Washington University Law Review

Volume 96 | Issue 2

2018

Protecting the Democratic Role of the Press: A Legal Solution to Fake News

Andrea Butler

PROTECTING THE DEMOCRATIC ROLE OF THE PRESS: A LEGAL SOLUTION TO FAKE NEWS

INTRODUCTION

It is difficult to discuss the 2016 presidential election without including the impact of fake news[1] in the conversation, and most commentators deplore the effect of fake news' proliferation across the internet on American politics and the public.[2] These conversations have centered on the impact fake news had on the presidential election,[3] as well as concerns that the general public is unable to identify fake news.[4] There have even been more immediately dangerous consequences stemming from fake news, such as a gunman showing up to a D.C. pizzeria to liberate children he believed Hillary Clinton was holding hostage there based on a widely-circulated fake news article.[5] Fake news has been shared widely on social media platforms, primarily Facebook, and these platforms' failure to contain the spread of blatantly false articles has exacerbated these problems.[6]

Fake news is a social problem threatening the public's ability to trust legitimate press outlets[7] and, ultimately, the ability of the press to serve its role in preserving our democracy.[8] Many commentators so far have focused on social solutions to fake news, such as better education for citizens to recognize fake news online, to the exclusion of legal solutions.[9] But the

1. Throughout this article, the term "fake news" refers to false political news stories posted to social media sites that the authors know are false and are specifically intended to mislead readers.

2. *See, e.g.*, Kurt Andersen, *How America Lost Its Mind*, THE ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/how-america-lost-its-mind/534231/ [https://perma.cc/CA5Q-ENPA].

3. Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 212 (2017).

4. *See* Michael Barthel, et al., *Many Americans Believe Fake News Is Sowing Confusion*, PEW RES. CTR. (Dec. 15, 2016), http://www.journalism.org/2016/12/15/many-americans-believe-fake-news-is-sowing-confusion/ [https://perma.cc/4XD2-NUQC].

5. *See* Joshua Gillin, *How Pizzagate Went from Fake News to a Real Problem for a D.C. Business*, POLITIFACT (Dec. 5, 2016, 5:23 PM), https://www.politifact.com/truth-o-meter/article/2016/dec/05/how-pizzagate-went-fake-news-real-problem-dc-busin/ [https://perma.cc/5E57-R3CM].

6. *See, e.g.*, Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook*, BUZZFEED NEWS (Nov. 16, 2016, 4:15 PM), https://www.buzzfeednews.com/article/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook [https://perma.cc/2QUK-MVPH].

7. Sabrina Tavernise, *As Fake News Spreads Lies, More Readers Shrug at the Truth*, N.Y. TIMES (Dec. 6, 2016), https://www.nytimes.com/2016/12/06/us/fake-news-partisan-republican-democrat.html.

8. C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317, 349 (1998).

9. *See, e.g.*, STANFORD HISTORY EDUC. GRP., EVALUATING INFORMATION: THE CORNERSTONE OF CIVIC ONLINE REASONING 24 (2016) [https://perma.cc/355Y-SLVA] (recommending providing students with more instruction on how to determine whether social media content originates from a source with a clear political agenda). The researchers tested middle school, high school, and college

threat fake news poses to the role of a free press in sustaining our democracy necessitates a legal solution to the problem as well.[10] Congress could curb the far-reaching problems of fake news by clarifying the intended implications of § 230 of the Communications Decency Act (CDA)[11] on defamation liability for internet distributors.[12] Applying a modified standard of common law distributor liability specifically targeted to address fake news to internet service providers (ISPs)[13] and websites would hold social media websites like Facebook responsible for fake news that site administrators have been informed is defamatory. This would drastically reduce the oversharing and spreading of fake news.[14] A modified standard of distributor liability would be the best legal solution to the problem of fake news because it merely applies a traditional area of tort law to a new technology. Additionally, it would not create ruinous liability for internet companies because most websites already implement similar monitoring requirements to comply with federal copyright law.[15]

This Note will explain the function of the free press in preserving our society, how fake news threatens the press's legitimacy, and why a legal solution is necessary to protect the press's democratic role. It will then propose a legal solution to curb the spread of fake news. Part II will explain that there is a consensus among First Amendment theorists that the role of the free press in a democratic society is to inform the public, allowing them

---

students' abilities to differentiate ads from news articles, recognize paid political advertising, and investigate the neutrality of a website publisher. *Id.* at 6. *See also* David O. Klein & Joshua R. Wueller, *Fake News: A Legal Perspective*, 20 J. INTERNET L. 1, 12 (2017) (noting the development of and advocacy for media literacy programs in New York and California).

10. *See* Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 588 (2001) ("Serious online defamation thus poses a significant threat to social welfare that requires appropriate legal rules for redress.").

11. Congress passed the Communications Decency Act in 1996. Pub. L. No. 104-104, 110 Stat. 133 (codified as amended in scattered sections of 47 U.S.C.). Relevant for this discussion is 47 U.S.C. § 230, which immunizes "provider[s] and user[s] of an interactive computer service" from common law defamation publisher liability. *See infra* Part II.

12. *See* Leonid Bershidsky, *How to Force Facebook to Fix Its Fake News Problem*, BLOOMBERG: VIEW (Oct. 16, 2017, 1:00 AM), https://www.bloomberg.com/view/articles/2017-10-16/how-to-force-facebook-to-fix-its-fake-news-problem [https://perma.cc/75ZF-YXCM].

13. As explained by an opinion interpreting § 230,

> 'Internet service provider' or 'ISP' is the term commonly used to describe a company that provides computer users access to the Internet. An ISP is a 'provider' of an interactive computer service within the meaning of section 230(c)(1) because the service provided is, in the language of section 230(f)(2), 'a service or system that provides access to the Internet.'

Grace v. eBay Inc., 16 Cal. Rptr. 3d 192, 197 (Cal. Ct. App.), *review granted and opinion superseded*, 99 P.3d 2 (Cal. 2004).

14. *See, e.g.*, Silverman, *supra* note 6 (noting that in the final three months of the 2016 presidential election, false election stories from hoax sites and hyper-partisan blogs had more shares, reactions, and comments than reliable news stories from traditional and credible media outlets).

