

NOTE

“YOU’RE FAKE NEWS”¹: PRESERVING BOTH FREE SPEECH AND DEFAMATION LAWSUITS

I. INTRODUCTION

The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”² These words ensure that the First Amendment is one of the core founding principles upon which the United States’ democratic government is based.³ As a general rule, through the First Amendment, the government may pass no laws prohibiting or abridging the freedom of speech, the freedom of the press, the right of peaceable assembly, or the right to “petition the Government for a redress of grievances.”⁴ However, this Amendment is not an impenetrable shield; the First Amendment has a multitude of limitations, especially in matters regarding defamation.⁵

To be clear, many lies are told by many people each day.⁶ State civil courts offer a legal avenue for redress in the face of particularly damning

1. See *infra* note 14 and accompanying text.

2. U.S. CONST. amend. I.

3. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *U.S. Institutions – Why Is the First Amendment Important?*, VOICE OF AM. (Feb. 20, 2017), <https://editorials.voa.gov/a/the-importance-of-the-first-amendment-/3733070.html>; see also Benjamin P. Pomerance, *What Are We Saying? Violence, Vulgarity, Lies . . . and the Importance of 21st Century Free Speech*, 76 ALB. L. REV. 753, 753-55 (2013).

4. U.S. CONST. amend. I; *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (holding that “the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

5. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-46 (2002) (“The freedom of speech has its limits; it does not embrace certain categories of speech, including *defamation*, incitement, obscenity, and pornography produced with real children.”) (emphasis added).

6. *UMass Researcher Finds Most People Lie in Everyday Conversation*, EUREKALERT! (June 10, 2002), https://www.eurekaalert.org/pub_releases/2002-06/uoma-urf061002.php (discussing a study conducted by Robert Feldman which found that, generally, sixty percent of people lie at least once in a ten-minute conversation).

lies in the form of defamation laws and lawsuits.⁷ Defamation lawsuits can, of course, be levied against the media (to varying levels of success).⁸ However, although labeling news as “fake” and thus malicious may be easy, the legal distinction is not always that simple.⁹

For example, in *New Times v. Isaacks*,¹⁰ the Supreme Court of Texas ruled in favor of the defendant because, although the allegedly satirical article in question was fake, the defendant testified that she “did not know or suspect [at the time of publication] that the satire would be misinterpreted.”¹¹ In addition, media outlets which are clearly biased or selective in their coverage and reporting are often protected from legal retribution by laws which deter strategic lawsuits against public participation (“SLAPP”) called anti-SLAPP legislation.¹² On the other hand, truthful yet unfavorable stories are routinely written about politicians from both sides of the aisle.¹³ President Donald Trump has introduced the practice of calling such stories, and their respective publications, varying levels of “Fake News,”¹⁴ coopting a term which is normally used for blatantly and egregiously doctored or constructed

7. See generally 128 AM. JUR. TRIALS *Litigating Defamation Claims* §1 (2013) [hereinafter *Litigating Defamation Claims*] (detailing a number of jurisdictions and their respective defamation elements).

8. See, e.g., *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976); Notice of Removal at 3, *Marshall Cty. Coal Co. v. Oliver*, No. 5:17-CV-99 (N.D. W. Va. June 30, 2017). See generally *New Times, Inc. v. Isaacks*, 146 S.W.3d 144 (Tex. 2004).

9. See *infra* Part II.C, III.C.

10. 146 S.W.3d 144 (Tex. 2004).

11. *Id.* at 168.

12. See RODNEY A. SMOLLA, 2 LAW OF DEFAMATION § 9:107 (2d ed. 2018).

13. See, e.g., Harriet Agerholm, *Donald Trump Boasts of ‘Plunging’ Health Insurance Stocks Following Executive Order on Obamacare*, INDEPENDENT (Oct. 14, 2017, 1:34 PM), <http://www.independent.co.uk/news/world/americas/us-politics/donald-trump-obamacare-executive-order-health-care-reform-insurance-stocks-company-a8000371.html?amp> (reporting Republican President Donald Trump’s executive order removing insurance company subsidies caused health insurer stocks to dip drastically and may lead to increased insurance premiums); Alex Pappas, *Michelle Obama Called Weinstein a ‘Good Friend,’ Was Silent for Days on Allegations*, FOX NEWS (Oct. 10, 2017), <http://www.foxnews.com/politics/2017/10/10/michelle-obama-called-weinstein-good-friend-was-silent-for-days-on-allegations.html> (reporting that the Democratic former First Lady Michelle Obama had a close relationship with Harvey Weinstein and avoided condemning him for five days following the multiple sexual misconduct allegations issued against him).

14. Rebecca Morin, *Trump Accuses “Fake News” Media of Making Up Sources*, POLITICO (May 28, 2017, 8:59 AM), <http://www.politico.com/story/2017/05/28/trump-fake-news-media-238894>. In the current political climate, the use of the term “fake news” has developed to hold two very distinct meanings, as will be discussed herein. For the purposes of this Note, “fake news,” uncapitalized—and from this point forward without quotation marks—shall refer to false or purposefully ambiguous information circulated under the pretense of appearing like actual news. In contrast, “Fake News,” capitalized and within quotation marks, shall refer to the phenomenon of legitimate journalism accused as being fake or unreasonably biased when reporting on unfavorable stories and facts regarding the accuser. See *infra* Part II.

published lies.¹⁵ Such threats of expensive litigation can chill public discourse and discussion on the part of the media or unaffiliated citizen reporters.¹⁶ How may our free press be protected while keeping fake news open to defamation lawsuits?¹⁷

This Note introduces the concepts of fake news and “Fake News,” and outlines the overall conflict between the two when they are subjected to defamation laws.¹⁸ Part II of this Note discusses in detail the First Amendment rights all Americans possess, the intricacies of defamation laws—both generally and as they relate to journalism—and the history and differences between fake news and “Fake News.”¹⁹ Part III discusses the ways in which fake news and “Fake News” may present difficulties with respect to defamation laws, as well as the potential threat posed to the First Amendment in attempting to strictly enforce defamation laws upon journalism deemed to be “Fake News.”²⁰ To broaden this narrow proverbial tightrope, Part IV of this Note proposes that news organizations should pledge themselves to ethics codes, whereby their individual anchors, reporters, and correspondents must sign affidavits or affirmations stating that their reports have been collected and disseminated according to the tenets of a code of ethics.²¹ Under the threat of perjury, media outlets and their individual employees will be more hesitant to publish actual fake news.²² At the same time, those who bring meritless defamation lawsuits in these cases would be punished with sanctions and court expenses.²³ In this way, the freedom of the press guaranteed by the First Amendment would be preserved while stamping out the recent trend of fake news upon which many have falsely based their knowledge and perception.²⁴

II. THE FIRST AMENDMENT, DEFAMATION, AND THE HISTORY OF FAKE NEWS

The First Amendment, since its creation, has acted as a safeguard against the impingement by the government of the freedom of words and

15. See 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>.

16. See *infra* Part III.

17. See *infra* Part III.

18. See *supra* Part I.

19. See *infra* Part II.

20. See *infra* Part III.

21. See *infra* Part IV.

22. See *infra* Part IV.

23. See *infra* Part IV.

24. See *infra* Part IV.

expression.²⁵ The extent of this safeguard, however, is a hotly debated area of law, with disagreements even within the Supreme Court of what constitutes unprotected speech.²⁶ One of the more generally agreed-upon types of unprotected speech is that of defamation.²⁷ Although defamation actions exist to provide defamed parties with relief,²⁸ the rise of two different variations and definitions of fake news²⁹ has muddied the waters in terms of what can and should be protected from defamation suits.³⁰ Subpart A discusses the history and meaning of the First Amendment, and what has historically qualified as protected and unprotected speech.³¹ Subpart B discusses the history and function of defamation laws, as well as how they generally operate across the various jurisdictions.³² Finally, Subpart C discusses the background and rise of factually spurious fake news as well as the newer, more politically-charged rhetoric of negative press being called “Fake News.”³³

A. *The First Amendment: Protections and Exceptions*

Free speech is not an esoteric area of law sequestered to a specific group of individuals; instead, it affects anybody with words to express, ideas to share, or information to offer.³⁴ Officially adopted as part of the Constitution under the First Amendment in 1791, the text of the amendment seems easy enough to understand.³⁵ The importance of the freedoms guaranteed by the First Amendment is, however, self-actualizing in how often and how widely the meaning of the amendment is scrutinized and debated.³⁶ Even within the American court system, free speech cases are judged according to a myriad of differing doctrines.³⁷ The meaning, interpretation, and guarantees of the First Amendment are further muddied when one examines its exceptions regarding what is considered free speech and what is not considered free speech, the latter of which is considered to be unprotected.³⁸

25. See generally Pomerance, *supra* note 3, at 753-55.

26. See generally Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297 (1995).

27. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-46 (2002).

28. See *infra* Part II.B.

29. See *supra* note 14 and accompanying text.

30. See *infra* Part II.C.

31. See *infra* Part II.A.

32. See *infra* Part II.B.

33. See *infra* Part II.C.

34. See Pomerance, *supra* note 3, at 753-54.

35. *Id.* at 753.

36. *Id.*

37. *Id.* at 755.

38. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-46 (2002).

As important as the First Amendment is in today's American society, the freedom of speech was not, at first, guaranteed to American citizens.³⁹ In fact, the Articles of Confederation did not reference or allude to any guaranteed right to the freedom of speech for any American citizen.⁴⁰ This was understandable, as the Articles of Confederation provided for little more than a series of thirteen loosely-unified states with a weak Congress to join them.⁴¹ With an exceedingly weak central government, the fledgling "nation" inevitably caved in on itself, unable to perform such basic duties as managing trade, currency, or its citizenry.⁴² The Constitutional Convention of 1787 was called in response to this crisis—featuring some of the greatest minds America had to offer—to construct a more stable framework for the federal government to be based upon.⁴³ From this legendary meeting of the minds, the United States Constitution came into existence.⁴⁴ However, before this new Constitution paved the way for a system of checks and balances, a stronger federal government, and a more stabilized Union could be instated, it would first need to be ratified.⁴⁵

Initially, the Anti-Federalist delegates of a few states were reluctant to ratify the new Constitution as presented because it lacked a Bill of Rights and centralized power in a national government.⁴⁶ In an effort to promote the ratification of the Constitution, these delegates were promised a Bill of Rights by the first Congress.⁴⁷ The American people formally ratified the United States Constitution in 1789.⁴⁸ The Bill of Rights followed soon after.⁴⁹

The Bill of Rights was originally drafted and presented in an effort to appeal to a segment of the population concerned with what they saw as the centralization of power and the erosion of personal liberty.⁵⁰

39. UNIV. OF TENN. KNOXVILLE, *The Bill of Rights: A Gift from the Antifederalists*, JEM FIRST AM. PROJECT, <http://firstamendment.cci.utk.edu/content/bill-rights-gift-antifederalists> (last visited Sept. 17, 2019).

40. *See generally* ARTICLES OF CONFEDERATION of 1781 (containing no provision for a freedom of speech).

41. THOMSON REUTERS, *A History of the Constitution*, FINDLAW, <http://supreme.findlaw.com/documents/consthist.html> (last visited Sept. 17, 2019) (noting that the Articles of Confederation did not even provide for the three branches of government we enjoy today).

