provoke self-censorship,<sup>25</sup> as well as abolish the prison sentences for defamation.<sup>26</sup> Finally, the PACE is aware “that abuse of freedom of expression can be dangerous, as history shows. As recently acknowledged in a framework decision applicable to member countries of the European Union, it must be possible to prosecute those who incite violence, promote negationism or racial hatred, conduct inimical to the values of pluralism, tolerance and open-mindedness which the Council of Europe and the European Convention on Human Rights promote.”<sup>27</sup>

The next important document is the Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect to Defamation, “Libel Tourism,” to Ensure Freedom of Expression, adopted on July 4, 2012.<sup>28</sup> “Libel Tourism” is “a form of “forum shopping” when a complainant files a complaint with the court thought most likely to provide a favourable judgment (including in default cases) and where it is easy to sue. In some cases, a jurisdiction is chosen by

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20. EUR. PARL. ASS. *Recommendation 1814 Towards Decriminalization of Defamation*, 34th Sitting, Doc. No. 11305 (2007).

21. EUR. PARL. ASS. *Res. 1577 Towards Decriminalization of Defamation*, 34th Sitting, Doc. No. 11305 (2007).

22. Eur. Parl. Ass., *Recommendation 1814 Towards Decriminalization of Defamation*, Doc. No. 11305 (2007).

23. EUR. PARL. ASS. *Res. 1577* art. 6, *supra*, note 21.

24. *Id.* art. 7.

25. *Id.* art. 8.

26. *Id.* art. 11 & 13.

27. EUR. PARL. ASS. *Res. 1577* art. 15, *supra*, note 18.2 (20).

28. COMM. OF MINISTERS, *Declaration on the Desirability of International Standards Dealing with Forum Shopping in Respect of Defamation, “Libel Tourism”, to Ensure Freedom of Expression*, 1147th Meeting (July 4, 2012).

a complainant because the legal fees of the applicant are contingent on the outcome (“*no win, no fee*”) and/or because the mere cost of the procedure could have a dissuasive effect on the defendant. The risk of forum shopping in cases of defamation has been exacerbated as a consequence of increased globalisation and the persistent accessibility of content and archives on the Internet.”<sup>29</sup> The countries are expected to reform their media legislation and offer better protection to freedom of expression in balancing between this freedom and right to reputation of others.

### B. *European Union*

The Audio-visual Media Services Directive<sup>30</sup> dominantly regulates the audio-visual sector in the European Union. It does not deal with defamation nor offer any legal remedies.<sup>31</sup> Instead, it recommends to “any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies.”<sup>32</sup> One of the most important characteristics of the right of reply – its urgent matter – is very well defined through the AVMSD, by obliging member states to make sure that the right of reply “is not hindered by the imposition of unreasonable terms and conditions.”<sup>33</sup> The Directive also recognizes the importance that the reply is “transmitted within a reasonable time,”<sup>34</sup> as a very essential condition, following the valid request and “at a time and in a manner appropriate to the broadcast to which the request refers.”<sup>35</sup> Furthermore, the Directive does not distinguish among broadcasters, stating that the right of reply and rules on equivalent remedies have to apply to all broadcasters.<sup>36</sup> Member States of the European Union have the obligation to incorporate the relevant procedures establishing the right of reply or the equivalent remedies and their adequate exercising in their national legislation, ensuring the permission for satisfactory duration of the right of reply for any natural or legal person residing or being established in another Member State.<sup>37</sup> The request for

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29. *Id.*

30. Council Directive 2010/13, 2010 O.J. (L 95) (EU).

31. “Without prejudice to other provisions adopted by the Member States under civil, administrative or criminal law,” *Id.*, art. 28.

32. *Id.*, art. 18.

33. *Id.*, art. 28.

34. *Id.*

35. *Id.*

36. *Id.*, art. 23.

37. *Id.*, art. 23.

exercising of the right of reply may be rejected only when a reply is not justified,<sup>38</sup> or is not in accordance with the civil, administrative or criminal laws of the Member States, or when it could possibly indicate a punishable act, cause the broadcaster to be liable to civil law proceedings or would disobey the public decency standards.<sup>39</sup> Any possible dispute related to exercising of the right of reply or equivalent remedies will be subject to judicial review<sup>40</sup>.

The AVMS Directive prescribes situations when the right of reply may be rejected:” if such a reply is not justified [...] if it would involve a punishable act, would render the broadcaster liable to civil-law proceedings or would transgress standards of public decency.”<sup>41</sup>

### *C. The Republic of Serbia*

The legal system of the Republic of Serbia is examined from both the media legislation point of view and the Journalist’s Code of Ethics, as a type of “self-regulation.”

*The Constitution of the Republic of Serbia* guarantees the right to freedom of expression in its Article 46 and at the same time prescribes its restrictions, of which one of them is the “right and reputation of others.”<sup>42</sup>

*The Law on Public Information and Media* (LPIM) prescribes that “It is not permitted to publish information that violates a person’s honour, reputation or piety, or portrays a person untruly by assigning him/her features or characteristics that he/she does not have or denying him/her features or characteristics that he/she does have, unless the interest for publishing information prevails over the interest of the protection of dignity and right to authenticity, and particularly if it does not contribute to the public debate on an occurrence, an event or a person that the information refers to.”<sup>43</sup> At the same time, this law incorporates the standpoint of the European Court on human rights related to the higher level of criticism that public figures have to withstand: “The elected, appointed, i.e., assigned holder of public office shall be obliged to be subjected to the expression of critical opinions that pertain to the results of their performance, i.e., the

38. “In accordance with Paragraph 1 of Article 28, which means that the legitimate interest of the applicant has not been “damaged by an assertion of incorrect facts in a television programme.” *Id.*, art. 28

39. *Id.*, art. 23

40. *Id.*; see also Jelena Surčulija Milojević, *The Right of Reply: A Tool for an Individual to Access the Media*, 9 Y.B. OF THE FAC. OF POL. SCI. 225, 229-230 (2015).

41. Council Directive 2010/13 art. 46, *supra*, note 30.

42. Ustav Republike Srbije (2006) [Constitution] art. 46 (Serb.).

43. Law on Public Information and Media art. 79, Службени гласник РС [Official Gazette of RS], No. 83/2014 (Serb.).

policy they implement, and the opinions are in relation to performing their function – regardless of whether they feel personally affected by the expression of these opinions.”<sup>44</sup>

*The Law on Electronic Media* (LEM) puts the defamation in electronic media into the scope of the work of the Regulator, by saying that it shall “determine specific rules relating to programme content in relation to the protection of human dignity and other personal rights, protecting the rights of minors, prohibition of hate speech etc.”<sup>45</sup> In addition, the LEM prescribes that the “Media services shall be provided in a manner that respects human rights and personal dignity in particular.”<sup>46</sup> And, “the Regulator shall ensure that all programme content respects dignity and human rights [...]”<sup>47</sup> This law is in line with AVMSD as it goes a step further and forbids the disrespect of human dignity in an audio-visual commercial communication.<sup>48</sup> Finally, the Law on Public Service Broadcasting<sup>49</sup> prescribes that the “respect for privacy, dignity, reputation, honour, and other basic human rights”<sup>50</sup> shall be in the public interest and maintained by the public service broadcaster through its programming.

The independent regulatory authority, namely the Regulatory Agency for Electronic Media (REM), has adopted the *Statute on Protection of Human Rights when providing media services*<sup>51</sup> where Article 26 prescribes that “the provider of audio-visual media service shall respect the dignity of a person and the right to authenticity of the person within the information published. In extraordinary circumstances, the provider of audio-visual media service may broadcast information that violates the honour, dignity and piety of a person the information relates to, if the interest for the information to be published prevails over the protection of the dignity of such a person, and especially when the subject matter contributes to public debate.”<sup>52</sup>

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44. *Id.* art. 8.

45. Закон о електронским медијима [Law on Electronic Media] art. 22, Службени гласник РС [Official Gazette of RS], No. 83/2014 (Serb.).

46. *Id.* art. 50.