15. *See infra* Part III.B.

to actively participate in elections and the governmental process.[16] It will also explain how fake news undermines the informing function of the press by eroding the legitimacy and credibility of traditional, reliable news outlets, creating an uninformed public unable to participate effectively in our democracy.[17] Part III will explain the history of defamation liability and the development and legal interpretation of the CDA, which eliminated common law distributor defamation liability for ISPs and social media websites.[18] Part IV will outline how the immunization of websites from distributor defamation liability has created a legal environment in which it is impossible for the subjects of fake news to bring defamation lawsuits against distributors to stop the spread of blatantly false and potentially dangerous material about them.[19] It will also explain how amending § 230 of the CDA to reinstate common law distributor defamation liability on a modified basis would be a workable legal solution to the threat fake news poses.[20]

I. THE LEGITIMACY OF THE PRESS AND ITS EFFECT ON DEMOCRACY

Before noting current policies contributing to the rise of fake news and identifying potential solutions to curb its proliferation, it is important to first analyze the threat fake news poses to our democracy in order to establish the necessity of such a legal solution. This section will describe the vital role a free press plays in sustaining a democratic government by informing the public and facilitating public participation necessary for self-government. It will also explain why corruption of the public's trust in the press by the spread of fake news impairs the structural function of the press in sustaining our democracy.

A. The Democratic Function of a Free Press

The Supreme Court has consistently stated that a free press is essential to the "heart of our democracy and its preservation is essential to the survival of liberty."[21] Defamation liability,[22] on the other hand, is generally

16. *See infra* Part I.A. Though First Amendment scholars provide differing justifications of the necessity of the press in a democratic society, the goal of this Note is to demonstrate that fake news is undermining the function of the free press, regardless of the theory of the First Amendment in which that freedom is grounded.

17. *See infra* Part I.B.

18. *See infra* Part II.

19. *See infra* Part III.A.

20. *See infra* Part III.B.

21. Craig v. Harney, 331 U.S. 367, 383 (1947) (Murphy, J., concurring). *See also* Associated Press v. United States, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring) ("A free press is indispensable to the workings of our democratic society.").

22. *See infra* Part II.A for an explanation of the common law doctrine of defamation liability.

considered to chill speech, making it inherently at odds with robust protections of First Amendment values.[23] Thus, any discussion of defamation liability implicates significant tensions between compensating defamation injuries—injuries to a person's reputation[24]—and still protecting freedom of speech and press.[25] But the problems created by fake news raise the question whether public officials could use defamation liability as more than a tool to protect their reputations.[26] Ultimately, these defamation suits could also serve to protect the essential democratic role of a free press from public disenchantment with its credibility and reliability by punishing publishers and distributors of fake news.[27]

The First Amendment's Freedom of the Press Clause[28] exists because of the press's "crucial contribution to democracy and democratic legitimacy."[29] At the time of the nation's founding, most Americans saw the Press Clause's function as "a bulwark against governmental tyranny," upholding "the individual right of every man to air his sentiments for all to consider."[30] In the twentieth and twenty-first centuries, scholars, courts, and politicians have emphasized various roles the press plays, such as providing information to the public,[31] serving as a forum for public comment and

23. Freiwald, *supra* note 10, at 583 ("The threat of costly litigation and liability for defamation casts a shadow over the expression of controversial content, however true it may be. Rules imposing liability on those who publish or otherwise disseminate the defamatory statements of third parties particularly risk inhibiting socially valuable discourse . . . .").

24. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) ("The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood.").

25. *See, e.g.*, Stanley Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785, 796 (1979) (explaining that "[n]owhere is the importance of free speech greater or the potential injury to reputation more severe than in the context of the American press").

26. *See, e.g.*, David Folkenflik, *Behind Fox News' Baseless Seth Rich Story: The Untold Tale*, NPR: MORNING EDITION (Aug. 1, 2017, 7:23 AM), https://www.npr.org/2017/08/01/540783715/law suit-alleges-fox-news-and-trump-supporter-created-fake-news-story (chronicling a lawsuit filed by a victim of a fake news story spread by Fox News).

27. The Supreme Court has recognized that blatantly false statements have slim to no social value, and therefore First Amendment law should not be overly concerned about chilling effects on blatantly false speech. Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 301 (1971) (White, J., concurring) ("Misinformation has no merit in itself; standing alone it is as antithetical to the purposes of the First Amendment as the calculated lie.").

28. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

29. Baker, *supra* note 8, at 388.

30. Sonja R. West, *The "Press," Then & Now*, 77 OHIO ST. L.J. 49, 66 (2016) (quoting ROBERT W.T. MARTIN, THE FREE AND OPEN PRESS: THE FOUNDING OF AMERICAN DEMOCRATIC PRESS LIBERTY, 1640–1800, at 3–4 (2001)).

31. *See* William T. Coleman, Jr., *A Free Press: The Need to Ensure an Unfettered Check on Democratic Government Between Elections*, 59 TUL. L. REV. 243 (1984).

criticism,[32] presenting the values of society,[33] and checking the power and corruption of the government.[34] The Free Press Clause is closely intertwined and therefore often examined in conjunction with the Free Speech Clause.[35] Scholars have questioned if the Free Press Clause can be examined independently from the Free Speech Clause because of the limited work it actually does in protecting American journalists.[36] Because the two ideas are so closely connected by courts and scholars, free press theory is heavily influenced by, and therefore often discussed almost synonymously with, general theories of free expression.[37]

First Amendment freedom of expression doctrine traditionally rested on the idea that allowing all speech would help society hone in on truth, which would triumph over false ideas in the marketplace of ideas.[38] This theory had significant influence over early and mid-twentieth century development of the Supreme Court's freedom of expression jurisprudence.[39] Modernly, however, scholars have detached free expression doctrine from the truth-seeking justifications of the marketplace of ideas because the theory rests on unverifiable, and likely untrue, assumptions that truth will trump other factors in determining whether individuals will accept an idea as true.[40]

---

32. Branzburg v. Hayes, 408 U.S. 665, 727 (1972) (Stewart, J., dissenting) ("As private and public aggregations of power burgeon in size . . . there is obviously a continuing need for an independent press to disseminate a robust variety of information and opinion through reportage, investigation, and criticism . . . .").

33. THE COMM'N ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS: A GENERAL REPORT ON MASS COMMUNICATION: NEWSPAPERS, RADIO, MOTION PICTURES, MAGAZINES, AND BOOKS 27 (Robert D. Leigh ed.,1947.).

34. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 538; Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 357 (2011) ("Indeed, we lionize the local newspaperman as a bulwark against local corruption.").

35. Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2437 (2014).

36. *Id.*

37. The clauses are not only closely related, but also work in tandem to protect press speakers vigilantly by providing strong protections to nonpress speakers even if they do not fall within the confined class of press speakers. *See id.* at 2442–43 ("The Speech and Press Clauses function differently, yet they also complement each other. The Speech Clause can work in tandem with the Press Clause precisely because nonpress speakers can fall back on the many protections the Speech Clause puts in place.") (footnotes omitted).

38. This idea is most famously drawn from John Stuart Mill's *On Liberty*. Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 445, 448 (2012).

39. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.").

40. *See* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 15.