42. *Id.*

43. *Id.* Thomas Jefferson, George Washington, Benjamin Franklin, James Madison, and Alexander Hamilton were among those in attendance. *Id.*

44. *Id.*

45. *Id.*

46. THOMSON REUTERS, *supra* note 41; UNIV. OF TENN. KNOXVILLE, *supra* note 39.

47. THOMSON REUTERS, *supra* note 41.

48. *Id.*

49. UNIV. OF TENN. KNOXVILLE, *supra* note 39.

50. *Id.*

Specifically, it was the Federalists who were largely attempting to appeal to the Anti-Federalists with a continually growing list of amendments to the United States Constitution.⁵¹ The First Amendment was the first of the ten amendments of the Bill of Rights added to the Constitution in 1789.⁵² Although the Anti-Federalists were at first worried at the prospect of a Constitution which did not outright guarantee the protection of the rights of the American people, the promise of a Bill of Rights and, by extension, the First Amendment, appeased the Anti-Federalists, who then allowed the Constitution to finally be ratified.⁵³

Essentially, the purpose of the First Amendment was, at first, “to safeguard the rights of popular majorities . . . against a possibly unrepresentative and self-interested Congress.”⁵⁴ Even so, this protective and important amendment has been repeatedly suspended in times of crisis or war.⁵⁵ The American citizens have preferred security over the freedom of speech during the Civil War,⁵⁶ World War I,⁵⁷ and the Red Scare.⁵⁸ Furthermore, it must be remembered that the wide-reaching protection offered to unpopular speech was a relatively modern construction of the twentieth century.⁵⁹ As a matter of fact, “[p]rior to these developments, ‘no group of Americans was more hostile to free speech claims . . . than the judiciary, and no judges were more hostile than the [J]ustices on the United States Supreme Court.’”⁶⁰

Today, however, Americans cherish and worship the broad interpretation of the First Amendment read by the Supreme Court and its protections of unpopular opinions, offensive ideas, controversial political statements, and the right of journalists to staunchly criticize the United States government and military and publish their classified secrets in the process.⁶¹ The importance Americans attribute to the First Amendment has even inspired law students to protest then-Attorney General Jeff

51. *Id.*

52. *Id.*

53. *Id.*

54. Tom Donnelly, *A Popular Approach to Popular Constitutionalism: The First Amendment, Civic Education, and Constitutional Change*, 28 QUINNIPIAC L. REV. 321, 329 (2010) (quoting Akhil Reed Amar, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 21 (1998)).

55. *See id.* at 328, 365, 369.

56. *Id.* at 328 (citing MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”*: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 300-56 (2000)).

57. *Id.* (citing STEPHEN M. FELDMAN, *FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY* 241-90 (2008); DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 248-341 (1997)).

58. *Id.* at 329.

59. *Id.* at 331.

60. *Id.* (quoting RABBAN, *supra* note 57, at 15).

61. *Id.* at 333-34.

Sessions during a lecture on his supposedly differing opinions as to what freedom of speech means, even after the school revoked its invitation.⁶² Indeed, the American people generally seem to agree that “the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”⁶³

As expansive as free speech protections under the First Amendment may seem, there are a number of caveats and exceptions.⁶⁴ For example, in the case of private employment, while an employee’s speech is protected from government retaliation, no such protection is offered from the actions of an employer.⁶⁵ Also not officially protected by the First Amendment is what the Court has sometimes called “low-value speech,” or speech which is of such little social worth that the Court does not believe it warrants protection.⁶⁶ Depending on the makeup of the Supreme Court, such low-value speech includes fighting words,⁶⁷ obscenity,⁶⁸ child pornography,⁶⁹ sexually explicit expression,⁷⁰ profanity,⁷¹ commercial speech,⁷² and libel.⁷³ *Ashcroft* solidified these varieties of unprotected speech in case law.⁷⁴ In the majority decision, the Supreme Court held that “[t]he freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.”⁷⁵ Exempted from protected

62. Colin Kalmbacher, *Protesters Banned at Jeff Sessions Lecture on Free Speech*, L. & CRIME (Sept. 26, 2017, 5:32 PM) <https://lawandcrime.com/high-profile/protesters-banned-at-jeff-sessions-lecture-on-free-speech>.

63. *United States v. Alvarez*, 567 U.S. 709, 716 (2012) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)).

64. *See supra* notes 55-60 and accompanying text.

65. Margaret M. DiBianca, *Think You've Got Rights? Yeah, Right*, 12 NO. 8 DEL. EMP. L. LETTER 3 (2007).

66. *See generally* Philip J. Prygoski, *Low-Value Speech: From Young to Fraser*, 32 ST. LOUIS U. L.J. 317 (1987).

67. Shaman, *supra* note 26, at 301-04 (noting that while “‘despite their verbal character,’ fighting words are ‘analogous to a noisy sound truck’ and are excluded from the scope of the First Amendment due to their ‘nonspeech’ element of communication[.]” the Supreme Court is very much split on how to handle cases involving fighting words and have no uniform method of ruling on such cases).

68. *Id.* at 304-08.

69. *Id.* at 308-09.

70. *Id.* at 309-12.

71. *Id.* at 312-14.

72. *Id.* at 317-19.

73. *Id.* at 314-17.

74. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-46 (2002).

75. *Id.* (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring)).

speech, therefore, are a number of nefarious kinds of ideas, images, and dialogues which center on these categories of speech.⁷⁶

B. Defamation Generally and its Origins

Prior to the 1500s, English common law had only an obscure predecessor to defamation actions to offer the defamed.⁷⁷ Back then, the jurisdiction of this primordial beginning of defamation law was under the purview of the Church.⁷⁸ It was not until much later that the King's courts allowed the defamed to bring actions for defamatory words.⁷⁹ This is because the common law in England was more physically-based than word-based.⁸⁰ These first "defamation" actions, allowed by the Statute of *Scandalum Magnatum* in 1378, allowed judges and Church officials to sustain such actions if they were insulted or defamed.⁸¹

In 1507, the first recorded common law defamation case was brought.⁸² At this time, three categories of defamation were recognized: (1) accusations of a crime, (2) accusations of incompetency, and (3) accusations of disease.⁸³ In the middle of the sixteenth century, English courts attempted to narrow the scope of possible defamation actions by requiring plaintiffs to prove actual damage to their reputation, disallowing actions against words said in jest or anger, and erring on the side of ambiguous words being less defamatory than they could potentially be interpreted as.⁸⁴

Britain's interpretation of defamation law followed the British to the colonies and embedded itself in what would eventually become the United States of America.⁸⁵ The true genesis of the American interpretation of defamation actions began in 1734, when John Peter Zenger was imprisoned for political attacks against the colonial governor of New York, William Cosby.⁸⁶ This case established that, in order to sue for defamation, the defamatory comments must be proven to be false.⁸⁷ In

76. *See id.*

77. Ben Darlow, *History of Defamation*, ENG. LEGAL HIST. (Oct. 18, 2013), <https://englishlegalhistory.wordpress.com/2013/10/18/history-of-defamation>.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *See* Steven Pressman, *Libel Law in the United States*, UNFETTERED PRESS, <https://web.archive.org/web/20190105003005/https://usa.usembassy.de/etexts/media/unfetter/press08.htm> (last visited Sept. 17, 2019).

86. *Id.*

87. *Id.*

addition, this case also established the precedent of placing defamation cases before a jury, allowing jurors to determine the amount of suffering and monetary damage.⁸⁸

Defamation laws have never truly been uniform across the nation, even after the formation of the United States.⁸⁹ Defamation laws are, for the most part, state law issues which vary from jurisdiction to jurisdiction.⁹⁰ While this includes the elements necessary to sustain a defamation claim on behalf of the plaintiff, states also are at liberty to determine the kinds of damages at stake in such a lawsuit.⁹¹

Because defamation lawsuits are so dependent on where the claim is brought, there are just as many sets of elements to prove as a plaintiff as there are legal jurisdictions.⁹² However, a standard set of elements which many jurisdictions hold in common does exist.⁹³ In order for a plaintiff to succeed in a defamation claim, he or she must generally show that: (1) a false and defamatory statement concerning another, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.⁹⁴ To further distinguish defamation lawsuits, defamatory comments made in writing are termed “libel,” while those made orally are termed “slander.”⁹⁵

For example, in *Accadia Site Contracting, Inc. v. Skurka*,⁹⁶ a New York court found that the plaintiff satisfied his burden of presenting a defamation cause of action by pleading the declaration of a false statement, published without authorization by a third party, present negligence, and special harm.⁹⁷ A slightly more recent example of a defamation lawsuit is *Marshall County Coal Co. v. Oliver*.⁹⁸ The plaintiff in this case claimed that the defendant, on an episode of *Last Week*

88. *Id.*

89. *Id.*

90. *Litigating Defamation Claims*, *supra* note 7, at § 2.

91. *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976).

92. *See generally Litigating Defamation Claims*, *supra* note 7, at § 2 (listing the elements of a defamation claim a prospective plaintiff must prove to sustain his or her action in different jurisdictions in the United States).

93. *Id.*

94. *Id.*

95. *Id.*

96. 10 N.Y.S.3d 772 (App. Div. 2015).

97. *Id.* at 774 (“[A] false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se.” (quoting *D’Amico v. Corr. Med. Care, Inc.*, 991 N.Y.S.2d 687, 694 (App. Div. 2014))).

98. Notice of Removal at 3, *Marshall Cty. Coal Co. v. Oliver*, No. 5:17-CV-99 (N.D. W. Va. June 30, 2017).

Tonight with John Oliver, defamed the plaintiff by discussing the decline of coal mining jobs, President Obama's war against coal, and Trump's promise to revitalize the coal industry.⁹⁹ It was subsequently remanded to state court due to a lack of diversity jurisdiction.¹⁰⁰

While the elements of a defamation action vary between jurisdictions, they usually do not vary by any wide degree.¹⁰¹ Under South Carolina law, for instance, a defamation claim must allege that the defendant: (1) made a false defamatory statement, (2) there was an unprivileged publication to a third party, (3) the publisher was at fault, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.¹⁰² In comparison, Minnesota requires: (1) a false defamatory statement of the plaintiff, (2) an unprivileged publication to a third party, and (3) a tendency to harm the plaintiff's reputation to the community.¹⁰³ Ohio's elements for defamation are likewise slightly different from the standard, where one must show: (1) a false statement, (2) the statement was defamatory to the plaintiff, (3) the statement was published to a third party, (4) the defendant was at least negligent, and (5) there was damage to the plaintiff's reputation.¹⁰⁴ While this makes defamation against a singular individual difficult to define across the nation, the Supreme Court has created measures to standardize defamation actions against the media and protect the press from actions by disgruntled public figures.¹⁰⁵

The Supreme Court has established that defamation lawsuits brought by public officials requires a special showing of actual malice.¹⁰⁶ In *New York Times Co. v. Sullivan*,¹⁰⁷ a libel action was brought against the *New York Times* by an Alabama commissioner regarding an editorial which discussed grievances held by the black community.¹⁰⁸ The Montgomery County Circuit Court reached a verdict for plaintiffs; the Supreme Court of Alabama affirmed.¹⁰⁹ On appeal to the United States Supreme Court, the Court held that the Alabama rule of law was inadequate in upholding freedom of speech.¹¹⁰ The Court further held that, as a safeguard for the

99. *Id.*

100. Order Granting Plaintiff's Motion to Remand at 3-4, *Marshall Cty. Coal Co. v. Oliver*, No. 5:17-CV-99 (N.D. W. Va. Aug. 10, 2017).