47. *Id.*

48. *Id.* art. 56.

49. Закон о јавним медијским сервисима [Law on Broadcasting], Службени гласник РС [Official Gazette of RS] No. 86/2006 (Serb.).

50. *Id.* art. 7.

51. *See generally* о заштити људских права у области пружања медијских услуга [Statute on Protection of Human Rights in the Field of Media Services], Службени гласник РС [Official Gazette of RS] July 16, 2015, No. 83/14 (Serb.).

52. Article 26 of the Statute on Protection of Human Rights in providing of audio-visual media services, Official Gazette of the Republic of Serbia No. 55/15.

Finally, the Press Council’s work is based on monitoring the respect of the Journalist’s Code of Ethics and reactions to complaints. The authenticity of reporting is regulated in Chapter I, where in Point 2 it specifies that “it is the right of the media to have different editorial concepts, but it is the obligation of journalists and editors to make a clear distinction between the facts they transmit and comments, assumptions and speculations,”<sup>53</sup> while in Point 5 it says that the “publishing of speculative charges, defamation, rumors and fabricated letters [...] are incompatible with journalism.”<sup>54</sup> “In cases that a journalist estimates that the publication of unverified information or speculation is in the public interest, he is obliged to emphasise clearly and unambiguously that the information is not confirmed.”<sup>55</sup> Nevertheless, the journalists’ responsibilities are prescribed by Chapter VI, Point 1 in that “a journalist is primarily responsible to his readers, listeners and viewers. This responsibility must not be subordinate to the interests of others, particularly the interest of publishers, the government and other state institutions. A journalist must oppose all those who violate human rights or promote any kind of discrimination, hate speech and incitement to violence.”<sup>56</sup>

#### IV. THE PROCESS OF DECRIMINALIZATION OF DEFAMATION IN EUROPE AND IN SERBIA

This article focuses on the decriminalization of defamation in Europe at the end of the twentieth and beginning of twenty-first century.

There is no unilateral opinion on whether defamation should be a criminal act or not. The ongoing legal debate includes questions about whether the fines for defamation should be criminal or civil, whether the financial fine for non-pecuniary damage should be higher or lower, etc. In the last two decades, the European legal system has been characterized by the *legal battle* of international organizations (e.g. the Council of Europe, OSCE, UN) for defamation to be decriminalized. The arguments for decriminalization are usually that prison is a too harsh a sentence for words said, but also that the criminal offences were usually used by politicians against journalists. In 2002, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression pointed out in one of their Joint Declarations that “Criminal defamation is not a

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53. Indep. Journalists’ Ass’n of Serbia & Journalists’ Association of Serbia, SERBIAN JOURNALIST’S CODE OF ETHICS, 7 (4th ed. 2015).

54. *Id.*

55. *Id.*

56. *Id.* at 23.

justifiable restriction on freedom of expression,” and that “all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.”<sup>57</sup>

The Council of Europe and OSCE lead the decriminalization of defamation “movement,” but there are still many countries in Europe where defamation is a criminal offence. Spaic et. al. found that “out of 28 EU countries, 25 treat defamation as a criminal offence. Of those 25, 21 impose imprisonment as a sanction.”<sup>58</sup> In Serbia, defamation was decriminalized in 2012 by simply deleting Article 171 of the Criminal Code.

Even the European Court on Human Rights does not have a firm position on that issue. In the case of *Radio France and Others*, the Court noted that “in view of the margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued.”<sup>59</sup> This was reaffirmed in the later case of *Lindon, Otchakovsky-Laurens and July v. France*.<sup>60</sup> On the other hand, in the case of *Bodrozic and Vujin v. Serbia*, the Court found that “recourse to criminal prosecution against journalists for purported insults raising issues of public debate, such as those in the present case, should be considered proportionate only in very exceptional circumstances involving a most serious attack on an individual’s rights.”<sup>61</sup> In civil matters, the Court measures whether an alternative to a fine is offered, such as right of reply, right to correction, a public apology or the publishing of the court decision.<sup>62</sup>

The International Press Institute (IPI) conducted research in January 2015 that showed that in the period of five years prior to the research, journalists in 15 EU countries were convicted of defamation as a criminal offence, either in the form of a fine or imprisonment (e.g. Bulgaria, Croatia, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Malta, Poland, Portugal and Spain).<sup>63</sup> The same research

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57. JOINT DECLARATIONS OF THE REPRESENTATIVES OF INTERGOVERNMENTAL BODIES TO PROTECT FREE MEDIA AND EXPRESSION (Ambeyi Ligabo ed. 2002).

58. Spaic, A., et al., (2016) *Decriminalization of Defamation - The Balkans Case: A Temporary Remedy or a Long-Term Solution?*, 47 INT’L J. L., CRIME & JUST. 21 (2016).

59. *Radio France v. France*, 2004-II, Eur. Ct. H.R. 83,117-118.

60. *Lindon, Otchakovsky-Laurens and July v. France*, 2007-IV, Eur. Ct. H.R. 125, 159-160.

61. *Bodrozic v. Serbia*, App. No. 38435/05, Eur. Ct. H.R. 1, 9 (2009.)

62. *Sloboda Izrazavanja i Kleveta* [FREEDOM OF EXPRESSION AND DEFAMATION] 53-58 (Tarlach McGonagle, et. al, eds. 2016).

63. See generally Scott Griffen, *OUT OF BALANCE, DEFAMATION LAW IN THE EUROPEAN UNION: A COMPARATIVE OVERVIEW FOR JOURNALISTS, CIVIL SOCIETY AND POLICYMAKERS* (Barbara Trionfi ed. 2015).

revealed that imprisonment as a sanction was used in EU candidate countries, such as Montenegro, Serbia and Turkey.<sup>64</sup>

The situation in the OSCE region is even more “*eye-opening*”: in 2017, “three-quarters (42) of the 57 OSCE participating states maintain general criminal defamation laws. In the vast majority of these cases, defamation and/or insult carries a potential penalty of imprisonment.”<sup>65</sup> On the other hand, “most non-EU member states in South East Europe have fully repealed general criminal provisions on defamation and insult.”<sup>66</sup> One of the reasons for the withdrawal may be the strong influence of various international organizations in the region, namely OSCE and CoE, that have a clear statement that defamation should not be criminal as it may have a “chilling effect” on journalists.<sup>67</sup> Politicians, who often see themselves as victims of defamation, usually take the position that the fines for defamation should be higher. In a poll conducted by Stefan Eklund, “Swedish MPs were asked to comment on statements that all involve restrictions on publishing and freedom of expression [...] 49 per cent think that the fines for damages for defamation are “ridiculously low” and should be increased substantially. The effect of increased fines would inevitably be more cautious journalism; important and revealing stories might not be written.”<sup>68</sup>

In Serbia, Insult,<sup>69</sup> Defamation, and Dissemination of Information on Personal and Family<sup>70</sup> life were all criminal offences under Chapter Seventeen of the Criminal Code of the Republic of Serbia,<sup>71</sup> dealing with criminal offences against honor and reputation. In 2012, the defamation reference was simply deleted from the Criminal Code, while insult and dissemination of information on personal and family life remained.

In order to gain the opinion of media attorneys specializing in defamation, two interviews were conducted. One was with Mrs. Kruna Savovic,<sup>72</sup> senior associate at the Zivkovic & Samardzic law office and the other with Mr. Dusan Stojkovic,<sup>73</sup> partner of the Stojkovic law office.

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64. *Id.* at 14.

65. Scott Griffen, DEFAMATION AND INSULT LAWS IN THE OSCE REGION: A COMPARATIVE STUDY 8 (Barbara Trionfi ed. 2017).

66. *Id.* at 11.

67. *Id.* at 7.

68. THE LEGACY OF PETER FORSSKAL 250 YEARS OF FREEDOM OF EXPRESSION 106 (Ulla Carlsson & David Goldberg eds. 2017).

69. Кривични законик (Criminal Code), art. 170 (Serb.).

70. Кривични законик (Criminal Code), art. 172 (Serb.).