> If truth is not ascertainable or cannot be substantiated, the victory of truth in the marketplace is but an unprovable axiom. In order to be discoverable, however, truth must be an objective rather than a subjective, chosen concept. Consequently, socioeconomic status, experience, psychological propensities, and societal roles should not influence an individual's concept of truth. If such factors do influence a listener's perception of truth, the inevitable differences in these perspectives caused by the vastly differing experiences among individuals make

Moreover, this theory incorrectly presumes that all citizens evaluate ideas rationally. In reality, the marketplace of ideas has not perpetuated true ideas and cast doubts on false ideas and therefore has not created a better-informed society.[41]

Justifications for First Amendment freedom of expression doctrine have shifted instead to arguments for increased democratic legitimacy through participation and decision-making,[42] arguments for individual autonomy,[43] and arguments for self-expression.[44] Scholars addressing justifications for the freedom of the press doctrine have focused specifically on the first two streams of argument.[45] The democratic self-governance theory posits that free expression, and by extension a free press, increases democratic legitimacy by informing citizens and allowing them to make better, more accurate decisions in self-governing and checking their government.[46] The individual autonomy theory, on the other hand, states that free expression and free press increase democratic legitimacy by allowing citizens to act as autonomous agents in seeking information through the press and applying it to their own self-governance.[47] Thus, the democratic self-governance theory is primarily consequentialist, while the individual autonomy theory values free expression as an essential component to democratic legitimacy in and of itself.[48]

These two theories of the relationship between free expression and democracy result in differing justifications for why a free press creates democratic legitimacy, but both agree that it is vital.[49] The democratic self-governance theory postulates that a self-governing society cannot create

> resolution of disagreement through simple discussion highly unlikely. And if the possibility of rational discourse and discovery is negated by these entrenched and irreconcilable perceptions of truth, the dominant "truth" discovered by the marketplace can result only from the triumph of power, rather than the triumph of reason.

Id. (footnotes omitted).

41. Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 909–10 (2010).

42. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 79 (1960) ("[T]he principle of the freedom of speech is derived, not from some supposed 'Natural Right,' but from the necessities of self-government by universal suffrage . . . .").

43. *See, e.g.*, Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991).

44. Schauer, *supra* note 41, at 910.

45. *See generally* Adam Cohen, *The Media That Need Citizens: The First Amendment and the Fifth Estate*, 85 S. CAL. L. REV. 1, 24–41 (2011) (outlining the role of the press in promoting First Amendment values).

46. *See* Blasi, *supra* note 34, at 539 ("The check on government must come from the power of public opinion, which in turn rests on the power of the populace to retire officials at the polls, to withdraw the minimal cooperation required for effective governance, and ultimately to make a revolution.").

47. *See* Scanlon, *supra* note 43, at 214 ("[A] legitimate government is one whose authority citizens can recognize while still regarding themselves as equal, autonomous, rational agents.").

48. *See id.* at 204–05.

49. Ingber, *supra* note 40, at 9–12.

optimal social value for its citizens unless the citizens are well-informed and able to contribute robustly to national conversation and debate.[50] The aim of democracy is for voters to make wise decisions—"[t]he voters, therefore, must be made as wise as possible."[51] The Supreme Court has often endorsed this theory, stating "speech concerning public affairs is more than self-expression; it is the essence of self-government."[52] Thus, in the democratic self-governance theory of free expression the primary role of the press is to inform the citizenry[53] because without an informed citizenry democratic decision-making will be less effective, and the government runs the risk of being tyrannized by the well informed.[54]

The second theory of free expression, the individual autonomy theory, emphasizes that a legitimate democratic process must be open to the entire citizenry, and the government must not manipulate citizens' decision-making by suppressing speech or ideas.[55] A government cannot be legitimate unless it allows citizens to take part in governing as "equal, autonomous, rational agents."[56] The government cannot unduly restrict the free press under this theory because, in making political decisions, citizens "have a right to the information necessary to make informed choices and can claim this right against the government."[57] Without such information, a rational, autonomous agent should not submit to any governmental decree because it would be an act of coercion by the government without respecting an individual's right to participate in the "collective decision making" of their community.[58] The role of the press is to facilitate political discussion

50. *Id.* at 9. *See also* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948), *reprinted in* IDEAS OF THE FIRST AMENDMENT 788, 793 (Vincent Blasi ed., 2d ed. 2012).

51. MEIKLEJOHN, *supra* note 50, at 793.

52. Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).

53. Cohen, *supra* note 45, at 24.

54. *Id. See also* Houchins v. KQED, Inc., 438 U.S. 1, 17 n.36 (1978) (Stevens, J., dissenting)

> In seeking out the news the press . . . acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment.

Id. (quoting Saxbe v. Wash. Post Co., 417 U.S. 843, 863–64 (1974) (Powell, J., dissenting)).

55. Ingber, *supra* note 40, at 10; *See also* Strauss, *supra* note 43, at 355–56 (explaining that government suppression of speech impermissibly manipulates a citizen's decision-making process).

56. Scanlon, *supra* note 43, at 214. Succinctly, the premise of an autonomy theory of free expression is that an autonomous citizen has, and morally should have, the ability to decide whether to follow a governmental decree. A rational, autonomous citizen will only do so when the harm being prevented, such as the spreading of false information, outweighs the benefits of free expression. This theory states the government has the authority to place restrictions on free expression to the extent that the benefits outweigh the harm of free expression. *Id.* at 217–18.

57. *Id.* at 222.

58. *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 991–92 (1978) (explaining that "individual self-fulfillment and participation in change are fundamental purposes of the first amendment").

between citizens, who are entitled to a free press to aid them in decision-making, and the government, which must communicate with and be subject to its citizens to remain democratically legitimate.[59] A free press makes self-governance possible by serving as an intermediary between the government and autonomous citizens.[60]

The main difference between these theories is that the democratic self-governance theory asserts freedom of expression will lead to better informed decisions and therefore better consequences for the public good.[61] The individual autonomy theory, on the other hand, asserts that, whether or not free expression creates better outcomes, citizens must have the ability to express themselves freely in order for a government exercising control over those citizens to be considered legitimate.[62] Regardless of why the right to free expression arises, under both theories of free expression[63] citizens must trust the press to serve its given role of informing the citizenry and facilitating a forum for communication between a legitimate government and its autonomous citizenry.

Public trust that the press will inform and mediate public discussion is essential to a democratic society because a government is only legitimate if the press performs these functions and facilitates the popular participation in elections and the political process that is essential to sustaining our democracy.[64]

B. How Fake News Is Undermining the Democratic Function of the Press

Extending defamation liability often invokes fears that increased liability will chill speech by media outlets and is considered by many to be in inherent conflict with our constitutional commitment to freedom of the press.[65] But the press cannot perform its essential functions, as outlined

59. *Cf.* Scanlon, *supra* note 43, at 222 ("[T]he authority of governments to restrict the liberty of citizens in order to prevent certain harms does not include authority to prevent these harms by controlling people's sources of information to insure that they will maintain certain beliefs.").