101. *See generally Litigating Defamation Claims*, *supra* note 7, at § 2.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Pressman*, *supra* note 85.

106. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

107. 376 U.S. 254 (1964).

108. *Id.* at 256.

109. *Id.*

110. *Id.* at 264.

sanctity of the freedom of speech, public officials could not recover from a libel action unless the author made his or her statements with actual malice.¹¹¹

To establish actual malice, the reporter in question must have actually known that the information he or she used to base their article upon was false or acted in a manner rising to the level of recklessness regarding the veracity of the claims being made.¹¹² Erroneous interpretation of the facts or information turning out to be false will not impute a finding of actual malice.¹¹³ Where there are obvious reasons to doubt the veracity of the information being reported regarding a public figure, a publisher's defense that he or she published the defamatory information in good faith is generally not enough to obtain summary judgment on the merits.¹¹⁴ This actual malice requirement ensures that the press remains able to report on public figures without fear of being hauled to court over every statement they make—thus infringing upon their freedom of speech—while at the same time allowing for public figures to bring defamation suits against the more egregious examples of openly intentional defamation.¹¹⁵

C. Fake News and Legitimate News

Recently, fake news has come to dominate social media and political discussion, especially in the news cycle surrounding the 2016 presidential election.¹¹⁶ Fake news, however, is hardly a new concept; in fact, *fake* news has its roots as far back as the late nineteenth century.¹¹⁷ *False* news, however, has an even longer history.¹¹⁸ “False news,” used in reference to spurious news and journalism, was used in parlance as far back as the sixteenth century and up to the late nineteenth century.¹¹⁹ This is because the word “fake” did not truly enter the English lexicon until the late

111. *Id.* at 279-80.

112. 50 AM. JUR. 2d *Libel and Slander* § 35 (2019).

113. *Id.*

114. *Id.*

115. *See id.*

116. Steven Seidenberg, *Lies and Libel*, 103 A.B.A. J. 48, 50 (2017).

117. *The Real Story of Fake News*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/the-real-story-of-fake-news> (last visited Sept. 17, 2019).

118. *Id.*

119. *Id.* (“cruel lies, false news, [dis]honest women, f[eig]ned friendship, continual[] en[]mities, doubled malice, vain[] words, and false hopes, of which[] eight things we ha[v]e such[] abundance in this Court[] . . .”) (quoting ANTONIO DE GUEVARA, *THE FAMILIAR EPISTLES OF SIR ANTHONY OF GUEVARA* 87 (Edward Hellowes trans., 1545)); *The Resignation of M. Drouyn De Lhuys*, DETROIT FREE PRESS, Sept. 20, 1866, at 263 (“The French press knows little, and under laws which punish ‘false news,’ and render a journal liable to suppression if it displeases the executive power, is naturally afraid to say what little it knows.”)).

nineteenth century.¹²⁰ Beginning in the 1890s, however, fake news was simply called “fake news.”¹²¹ This resulted in a stream of news articles and headlines which could have easily come from any article written today, all using “fake news” to refer to truly fake news.¹²² Both the term and the concept are, therefore, entrenched and established in both the English lexicon and our American history.¹²³

Of course, even after the term “fake” came into use, fake news as a concept did not have a strict uniform name, although its harmful effects were certainly damning.¹²⁴ For example, “yellow journalism,” was popular amongst American newspapers at the turn of the twentieth century.¹²⁵ Named after a feud between two newspaper moguls over a cartoon character known as the Yellow Kid, yellow journalism was the practice of using the great resources the press had to fashion sensational stories with the goal of exerting power over politics and selling newspapers.¹²⁶

The era of yellow journalism was one of “exaggerated headlines and fabricated stories.”¹²⁷ Even then, such sensationally falsified news was not without far-reaching consequences, one of which was the Spanish-American War.¹²⁸ In a series of machinations, newspaper baron William Hearst, disagreeing with then President McKinley’s philosophy of non-intervention in global conflicts and supportive of Cuba’s movement for independence from Spain, published a pilfered letter from the Spanish minister to Washington which labeled McKinley as a weak and lowly politician and pressured him to take action.¹²⁹ Frederick Remington, a photographer, was eventually sent to Cuba by Hearst to cover the eventual

120. *Id.*

121. *Id.*

122. *See, e.g., id.* (quoting *Fake News*, KEARNEY DAILY HUB, July 7, 1890, at 4 (“Fake News[:] The following is handed to us for publication: Sunday’s Enterprise says that I and a companion were run over by the Neptune and thrown into the water. As can be proved by more than one, we did not so much as get our feet wet, nor were we helped into the Neptune.”); *Work of “Special Fiends,”* BUFFALO COM., May 2, 1891, at 11 (“The public taste is not really vitiated and it does not in its desire for ‘news’ absolutely crave for distortions of facts and enlargements of incidents; and it certainly has no genuine appetite for ‘fake news’ and ‘special fiend’ decoctions such as were served up by a local syndicate a year or two ago.”).

123. *See id.*

124. *See infra* notes 124-34 and accompanying text.

125. Jessica E. Jackson, Note, *Sensationalism in the Newsroom: Its Yellow Beginnings, the Nineteenth Century Legal Transformation, and the Current Seizure of the American Press*, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 789, 789 (2005).

126. *Id.* at 790-91.

127. *Id.* at 791.

128. *Id.* at 791-92.

129. *Id.*

conflict.¹³⁰ When Remington contacted Hearst and informed him that there was, in fact, no war to cover, Hearst responded, “You furnish the pictures, I’ll furnish the war.”¹³¹ Soon after, the U.S. battleship *Maine* exploded and sunk into Havana harbor.¹³² Onsite observers and initial descriptions depicted an explosion which originated from onboard the vessel, but Hearst and other media tycoons had their newspapers report on supposed rumors and plots from the Spanish to sink an American ship.¹³³ Amidst Hearst’s calculatedly-circulated rallying cry, “Remember the Maine! To hell with Spain[.]”¹³⁴ America was inevitably pushed into open conflict when the Spanish-American War broke out in May of 1898.¹³⁵

Starting a war may seem like an outlandishly severe outcome of fake news and stretched, sensationalized truth, but dishonest stories oftentimes have crippling, life-altering effects on individuals both private and public.¹³⁶ In 1996, for example, a private security officer named Richard Jewell was lauded as a hero and then defamed as a possible terrorist in the span of just a few days.¹³⁷ In the early hours of his shift, Jewell happened upon an undetonated bomb located within the AT&T Pavilion at Centennial Olympic Park in Atlanta, Georgia.¹³⁸ Jewell alerted all who he could in the area, and aided in evacuating those who would otherwise be caught in the blast zone.¹³⁹ Although the ensuing blast did claim the lives of two people, and injured a hundred others, the media hailed Jewell as a hero.¹⁴⁰ It took a scant seventy-two hours for the media to sensationalize Jewell’s story by reporting on unverified rumors specifically reported and framed to create more salient and attention-grabbing news: that Jewell matched the profile of the bomber, that he was an aggressive police officer in the past, that he sought publicity in all that he did, and that one law

130. *Id.* at 792.

131. *Id.*

132. U.S. DEP’T OF STATE, *U.S. Diplomacy and Yellow Journalism, 1895-1898*, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1866-1898/yellow-journalism> (last visited Sept. 17, 2019) [hereinafter *U.S. Diplomacy*].

133. *Id.*

134. Jonathan W. Lubell, *The Constitutional Challenge to Democracy and the First Amendment Posed by the Present Structure and Operation of the Media Industry Under the Telecommunications Acts*, 17 ST. JOHN’S J. LEGAL COMMENT. 11, 30 n.70 (2003) (noting that Hearst’s own *New York Journal* was not alone in promoting war with Spain, and in fact was joined by other publications such as the *Chicago Tribune*, *The World*, and the *New York Herald*).

135. U.S. DEP’T OF STATE, *The Spanish-American War, 1898*, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1866-1898/spanish-american-war> (last visited Sept. 17, 2019); *U.S. Diplomacy*, *supra* note 132.

136. *See, e.g.*, Jackson, *supra* note 125, at 800-15.

137. *Id.* at 802-08.

138. *Id.* at 802.

139. *Id.*

140. *Id.* at 802-03.

enforcement officer was quoted as saying that if Jewell was not the bomber, he was still “one sick puppy.”¹⁴¹ Jewell filed defamation lawsuits to recover financially, if not emotionally and socially, from this character assassination which had demolished the public’s perception of him.¹⁴² Perplexingly, the Court of Appeals of Georgia, in *Jewell v. Cox Enterprises Inc.*, found Jewell to be a public figure instead of a private individual because he willingly appeared on television and granted interviews.¹⁴³ As discussed earlier, this finding makes any seemingly private citizen’s attempt to legally recover from having been defamed in the press much more difficult, since public figures must show actual malice in a story’s publication to recover from a defamation claim.¹⁴⁴

As technology develops, so too does its effect on society, and now fake news, unabashedly false and a far cry from merely being sensationalized, is a phenomenon occurring predominantly on the Internet.¹⁴⁵ It is essentially misinformation, false statements, or lies originating on intentionally misleading websites and meant to spread like a virus through social media in order to influence public perception or

141. *Id.* at 803-08.

142. *Id.* at 804.

143. *Id.* at 806.

144. *See supra* Part II.B.

145. David O. Klein & Joshua R. Wueller, *Fake News: A Legal Perspective*, J. INTERNET L., Apr. 2017, at 1. Technology has complicated the issue of fake news further with the introduction of what are called “deep fakes.” *See* Oscar Schwartz, *You Thought Fake News Was Bad? Deep Fakes Are Where Truth Goes to Die*, GUARDIAN (Nov. 12, 2018), <https://www.theguardian.com/technology/2018/nov/12/deep-fakes-fake-news-truth>. Deep fakes began as videos generated by artificial intelligence which constructed convincing videos of people doing and saying things that they never actually did or said. *Id.* Early uses of this technology included doctored political speeches by manipulating a digitized image of Donald Trump and superimposing female celebrities’ faces into pornographic scenes. *Id.* Deep fake technologies can now mimic speech to digitally fabricate original speech content from just a few seconds of sample material or generate an entire news article which might be convincing enough to fool the average reader into believing it was written by a human being, the latter capability being so potentially misleading and dangerous that its own creators are unwilling to release the full program to the public. Samantha Cole, *‘Deep Voice’ Software Can Clone Anyone’s Voice with Just 3.7 Seconds of Audio*, VICE (Mar. 7, 2018, 1:00 PM), https://motherboard.vice.com/en_us/article/3k7mgn/baidu-deep-voice-software-can-clone-anyones-voice-with-just-37-seconds-of-audio; Sean Gallagher, *Researchers, Scared by Their Own Work, Hold Back “Deepfakes for Text” AI*, ARS TECHNICA (Feb. 15, 2019, 3:10 PM), <https://arstechnica.com/information-technology/2019/02/researchers-scared-by-their-own-work-hold-back-deepfakes-for-text-ai>. Deep fakes are certainly disruptive to truth and can potentially lead to many troubling outcomes for how we understand or value what the truth may be, since they so easily fool our eyes and make it difficult to tell what is real or not. John Villasenor, *Artificial Intelligence, Deepfakes, and the Uncertain Future of Truth*, BROOKINGS INSTITUTE (Feb. 14, 2019), <https://www.brookings.edu/blog/techtank/2019/02/14/artificial-intelligence-deepfakes-and-the-uncertain-future-of-truth>. While this is a pressing issue which must eventually be tackled, either by the legislature or by the courts, this Note focuses on the issue of actual human beings in publication positions who may attempt to willfully doctor or fabricate news stories and their liability for defamation. *See supra* Part III.