71. *See* Кривични законик (Criminal Code) (Serb.).

72. Interview with Kruna Savovic, Senior Associate, Zivkovic & Samardzic (Jan. 3, 2017 & Dec. 20, 2017).

73. Interview with Dusan Stojkovic, Partner, Stojkovic Law Office (Dec. 20, 2017).



The interviews focused on Savovic's and Stojkovic's observations relating to the protection of human dignity with respect to the protection of a person's reputation after the decriminalization of defamation and their observations. Savovic said that several years ago there were media who were sued by physical persons. Now, the victims of defamatory statements by the tabloids have become investigative journalists who critically report on the authorities. "In order to protect themselves from campaigns that can last for months, journalists are forced to press charges against tabloid media."<sup>74</sup>

One of the downsides of decriminalization of defamation, pointed out by Dusan Stojkovic, a founder and partner of the Stojkovic law office, was that the moral damage claims were very low (app. 830-125 EUR) from the point of view of a client and that clients often had very little material satisfaction for moral damage. Stojkovic claims that the media are not intimidated by potential claims, so that fake news with the purpose of sensationalism, higher circulation and other interests blossoms.<sup>75</sup>

Another downside of the decriminalization of defamation that Savovic notes, is that in civil law "legal persons do not have any mechanism to protect their reputation anymore, as they are required to prove material damage, which cannot be shown in every defamatory case, while a legal person, under the Serbian legal system, cannot claim moral (non-pecuniary) damage."<sup>76</sup> "The courts in Serbia are firm and persistent in their understanding that a legal entity cannot claim compensation for moral damage. An injury to the reputation of a legal person does not constitute a legally recognized and recoverable type of non-pecuniary loss, as there can be no legally relevant mental suffering caused by it. Therefore, legal entities are not entitled to equitable compensation for moral damage."<sup>77</sup> However, Montenegro<sup>78</sup> and Croatia<sup>79</sup> have incorporated the right to reputation of the legal person in their civil legal system.

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74. Interview with Kruna Savovic, Senior Associate, Zivkovic & Samardzic (Jan. 3, 2017 & Dec. 20, 2017).

75. Interview with Dusan Stojkovic, Partner, Stojkovic Law Office (Dec. 20, 2017).

76. Interview with Kruna Savovic, Senior Associate, Zivkovic & Samardzic (Jan. 3, 2017 & Dec. 20, 2017).

77. See Marija Karanikić Mirić, *Non-Pecuniary Loss in Serbian Tort Law: Time for a Change in Paradigm?*, 2 SEEEU CLUSTER OF EXCELLENCE IN EUR. & INT'L L. SERIES PAPERS 25 (2016).

78. *Zakon o obligacionim odnosima* [L. on Obligations] arts. 149, 151 & 207, Službeni List CG [Official Gazette of Montenegro] Aug. 7, 2008, No. 47/2008.

79. See Aldo Radolovic, *Pravo osobnosti u novom Zakonu o obveznim odnosima* [Right on Personality in the New Law on Obligations], 27 ZBORNIK PRAVNOG FAKULTETA SVEUČILIŠTA U RIJECI (Zb. Prav. Fak. Sveuč. Rij.) 129 (2006).

## V. CASE STUDIES: DEFAMATION

*A. The Defamatory Cases against Serbia at the European Court of Human Rights*

Although these are “regular” defamatory cases and not “weaponized defamation,” they provide a context for understanding the way national courts decide defamatory matters. It is often opposite from the ECHR case law in defamatory cases, especially when public figures are involved. This article presents three of the six<sup>80</sup> cases in which ECHR found that Serbia had violated someone’s freedom of expression, due to the respect of right to honor and reputation of others, as prescribed by Article 10 (2).

Local courts, especially the lower ones, had tended to decide that “the honour, reputation and dignity of ... [a public person]... had more significance than the honour, reputation and dignity of an ordinary citizen.”<sup>81</sup> This was stated by the Municipal Court and is the first case of a Serbian citizen taken to ECHR on the occasion of a breach of Article 10 (2) in infringing the right to honor and the reputation of others.<sup>82</sup> However, “the Court notes that [...] the target of the applicant's criticism was the mayor, himself a public figure, and the word “*sumanuto*” (“*insane*”) was obviously not used to describe the latter's mental state but rather to explain the manner in which he had allegedly been spending the money of the local taxpayers. [...] Although the applicant was unable to prove before the domestic courts that his other claims were true, even assuming that they were all statements of fact and, as such, susceptible to proof, he clearly had some reason to believe that the mayor might have been involved in criminal activity and, also, that his tenure was unlawful [...]. In any event, although the applicant's article contained some strong language, it was not a gratuitous personal attack and focused on issues of public interest rather than the mayor's private life, which transpired from the article's content, its overall tone as well as the context. [...] Finally, the reasoning of the criminal and civil courts, in ruling against the applicant, was thus “relevant” when they held that the reputation of the mayor had been affected.<sup>83</sup> Finally, in view of the above and especially bearing in mind the seriousness of the criminal sanctions involved, as well as the domestic courts' dubious reasoning to the

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80. These cases were selected from the HUDOC database, based on the criteria on cases from Serbia, related to Article 2, restriction of freedom of expression because of the respect of right to honor and reputation of others. Eur. Ct. of Hum. Rts., HUDOC, <https://hudoc.echr.coe.int/> (last visited Jan. 15, 2019).

81. Lepojic v. Serbia, App. No. 13909/05 Eur. Ct. H.R. art. 16 (2008).

82. *Id.*

83. *Id.* art. 77.

effect that the honor, reputation and dignity of the Mayor “had more significance than ... [the honor, reputation and dignity] ... of an ordinary citizen”<sup>84</sup> the ECHR found here that the interference was not necessary in a democratic society thus that there was a violation of Article 10 of the ECHR.

In the second case, after historian, J.P., was a guest on a Novi Sad television show, expressing controversial statements towards national minorities in the autonomous province Vojvodina, such as that “Slovaks, Romanians and above all Hungarians in Vojvodina were colonists,”<sup>85</sup> ... that “there are no Croats in Vojvodina, whereas the Hungarians are mainly Slavs because they have ‘such nice Slavic faces’,” his public appearance provoked the applicant, the journalists of the newspaper *Kikindske*, to write an article “The Floor is Given to the Fascist, J.P.” The *Zrenjanin Municipal Court*, had ruled “that describing someone as a ‘fascist’ was offensive, given the historical connotations of that expression, representing tragedy and evil.”<sup>86</sup> “The court fined the applicant 15,000 Serbian dinars (RSD), or approximately €162, and ordered him to pay J.P. another RSD 20,700 (approximately €225) to cover the costs of the proceedings.”<sup>87</sup> In addition, J.P. had initiated a civil procedure where he had filed “a civil claim for compensation for non-pecuniary damage – and that the domestic courts ordered the applicant to pay him compensation in the sum of RSD 50,000 (approximately €540).”<sup>88</sup> However, ECHR noted when it heard the case that “the applicant’s statements must be seen in context. The applicant had reacted to certain controversial statements made by J.P. on public television concerning the existence and the history of national minorities in Vojvodina, a multi-ethnic region, 35% of whose population was non-Serbian, according to the 2002 census. This large minority was made up mostly of Hungarians, but also of Slovaks, Croats and others.”<sup>89</sup> Responding to the Government’s claims that J.P. was not a public figure, but a historian, the Court stated that “even private individuals lay themselves open to public scrutiny when they enter the arena of public debate”<sup>90</sup> and therefore J.P. “must have been aware that he might be exposed to harsh criticism by a large audience” and where he should show “a greater degree of tolerance in this context.”<sup>91</sup>

In the third case of *Bodrozic and Vujin v. Serbia*,<sup>92</sup> one of the applicants (Bodrozic) was a journalist at *Kikindske*, a local newspaper in Vojvodina, while the second applicant was the editor of the page “Amusement,” publishing anagrams, jokes, a crossword and a horoscope. Bodrozic wrote “an article criticizing several criminal convictions he and

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84. *Id.* art. 78.