60. Baker, *supra* note 8, at 343.

61. *See* Ingber, *supra* note 40, at 10–11 (explaining the different values driving the social value and individual perspective on free expression).

62. *Id.*

63. *Id.*

64. *See* Baker, *supra* note 8, at 332 ("An autonomous, moral agent ought to be self-governing. . . . For self-governance, a person must be able to participate in and be able to accept the mandates of the collective process."). *See also* Ingber, *supra* note 40, at 11.

65. *See, e.g.*, Freiwald, *supra* note 10, at 583 ("In recognition of the risks to non-defamatory speech posed by defamation liability, the Supreme Court has erected First Amendment-based hurdles to defamation claims. Those hurdles attempt to balance the need to afford redress to defamation victims against the need for robust social discourse, particularly that facilitated by a free press.").

above, when a constant flow of fake news undermines media legitimacy in the eyes of the public.[66]

The recent onslaught of fake news in the political arena, exemplified by the uptick of fake political news circulated online during the 2016 presidential election, is just the most recent development in a string of changes in cultural norms undermining the ability of the press to perform its democratic functions.[67] One commentator has suggested that fake news thrives on the tendency, building for decades, of the American public to let "the subjective entirely override the objective; thinking and acting as if opinions and feelings are just as true as facts."[68] This mentality may be traceable to the 1960s post-modernist intellectual era and has slowly expanded into the political sphere, culminating in political figures using the term "alternative facts" to undermine news reports portraying an administration in an unfavorable light.[69]

This growing tendency to discount facts has created a market for fringe media outlets to manipulate opinions to look like objective truths and ultimately has created a public apathy among citizens as to whether their opinions are based in fact.[70] Combined with other factors, like the consolidation of media companies and the continued increase in the percentage of Americans getting their news through social media websites, such as Facebook, this disregard for objective truth has created an environment in which fake news thrives.[71]

Legal scholars[72] began discussing the effects of these cultural changes on the function of the First Amendment,[73] particularly noting that millions of Americans held a variety of beliefs that were simply untrue,[74] before fake

66. *See* Allcott & Gentzkow, *supra* note 3, at 215 (noting that "[t]he declining trust in mainstream media could be both a cause and consequence of fake news gaining more traction.").

67. Anderson, *supra* note 2.

68. *Id.*

69. *Id.*

70. *Id.* (stating that facts and opinions are interchangeable in the general public's mindset because the average American believes "being American means we can believe anything we want; that our beliefs are equal or superior to anyone else's, experts be damned"). *See also* Tavernise, *supra* note 7 (explaining that experts believe fake news allows people to feel as though they are "[n]o longer burdened with wrestling with the possibility that they might be wrong," creating a political atmosphere of hyperpolarization).

71. *See* Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POL'Y 57, 65 (2017).

72. *See generally* Horwitz, *supra* note 38, at 468 (chronicling recent works by First Amendment scholars addressing how the First Amendment should deal with false statements).

73. Though legal scholars have been discussing these issues in relation to the internet and social media in particular, concerns about the increased spread of false information existed long before the recent anxiety surrounding fake news. Similar concerns were raised in the 20th century when both the radio and television became prominent news media. Allcott & Gentzkow, *supra* note 3, at 211.

74. In 2010, Frederick Schuaer cited the beliefs that President Obama was born in Kenya, that President Bush knew about the 9/11 attacks before they happened, and that the Holocaust is a myth

news became a household phrase. First Amendment scholars have been grappling with whether there is a justification for protecting false statements, generally recognized as socially worthless,[75] at the point that "plainly, demonstrably, and factually false"[76] claims of fact have "become cascades, gaining adherents at dramatically increased rates and distorting politics, public discussion, and public policy itself."[77] These discussions have focused on how far false statements should be protected in order to avoid chilling socially useful contributions of the press and free expression.[78] Striking this balance is the key to creating an acceptable legal solution to the problem of fake news.

While the intellectual irrationality that has led to fake news is not novel,[79] the specific threat fake news poses to the press's ability to inform the public, critical to its role in a democratic society, has already had significant consequences. For example, a study completed shortly after the 2016 presidential election found most Americans believe fake news articles caused a great deal of confusion about the basic facts of current events and issues.[80] Another study conducted by Stanford researchers found that even technologically savvy teenagers were "easily duped" by misinformation on the internet.[81] The authors of the study stated, "we worry that democracy is threatened by the ease at which disinformation about civic issues is allowed to spread and flourish."[82] Moreover, the teenage subject group demonstrated that allowing the spread of fake news to continue represents a threat to the ability of the next generation to participate in our democracy as an informed electorate.[83]

The problem posed by fake news is not only that citizens believe false news stories, but also that they stop believing real news as well because they no longer trust the mainstream press.[84] One commentator has noted, "Fake news, and the proliferation of raw opinion that passes for news, is creating

perpetuated by Zionists as examples of beliefs held by a substantial number of Americans that are demonstrably untrue. Schauer, *supra* note 41, at 897.

75. Horwitz, *supra* note 38, at 468.

76. Schauer, *supra* note 41, at 898.

77. Horwitz, *supra* note 38, at 472 (footnotes omitted).

78. *See* Schauer, *supra* note 41, at 899 (attempting to determine how to balance free speech doctrine with "what appears to be the increasing and unfortunate acceptance of factual falsity in public communication").

79. *See* Anderson, *supra* note 2 (stating that the ability to label "inconvenient journalism" as fake news and that statement being accepted by at least some portion of the public is possible "because now factual truth really is just one option").

80. *See* Barthel, Mitchell & Holcomb, *supra* note 4 (a survey conducted one month after the 2016 election found that sixty-four percent of Americans believe fake news caused a great deal of confusion about the basic facts regarding current events and issues among the general public).

81. STANFORD HISTORY EDUC. GRP., *supra* note 9, at 4.

82. *Id.* at 5.

83. *Id.*

84. *See* Tavernise, *supra* note 7.

confusion, punching holes in what is true, causing a kind of fun-house effect that leaves the reader doubting everything, including real news."[85] The public's inability to trust information presented by the media threatens the continued viability of our representative democracy by causing citizens to vote irrationally and irresponsibly, as their political opinions become unmoored from facts,[86] or lose trust in the electoral system completely.[87]

II. HISTORY AND DEVELOPMENT OF COMMON LAW DEFAMATION AND § 230 OF THE COMMUNICATIONS DECENCY ACT

Having established the necessity of public trust in reliable and credible sources of news to sustain our democratic system,[88] it is necessary to discuss how defamation law traditionally helped deter the publication of socially worthless false information. Understanding the role of defamation liability in discouraging the spread of false information is key to understanding how modern policy developments have prevented defamation litigation from inhibiting the spread of fake news. This section traces the history of common law defamation liability and its modified application to internet sources through § 230 of the Communications Decency Act.