generate revenue from clicks and page visits.¹⁴⁶ Fake news articles are designed to mislead, are intentionally and knowingly fabricated, and almost always center on a well-known public figure or a divisive current event.¹⁴⁷

Fake news articles within the last few years have been overtly political in nature and have oftentimes held a marked right-wing slant.¹⁴⁸ In the months leading up to the 2016 American presidential election, articles from credible mainstream news sources were actually outpaced in traffic and shares by fake news sites.¹⁴⁹ These articles ranged anywhere from benign, to ridiculous, to downright dangerous.¹⁵⁰ One article, for instance, claimed that after Melania Trump's "brilliant speech" on cyberbullying, she was instantly beset by "leftist elites" because her husband, President Donald Trump, "likes to tell the truth on Twitter."¹⁵¹ According to the article, Lady Gaga, one of these "leftist elites," verbally assaulted the future First Lady and hurled racial insults at her, eventually physically throwing "something" at her.¹⁵² The article reported that Lady Gaga was summarily handcuffed and was sent to face a multi-million dollar lawsuit, as long as the event was not "prosecuted by the corrupt liberals in the city government."¹⁵³ This was all patently false information.¹⁵⁴

In another example, hinging on the absurd, there was a fake news article written by "ABC News"—titled as such to emulate the name of the more respectable and legitimate American Broadcasting Company—

146. Klein & Wueller, *supra* note 145, at 1, 6.

147. *Id.* at 6.

148. Laura Sydell, *Facebook Faces Increasing Scrutiny Over Election-Related Russian Ads*, NPR (Sept. 26, 2017), <http://www.npr.org/sections/alltechconsidered/2017/09/26/553827241/facebook-faces-increasing-scrutiny-over-election-related-russian-ads>.

149. Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook*, BUZZFEED (Nov. 16, 2016, 5:15 PM), https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm_term=.ltwLnRPoW#.oj5GYBWAJ (reporting that, while up until the last few months of the campaign season content from reputable news sources far outpaced content from fake news sources, the last few months of the 2016 presidential election campaign saw the top twenty election stories from fake news sites garnering 8,711,000 shares, reactions, and comments on Facebook, while the top twenty election stories from legitimate news sites only received 7,367,000 shares, reactions, and comments on Facebook).

150. *See infra* notes 150-63 and associated text.

151. Stryker, *Lady Gaga's Twitter Attack on Melania Trump Lands Her in Handcuffs When the Two Meet Face to Face*, AM. LAST LINE OF DEFENSE (Nov. 6, 2016), <https://web.archive.org/web/20170609175627/http://thelastlineofdefense.org/lady-gagas-twitter-attack-on-melania-trump-lands-her-in-handcuffs-when-the-two-meet-face-to-face>.

152. *Id.*

153. *Id.*

154. Dan Evon, *Lady Gaga Arrested for Twitter Attack on Melania Trump*, SNOPE (Nov. 15, 2016), <http://www.snopes.com/lady-gagas-arrested-for-twitter-attack-on-melania-trump>.

which claimed President Obama signed Executive Order 13738 while in office.¹⁵⁵ According to the article, President Obama made it a federal offense for any federal employee to recite the Pledge of Allegiance or for any federally funded agency to display the pledge, punishable by fines reaching \$10,000 and up to a year in federal prison.¹⁵⁶ The article went on to praise Donald Trump and quoted him as calling President Obama an “illegitimate Muslim traitor” who founded ISIS and was doing all in his power to harm the Christian nation of America.¹⁵⁷

Things become a bit more damning and outrageous as one begins to inspect the craze known as “Pizzagate.”¹⁵⁸ Due to the efforts of Macedonian fake news publishers, a conspiracy theory gained traction in late 2016 amongst conspiracy theorists and alt-righters alike.¹⁵⁹ The conspiracy theory hypothesized that Hillary Clinton was, with the aid of her former campaign manager John Podesta, running a child sex ring from the basement of a pizza parlor.¹⁶⁰ Even though the D.C. pizza place in question, Comet Ping Pong, does not have a basement, that did not stop the momentum of this fake news story, which was widely discussed and solicited by notorious conspiracy theorist Alex Jones.¹⁶¹ An associated fake news article made the claim that Andrew Breitbart, of the far-right website *Breitbart*, was killed for his role in exposing this conspiracy.¹⁶² Distressingly, this led to death threats aimed at the owner of Comet Ping Pong, James Alefantis.¹⁶³ This eventually culminated into a one-man-assault on the restaurant conducted by twenty-eight-year-old Edgar Maddison, who made a misguided attempt to save trapped children by entering the pizza restaurant with an AR-15 assault rifle and firing repeated shots.¹⁶⁴ The obvious danger caused by this mistaken aspiring hero, and those who may emulate him, let alone the influential effect these bogus stories most likely had on the 2016 presidential race, have caused some to consider fake news and the ways in which it exerts influence as a very dangerous and harmful problem which must be solved.¹⁶⁵

155. Jimmy Rustling, *Obama Signs Executive Order Banning the Pledge of Allegiance in Schools Nationwide*, ABC NEWS (Nov. 11, 2016), <https://web.archive.org/web/20170314014808/http://abcnews.com.co/obama-executive-order-bans-pledge-of-allegiance-in-schools>.

156. *Id.*

157. *Id.*

158. Klein & Wueller, *supra* note 145, at 1, 6.

159. *Id.*

160. *Id.*; Seidenberg, *supra* note 116, at 49.

161. Seidenberg, *supra* note 116, at 49.

162. Sean Adl-Tabatabai, *Bombshell: Breitbart Murdered After Exposing Clinton Pedo Ring*, NEWSPUNCH (Dec. 2, 2016), <https://newspunch.com/breitbart-murdered-clinton-pedo-ring>.

163. Seidenberg, *supra* note 116, at 49.

164. *Id.*

165. Dominik Stecula, *The Real Consequences of Fake News*, CONVERSATION (July 26, 2017,

The scourge of fake news is hardly only a right-wing problem, evidenced by the rise of left-wing fake news as well.¹⁶⁶ In April of 2017, Snopes, a fact-checking resource, had to debunk more anti-Republican stories as opposed to pro-Republican stories.¹⁶⁷ Further, a recent study conducted by Trade Desk, an advertising company, using a false story regarding a Standing Rock protest being raided by police, showed that consumers on the left who consume fake news are thirty-four times more likely than the average person to have a college degree.¹⁶⁸ Purveyors of fake news on the left have financial interests at heart and exploit the phenomenon of confirmation bias.¹⁶⁹ As Claire Wardle, a research director for First Draft, an organization studying the status of truth in a post-truth world, says, “People like to share information that makes them feel good . . . [and m]any people on the left right now are feeling overwhelmed and fearful . . . of what’s going to happen next.”¹⁷⁰ Those who are scrolling their newsfeeds on their phones do not afford their full attention to the facts or sources behind a story, so when a story that seems to agree with them or makes them feel good shows up, they are more willing to share the joy with like-minded people.¹⁷¹ Although rose-colored glasses may make fake news appear to be a cancer established and controlled by the opposite side of the political aisle, it originates from and affects all avenues of the political spectrum.¹⁷²

Compounding this all is how the rhetoric for what fake news is actually used to refer to is shifting and being muddled.¹⁷³ President Trump has coopted and repurposed the term fake news, referring to intentionally false articles with the intention to deceive, into “Fake News,” his specially branded insult routinely hurled at news organizations he views as unfavorable to his image.¹⁷⁴ In fact, President Trump claims that it was he

7:25 PM), <https://theconversation.com/the-real-consequences-of-fake-news-81179>.

166. See *The Rise of Left-Wing, Anti-Trump Fake News*, BBC (Apr. 15, 2017), <https://www.bbc.com/news/blogs-trending-39592010>.

167. *Id.*

168. *Id.*

169. *Id.*; Abby Ohlheiser, *This Is How Facebook’s Fake-News Writers Make Money*, WASH. POST (Nov. 18, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/11/18/this-is-how-the-internets-fake-news-writers-make-money/?utm_term=.5e276acecd4b. One prolific writer of fake news has claimed to have made nearly \$10,000 a month from AdSense, and Macedonian teens can make nearly \$5000 a month at their most successful. *Id.*

170. *The Rise of Left-Wing, Anti-Trump Fake News*, *supra* note 166.

171. *Id.*

172. *Id.*

173. See, e.g., Carla Herrera, *Trump Says “Fake News” Won’t Show Crowd Size as CNN Shows Crowd Size*, HUFFINGTON POST (Sept. 22, 2017), http://www.huffingtonpost.com/entry/trump-huntsville-crowd-sizecnn_us_59c5c124e4b06ddf45f810ec.

174. See, e.g., *id.*; Morin, *supra* note 14; Donovan Slack, *Trump to CNN: ‘You Are Fake News,’* USA TODAY (Jan. 12, 2017), <https://www.usatoday.com/story/news/politics/onpolitics/2017/01/>

himself who coined the phrase “Fake News,” rather than it being a commonly-known phrase reserved for falsified news articles.¹⁷⁵ In hindsight of the fact that politicians and newspapers have been referring to fake news as such since the end of the nineteenth century, President Trump’s claim of invention of the phrase seems to be mistaken.¹⁷⁶ Scholars note that Trump’s tactic seems to be to injure and erode any trust his supporters and the rest of the American people may have in legitimate journalism until they are no longer receptive to the truth and are only receptive to his own word.¹⁷⁷ In his continued war against the media, President Trump has voiced his desire to loosen libel laws.¹⁷⁸ President Trump has gone so far as to threaten NBC with a revocation of their broadcasting license over an unfavorable news article they published about him.¹⁷⁹

These accusations against legitimate press and news organizations are hardly ignored by the American people.¹⁸⁰ According to a poll published in 2017, 46% of all voters believe the national news media creates and disseminates false stories about Donald Trump, while only 37% of voters hold the requisite faith in the media not to fabricate political stories.¹⁸¹ However, where more American voters believe in the illegitimacy of major broadcast news than not, opinions split from that of

11/trump-cnn-press-conference/96447880.

175. Chris Cillizza, *Donald Trump Just Claimed He Invented ‘Fake News’*, CNN (Oct. 26, 2017), <http://www.cnn.com/2017/10/08/politics/trump-huckabee-fake/index.html>. *But see* Katy Steinmetz, *The Dictionary Is Adding an Entry for ‘Fake News’*, TIME (Sept. 27, 2017), <http://time.com/4959488/donald-trump-fake-news-meaning> (reporting that Dictionary.com will be adding an entry for “fake news,” which will be defined as “[f]alse news stories, often of a sensational nature, created to be widely shared online for the purpose of generating ad revenue via web traffic or discrediting a public figure, political movement, company, etc.”).