85. *See* Bodrozić v. Serbia, App. No. 32550/05 Eur. Ct. H.R. art. 7(2009).

86. *Id.* art. 17.

87. *Id.* art.16.

88. *Id.* art. 20.

89. *Id.* art. 52.

90. *Id.* art. 54.

91. *Id.*

92. *See* Bodrozić and Vujin v. Serbia, App. No. 38435/05 Eur. Ct. H.R.

another journalist had incurred for defamation. The article was entitled “They have not punished us much for what we are”<sup>93</sup> asking whether the judge D.K had punished them mildly and whether the lawyer S.K. had “deservedly ripped” them off.<sup>94</sup> At the same time, on the “Amusement” page a picture of a blonde woman in her underwear was published next to the text “JPICK and the manager were visited by a blonde the other day. On that occasion the blonde was whistled at by the workers who were not on strike. And she wasn’t even a lawyer...” while “on the left of the photograph, there was a small box containing three anagrams, the first of which was an anagram of S.K.’s name.”<sup>95</sup> S.K. claimed criminal offense – insult and the Kikinda Municipal Court convicted the applicants of it.<sup>96</sup> While the Government had claimed that the lawyer (S.K.) was not a public figure as he was not known outside the local area, the ECHR disagreed with this and stated that he was known to the population of Kikinda, and the newspapers were also local.<sup>97</sup> The Court did not find any “pressing social need” to restrict the applicant’s freedom of expression, thus finding a violation of Article 10 of the Convention.<sup>98</sup>

That common thread in these three cases is that a) the applicants are (investigative) journalists whose freedom of expression was restricted by domestic courts, under criminal charges; b) the ECHR found violations of Article 10.<sup>99</sup> In these cases, the ECHR rightly protected the right of journalists to criticize public figures in the interest of the public.

In the next part, cases are reviewed in which tabloid media used “*weaponized defamation*” against public figures, along with the legal and self-regulatory norms that were implemented.

### B. Instances of “*Weaponized Defamation*” in Serbia: *Cedomir Cupic v. TV Pink*

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93. See *Bodrožić and Vujin v. Serbia*, App. No. 38435/05, art. 7 Eur. Ct. H.R. (2009).

94. *Id.*

95. *Id.* art. 8.

96. *Id.* art. 9-10.

97. *Id.* art. 25.

98. *Id.* art. 43.

99. By December 30, 2017, Serbia had lost six cases in Strasbourg based on the claim of protection of the rights of others, as a permissible restriction of Article 10 (2). See *Bodrozić v. Serbia*, App. No. 32550/05 Eur. Ct. H.R. (2009); *Bodrozić and Vujin v. Serbia*, App. No. 38435/05 Eur. Ct. H.R. (2009); *Filipović v. Serbia*, App. No. 2793/05 Eur. Ct. H.R. (2007); *Lepojic v. Serbia*, App. No. 13909/05 Eur. Ct. H.R. (2006); *Stojanović v. Croatia*, App. No. 23160/09 Eur. Ct. H.R. (2013); *Tesic v. Serbia*, App. No. 50591/12 Eur. Ct. H.R. (2014).

One of the very first instances of “*weaponized defamation*” in Serbia involved Cedomir Cupic,<sup>100</sup> a professor at the faculty of Political Sciences and member of the Anticorruption body at the time he was attacked by Zeljko Mitrovic, the owner and editor-in-chief of TV Pink. It is also relevant to mention that Cupic had been a member of the OTPOR movement,<sup>101</sup> heavily involved in fighting for democratic change in Serbia during the 1990s, while Mitrovic was then a member of the political party “JUL”<sup>102</sup> led by Mirjana Markovic, the wife of the former president of Serbia, Slobodan Milosevic. After the appointment of Cupic to the Anticorruption body, he stated in interviews that the first priority should be the Lustration Law, as well as taking down illegally built buildings in Belgrade, some of which belonging to ordinary citizens had been brought down, while those of the wealthy Karic family<sup>103</sup> and of TV Pink were never mentioned or touched.<sup>104</sup> For these reasons, Cupic named those buildings as examples of selective implementation of the law, in an unauthorized interview given to the newspaper “*Gradjanski list*” (*Citizens’ Newspaper*).<sup>105</sup> On February 16-17, 2002, the newspapers published an interview with him under the title “*Illegal construction of TV Pink and palaces of Karic family should be destroyed as an example to citizens.*”<sup>106</sup> The main evening news of the public service broadcaster RTS transmitted extracts from the interview, with a picture of the TV Pink building, shots of a meeting of the Minister of Culture with Mitrovic, the owner of TV Pink, as well as the fences outside the Karic palaces.<sup>107</sup>

The same evening, TV Pink broadcast a very personal open letter written by Mitrovic to Cupic in which he strongly condemned the allegations that the TV Pink building was illegal and accused Cupic of

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100. Cupic, in his book, presents a precise chronological archive of all events, broadcasting, publishing, etc that were related to the media campaign TV Pink held against him, as well as the newspaper articles of support by various groups and individuals and copies of court decisions. See Cedomir Cupic, *Medijska etika i medijski linč* [MEDIA ETHICS AND MEDIA LYNCH] 83-360 (2010).

101. For information regarding the OTPOR movement see Lester Kurtz, *Otpor and the Struggle for Democracy in Serbia 1998-2000*, INT’L. CTR. ON NONVIOLENT CONFLICT (Feb. 2010), <https://www.nonviolent-conflict.org/otpor-and-the-struggle-for-democracy-in-serbia-1998-2000>.

102. See Jelena Grujic, *Zeljko Mitrovic – owner of RTV Pink*, VREME BR 582 (Feb. 28, 2002), <http://www.vreme.com/cms/view.php?id=308803> (last visited Jan. 15, 2019).

103. A wealthy family in Serbia See *Net Worth Leaks*, NETWORKLEAKS.COM, <https://www.networkleaks.com/bogoljub-karic> (last visited Jan. 16, 2019).

104. Cupic, *supra* note 100, at 91.

105. *Id.* at 92.

106. *Id.* at 92.

107. *Id.* at 94.

being “in a destructive mode” regarding the TV Pink building. The open letter was read almost every hour for 26 hours<sup>108</sup> and Cupic received numerous calls from worried friends and colleagues. Afterwards, the Anticorruption Council responded on February 22, 2002,<sup>109</sup> stating that “every citizen has a right to freely and publicly express themselves about issues of general interest.” Cupic had used that right, they added. Further, the Council called on TV Pink to “stop abusing its media power for a personal clash with Professor Cupic”<sup>110</sup> and to stop its media attacks. The Anticorruption Council reaction triggered even stronger response from Zeljko Mitrovic, so he wrote a new open letter that was read as the first news (lasting six minutes) every hour on TV Pink from February 23-24, 2002. In that letter, many issues were raised related to the honor and reputation of Cupic (whether he was fulfilling the conditions to become an associate professor, his income, housing) as though “offering material evidence” of Cupic’s corruption.<sup>111</sup> That letter triggered responses from the academic community, various associations, students and professors in independent media,<sup>112</sup> public figures,<sup>113</sup> journalists<sup>114</sup> and private citizens.<sup>115</sup> Cupic filed a complaint against Mitrovic for defamation, which was at that time a criminal offence, on April 11, 2002.<sup>116</sup> On December 6, 2004, in an oral hearing the Court decided that Mitrovic was guilty of insult.<sup>117</sup> Later, on June 8, 2005, the court delivered a written decision<sup>118</sup> in which it held the criminal offence was an “Insult” and prescribed the fine. After appeals filed by both sides,<sup>119</sup> the District court rejected both complaints and affirmed the Decision of the Second Basic Court in Belgrade K. No. 851/02 from December 6, 2004 that the appellant Mitrovic Zeljko was found guilty of the criminal act of insult under Article 93, Para 2 and was fined 30,000 RSD, in addition to covering court expenses.<sup>120</sup>

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108. *Id.* at 98-100.

109. *Id.* at 103-104.

110. *Id.*

111. Cupic, *supra* note 100, at 105-107.

112. *Id.* at 127-135.