A. Common Law Defamation

The tort of defamation serves to allow individuals to seek relief for injuries to their reputation caused by the spreading of false statements that tend "to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace."[89] Historically, defamation allowed a plaintiff to protect his reputation by setting the record straight in a public forum, punished publishers of defamatory statements by imposing damages, and compensated a plaintiff for the injury caused to his "deserved" reputation.[90]

85. *Id.*

86. The confusion about basic facts underlying current events and basic political issues leads voters to give into the "natural human tendency toward confirmation bias, whereby we selectively choose facts that support our pre-existing biases." Gaughan, *supra* note 71, at 69. Reinforcing political polarization, citizens are voting based on a worldview that is uninformed about certain facts and political issues and misinformed regarding other political issues because they only read news confirming their pre-conceived notions of the issues. *Id.*

87. *See id.* at 69–70 (explaining how a fake news story alleging 2016 presidential candidate Hillary Clinton's campaign had committed election fraud reached more than six million people and created "baseless fears about the integrity of the election results").

88. *See supra* Part I.

89. Ingber, *supra* note 25, at 797 (quoting Kimmerle v. N.Y. Evening Journal, Inc., 186 N.E. 217, 218 (N.Y. 1933)).

90. *Id.* at 791–92.

Defamation requires 1) a false and defamatory statement concerning another, 2) that is published without privilege to a third party, and 3) is actionable irrespective of special harm or is the legal cause of special harm.[91] A statement is considered defamatory if it "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[92]

Defamation law imposes different standards of liability on authors and publishers versus distributors based on their ability to evaluate the truthfulness of a statement they published.[93] Authors are subject to liability if they were negligent in failing to ascertain their statement's falsity or defamatory character because they usually know or can find out whether a work they produced themselves contains a defamatory statement. [94] Publishers, such as the news outlet that employs the journalist who authored a piece, are liable under the same negligence standard as authors because they also had the ability to easily find out whether they were publishing a defamatory statement. [95] Mediums that exercise editorial control over material are considered publishers and held to the negligence standard under common law defamation liability. [96] Distributors, who do not exercise editorial control over the content, are only liable for the defamatory material if they knew or had reason to know of its defamatory character.[97]

B. The Supreme Court Constitutionally Limits Defamation

In the middle of the twentieth century, the Supreme Court began imposing First Amendment restrictions on defamation suits.[98] Tying the right to freedom of speech and press to the role of political discussion in sustaining our democracy,[99] the Court stated defamation laws allowing broad recovery "dampen[] the vigor and limit[] the variety of public debate."[100] To accommodate the competing values of preventing self-censorship and providing compensation for harms to an individual's reputation, the Court distinguished between public officials, who

91. RESTATEMENT (FIRST) OF TORTS § 558 (AM. LAW INST. 1938).
92. RESTATEMENT (FIRST) OF TORTS § 559 (AM. LAW INST. 1938).
93. RESTATEMENT (SECOND) OF TORTS § 581.1 cmt. c (AM. LAW INST. 977).
94. *Id.*
95. 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 4:92 (2d ed. 2018).
96. Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991).
97. RESTATEMENT (SECOND) OF TORTS § 581 (AM. LAW INST. 1977).
98. 1 SMOLLA, *supra* note 95, § 1:17.
99. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.") (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).
100. *Id.* at 279.

voluntarily inject themselves into public life and debate, and private figures, who have not voluntarily opened themselves up to scrutiny by the press.[101] To protect speech critical to political debate, the Court held that the Constitution requires a public official seeking damages for defamation to prove "actual malice"—meaning the author or publisher published material concerning public officials with "knowledge that it was false or with reckless disregard of whether it was false."[102] Distributors are also held to the constitutional standard of actual malice.[103]

C. Congress Implements § 230 of the Communications Decency Act

It was against this backdrop of defamation law's tension between protecting freedom of expression and providing compensation for injury to reputation that Congress enacted 47 U.S.C. § 230, commonly known as the Communications Decency Act (CDA).[104] Congress enacted the CDA as part of the Telecommunications Act of 1996 with the intent to overrule early cases regarding defamation liability for internet intermediaries—*Cubby, Inc. v. CompuServe, Inc.*[105] and, more explicitly,[106] *Stratton Oakmont, Inc. v. Prodigy Services Co*.[107]

In *Cubby*, the Southern District of New York considered whether an "electronic, for-profit library" that made a vast number of publications available to subscribers but exercised no editorial control over the content uploaded to their database was subject to publisher or distributor defamation liability.[108] The court applied common law defamation liability and held that CompuServe was subject to only distributor liability and therefore had no duty to monitor every issue of every periodical on its database for defamatory content.[109]

In *Stratton*, a New York trial court followed the logic of *Cubby* and found Prodigy, a provider of online bulletin boards on which members could post

101. Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974). *See also* 1 SMOLLA, *supra* note 95, § 2:12 (explaining the modern approach to the distinctions between public figures and private individuals).

102. *N.Y. Times*, 376 U.S. at 279–80.

103. The Second Restatement of Torts states "one who publishes" a defamatory statement regarding a public official must act with knowledge of the falsity or reckless disregard for the truth without differentiating between publishers and distributors. RESTATEMENT (SECOND) OF TORTS § 580A (AM. LAW INST. 1977).

104. Freiwald, *supra* note 10, at 596–98 (explaining how courts' failure to cost-effectively reduce defamation in interpreting the CDA does not optimally balance the interests of free speech and compensating injuries).

105. 776 F. Supp. 135 (S.D.N.Y. 1991).

106. Freiwald, *supra* note 10, at 596.

107. No. 31063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995).

108. 776 F. Supp. at 140.

109. *Id.*

information,[110] subject to a negligence standard as a publisher of defamatory information.[111] Because Prodigy monitored the content posted to its bulletin boards for content it considered inappropriate,[112] the court held that Prodigy was a publisher, not a distributor.[113] The court concluded that "Prodigy's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice."[114]

Following the *Stratton* decision, internet intermediaries lobbied Congress to rectify the paradox created by these two cases: that internet companies who monitored the content posted to their websites would be held liable while those who provided no supervision would be subject to no liability, creating the perverse incentive for ISPs to forego monitoring content altogether.[115] Congress acquiesced by passing the CDA with the specific intent of overruling the disincentives created by *Stratton* for websites[116] to monitor inappropriate material on their sites.[117] Congress erred on the side of imposing less liability on websites and ISPs, for the purpose of preserving "the vibrant and competitive free market that presently exists for the Internet and other interactive computer services."[118] Rather than requiring interactive computer services to monitor their content, the CDA instead provides broad immunity for websites that do not exercise editorial control over the content posted on their platforms.[119] CDA § 230 states: "No provider or user of an interactive computer service shall be