176. Cillizza, *supra* note 175; *see also supra* notes 117-23 and accompanying text.

177. Cody Lyon, *How Dangerous Is President Trump’s ‘Fake News’ Rhetoric?*, HUFFINGTON POST (Jul. 24, 2017, 3:54 PM), http://www.huffingtonpost.com/entry/how-dangerous-is-president-trumps-fake-news-rhetoric_us_5973a737e4b0545a5c310094.

178. *See* Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 30, 2017, 7:27 AM), <https://twitter.com/realDonaldTrump/status/847455180912181249>.

179. Peter Baker & Cecilia Kang, *Trump Threatens NBC Over Nuclear Weapons Report*, N.Y. TIMES (Oct. 11, 2017), <https://www.nytimes.com/2017/10/11/us/politics/trump-nbc-fcc-broadcast-license.html>; Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 11, 2017, 6:55 AM), <https://twitter.com/realDonaldTrump/status/918112884630093825>.

180. *See* Steven Shepard, *Poll: 46 Percent Think Media Make Up Stories About Trump*, POLITICO (Oct. 18, 2017), <https://www.politico.com/story/2017/10/18/trump-media-fake-news-poll-243884>; Kelsey Sutton, *Poll: 6 in 10 Americans Think Traditional News Outlets Report Fake News*, POLITICO (Mar. 29, 2017, 11:21 AM), <https://www.politico.com/story/2017/03/fake-news-monmouth-poll-media-236639>.

181. Shepard, *supra* note 180 (reporting that 76% of Republican voters believe in the invention of hit pieces on Donald Trump while 11% do not; 20% of Democrats believe major news organizations fabricate news stories about Donald Trump, while 65% do not; 44% of independent voters hold no faith in the media in this regard, while 31% do).

President Trump in how best to combat this torrent of alleged “Fake News.”¹⁸² While President Trump’s solution may be to make it easier to sue major broadcasters¹⁸³ or revoke broadcasting licenses from dissenting news agencies,¹⁸⁴ only about 28% of American voters believe that the government should possess the power to rescind broadcasting licenses while 51% agree that the government should not possess such a power.¹⁸⁵ Whatever the definition of what fake news is or the opinion on what a proposed solution should be, the fact remains that this is an issue which needs to be addressed.¹⁸⁶

III. LIMITED PROTECTION FOR LEGITIMATE NEWS; LIMITED PROTECTION FROM FAKE NEWS

With the term “Fake News” being thrown around to tarnish the reputation of the news media, the concept of loosening defamation laws to more easily sue news organizations being floated by the President himself, and a number of right-wing figures filing defamation lawsuits against the media,¹⁸⁷ it appears that the news media is assailed.¹⁸⁸ While some of these attacks may come from politicians, competing news organizations are likewise labeling their opponents as “Fake News” to discredit their coverage and opinions.¹⁸⁹ Furthermore, it is no easy task to look to the government for legislation to curb purposefully fake news

182. *Id.*

183. Trump, *supra* note 178.

184. Trump, *supra* note 179.

185. Shepard, *supra* note 180 (68% of Democrats believe the government should not revoke broadcasting licenses while 46 percent of Republicans believe that it should).

186. *See infra* Part III.

187. Bente Birkeland, *When a Politician Says ‘Fake News’ and a Newspaper Threatens to Sue Back*, NPR (Feb. 17, 2017), <http://www.npr.org/2017/02/17/515760101/when-a-politician-says-fake-news-and-a-newspaper-threatens-to-sue-back> (here, an embattled newspaper, in the face of impending defamation claims from a politician for being “Fake News,” decided to fight fire with fire and threaten to levy their own defamation lawsuit against the politician); Sydney Ember, *A Times Editor Testifies in Defamation Suit Filed by Sarah Palin*, N.Y. TIMES (Aug. 16, 2017), <https://www.nytimes.com/2017/08/16/business/media/a-times-editor-testifies-in-defamation-suit-filed-by-sarah-palin.html?mcubz=3>; Emily Steel, *Author of HuffPost Article Fights Possible Defamation Suit by Fox News Host*, N.Y. TIMES (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/business/media/fox-news-eric-bolling-defamation-suit.html?mcubz=3>.

188. *See infra* Part III.A.

189. *See* John Nolte, *Very Fake News: CNN Selectively Edits Trump Quote on Japanese Auto Production in U.S.*, BREITBART (Nov. 6, 2017), <http://www.breitbart.com/big-journalism/2017/11/06/fake-news-cnn-electively-edits-trump-quote-japanese-auto-production-u-s>, (accusing CNN of being “very fake news” and of purposefully and malignantly misquoting President Trump to suggest his ignorance, as well as asserting a laundry list of grievances including: inventing controversies, failing ratings and reputation, and CNN anchor Jake Tapper’s “misleading and wildly inappropriate interpretation of ‘Allahu Akbar’”).

websites.¹⁹⁰ Any effort by the government to forcefully curb the flow of fake news will undoubtedly run into First Amendment restrictions, and surely no American citizen would want his or her government to so blatantly ordain what should and should not be believed.¹⁹¹ Subpart A examines the limited protection for legitimate news offered by current defamation laws while Subpart B discusses the limited protection society has from fake news.¹⁹² Subpart C examines the methods of controlling fake news some content platforms have taken, and where and how they have failed.¹⁹³

A. *The News Media's Limited Protection from Defamation Suits*

Defamation laws have been written, and the Supreme Court has interpreted them, in ways which attempt to avoid impinging on a speaker or author's freedom of speech.¹⁹⁴ For example, the Supreme Court has held that, in addition to the necessity of proving actual malice in defamation claims against a public figure,¹⁹⁵ a public-figure-plaintiff in a defamation action against a defendant who is a member of the media must bear the burden of proving the falsity of the statement in question, rather than the defendant proving its veracity.¹⁹⁶ Such a burden, however, is not a complete bar against meritless lawsuits;¹⁹⁷ SLAPP lawsuits may legally intimidate anybody and chill his or her freedom of speech, including that of the media.¹⁹⁸

Lance Armstrong is a former professional bicyclist, whose many wins of the Tour de France propelled him deep into athletic fame.¹⁹⁹ Through his endless denials otherwise, however, his incredible winning streak and unceasing athletic skill inspired rumors and allegations

190. See Anna Gonzalez & David Schulz, *Helping Truth with Its Boots: Accreditation as an Antidote to Fake News*, 127 YALE L.J. 315, 322 (2017).

191. *Id.*

192. See *infra* Part III.A–B.

193. See *infra* Part III.C.

194. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). See also *Near v. Minnesota*, 283 U.S. 697, 733 (1931) (Butler, J., dissenting) (condemning prior restraint on speech as unconstitutional).

195. *Sullivan*, 376 U.S. at 279-80.

196. William G. Hagans, *Who Does the First Amendment Protect?: Why the Plaintiff Should Bear the Burden of Proof in any Defamation Action*, 26 REV. LITIG. 613, 617, 619 (2007). Because proving actual malice is required in cases where a public figure is suing a media defendant, plaintiffs in such cases are required to bear the burden of proving the falsity of the statement. See *Sullivan*, 376 U.S. at 279-80.

197. See, e.g., Notice of Removal at 3, *Marshall Cty. Coal Co. v. Oliver*, No. 5:17-CV-99 (N.D. W. Va. June 30, 2017).

198. Laura L. Prather & Jane Bland, *Bullies Beware: Safeguarding Constitutional Rights Through Anti-SLAPP in Texas*, 47 TEX. TECH. L. REV. 725, 729-31 (2015).

199. *Id.* at 727.

centering on his purported use of performance-enhancing drugs.²⁰⁰ In a response which may best be described as litigious, Armstrong filed an endless amount of lawsuits to quiet these accusatory voices.²⁰¹ Notably, Armstrong filed a suit against: (1) Emma O'Reilly, his former soigneur, who disclosed to the authors of the book *L.A. Confidential: Les Secrets de Lance Armstrong* information about his drug use, in a case that settled; (2) *The Sunday Times* of London for their reprinting of allegations found within *L.A. Confidential: Les Secrets de Lance Armstrong* within a case that *The Sunday Times* settled for \$500,000 and spent more than \$1 million in legal fees defending; (3) SCA Promotions for their declination to pay a bonus to Armstrong for one of his wins due to the allegations about his use of performance-enhancing drugs which SCA Promotions ended up settling for \$7.5 million; and (4) his former personal assistant, Mike Anderson, for his discovery and disclosure of a box of androstenone, in a case which was settled.²⁰² Additionally, *The Sunday Times'* lawyers were forced to issue a statement which claimed that the news organization "never intended to accuse [Armstrong] of being guilty of taking any performance-enhancing drugs and sincerely apologize[d] for any such impression."²⁰³ In these cases, the truth did not win the day; in 2012 the United States Doping Agency finally confirmed that which had been spoken by the voices Armstrong tried, and in many ways succeeded in, silencing.²⁰⁴ Armstrong, in response, admitted that he had abused the legal system by opening these defamation lawsuits and acting as a bully.²⁰⁵

SLAPP actions are, unfortunately, common.²⁰⁶ As a failsafe to protect the legitimate use of free speech, some states have enacted legislation targeting SLAPP actions.²⁰⁷ Known as anti-SLAPP statutes, such legislation allows accused defamers to quickly dismiss a case, and, in some cases, "SLAPPback" with their own lawsuit.²⁰⁸ However, many states do not have any anti-SLAPP statutes,²⁰⁹ and there is currently no

200. *Id.*

201. *Id.*

202. *Id.* at 727-28.

203. *Id.* at 728 (citing *The Sunday Times Sues Lance Armstrong Over Libel-Suit Settlement*, VELONEWS (Dec. 23, 2012), https://www.velonews.com/2012/12/news/the-sunday-times-sues-lance-armstrong-over-libel-suit-settlement_269715 (quoting formal apology issued by *The Sunday Times*)).

204. *Id.*

205. *Id.*

206. *Id.* at 731 (citing GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* 1-2 (Temple Univ. Press 1996)).

207. Klein & Wueller, *supra* note 145, at 7.

208. *Id.*

209. Currently, the list of anti-SLAPP jurisdictions are as follows: Arizona, Arkansas, California, Colorado, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana,

federal anti-SLAPP legislation in existence.²¹⁰ With these jurisdictional limits on anti-SLAPP protection, the prospect of forum shopping may foreseeably be encouraged²¹¹ and litigants may open meritless defamation claims with impunity.²¹² If meritless, these claims would eventually get struck down; however, the goal of such litigation is not necessarily to win but to drag the opponent into litigation and chill free speech with the threat of court costs and time spent defending oneself.²¹³

B. Society's Limited Protection from Fake News

On the other hand, anti-SLAPP legislation has the unintended effect of sometimes protecting fake news sources.²¹⁴ Fake news sources are just as likely to employ such anti-SLAPP measures as any other media defendant to either bully the plaintiff into silence, or even have the case dismissed.²¹⁵ This may seem an empty threat to some, since the affirmative defense to defamation is the truth of the statement²¹⁶ and fake news is usually patently false,²¹⁷ but even purveyors of fake news can easily avoid the difficulty of conjuring truth from falsity.²¹⁸

Courts are more than willing to give deference, or “breathing space” to satirical or parodical articles or news pieces in defamation suits.²¹⁹ This can present a challenge for any public figure who brings a defamation claim against a fake news publisher, as public figures must allege and prove actual malice in the publication of a defamatory news piece in order to sustain his or her action.²²⁰ In some cases, it may be defense enough to claim that one “did not know or suspect [at the time of publication] that

Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and West Virginia. *State Law: SLAPPS, DIGITAL MEDIA L. PROJECT*, <http://www.dmlp.org/legal-guide/state-law-slapps> (last visited Sept. 17, 2019).