113. *Id.* at 137-150.

114. *Id.* at 150-168.

115. *Id.* at 169-174.

116. *Id.* at 183.

117. *Id.* at 212.

118. Presudu [Decision], XI K. No. 851/02 Drugi osnovni sud u Beogradu [District Ct. in Belgrade] (2005) (Serb.); *see also* Cupic, *supra* note 100, at 215-231.

119. Zalba Privatnog Tuzioca [Appeal from a Private Prosecutor], XI K. No. 851/02 Drugom Opstinskom Sudu u Beogradu [Second District Ct. in Belgrade] (2002) (Serb.) (complaint); *see also* Cupic, *supra* note 100, at 232-241.

120. Пресудч [Judgement], Kz. No. 2274/2005 Drugom Opstinskom Sudu u Beogradu [Second District Ct. in Belgrade] (Serb.).

This case marks the beginnings of the open letters written by Zeljko Mitrovic under the same scenario: open letters were read hour by hour, day by day on his television station.

*C. Dragan Djilas v. TV Pink*

On June 19, 2013, then-mayor of Belgrade Dragan Djilas filed a complaint to the then-Republican Broadcasting Agency<sup>121</sup> related to the content of TV Pink's informative program. In the complaint, Djilas stated that "TV Pink was, contrary to professional standards, using a national frequency for personal battles." The broadcaster declared that the complaint was untrue overall and unfounded, without stating which parts of the complaint were not true. The broadcaster also declared that Dragan Djilas had been given the opportunity to present his arguments, but had declined the offer.<sup>122</sup>

On August 7, 2013, the Agency issued a warning to the broadcaster, Pink International Company, (TV Pink) based on TV Pink's abuse of a national frequency on several occasions, one of which was the filed complaint by Dragan Djilas and two others that the Agency enacted "*ex officio*."<sup>123</sup>

The first warning stated that the editor-in-chief of TV Pink had run "illegitimate broadcasts of unilateral attacks on the personality of and led a long-lasting campaign" against Dragan Djilas for 8 days (between June 11-25, 2013).<sup>124</sup> The open letter had been written by Zeljko Mitrovic, owner and editor-in-chief and had been read by a speaker during the "National News" program several times each day. The letter was between three and four minutes long and there was no information about any response by the other side (Mr. Djilas's). The letters were written in a very defamatory way, accusing the mayor of being involved in many possibly corrupt transactions, without offering proof of that, such as that the mayor had stolen from other citizens, including his wife and children and abused public funds.<sup>125</sup>

The next warning concerned a letter written by Mitrovic and addressed to Veselin Simonovic, then-editor of *Blic* newspaper, regarding his so-

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121. The organization is now referred to as The Regulatory Agency for Electronic Media. See REGULATORY AGENCY FOR ELECTRONIC MEDIA, <http://www.rirm.org/en/rem-regulatory-authority-of-electronic-media-2/> (last visited Jan. 16, 2019).

122. Решење [Decision], Републичке агенције за радиодифузије [Republican Broadcasting Agency] 7, 12-13.

123. *Id.* at 12-13.

124. *Id.* at 1-3.

125. *Id.* at 9-10.

called relationship with Dragan Djilas. It was read over the period of July 23-26, 2013, repeating the strategies of a long-lasting campaign. Mitrovic asked Simonovic why he “neighed like a horse” instead of speaking the truth about Djilas, also citing an alleged Facebook group that called upon *Blic* newspapers to change its name to “Smelly papers” (“*Smrdljive novine*”).<sup>126</sup>

The third warning came after strong protest by the Independent Journalist’s Association of Serbia (IJAS), where IJAS called on the Regulator to respond to the campaign run by TV Pink and its misuse of the national frequency by insulting Simonovic, editor of the *Blic* newspaper.<sup>127</sup> Mitrovic’s third campaign, this time against IJAS had started on July 25, 2013. In this case, the TV Pink news speaker read a new open letter of an offensive nature from Mitrovic, this time referring to IJAS, which was followed by a picture on the screen in which Simonovic was drawn as a horse with a sign around its neck with the name “Blic” on it, while Dragan Djilas was riding the horse, surrounded by lots of money.<sup>128</sup>

The Regulator found that the Code of Conduct for Broadcasters was breached in all three cases of the long-lasting campaigns against Mayor, the editor of *Blic* newspapers and IJAS. In its conclusions, the agency found breaches of provisions on impartiality of reporting<sup>129</sup> and on the right to hear the other side,<sup>130</sup> while in the third case where TV Pink broadcasted an open letter to IJAS, the REM found the use of extremist and defamatory

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<sup>126</sup> *Id.* at 11.

<sup>127</sup> *Id.* at 10-11.

<sup>128</sup> *Id.* at 12.

<sup>129</sup> “Impartiality: Broadcasters have a right to their own editorial policy, with respect to minimal lack of bias in reporting. Minimal fairness means that broadcasters should identify a clear difference between facts and someone’s attitude, opinion or comment. The broadcaster needs to make sure that personal belief and opinion and that of the journalists cannot influence the choice of a topic or the way it is presented in any discriminatory way. It is not permitted to manipulate with statements, press releases... with the aim to change an original meaning [...]. This instruction does not refer to the classical editing of a picture or a tone, but to the manipulation of a picture, tone and content that twists the basic meaning of the report.” See ОПШТЕ ОБАВЕЗУЈУЋЕ УПУТСТВО ОПОНАШАЊУ ЕМИТЕРА (КОДЕКС ПОНАШАЊА ЕМИТЕРА) [*General Binding Instruction on the Behavior of Broadcasters (Code of Conduct for Broadcasters)*], Републичке радиодифузне агенције [REGULATORY AGENCY FOR ELECTRONIC MEDIA] art. 2.3, [http://rem.rs/uploads/files/Obavezujuca\\_uputstva/3951-Opste-obavezujuca-upustva-rra.pdf](http://rem.rs/uploads/files/Obavezujuca_uputstva/3951-Opste-obavezujuca-upustva-rra.pdf).

<sup>130</sup> “The right to hear the other side: When reporting on debates that include conflict of any kind, the broadcaster is obliged to offer the opportunity to all parties to participate in a debate in an equal way. It is not permitted to launch unilateral attacks on a personality nor run long-lasting or repeated campaigns against persons, groups or institutions without any new, relevant details, that would justify long or repeated reporting on the same phenomenon, event, institution or person.” *Id.* art. 2.8.



speech<sup>131</sup> and issued a further warning (*upozorenje*) to TV Pink.<sup>132</sup> The warning was issued (as a higher measure) and took into consideration that on October 29, 2009, the first notice (*opomena*) had been sent to TV Pink for breach of the Broadcasting law<sup>133</sup> so the higher measure could be applied on them this time. In addition, TV Pink was made to broadcast the REM Decision on its program.<sup>134</sup> In its final decision,<sup>135</sup> the Broadcasting Agency had also concluded that it was “legitimate to criticize someone’s work especially if that person was working in the public interest (as a mayor does). The Agency stressed that the duty of journalists is to criticize public figures, but in a serious way, while long-lasting campaigns against persons, without allowing them to participate in the debate, was not permitted.<sup>136</sup>

The mayor of Belgrade was dismissed from his position on September 24, 2013, which may indicate that the campaign helped his opponents meet their goal.<sup>137</sup>

#### D. *Sreten Ugricic v. Pres newspapers*

On January 11, 2012, Andrej Nikolaidis<sup>138</sup> published an article on the “Analitika” web site titled “What is Left of Greater Serbia” (“*Šta je ostalo od velike Srbije?*”)<sup>139</sup> where he called the 20<sup>th</sup> year celebration of *Republika Srpska* “a celebration of what was created from the crimes committed at the

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131. “Extremism and Defamatory Speech: Broadcasters shall suppress extremism and insult in their program, either in the speech of the host of the program or the expression of the guests.” *Id.* art. 10.2.

132. *Id.*

133. Решење [Decision], Републичке агенције за радиодифузије [Republican Broadcasting Agency], *supra* note 122 at 22.