110. 1995 WL 323710, at *1.
111. *Id.* at *4.
112. *Id.* at *2.
113. *Id.* at *4.
114. *Id.* at *5.
115. Friewald, *supra* note 10, at 594.
116. The CDA uses the non-intuitive terms "interactive computer service" and "information content provider" to differentiate between websites that exercise editorial control and those that provide only a platform for others to post content without monitoring that content at all. An "interactive computer service" is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions" and denotes a platform that does not exercise editorial control over the content posted on the website. 47 U.S.C. § 230(f)(2) (2016). An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3) (2016). Interactive computer services are immune from publisher or speaker liability based on information posted to their website by another information content provider. 47 U.S.C. § 230(c)(1) (2016).
117. H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.) *as reprinted in* 1996 U.S.C.C.A.N. 10, 208 ("One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material."). *See also* Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) (stating that Congress enacted § 230 to remove disincentives for self-regulation created by *Stratton*).
118. 47 U.S.C. § 230(b)(2) (2016).
119. Friewald, *supra* note 10, at 595.

treated as the publisher or speaker of any information provided by another information content provider." [120] These provisions of the CDA have modified the common law defamation framework as applied to ISPs and websites, granting web services broader protection from defamation liability than they would have under defamation law that still applies to print and television publications.[121]

The courts have interpreted § 230 of the CDA to convey broad immunity to website administrators, regardless of whether they exercise editorial control over defamatory content posted on their platforms,[122] a distinction that traditionally would have mattered under common law defamation.[123] In *Zeran v. American Online*, one of the first cases interpreting § 230, the Fourth Circuit held that §230(c)(1) immunized interactive computer services from not only publisher liability but also distributor liability for defamatory material posted by third parties on their websites.[124] The court broadly claimed that, "[b]y its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."[125] The court reasoned that Congress intended § 230 to immunize both publishers and distributors because, while a distributor is indeed distinct from a publisher in determining the standard of liability, both can be considered a subset within the broader definition of publisher for defamation purposes.[126]

All federal courts to consider the issue since *Zeran*'s seminal holding have followed—and, in some cases, even extended[127]—this precedent, refusing to hold websites that do not contribute to the development of content posted to their website liable for defamatory statements posted by third parties.[128] In *Blumenthal v. Drudge*, the D.C. district court stated,

120. 47 U.S.C. § 230(c)(1) (2016).

121. *See Zeran*, 129 F.3d at 330–31 (explaining that § 230 creates immunity from common law defamation categories for internet intermediaries).

122. *See* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003).

123. *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *3–4 (N.Y. Sup. Ct. May 24, 1995).

124. 129 F.3d at 328.

125. *Id.* at 330.

126. *See id.* at 332.

> Those who are in the business of making their facilities available to disseminate the . . . information gathered by others may also be regarded as participating to such an extent . . . as to be regarded as publishers. They are intentionally making the contents available to others, sometimes without knowing all of the contents—including the defamatory content—and sometimes without any opportunity to ascertain, in advance, that any defamatory matter was to be included in the matter published.

Id. (quoting PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 803 (5th ed. 1984))

127. *See, e.g.*, *Carafano*, 339 F.3d at 1125 (holding that even websites providing "pre-prepared responses" could not be held liable for defamatory statements because of the CDA).

128. *See* 1 SMOLLA, *supra* note 95, § 4:86 (summarizing holdings of *Zeran*'s progeny). *But see* Grace v. eBay Inc., 16 Cal. Rptr. 3d 192, 201 (Cal. Ct. App.), *review granted and opinion superseded*, 99

"[Congress] made the legislative judgment to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others."[129] Similarly, in *Doe v. America Online, Inc.*, the Florida Supreme Court held that, although under traditional distributor liability the defendant would be liable for negligently failing to remove offensive material from its website,[130] § 230 pre-empted a state tort claim based on distributor liability because "distributor liability, or more precisely, liability for knowingly or negligently distributing defamatory material, is merely a species or type of liability for publishing defamatory material."[131]

Overall, courts have interpreted the § 230 immunity provision broadly and have refused to hold ISPs liable for any publication of defamatory material, regardless of any exercise of, or lack of, editorial control.[132] This means courts are affording websites and ISPs the broadest immunity possible. Few courts have challenged this interpretation of the CDA, though in *Doe v. GTE Corp.* the Seventh Circuit questioned whether disclaiming all liability for ISPs achieves the goals of § 230, the title of which promises protection for "Good Samaritan" screening of offensive materials.[133] The court correctly pointed out that because both websites and ISPs that screen for offensive material and those that refrain from screening are granted immunity, websites and ISPs can be expected to take the less expensive, non-screening route.[134] Thus, an interpretation of § 230 that treats websites and ISPs exercising editorial control the same as those that do not defeats the original policy goals of the "Good Samaritan" law and likely serves few of the purposes Congress intended.[135]

P.3d 2 (Cal. 2004) (holding that § 230 does not explicitly address distributor liability and therefore does not preclude holding internet service providers liable for failing to take down defamatory material after receiving notice).

129. 992 F. Supp. 44, 49 (D.D.C. 1998).

130. 783 So. 2d 1010, 1013 (Fla. 2001).

131. *Id.* at 1016.

132. *See, e.g.*, Ben Ezra, Weinstein, & Co. v. Am. Online Inc., 206 F.3d 980, 986 (10th Cir. 2000) ("Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions."); *Carafano*, 339 F.3d at 1123 (stating that the defendant website cannot be liable unless it created the defamatory content).

133. Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003).

134. *Id.*

135. *Id.*

III. REFORMING § 230 TO COMBAT FAKE NEWS AND PROTECT LEGITIMACY OF THE PRESS

The ramifications of the CDA's immunity provisions are evident in the rise of fake news.[136] The broad immunity from defamation afforded to web sites has created an environment in which "rumors, 'counter-knowledge,' misinformation, 'post-truths,' 'alternative facts' or just plain damned lies" are ubiquitous on social media sites and completely unchecked, as long as the web sites did not author the defamatory material in the first place.[137] The problems caused by fake news could be solved, or at least substantially decreased, by amending the CDA to impose a modified version of common law distributor liability on ISPs and websites, which would ultimately hold social media websites accountable for fake news they know is posted on their platforms.[138]

A. Defects in Current Law

Those discussing possible solutions to curbing fake news have been pessimistic about finding a legal solution to the problem.[139] Legal commentators are reluctant to advocate extending defamation law in a meaningful way specifically for the purpose of addressing fake news due to the perceived negative effects such an extension would have on the interests of free expression.[140] As discussed above, however, the effect of failing to regulate fake news could be even more harmful to First Amendment values than expanding defamation liability on the internet.[141]

In certain circumstances, our current defamation law has been sufficient to hold authors of fake news liable, even under the heighted actual malice standard applied when a publication is commenting on public officials, because the authors know what they are writing is false or have conscious

136. *See* Klein & Wueller, *supra* note 9, at 7; Steven Seidenberg, *Lies and Libel*, ABA J., July 2017, at 48, 52.