210. Cory L. Andrews, *Are Anti-'SLAPP' Statutes Toothless in Federal Courts?*, FORBES (Feb. 24, 2017), <https://www.forbes.com/sites/wlff/2017/02/24/are-anti-slapp-statutes-toothless-in-federal-courts/#785694114a2c>.

211. Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1682 (1990).

212. Klein & Wueller, *supra* note 145, at 7.

213. Prather & Bland, *supra* note 198, at 730-31.

214. Klein & Wueller, *supra* note 145, at 7.

215. See *supra* Part III.A.

216. 22 AM. JUR. 3D *Proof of Facts* § 2 (2018). In the case of a public official-plaintiff, the defendant will not usually assert the defense of the truth, because *Sullivan* places the burden of proving actual malice, and thus known falsity, on the plaintiff. *Id.*

217. See *supra* Part II.C.

218. See Klein & Wueller, *supra* note 145, at 7.

219. *Id.*

220. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

the satire would be misinterpreted” to dismiss a defamation claim.²²¹ Of course, strategically placing a small, easily-missed disclaimer that the articles on one’s page are fake or satirical is an easy way to ensure a quick defense of satire if that news source is hauled into court on a defamation claim.²²²

Online publishers of news and information are also protected from defamation actions by Section 230 of the federal Communications Decency Act of 1996 (“CDA”), which protects those who publish information online from defamation claims if such information was provided by content providers, usually another Internet user.²²³ This statute does not protect the original author of false information.²²⁴ However, the Electronic Frontier Foundation, and other such champions of digital rights, assert that the CDA can and should be extended to protect any website which gathers information from a third-party Internet source and republishes it online with only “minimum alteration.”²²⁵

Finally, fake news itself is designed to specifically target groups which will read it, analyze it, and reblog or share it before it has even been noticed by the defamed individual.²²⁶ In fact, in a recent study conducted by three network theorists researching the topic, it was discovered that all it took for a fake news story to take root was a small cluster of initial believers who were poorly informed and thus unable to discern whether the information disseminated was factual or not.²²⁷ From there, fake news spreads like a virus, jumping from individual to individual, spread by shares, reblogs, and a willingness to believe.²²⁸ Fake news is a deeply rooted issue, therefore, which is difficult to halt from being created, and

221. *New Times Inc. v. Isaacks*, 146 S.W.3d 144, 168 (Tex. 2004).

222. David Emery, *Don't Be Fooled! A Guide to Fake News Websites*, THOUGHTCO. (Jan. 18, 2018), <https://www.thoughtco.com/guide-to-fake-news-websites-3298824> (listing a number of fake news websites which technically consider themselves to be satire, including Empire News, Huzlers, and NewsWatch33).

223. Klein & Wueller, *supra* note 145, at 7 (citing 47 U.S.C. § 230 (2006)).

224. *Id.*

225. *Id.*

226. See Mark Buchanan, *Commentary: Why Fake News Spreads like Wildfire on Facebook*, CHI. TRIBUNE (Sept. 3, 2017), <https://www.chicagotribune.com/opinion/commentary/ct-perspec-fake-news-google-facebook-0904-story.html>.

227. *Id.*

228. *See id.*

even harder to keep from spreading once it has found minds to take refuge in.²²⁹

C. *Attempted Remedies by Private Platforms*

In the face of spreading fake news with no real regulation within the journalism profession, the private platforms where these fake news stories are posted, disseminated, and mentally digested have started to take some action.²³⁰ Methods by which platforms such as Twitter, YouTube, and Facebook are using to regulate the spread of fake news stories include delisting frequent and egregious offenders, demonetizing individual pieces of content to cut ad revenue and dissuade content creators, and tweaking internal algorithms so that users are recommended less problematic content.²³¹ Unfortunately, removing access to fake news content, or setting up roadblocks to prevent easy access to such content, may actually cause more harm than good; not only does it fuel distrust of the political motivations behind these platforms and their integrity as free and open content platforms, but it also presents a springboard for insinuations and accusations of censorship—which might seem on their face like fake news themselves.²³²

One way Facebook has attempted to solve the fake news crisis has been to outright remove offending accounts which intentionally disseminate false information.²³³ Near the end of 2018, Facebook reported that it had removed over 550 pages and over 250 accounts which were involved in the coordinated spreading of fake news.²³⁴ Two variants of such bad actors are targeted in Facebook's removal sweeps: domestic

229. *Id.*

230. See Olivia Solon, *Facebook's Plan to Kill Dangerous Fake News Is Ambitious—And Perhaps Impossible*, *GUARDIAN* (July 19, 2018, 8:17 PM), <https://www.theguardian.com/technology/2018/jul/19/facebook-fake-news-violence-moderation-plan>; Julia Carrie Wong, *How Facebook and YouTube Help Spread Anti-vaxxer Propaganda*, *GUARDIAN* (Feb. 1, 2019), <https://www.theguardian.com/media/2019/feb/01/facebook-youtube-anti-vaccination-misinformation-social-media>; Julia Carrie Wong & Sam Levin, *YouTube Vows to Recommend Fewer Conspiracy Theory Videos*, *GUARDIAN* (Jan. 25, 2019), <https://www.theguardian.com/technology/2019/jan/25/youtube-conspiracy-theory-videos-recommendations>; see also *infra* note 262 and accompanying text.

231. See generally Solon, *supra* note 230; Wong, *supra* note 230; Wong & Levin, *supra* note 230.

232. See, e.g., Paul Joseph Watson (@PrisonPlanet), *TWITTER* (Aug. 6, 2018, 8:50AM), <https://twitter.com/prisonplanet?lang=en> (stating that the removal of Alex Jone's YouTube channel was a coordinated "PURGE" and should be considered "political censorship"). As of March 3, 2019, this tweet had been retweeted 5,871 times and liked 10,511 times. *Id.*

233. See Sarah Frier, *Facebook Has Removed More Than 800 U.S. Accounts Spreading Fake News*, *TIME* (Oct. 11, 2018), <http://time.com/5422546/facebook-removes-800-fake-news-accounts>.

234. *Id.*

actors and foreign actors.²³⁵ These two groups use the identical means of fake news to reach widely differing goals: domestic actors are looking for clicks and ad revenue, whereas foreign actors look to manipulate the political landscape and sow discord within the American populace.²³⁶ In many cases, these accounts and pages used dummy or fake accounts to inflate their likes, thus making the fake news stories more visible to wayward Facebook users.²³⁷ For the most part, however, Facebook has tried to avoid directly removing specific stories, even if they are falsified.²³⁸

This is not to say that there are no cases where Facebook would attempt to remove misinformation.²³⁹ In certain cases, where misinformation may lead to “real-world harm,” Facebook has pledged to afford such misinformation a higher level of scrutiny in determining whether it should remain on the platform.²⁴⁰ Facebook has announced that it will actively delete fake content which it has determined will lead to physical violence.²⁴¹ For example, Facebook removed content falsely alleging that Muslims were poisoning food after these false claims led to violent riots in Sri Lanka.²⁴² Facebook also seems to understand the inherent harm to public health in allowing certain fake news on its platform, such as anti-vaxxer misinformation.²⁴³ Anti-vaxxer groups, which promote the idea of foregoing vaccinations—and which the World Health Organization has placed in the top ten threats to global health in 2019²⁴⁴—can actually be found easier than legitimate vaccination groups on Facebook in some cases.²⁴⁵ Facebook’s autofill feature for its search bar will suggest anti-vaxxer pages after typing in the word “vaccination,” and even the search results for the word “vaccination” will result in a large return of anti-vaxxer groups and pages.²⁴⁶ Although Facebook founder and CEO Mark Zuckerberg has gone on record to encourage vaccination, it remains to be seen whether Facebook will actually take any substantive action against anti-vaxxer pages.²⁴⁷ Facebook accepts ad revenue from

235. *See id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *See Wong, supra note 230.*

240. *Id.*

241. Solon, *supra note 230.*

242. *Id.*

243. Wong, *supra note 230.*

244. *Ten Threats to Global Health in 2019*, WORLD HEALTH ORG., <https://www.who.int/emergencies/ten-threats-to-global-health-in-2019> (last visited Sept. 17, 2019).

245. Wong, *supra note 230.*

246. *Id.*

247. *Id.*

anti-vaxxer pages, injecting a conflict of interest for removing this content.²⁴⁸ Further, even in the cases of fake news which may potentially cause physical violence, the specifics of the practice of removing such news—such as the threshold of violence necessary, how that violence will be assessed, or whether it will retroactively remove content which causes violence months later—have not been made clear.²⁴⁹

YouTube is also clarifying similar intentions to remove fake news content from its platform.²⁵⁰ In the summer of 2018, YouTube initially removed four videos denouncing Muslim immigrants by the heavy-hitter conspiracy theorist Alex Jones, with the comment that this content constituted hate speech and violent rhetoric.²⁵¹ This eventually culminated in the complete removal of Alex Jones' content from the YouTube platform.²⁵² Although Jones was not explicitly removed for his fake news content,²⁵³ he was famous for spewing demonstrably false conspiracy theories, such as how 9/11 was an inside job and that the children killed at Sandy Hook Elementary School never existed, their parents actually being “crisis actors” as part of a government-planned false flag operation.²⁵⁴ YouTube has made its war against fake news more overt by altering its algorithm to prevent fake news from appearing in recommended videos with the frequency that they once had.²⁵⁵ Types of content specifically cited by YouTube as being affected include “videos promoting a phony miracle cure for a serious illness, claiming the earth is flat, or making blatantly false claims about historic events like 9/11.”²⁵⁶ While these videos will still be viewable on the platform, the intent is to make them less visible.²⁵⁷

248. *See id.*

249. Solon, *supra* note 230.

250. Alex Galbraith, *YouTube Is Removing Conspiracy Theories from Their Recommended Videos*, COMPLEX (Jan. 26, 2019), <https://www.complex.com/music/2019/01/youtube-removing-conspiracy-theories-from-recommended-videos>; Wong & Levin, *supra* note 230.

251. Alex Dobuzinkis, *YouTube Removes Videos from Conspiracy Theorist Alex Jones: Infowars Website*, REUTERS (July 25, 2018, 7:44 PM), <https://www.reuters.com/article/us-youtube-infowars/youtube-removes-videos-from-conspiracy-theorist-alex-jones-infowars-website-idUSKBN1KF36Z>.

252. Alex Hern, *Facebook, Apple, YouTube and Spotify Ban Infowars' Alex Jones*, GUARDIAN (Aug. 6, 2018), <https://www.theguardian.com/technology/2018/aug/06/apple-removes-podcasts-infowars-alex-jones>.

253. *Id.*

254. *Id.*; Elizabeth Williamson, *Alex Jones, Pursued Over Infowars Falsehoods, Faces a Legal Crossroads*, N.Y. TIMES (July 31, 2018), <https://www.nytimes.com/2018/07/31/us/politics/alex-jones-defamation-suit-sandy-hook.html>.