134. *Id.*

135. *Id.* at 1.

136. *Id.* at 19.

137. Ever since the Democratic party lost the national elections, the current ruling (Progressive Party of Serbia – SNS) had also tried to win elections in the capital, Belgrade. After a long-lasting campaign in various media, of which the case of TV Pink is presented here, the mayor was discharged from office. See *Councilors Vote to Remove Belgrade Mayor From Office*, B92 (Sept. 24, 2013, 4:56 PM), [https://www.b92.net/eng/news/politics.php?yyyy=2013&mm=09&dd=24&nav\\_id=87773](https://www.b92.net/eng/news/politics.php?yyyy=2013&mm=09&dd=24&nav_id=87773).

138. Nemanja Cabric, *Serbia Library Chief Purged for ‘Backing Terrorism*, BALKAN INSIGHT, (Jan. 23, 2012), <http://www.balkaninsight.com/en/article/analysis>.

139. Iva Martinovic, *Medijska hajka na Nikolaidisa u Srbiji* [*Media hue (hajka) of Nikolaidis in Serbia*], RADIO SLOBODNA EVROPA [RADIO FREE EUROPE], (Jan. 18, 2012) [https://www.slobodnaevropa.org/a/beograd\\_uputio\\_demars\\_podgorici\\_zbog\\_nikolaidisa/24455727.html](https://www.slobodnaevropa.org/a/beograd_uputio_demars_podgorici_zbog_nikolaidisa/24455727.html) (last accessed on Jan. 16, 2019).

Hague Tribunal”<sup>140</sup> and continued that "it would have been a civilized step forward if the dynamite and rifles, previously brought into the room “Borik,”<sup>141</sup> were used there.”<sup>142</sup> This column triggered a huge debate in both Serbia and Montenegro about whether the article was a real call for a breach of national security or whether it was just the writer’s opinion. As Nikolaidis was, at the time, the advisor to the president of the Montenegrin Parliament, the Government of Serbia filed a diplomatic protest note to the Ministry of Foreign Affairs of Montenegro.<sup>143</sup> The diplomatic conflict and public attack on Nikolaidis, triggered the Forum of Writers of Serbia to file a petition in which the freedom of expression of Nikolaidis was supported.<sup>144</sup> The petition was publicly announced and one of those who signed it was Sreten Ugrić, Manager of the National Library of Serbia.

Ugrić’s signature of the petition generated wide national interest and a new media outcry. One of the titles was “The Manager of the National Library of Serbia has supported the assassination of Tadić,”<sup>145</sup> published by the newspaper *Press*<sup>146</sup> on February 19, 2012 in both its print and internet edition. Ugrić had filed a complaint to the Press Council claiming that he had clarified to journalists that all of his answers were to be published “without any shortages or interventions, including the statement that, of course, he did not support any anti-Serbian viewpoints, which unfortunately was not published.”<sup>147</sup> On behalf of the newspapers, the response was sent by Veljko Lalić, editor of *Press* and Branko Miljusić, the director general of the *Press Publishing Group*. Lalić, in his response, stated that he had not implicated by name that Ugrić was a terrorist, adding that the manager of the National Library should “promote Ivo Andrić<sup>148</sup> and Njegoš<sup>149</sup> and not

140. See *International Criminal Tribunal for the Former Yugoslavia 1993-2017*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, <http://www.icty.org> (last accessed on Jan. 16, 2019).

141. The hall where the celebration was held.

142. *Id.*

143. Beta, *Demarš Srbije zbog Nikolaidisa* [Serbia Protests Because Of Nikolaidis], B92 (Jan. 18, 2012, 1:36 PM), [https://www.b92.net/info/vesti/index.php?yyyy=2012&mm=01&dd=18&nav\\_category=167&nav\\_id=574826](https://www.b92.net/info/vesti/index.php?yyyy=2012&mm=01&dd=18&nav_category=167&nav_id=574826).

144. *Proglas javnosti* [Public Proclamation], PESCANIK (Jan. 17, 2012), <http://pescanik.net/proglas-javnosti>.

145. President of the Republic of Serbia at the time of publication. The article is no longer available for scholarly review. See Tanjug, *National Library Director Supports Terror*, B92 (Jan. 19, 2012, 7:14 PM), [https://www.b92.net/eng/news/politics.php?yyyy=2012&mm=01&dd=19&nav\\_id=78367](https://www.b92.net/eng/news/politics.php?yyyy=2012&mm=01&dd=19&nav_id=78367).

146. *Id.*

147. Sreten Ugrić protiv dnevnog lista „Pres” [Sreten Ugrić v Daily Newspapers “Pres”], Савету за штампу [Press Council], 1 (2012) (Serb.).

148. *Id.* at 2.

149. *Id.*

Andrej Nikolaidis,<sup>150</sup> who calls upon the assassination of the highest public figures.<sup>151</sup> Branko Miljus, in his response, said that *Press* found “their professional obligation to be to inform the public about the activities of both the governments of Serbia and of Montenegro, as well as of their state servants, as related to the text of Andrej Nikolaidic. He stressed that the title itself was supposed to provoke the responsibility of state servants (in which it succeeded), and to lead to the dismissal of the manager of the National Library of Serbia, which also happened in the end.”<sup>152</sup> The Press Council reached its decision on Ugricic’s complaint anonymously, stating that the newspaper *Press* had breached the Journalists’ Code of Ethics, Chapter I, point 2 and Chapter II, point 1 that prescribe that there should be “the clear distinction between the facts they transmit and comments, assumptions and speculations”<sup>153</sup> and that the “title of the text must not be in contradiction with the essence of the text.”<sup>154</sup> The Commission for Appeals found that the title which stated that Ugricic supported the assassination of the president, without mentioning the assassination in the text itself, had “breached the cornerstone of the Code of Ethics that refers to truth in reporting”<sup>155</sup> and obliged the newspaper *Press* to publish that decision.

On January 20, 2017, Ugricic was dismissed from the position of manager of the National Library of Serbia, in an urgent Government session (held by phone), as initiated by the Minister of Interior and Minister of Culture.<sup>156</sup> The Forum of Writers reacted again with a public petition that was signed by more than a thousand people (writers, artists, university professors and others) in less than 24 hours,<sup>157</sup> asking the government to

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150. *Id.*

151. Сретен Угричић против дневног листа „Прес” [Sreten Ugricic v Daily Newspapers “Pres”], Одговор Вељка Лалића, главног уредника Преса [Response of Veljko Lalic], Савету за штампу [Press Council], 1, 2 (2012) (Serb.).

152. Сретен Угричић против дневног листа „Прес” [Sreten Ugricic v Daily Newspapers “Pres”], Одговор Бранка Миљуша, генералног директора „Press Publishing Group” [Response of Branko Milijus], Савету за штампу [Press Council], 1, 3 (2012) (Serb.).

153. Сретен Угричић против дневног листа „Прес” [Sreten Ugricic v Daily Newspapers “Pres”], ОДЈУКУ [Decision], Савету за штампу [Press Council], 1, 4 (2012) (Serb.).

154. *Id.*

155. *Id.* at 5.

156. *Smenjen Sreten Ugričić* [Smenjen Sreten was Replaced], PEŠCANIK.NET (Jan. 21, 2012), <https://pescanik.net/smenjen-sreten-ugricic/>; *Smenjen Sreten Ugričić: Beograd – Sreten Ugričić je smenjen s mesta upravnika Narodne biblioteke Srbije na telefonskoj sednici Vlade Srbije, saznaje B92*, [Sreten Ugričić was Replaced Belgrade - Sreten Ugricic was removed from the headquarters of the head of the National Library of Serbia on a phone session of the Government of Serbia] B92 (Jan. 20, 2012), [https://www.b92.net/info/vesti/index.php?yyyy=2012&mm=01&dd=20&nav\\_id=575568](https://www.b92.net/info/vesti/index.php?yyyy=2012&mm=01&dd=20&nav_id=575568) (Serb.).