137. Klein & Wueller, *supra* note 9, at 1.

138. *See infra* Part III.B.

139. *See* Seidenberg, *supra* note 136, at 54.

140. *See, e.g.*, Mark Verstraete, Derek E. Bambauer & Jane R. Baumbauer, *Identifying and Countering Fake News* 17 (Univ. of Ariz., Discussion Paper No. 17-15, 2017), https://ssrn.com/abstract=3007971 ("[L]egal solutions are likely to be over-inclusive and threaten flourishing, robust public debate on the Internet to a greater degree than fake news imperils it."); *All Things Considered: What Legal Recourse Do Victims of Fake News Stories Have?*, NPR (Dec. 7, 2016, 7:04PM), http://www.npr.org/2016/12/07/504723649/what-legal-recourse-do-victims-of-fake-news-stories-have [hereinafter *What Legal Recourse Do Victims of Fake News Stories Have?*] (discussing the reluctance of media law and constitutional law thinkers to limit the ideals of the First Amendment and the marketplace of ideas and curb fake news).

141. *See supra* Part I.B.

doubts that what they are writing is true.[142] For example, the yogurt company Chobani sued the right-wing radio host Alex Jones for defamation after Jones alleged on his website, radio show, and YouTube channel that the company's employees, who were refugees, were connected to a sexual assault of a child.[143] Chobani's founder maintained the publication was defamatory, and Jones ultimately retracted and apologized for the remarks.[144] This demonstrates how defamation liability can and does restrict the spread of socially-worthless false information.[145]

In many instances, however, targets of fake news are unable to bring defamation suits for various reasons.[146] First, many authors of fake news are anonymous.[147] Second, some authors of fake news live outside the United States and therefore are outside the jurisdiction of United States courts.[148] Finally, the incentive for victims to bring a defamation suit may be low because many authors, even if they are within the United States, have limited financial resources.[149]

Social media websites, most prominently Facebook, spread fake news articles widely.[150] Because of their reach, the fake news traffic on these sites has been the target of much concern in the fight against fake news.[151] But because social media websites rarely, if ever, create or exercise editorial control over the content shared by users on their websites, they benefit from the complete immunity the CDA offers to internet distributors.[152] The CDA

142. Seidenberg, *supra* note 136, at 52. "Courts also look at the inherent improbability of the [defamatory] statements" to establish reckless disregard for the truth in order to satisfy the actual malice standard. *Id.* (alteration in original). For particularly outrageous stories, like Pizzagate (*see* Gillian, *supra* note 5), even public officials could have a good chance at winning a defamation suit.

143. Christine Hauser, *Alex Jones Retracts Chobani Claims to Resolve Lawsuit*, N.Y. TIMES (May 17, 2017), https://www.nytimes.com/2017/05/17/us/alex-jones-chobani-lawsuit.html?mcubz=3.

144. *Id.*

145. Seidenberg, *supra* note 136, at 50.

146. *What Legal Recourse Do Victims of Fake News Stories Have?*, *supra* note 140.

147. *All Things Considered: We Tracked Down a Fake-News Creator in the Suburbs. Here's What We Learned*, NPR (Nov. 23, 2016, 3:31 PM), http://www.npr.org/sections/alltechconsidered/2016/11/23/503146770/npr-finds-the-head-of-a-covert-fake-news-operation-in-the-suburbs [hereinafter *We Tracked Down a Fake-News Creator in the Suburbs*].

148. Seidenberg, *supra* note 136, at 52.

149. *What Legal Recourse Do Victims of Fake News Stories Have?*, *supra* note 140.

150. Silverman, *supra* note 6.

151. *See* Gaughan, *supra* note 71, at 67–68.

> [Many] things made the influence of fake news in the 2016 election different and more dangerous than previous incarnations of politically-motivated misinformation and scurrilous allegations. First, fake news spread at an alarmingly fast rate in 2016. The internet's democratization of the dissemination of information has facilitated the spread of fake news like never before.

Id. (footnotes omitted).

152. Timothy L. Alger, *The Communications Decency Act: Making Sense of the Federal Immunity for Online Services*, ORANGE COUNTY LAW., Jan. 2017, at 30.

prevents social media websites from bearing any liability for defamatory, fake news posted to their websites.[153]

B. Possible Reforms Aimed at Curbing the Proliferation of Fake News

The conversation regarding the recent uptick and negative effects caused by the proliferation of fake news has included educational and corporate solutions to the problem.[154] For example, educational researchers have emphasized the need for digital literacy education for middle school and high school students.[155] Major websites like Google and Facebook are also taking steps against fake news.[156] Google, for example, is reported to be terminating advertising revenues to fake news sites and revising its search algorithms to place misleading information lower on results lists.[157] Facebook has reportedly considered allowing users to flag news articles as fake and investigating articles tagged as such further by third-party fact checkers.[158]

Due to the significant threat fake news poses to the functions of our free press and its role in our democracy, however, social solutions alone are insufficient.[159] Legal solutions are necessary to address and prevent the further spread of fake news.[160] One legal solution that would be highly effective in addressing the problem of fake news on social media websites is amending § 230 of the CDA.[161] Congress should amend § 230's broad immunity provision to hold interactive computer services—meaning social media websites allowing fake news—liable based on a common law defamation framework for distributor liability targeted specifically toward curbing fake news. Congress could structure the new distributor liability to target the problem of fake news by requiring, or strongly incentivizing, ISPs and websites, specifically social media websites, to provide a forum to submit complaints about fake news articles circulating on the platforms.[162]

153. *See* Bershidsky, *supra* note 12 ("Today, if the potentially libelous information was published on a platform like Facebook or Twitter, the platform won't be liable for any damages.").

154. Seidenberg, *supra* note 136, at 55.

155. *See, e.g.*, STANFORD HISTORY EDUC. GRP., *supra* note 9, at 7.

156. Nick Wingfield et al., *Google and Facebook Take Aim at Fake News Sites*, N.Y. TIMES (Nov. 14, 2016), https://www.nytimes.com/2016/11/15/technology/google-will-ban-websites-that-host-fake-news-from-using-its-ad-service.html.

157. Seidenberg, *supra* note 136, at 55.

158. Amber Jamieson & Olivia Solon, *Facebook to Begin Flagging Fake News in Response to Mounting Criticism*, THE GUARDIAN (Dec. 15, 2016, 3:05 PM), https://www.theguardian.com/technology/2016/dec/15/facebook-flag-fake-news-fact-check [https://perma.cc/P5AZ-98FW].

159. *See supra* Part I.

160. *See* Bershidsky, *supra* note 12.