255. *Continuing Our Work to Improve Recommendations on YouTube*, YOUTUBE (Jan. 25, 2019), <https://youtube.googleblog.com/2019/01/continuing-our-work-to-improve.html>.

256. *Id.*

257. *Id.*

Although the end result of making fake news less accessible on YouTube may seem admirable, at bottom these videos will still be viewable if one intentionally makes inroads to find them.²⁵⁸ Of course, when considering the strength of YouTube's actions against fake news, one should also consider the amount of revenue it receives from placing ads on high-traffic extremist content.²⁵⁹ Further, there is also the possibility that, in giving the impression of censoring content, media platforms may themselves become the subject of conspiracist fake news stories.²⁶⁰ Therefore, while content platforms might appear on their face to have plans to tackle fake news, the ultimate solution might not arise with them but from within the journalist profession itself.²⁶¹

IV. A SOLUTION: ETHICS CODES TO FOLLOW AND SANCTIONS TO FEAR

The task of instituting regulatory rules to condemn truly fake news while protecting legitimate broadcasters is, to put it lightly, problematic.²⁶² There are methods by which online platforms may themselves police their content to promote the spread of accurate information while fighting disinformation, but these efforts are often ineffectual and met with their own host of complications.²⁶³ Legislative efforts in the form of government regulations to combat fake news, such as those recently announced in France,²⁶⁴ inherently tread closely to the toes of the First

258. See Galbraith, *supra* note 250.

259. Paul P. Murphy et al., *Exclusive: YouTube Ran Ads from Hundreds of Brands on Extremist Channels*, CNN (Apr. 20, 2018, 1:09 PM), <https://money.cnn.com/2018/04/19/technology/youtube-ads-extreme-content-investigation/index.html>.

260. See, e.g., Makia Freeman, *Google Censorship Takes Another Large Stride: YouTube to Hide Conspiracy Vids*, FREEDOM ARTICLES, <http://freedom-articles.toolsforfreedom.com/google-censorship-youtube-vids> (last visited Sept. 17, 2019) (claiming that YouTube is engaging in a form of "thought control" to promote the censorship of the New World Order); *supra* note 224 and accompanying text.

261. See *supra* Part IV.

262. See Gonzalez & Schulz, *supra* note 190, at 322.

263. *Id.* at 318–21 (noting that online platforms that use algorithms to hide "low-quality content" are often accused of censorship, the promotion and hosting of legitimate news on social media is financially harmful to content producers, and attempts to increase news literacy are often unable to alter users' news habits).

264. See Scott Neuman, *France's Macron Says He Wants Law to Combat Fake News*, NPR (Jan. 4, 2018, 6:09 AM), <https://www.npr.org/sections/thetwo-way/2018/01/04/575580790/frances-macron-says-he-wants-law-to-combat-fake-news> (reporting that French President Emmanuel Macron, whose presidential campaign suffered from allegedly Kremlin-backed cyberattacks and fake news, supports legislation which would involve requiring news and media websites to disclose funding sources and limiting the amount of money such websites receive in promoting sponsored content). Macron noted the importance of accurate information especially during an election and stated that in such circumstances the government should be granted the power to outright block fake news. *Id.*

Amendment and its protections to public discourse, where most fake news occurs.²⁶⁵ Any government action which aims to influence what information the public should be exposed to should be discouraged, especially when that news is political in nature.²⁶⁶ Moreover, defamation lawsuits are ill-suited to stem the tide of fake news, since by the time such lawsuits take place the false information has already been released for consumption by the consuming public.²⁶⁷

On the other hand, the legal protections currently afforded to legitimate news broadcasters are oftentimes insufficient to protect them from SLAPPs.²⁶⁸ The current scope of defamation statutes and limited spread of anti-SLAPP legislation does little to prevent meritless lawsuits from being filed to bully news organizations that are reporting the truth.²⁶⁹ Although well-intentioned, defamation laws as they currently stand do allow for attacks on legitimate news media which may therefore lead to public distrust of these organizations, or even their silence or retraction.²⁷⁰

To broaden the narrow proverbial tightrope of protecting legitimate news while keeping fake news open to defamation laws, this Part proposes in Subpart A that broadcasters and news publishers be required to sign affidavits and affirmations as to their belief in the veracity of the information they are reporting and their adherence to a code of ethics. Subpart B suggests the implementation of heavy sanctions in the form of a guaranteed “SLAPPback” measure against any individual who files an ultimately meritless lawsuit in the face of one of these aforementioned affidavits and affirmations for no purpose other than a bad faith effort to discourage public discussion.²⁷¹

A. *The Need for Ethics Codes, Affirmations, and Affidavits*

In the realm of news organizations, the concept of simple ethics in the procurement and dissemination of information is not exactly a recent invention.²⁷² In fact, in the early twentieth century, a time period rife with fake news in the form of yellow journalism,²⁷³ the news media’s first code of ethics was proposed and subsequently adopted by the Kansas State

265. See Gonzalez & Schulz, *supra* note 190, at 322.

266. *Id.*

267. *Id.* at 322-23.

268. See *supra* Part III.A.

269. See *supra* Part III.A.

270. See *supra* Part III.A.

271. See *infra* Part IV.A–B.

272. See Alexandra Samuel, *To Fix Fake News, Look to Yellow Journalism*, JSTOR DAILY (Nov. 29, 2016), <https://daily.jstor.org/to-fix-fake-news-look-to-yellow-journalism>.

273. See *supra* notes 125-135 and accompanying text.

Editorial Association.²⁷⁴ This code of ethics included condemnations against:

[t]he publication of fake illustrations of men and events of news interests . . . without an accompanying statement that they are not real pictures of the event or person . . . [t]he publication of fake interviews . . . [t]he publication of interviews in quotations unless the exact, approved language of the interviewed [is] used . . . [and t]he issuance of fake news dispatches whether the same have for their purpose the influencing of stock quotations, elections, or the sale of securities or merchandise.²⁷⁵

Such codes were said to have injured the circulation of “untruthful statements.”²⁷⁶

Soon after, an organization termed the American Society of Newspaper Editors was founded, which subsequently set forth a formal journalistic code of ethics.²⁷⁷ This code of ethics would then be adopted by the Society of Professional Journalists (“SPJ”).²⁷⁸ The SPJ’s preamble states that its “[m]embers . . . believe that public enlightenment is the forerunner of justice and the foundation of democracy. Ethical journalism strives to ensure the free exchange of information that is accurate, fair, and thorough. An ethical journalist acts with integrity.”²⁷⁹ The SPJ’s preamble further asserts that an ethical journalist follows the following four principles: seeking and reporting truth,²⁸⁰ minimizing harm,²⁸¹ acting independently,²⁸² and being accountable and transparent.²⁸³ By 1955, the adoption of similar codes by news organizations allowed the American Bar Association Journal to plainly assert that “[i]n recent decades the

274. See Samuel, *supra* note 272.

275. *Id.*

276. *Id.*

277. See Gonzalez & Schulz, *supra* note 190, at 324.

278. *Id.*

279. *SPJ Code of Ethics*, SOC’Y PROF. JOURNALISTS, <https://www.spj.org/ethicscode.asp> (last updated Sept. 6, 2014).

280. *Id.* Defined as journalists being “accurate and fair,” “tak[ing] responsibility for the accuracy of their work,” providing context, identifying sources, considering the motives of sources, avoiding “surreptitious methods” of information collection where possible, and “[n]ever deliberately distort[ing] facts or context.” *Id.*

281. *Id.* Defined as journalists “treat[ing] sources, subjects, colleagues[,] and members of the public as human beings deserving of respect.” *Id.*

282. *Id.* Defined as journalists “serv[ing] the public” by “[a]void[ing] conflicts of interest,” “refus[ing] gifts [or] favors” which would injure integrity, and “[d]istinguish[ing] news from advertising.” *Id.*

283. *Id.* Defined as journalists “[t]aking responsibility for [their] work and explaining [their] decisions to the public” by “[e]xplain[ing] ethical choices and processes to audiences,” “[r]espond[ing] quickly to questions about accuracy, clarity, and fairness,” “[a]cknowledg[ing] mistakes and correct[ing] them promptly,” and “[e]xpos[ing] unethical conduct in journalism, including within their organizations.” *Id.*

press of the nation has developed a code of ethics to which it adheres within reason, though sometimes stooping a little to get results.”²⁸⁴

Of course, it would be difficult to ascribe a singular code of ethics to all journalistic organizations.²⁸⁵ The differing cultures of news organizations, as well as the unique aspects of each news piece, may require practices which conflict with those of other journalistic institutions.²⁸⁶ However, as evidenced by the number of educational institutions which follow and are accredited based on their adherence to a set of uniform standards, difficulty does not equate to impossibility.²⁸⁷

Although all of the goals aimed to be accomplished by SPJ’s Code of Ethics are noble and, by all accounts, beneficial to the field of journalism, those goals which are most pertinent in the war against fake news are those which deal with the accuracy of information, the clear identification of sources, the prevention of compromises to journalistic integrity by conflicts of interest, the prompt response to questions regarding the veracity of reported information, and the speedy correction of factual mistakes.²⁸⁸ It can be presumed that if the SPJ’s Code of Ethics was universally followed by all institutions purporting to be journalistic institutions, it would be a very difficult thing to imagine something as unethical as fake news being released to an unwitting public.²⁸⁹ However, simply drafting a code of ethics is not enough to ensure that an entire industry follows such practices.²⁹⁰ For example, even though Patricia Smith and Mike Barnicle of the *Boston Globe* and Michael Gallagher of the *Cincinnati Enquirer* were all aware of codes of ethics their respective papers followed and what those papers expressly disallowed, it did not stop them from respectively falsifying information and illegally hacking a lead’s voicemail.²⁹¹ The challenge is not in drafting a code of ethics, or even teaching such a code to journalists, but is instead in ensuring that such codes are actually followed.²⁹²

A code of ethics must be internalized within any organization, those of a journalistic nature included, from the highest echelons to the lowest

284. Eustace Cullinan, *The Rights of Newspapers: May They Print Whatever They Choose?*, 41 A.B.A.J. 1020, 1063-64 (1955).

285. See Gonzalez & Schulz, *supra* note 190, at 324.

286. *Id.*

287. *Id.* at 324-25.

288. See *SPJ Code of Ethics*, *supra* note 279.

289. See generally *id.*

290. See Jeffrey Seglin, *Codes of Ethics: Why Writing One Is Not Enough*, POYNTER (Aug. 15, 2002), <https://www.poynter.org/news/codes-ethics-why-writing-one-not-enough>.