157. Forum of Writers, *1001 signatures of the Petition*, PESCANIK (Jan. 24, 2012), <http://pescanik.net/potpisite-peticiju>.

withdraw the dismissal on the grounds that the Constitution prescribes that “no one can bear consequences for signing a petition, unless a criminal act is committed from that.”<sup>158</sup> The Petition was calling the Constitutional court to react. However, that call did not have any impact on the final government decision.

The *Ugricic* case triggered a great deal of public debate among Serbian intellectuals and has raised to a higher level the examination of permissible restrictions to freedom of expression. Two law professors, Vesna Rakic-Vodinelic and Zoran Ivošević, both human rights activists, have used this case to exchange their views in the weekly magazine *Vreme*.<sup>159</sup> The subject of the debate were two issues: whether Ugricic had a right to freedom of expression as a writer, even while serving public office; and whether he should have freedom of expression even if others disagree with him.

First, Ivošević<sup>160</sup> explained that Sreten Ugricic had been a public figure, and not a public servant, as the government of the Republic of Serbia had appointed him to that higher position. Ivošević pointed out that the differentiation was important as “public figures are less protected in the media.”<sup>161</sup> He added that the narrowing of freedom of expression of public figures is prescribed by the Law on Public Information, the Journalistic Code of Ethics and many European media standards, including ECHR decisions. “Another aspect of the importance of the public function that Sreten Ugricic had, was that Ugricic, from the moment he was appointed manager of the National Library, “could not *divide* into writer and public figure as his integrated body was exposed to the public.”<sup>162</sup>

Rakic-Vodinelic responded in the next issue of *Vreme* asking “whether it is accurate that within the legal system a public figure cannot be divided personality to ‘public’ and ‘professional’?”<sup>163</sup> Rakic-Vodinelic recalled the *Wille v. Liechtenstein* case.<sup>164</sup> She asserted that in the *Ugricic* case the court could apply the same standard – that he had a right to freedom of

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158. Forum Pisaca, *Zahtev Foruma pisaca* [The Writers Forum Request], PEŠČANIK.NET (Jan. 23, 2012) (quoting CONSTITUTION OF THE REPUBLIC OF SERBIA Sept. 29, 2006, art. 56, ¶ 3), <https://pescanik.net/zahtev-foruma-pisaca>.

159. See ZORAN IVOŠEVIĆ, PRAVNI(ČKI) POGLED NA SLUČAJ UGRIČIĆ, *Vreme* (Feb. 2, 2012), <https://www.vreme.com/cms/view.php?id=1032828>; Vesna Rakić-Vodinelic, Još jedan pravnički pogled – “Slučaj Ugričić,” *VREME* (Feb. 9, 2012), <https://www.vreme.com/cms/view.php?id=1034169>.

160. Former Supreme Court Judge.

161. IVOŠEVIĆ, *supra* note 159.

162. *Id.*

163. Rakić-Vodinelic, *supra* note 159.

164. *Wille v. Liechtenstein*, 1999-VII Eur. Ct. H.R. 1.

expression as a writer, which is his profession, did not necessarily align with his public function.<sup>165</sup>

In the following issue of *Vreme*, Ivosevic pointed out that he didn't want to analyze the right of Ugricic to freedom of expression as a writer or as a public figure, but that he was questioning whether the freedom of expression was permissibly restricted or not. Therefore, he was dealing with the *content* of the text, considering that "whoever, through public speech, jeopardizes its values, is not furthering the hygiene of freedom of expression, but its pathology." Ivosevic added that "the freedom [of expression] cannot be more important than the right to life and health, the right to physical and psychological integrity, moral, national security and the safety of citizens."<sup>166</sup> Finally, his standpoint was that "whoever (ab)uses freedom of expression above its permissible borders is not deserving of a public function, whatever his profession is outside of that function. Therefore, Ugricic cannot, in the opinion of Ivosevic, be at the same time writer and public figure."<sup>167</sup>

In her final response in the exchange, Vesna Rakic-Vodinelic reminded that Ugricic was dismissed for "expressing his opinion as an individual and not a public figure. He had signed the Appeal of the Forum of Writers, which did not call for violence, but for the right of Andrej Nikolaidis to speak freely. Rakic-Vodinelic sees a parallel between the *Wille* case and the case of Ugricic only in so far as both Wille and Ugricic "should bear legal responsibility for opinions expressed publicly, not as public figures, but rather as professionals."<sup>168</sup> In her conclusion, Rakic Vodinelic reminds that in order to restrict someone's freedom of expression the principles of legality, legitimacy, proportionality and the necessity of restriction must be considered and that all of these should be simultaneously fulfilled.

#### E. *Veran Matic v. Informer Newspapers*

In the period from August 2014 until May 2015 the newspaper *Informer* held a long-term campaign against Veran Matic, editor of the Informative Programme of Broadcasting Company B92 and one of the minor stakeholders of that company. As a result of these negative texts, Matic pressed charges against the "Insajder Tim company", its publisher, and Dragan Vucicevic, editor of the "independent daily newspaper *Informer*". After its main session was held, the Higher Court in Belgrade

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165. Rakić-Vodinečić, *supra* note 159.

166. Rakić-Vodinečić, *supra* note 159 at 32.

167. *Id.*

168. *Id.*

reached the verdict that Veran Matic’s complaint was justified and that Insajder and Vucicevic were obliged to pay RSD 250,000 (approximately €2,000) to Matic for breach of his honor and reputation.<sup>169</sup>

In his complaint, Matic said that ever since the *Informer* was founded in 2012, he had been a target, always in a negative context. The false information was always presented as factual information received by an anonymous source. Matic stated that such writings influenced his feelings, resulted in the creation of certain stereotypes in the wider public about him that could lead to the permanent damage of his reputation due to the very high circulation of the *Informer*.<sup>170</sup> In addition, such a negative public image threatened the charity, Fund B92, which depended on the high contributions of donors. Finally, the descriptions made Matic look as if he had grown rich with money earned in unsavory ways, potentially adding to the insecurity he and his family already faced, having had permanent police security since 2011.<sup>171</sup> The following texts were the subject of Matic’s complaints:

The first was published on August 4, 2014 when the *Informer* claimed that Matic intended to become the new director of the Public Service Broadcaster – RTS, which was a statement that came immediately after the sudden death of the long-time director Aleksandar Tijanic (who died of a heart attack). The headline read, “Hit: Matic elected himself as the boss of RTS,” with the subtitles, “Veran Matic uses all of his connections in the EU and media” and “Tijanic is turning over in his grave.” The article itself said that Matic was “asking his connections in the EU to lobby for his election and he was so sure of his new position that had already announced it to his colleagues.”<sup>172</sup> Further on, the text claims that Matic had already had talks with then-Prime Minister Vucic “with whom he shares the same view on the future of public service.”<sup>173</sup>

The second text on September 19, 2014 announced the alleged dismissal of Veran Matic from his position, due to the (forthcoming) privatization of B92. The title was “Veran fired from B92.” The text says that “as we have found out, Greek owners of this TV were very unsatisfied with the critique expressed by Matic with respect to the editorial and business policy of this company and they intend to make him redundant. In accordance to our sources, the management of the television station has

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169. пресуду [The Verditct], 6 P.Z. Виши суду београду [Higher Ct. Belgrade] 2017, No. 50/15, 1, 1 (Serb.).

170. *Id.* at 2.

171. *Id.*

172. пресуду [The Verditct], 6 P.Z. Виши суду београду [Higher Ct. Belgrade] 2017, No. 50/15, 1, 2-3, 10 (Serb.).