161. *Id.*

162. This solution is modeled on the notice and takedown procedures the Digital Millennium Copyright Act (DMCA) currently incentivizes websites to adopt in order to monitor users posting material that infringes on copyrights. *See* U.S. PATENT & TRADEMARK OFFICE, DMCA NOTICE-AND-

The new distributor liability could limit websites' responsibility to monitor complaints to only postings linking to published articles to avoid imposing a duty to monitor comments posted by individual users.[163] The websites would then have an obligation to check the veracity of the article, to the extent possible, and remove the article within a certain designated time frame if the information in the article appears to be falsified.[164] This structure would be similar to what Facebook has already proposed, but amending the CDA to allow distributor liability would hold these websites legally accountable for implementing protections against fake news.[165] The threat of this liability would incentivize social media sites to take down fake news articles when they are informed an article is spouting defamatory material.

While Congress has allowed the internet to grow up without the imposition of common law defamation liability on interactive computer services, like social media websites, imposing liability is not a radical idea.[166] The decision to avoid imposing distributor liability on websites and ISPs that do not exercise editorial control over content was a mere policy choice, one that Congress could have easily decided the other way.[167] Fake news is taking a toll on the ability of the press to function in its democratic role of distributing the information citizens need to act as an informed electorate.[168] Congress's policy choice—made while the internet was nascent—needs amending now that the internet has come to play such a dominant role in how our society and the press function.

TAKEDOWN PROCESSES: LIST OF GOOD, BAD, AND SITUATIONAL PRACTICES 2 (2015), https://www.uspto.gov/sites/default/files/documents/DMCA_Good_Bad_and_Situational_Practices_Document-FINAL.pdf [https://perma.cc/2BF3-MTQF]. The DCMA incentivizes websites to set up notice and takedown procedures for instances of copyright infringement hosted on their networks by limiting copyright infringement liability for service providers who lack actual knowledge of the infringement, provided that the infringement was not "actively apparent," and "respond[] expeditiously" to remove infringing content once made aware of its presence. Digital Millennium Copyright Act, Pub. L. 105-304, § 512(c)(1), 112 Stat. 2863, 2879–81 (1998) (codified as amended at 17 U.S.C. § 512(c)(1)). Congress could adopt a similar incentive structure by limiting distributor liability when websites provide adequate notice and takedown procedures.

163. The legislation could include a definition of fake news set out in *supra* note 1 to avoid sweeping up individuals and even opinion writers such as bloggers in its scope.

164. U.S. PATENT & TRADEMARK OFFICE, *supra* note 162, at 1–2.

165. Jamieson & Solon, *supra* note 158.

166. *See, e.g.*, Bershidsky, *supra* note 12 (discussing amending the CDA to hold social media websites to a common law distributor liability standard); Jamieson & Solon, *supra* note 158 (explaining that Facebook will be implementing a user-reporting system to flag fake news and sending flagged articles to third-party fact checkers to verify information).

167. *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (describing Congress's decision not to impose distributor liability on interactive computer services as a policy choice); Blumenthal v. Drudge, 992 F. Supp. 44, 49 (D.D.C. 1998) (describing Congress's choice not to impose distributor liability on interactive computer services as a "legislative judgment" made "wisely or not").

168. *See supra* Part I.

Critics may argue that subjecting interactive computer services to common law defamation distributor liability this late in the day would lead to ruinous liability for some of the most profitable companies in our economy,[169] but these fears are overwrought. First, as discussed above, websites like Google and Facebook are already taking steps on their own to begin combatting the plague of fake news.[170] Although these voluntary steps are encouraging, the threat that fake news poses to our democracy is significant enough that we should not rely exclusively on these companies self-monitoring their own efforts.[171]

Second, websites and ISPs, such as YouTube, are already incentivized to engage in similar monitoring of potential copyright infringement.[172] For ISPs to comply with the Department of Commerce's best practices for monitoring copyright infringement, limiting their legal liability under the Digital Millennium Copyright Act (DMCA), websites must provide mechanisms to copyright holders and others to give takedown notices when copyright infringements are found on a given website.[173] After receiving notice of a possible copyright infringement on their platform, ISPs are then required to respond "expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity."[174]

Common law distributor liability, which requires the distributor have knowledge as to the falsity of a published article, provides a similar notice and takedown method for defamatory material as is already required for copyrighted material under the DCMA.[175] Requiring websites and ISPs to follow a takedown protocol after receiving notice that defamatory material was posted on their website or platform would not be any more onerous for websites than what is already required by copyright law. Thus, amending § 230 provides a workable solution to the problems created by fake news, which are currently exacerbated by the spread of fake news on social media, because social media websites are already taking the first steps toward

169. *See* Todd Shields, *Google and Facebook Fret over Anti-Prostitution Bill's Fallout*, BLOOMBERG (Sept. 15, 2017, 10:46 AM), https://www.bloomberg.com/news/articles/2017-09-15/google-and-facebook-fret-over-anti-prostitution-bill-s-fallout [https://perma.cc/4E35-V9PL] (noting technology companies' opposition to an amendment to the CDA designed to stop prostitution advertising on social media websites).

170. Wingfield, Isaac & Benner, *supra* note 156.

171. Bershidsky, *supra* note 12.

172. *See* U.S. PATENT & TRADEMARK OFFICE, *supra* note 162.

173. *Id.*

174. Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512(c)(1).

175. Andrew Bolson, *The Internet Has Grown Up, Why Hasn't the Law? Reexamining Section 230 of the Communications Decency Act*, INT'L ASS'N PRIVACY PROFS. (Aug. 27, 2013), https://iapp.org/news/a/the-internet-has-grown-up-why-hasnt-the-law-reexamining-section-230-of-the/ [https://perma.cc/EY4T-J5DJ].

monitoring their platforms for this content and have strong legal incentives to conduct similar monitoring in the copyright context.

CONCLUSION

Fake news poses such a significant threat to the legitimacy of our press, and thus the democratic legitimacy of our government, that Congress should create a legal solution to address this problem. Our democracy depends on the public's ability to rely on the information presented to it by the press in order to engage in the political process, yet fake news is significantly undermining Americans' trust in the press's credibility. Congress could address these problems created by fake news by amending § 230 of the CDA to hold ISPs and social media websites liable under a modified common law distributor liability. This would incentivize websites to remove defamatory fake news once they are made aware of it. Fake news creates a serious enough threat to our democracy that it necessitates a legal solution, and amending the CDA provides a solution that would be both effective and workable.

Andrea Butler[*]

[*] J.D. (2019) Washington University School of Law, B.J. (2015) The University of Missouri. I would like to thank all the members of the Washington University Law Faculty who guided my ideas and writing process, and the editors of the *Washington University Law Review* for their valuable contributions and thoughtful suggestions regarding this Note.