173. *Id.* at 3.

decided to fire Matic as they believe that he has exceeded his authority. Matic will continue to be one of the co-owners of B92 but will have to receive a salary at another place.”<sup>174</sup>

The next text published on December 2, 2014 speculated on the value of Matic’s share in B92, his managerial contract and his high severance pay. The title was “Veran has a golden parachute worth €3,100,000” with the subtitle “Rich Man Journalist” next to his picture, along with other sensationalistic titles. The purpose of the text, in Matic’s explanation, was “to create the inaccurate picture of him as someone who has become rich in a questionable way, which in one way hurts his reputation and creates damage, but on the other hand seriously endangers his security.”<sup>175</sup>

On January 27, 2015 the *Informer* published the information that Matic didn’t want the position at RTS, with the title “*Veran promises: I will not go to RTS.*” Further on, under his picture a quotation states, “I won’t. I swear, Mom” (“*Necu, mame mi*”), a Serbian expression that indicates saying “no” when meaning “yes.”<sup>176</sup>

On May 25, 2015 the newspaper stated that Tasovac (Minister of Culture at the time) had given Matic RSD 3,880,000 (approximately €35,000) presenting it as though Matic had received that money personally and not explaining that it had been given to Fund B92 as a regular tender by the Ministry of Culture.

On May 27, 2015 the newspaper published a new title “How our money is distributed – Veran Matic’s ANEM gets RSD 9,710,00,” (approximately €80,000).

In his court arguments, Veran Matic stated that “the intention of the *Informer* was to falsely present him in public, with a confirmed intention to create various affairs against the plaintiff that have lasted for years, and this was just one of them.”<sup>177</sup> Matic added that even when the newspapers published his reply, it was done in a nearly invisible way or, for example, instead of stating that he didn’t want the position, that information was only communicated through comments next to his photo that said, “I won’t. I swear, Mom,” by which his response was neutralized and the purpose of it lost.<sup>178</sup> Regarding the Association of Independent Electronic Media (ANEM), Matic explained that ANEM “was established in 1993 and that he was its first president until 2004, after which he hadn’t held any position in

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174. *Id.*

175. *Id.* at 4.

176. *Id.*, at 4, 10.

177. *Id.* at 5.

178. *Id.* at 5.

the organization.”<sup>179</sup> Matic added that he had never had any intention to become the director of RTS, nor had he spoken to the prime minister about that position nor had he lost his position at B92, “even four months after the fake text in the *Informer*.”

Informer denied that the texts published created the atmosphere of a lynching [...] as well as that the texts seriously disturbed Matic and his family, friends and colleagues. Ironically, Informer used Matic’s argument that he had been a target from the beginning of their work to say that in its defense: such texts had been published since 2012, and the prosecutor reacted to it only on February 4, 2015.<sup>180</sup> This statement shows that Informer was fully aware of its actions.<sup>181</sup> Further on, Informer, answered that there was nothing controversial in those articles as they all “deal with events and persons about which the public has a justified interest to know and that part of the disputable content presents value judgments.”<sup>182</sup> Informer added that the text published on September 20, 2014 was an opinion column and not a journalistic article.<sup>183</sup>

At the higher-level trial, the Court of Appeals stressed that, “in accordance with Article 10 of the European Convention on Human Rights and the Journalist’s Code of Ethics, the conclusion of the Supreme Court related to the text from September 20, 2014 (e.g. “Did you sell B92?”) [...] for which the defendant claimed that it was an opinion column and not news, the Court of Appeals disagreed and found that it transmitted untrue information about the plaintiff, while the context in which the statements were made confirmed the ill intention of the journalist, as well as jeopardizing the plaintiff’s credibility as a public figure, a long-term journalist and editor, thus this text had breached the plaintiff’s mental pain and hurt his honor and reputation.”<sup>184</sup>

The Court of Appeals confirmed the Higher Court Decision P. No. 50/15 from February 2, 2017, except in the part regarding the amount of compensation for non-pecuniary damage. There, the defendant was required to pay RSD100,000 (approximately €830), while another RSD 150,000 requested by the plaintiff and assigned by the Higher Court was denied as

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179. *Id.* at 6.

180. *Id.* at 6.

181. B92, *Urednik Informera izgubio sudski process protiv Matica* [*Informer’s Editor Lost the Court Procrss Against Matic*], B92 (Aug. 10, 2017, 3:21 PM), [https://www.b92.net/info/vesti/index.php?yyyy=2017&mm=08&dd=10&nav\\_category=12&nav\\_id=1291886](https://www.b92.net/info/vesti/index.php?yyyy=2017&mm=08&dd=10&nav_category=12&nav_id=1291886) (last accessed on Jan. 16, 2019).

182. пресуду [The Verdict], 6 P.Z. Виши суду београду [Higher Ct. Belgrade] 2017, No. 50/15, 1, 6 (Serb.).

183. *Id.*

184. *Id.* at 3.



the Court obliged Vucicevic, in accordance to Article 120 of the Law on Public Information, to publish its judgment in the second next issue of the newspaper, at the latest, in both its print and electronic editions.<sup>185</sup> The defendant was also required to pay RSD 86,000 for the costs of the civil trial.<sup>186</sup>

This case is important as here the Court of Appeals acknowledged not only the legal norms, Article 10 of the ECtHR, the Law on Public Information, and the Obligation Law, but also the ethical norms of the Journalistic Code of Ethics, stating that “the obligation of journalists is to publish accurate, objective, complete information, without delay, about events of public importance, respecting the right of the public to know the truth and the basic standards of the journalist’s profession.”<sup>187</sup> This sentence is of extreme importance as it acknowledges the standards of the journalistic profession as valuable to the final decision. Also, this was a rare occasion when the newspaper implemented the court order and published the court decision on its web site.<sup>188</sup>

## VI. CONCLUSION

As seen, “weaponized defamation” has a tendency to seriously impact the defamed person’s life with a number of negative consequences: dismissal from a job, problems with the perception of the general public, the loss of the reputation of a company and finally – life threats. Although there is a solid legal framework on the both international and national level (for Serbia), the enforcement of such laws and the satisfaction of the victim of defamation is an issue. The question that attorney Stojkovic asked was - is the current financial sanction enough for tabloid media to refrain from defaming a person? On the other hand – is a public announcement of a lost court case or an apology enough satisfaction for a person who has been a victim of weaponized defamation? How can a person “gain back” his or her life that is ruined in some part and what if that is not possible at all? Ever? Despite the public support of “*right-thinking*” members of public? What if someone’s mental condition has been seriously damaged due to the stress involved? Or if he/she is recognized by a wider population and has to live with negative shouting on the street on a daily basis or threats via social

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185. *Id.* at 8.

186. *Id.* at 1-2.

187. *Id.* at 4.

188. Apelacioni Sud u Beogradu: Presuda [*Court of Appeals in Belgrade: Decision*], NEZAVISNE DNEVNE NOVINE INFORMER (Nov. 10, 2017, 1:35 PM), <http://informer.rs/vesti/drustvo/356522/apelacioni-sud-u-beogradu-presuda> (last accessed on Jan. 16, 2019).

networks, caused by the stereotypes from the tabloid media? How can a decision on the breach of defamatory legislation reinstall someone’s life? And what if it won’t? These are questions to which there are no answers, yet.

The author, as a media lawyer, is aware of all the downsides of strict regulation of defamation, either as a criminal offence or as civil offence with very high fines. Such a legal definition can have a significantly negative impact on the daily work of journalists and their possible self-censorship. On the other hand, the reality is that in Europe and in Serbia there are no proper legal solutions for the type of *weaponized defamation* that could seriously ruin someone’s life.

One of the solutions may be keeping the regulation of defamation within civil laws, but prescribing much stronger sanctions for *weaponized defamation* with safeguards to prevent abuse by public authorities against media freedom. This is certainly a serious challenge both for international organizations to offer a new model as well as for the individual countries to implement it.

Until then, self-regulatory mechanisms should continue to be supported, such as the Press Council, although it has only moral and no legal powers. Still, it offers the fastest satisfaction to the victim of defamation by, at least, saying that (tabloid) media have breached professional and ethical norms. The new practice of Serbian courts to cite the Journalist’s Code of Ethics is also an important step forward in deciding media law cases, as the courts do not depend on the media’s explanation of the issue, but are able to conclude for themselves.

Finally, pure satisfaction after winning a court case is not enough. Proper enforcement of court decisions is an important element in the fight against the “*weapon*” discussed.

# JOURNAL OF INTERNATIONAL MEDIA & ENTERTAINMENT LAW

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