291. *Id.*

292. *Id.*

to be followed and effective.²⁹³ Even if top management wills its employees to follow a code of ethics through a comprehensive ethical program,²⁹⁴ employees must still understand and appreciate the existence of consequences in the case of a breach.²⁹⁵ When a code of ethics lacks teeth or a contingent reaction against a breach, it makes it easy for top-level and low-level members of an organization to disregard such a code as unimportant, or even contrary to the organization's best interests.²⁹⁶

At their cores, the law and ethics are two very dissimilar concepts and, where the two clash, ethics gives deference to the law.²⁹⁷ As stated above, however, without obvious consequences to the violation of ethics codes, both top-level and low-level employees of news organizations would have little motivation to follow them beyond general exposure to the public.²⁹⁸ In the case of fake news, in most cases such defamatory pieces are specifically designed to be effectively spread and believed regardless of the publisher's overall public credibility.²⁹⁹ An appropriate way to ensure the adherence to an ethics code by both top-level and low-level news officials, therefore, may be to attach a legal ramification to a failure to follow such ethics codes in the form of the possibility of perjury.³⁰⁰ In other words, publishers of fake news may be discouraged from publishing such deceptively incorrect information if they are required to sign affidavits and affirmations as to their compliance with a code of ethics which can be easily viewed by the public.³⁰¹ Such a code of ethics may be internal and built within the news organization,³⁰² or a standardized code of ethics developed by an outside organization, such as the SPJ.³⁰³

First, this solution would not involve the government stepping in to dictate what news should or should not be considered fake, which, as noted above, is an inherent problem which must be taken into account

293. *Id.*

294. Michael McMillan, *Codes of Ethics: If You Adopt One, Will They Behave?*, ENTERPRISING INVESTOR (Feb. 20, 2012), <https://blogs.cfainstitute.org/investor/2012/02/20/codes-of-ethics-if-you-adopt-one-will-they-behave>. A comprehensive ethical program consists of a written code of ethics, provisions for guidance, a method for employees to obtain ethical advice or guidance, and training. *Id.*

295. *See* Seglin, *supra* note 290.

296. *Id.*

297. Surbhi S., *Difference Between Law and Ethics*, KEY DIFFERENCES (Dec. 24, 2015), <https://keydifferences.com/difference-between-law-and-ethics.html>.

298. *See* Seglin, *supra* note 290.

299. *See supra* notes 218-21.

300. Kathryn Kavanagh Baran & Rebecca I. Ruby, *Perjury*, 35 AM. CRIM. L. REV. 1035, 1036 nn. 2-5 (1998). Legal consequences of perjury include fines or imprisonment. *Id.*

301. *See generally* 3 AM. JUR. 2 *Affidavits* § 8; 58 AM. JUR. 2 *Oath and Affirmations* § 2.

302. *See* Seglin, *supra* note 290.

303. *See SPJ Code of Ethics*, *supra* note 279.

whenever the government becomes involved in the consumption of news.³⁰⁴ Instead, such a solution would offer an internally recognized consequence for news organizations which purport themselves to be publishers of reliably truthful news while blatantly disregarding the tenants of any worthwhile journalistic code of ethics.³⁰⁵ News organizations would be free to submit to any amount of bias, choose any angle, or present any story however they wish, as long as the news story is collected and reported as required by a code of ethics.³⁰⁶

Second, this solution strongly discourages the peddling of fake news with the threat of perjury.³⁰⁷ News organizations would be forced to pledge themselves to a code of ethics, and any code of ethics worth its muster would not allow for the creation and dissemination of fake news with the purpose of deception.³⁰⁸ After pledging themselves to a readily available code of ethics which condemns false publications, news organizations may think twice before dabbling in fake news, especially when they are forced to face the consequences of perjury.³⁰⁹ After all, if a news organization generates fake news after pledging itself with an affidavit or affirmation to a code of ethics, that organization most likely committed perjury as any news organization following a code of ethics would necessarily abstain from fake news.³¹⁰

Finally, as stated above, there are a number of satirical websites and media outlets which appear as legitimate news organizations as part of their charm; courts are more than willing to give deference to these sites as satire and not legitimate news.³¹¹ While news organizations which purport to be legitimate would be required to sign affidavits as to their compliance with a code of ethics, any other kind of media outlet would not.³¹² In exchange, however, such satirical websites and media outlets should be legally required to broadly and clearly display their status and establishment as a satirical website, as many already do.³¹³ However, as many fake news stories are coordinated to spread in ways so that satire disclaimers are either omitted or easily missed, these disclaimers should

304. See *supra* notes 257-58 and accompanying text.

305. See Seglin, *supra* note 290.

306. See *supra* Part II.A. This adequately preserves the First Amendment rights of news organizations in avoiding the infringement of their freedom of speech. See *supra* Part II.A.

307. See *supra* note 301 and accompanying text.

308. See Gonzalez & Schulz, *supra* note 190, at 324-26; see, e.g., *SPJ Code of Ethics*, *supra* note 279.

309. See *supra* note 293 and accompanying text.

310. Gonzalez & Schulz, *supra* note 190, at 324-26; see, e.g., *SPJ Code of Ethics*, *supra* note 279.

311. Klein & Wueller, *supra* note 145, at 7.

312. See *supra* notes 292-95 and accompanying text.

313. See, e.g., *About The Onion*, THE ONION (Oct. 18, 1996), <https://www.theonion.com/about>.

be required to be made more apparent and prominent, to avoid misleading readers and other consumers of news.³¹⁴ In theory, this should add to the difficulty of attempting to pass fake news off to consumers as legitimate news by eliminating the shield that most fake news websites hide behind.³¹⁵

B. Sanctions for Meritless Defamation Lawsuits

The implementation of sanctions is, as ethics is to journalism, nothing new to the legal process.³¹⁶ Judicially-imposed Rule 11 sanctions are a necessary component in the court system to discourage frivolous litigation with no use beyond wasting precious time.³¹⁷ Indeed, as per the ABA, such frivolous contentions run counter to the Model Rules of Professional Conduct.³¹⁸ However, what is ultimately considered frivolous by the courts differs from jurisdiction to jurisdiction.³¹⁹

Some jurisdictions consider an objective standard in assessing whether a lawsuit is meritless.³²⁰ In these jurisdictions, courts broadly examine whether a lawsuit is meritless based on whether the plaintiff should have reasonably known that the action was meritless.³²¹ On the other hand, other jurisdictions interpret meritless sanctions based on a narrower subjective standard.³²² This standard considers a lawsuit to have been brought frivolously only if the court finds that the plaintiff acted in bad faith.³²³ The former of these two methods of assessing frivolity, at its extreme, tends to chill litigant discourse.³²⁴ The latter, while seeking to discourage frivolous claims from reaching the court, may sometimes fail to catch meritless lawsuits if they do not reach the standard of bad faith.³²⁵

In some ways, the threat of sanctions does more to deter frivolous actions than the actual sanctions themselves.³²⁶ For example, an American

314. See Emery, *supra* note 222; see also *FAQ*, WORLD NEWS DAILY REP., <http://worldnewsdailyreport.com/faq> (last visited Sept. 17, 2019) (depicting a disclaimer which is written in a markedly lighter shade of color at the end of its “About” section).

315. *But see* YOURNEWSWIRE.COM, <http://yournewswire.com> (last visited Sept. 17, 2019) (offering no “About” section at all).

316. See, e.g., FED. R. CIV. P. 11(c).

317. Byron C. Keeling, *Toward a Balanced Approach to “Frivolous” Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1074 (1994).

318. MODEL RULES OF PROF’L CONDUCT r. 3.1 (AM. BAR. ASS’N 2018).

319. Keeling, *supra* note 317, at 1070-71.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* at 1071.

325. *Id.* at 1070.

326. *Id.* at 1137.

Judicature Society study conducted by Lawrence C. Marshall, Herbert M. Kritzer, and Frances Kahn Zemans focusing on three federal circuits found that Rule 11 sanctions affected litigation more in the Fifth Circuit than in the Seventh Circuit, even though sanctions were employed with much less frequency in the Fifth as compared to the Seventh.³²⁷ Noting that the Fifth Circuit was more likely than the Seventh Circuit to threaten but not impose sanctions, Marshall, Kritzer, and Zemans concluded that “attorneys are deterred not only by the fear of the actual imposition of sanctions, but by the fear of involvement in a proceeding in which sanctions are considered or threatened.”³²⁸

Regardless of the fact that most SLAPPs are ultimately meritless, such suits are still brought to court to intimidate rather than to actually win on the merits.³²⁹ Those who routinely bring SLAPPs do so knowing full well that they will most likely be sanctioned, but count such sanctions into their bottom line.³³⁰ The benefit in convincing an opposing party not to publish an unflattering news piece may outweigh the overall cost of being sanctioned.³³¹ As courts are encouraged to impose attorney fee awards as sanctions, this may very well be the case.³³²

With an embattled news media that is under fire from the current presidential administration and its party members, the discouragement of SLAPPs is necessary to preserve and protect free speech without the potentially chilling effects of meritless defamation lawsuits.³³³ More recently, there have been accusations of libel levied at Michael Wolff, author of the Trump exposé *Fire and Fury*, with demands of a cease and desist.³³⁴ As the facts currently stand, 46% of all voters believe that legitimate news organizations are, in fact, “Fake News” which lie to push a narrative and foster opinion amongst the American people.³³⁵ With the fact that a majority of voters with this belief are Republican, it can be surmised that these voters have in some way been influenced by President Trump’s rhetoric.³³⁶ To be able to perform their duty to the American people and freely report the news, detractors must face a greater form of

327. *Id.*

328. *Id.* (quoting Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U.L. REV. 943, 982 (1992)).

329. *Id.* at 1143-45.

330. *Id.* at 1144-45.

331. *See id.*; *supra* Part III.A.

332. Keeling, *supra* note 317, at 1072.

333. *See supra* notes 169-70 and accompanying text.

334. Adam Kelsey, *Attorneys for “Fire and Fury” Publisher Push Back Against Trump Team’s Cease-and-Desist Letter*, ABC NEWS (Jan. 8, 2018), <http://abcnews.go.com/Politics/attorneys-fire-fury-publisher-push-back-trump-teams/story?id=52217633>.

335. *See supra* notes 171-77 and accompanying text.

336. *See supra* notes 171-77 and accompanying text.

deterrence against holding the threat of a defamation lawsuit over the heads of news organizations.³³⁷

The ever-present threat of a defamation SLAPP held over the head of news organizations is ensured by the fact that nobody who intentionally files a SLAPP is ever really worried by the impending and inevitable court sanctions.³³⁸ Without an effective sanctions scheme which goes beyond simply awarding attorneys' fees, SLAPPs will invariably be filed without any worry for the repercussions.³³⁹ At the same time, any new sanctions scheme which is developed must not discourage the use of the court system by those who may have a legitimate grievance.³⁴⁰

The sanctions which are levied at those who bring meritless defamation lawsuits, therefore, must be specifically tailored to the level of abuse these litigants subject the court system to, and the goal of chilling speech they would be attempting to fulfill.³⁴¹ Therefore, when faced with a motion for sanctions by a defendant in a defamation action, a court should assess whether the plaintiffs brought their action in bad faith and with the goal of discouraging public participation.³⁴² This narrower assessment of the frivolity of a lawsuit would not limit or discourage honest defamation lawsuits brought by parties with legitimate grievances while leaving for the court the teeth to punish those who abuse the court system and threaten legitimate news sites with SLAPP actions for being "Fake News."³⁴³ It is true that frivolous defamation actions which are not filed in bad faith would not be subjected to harsher sanctions under this proposed standard.³⁴⁴ However, this standard specifically targets bad faith SLAPP actions, which is of more concern to free speech than litigants who mistakenly believe they have a legitimate case while their action is ultimately meritless.³⁴⁵ This subjective standard for defamation claims also helps to ensure that litigants with uncertain claims have fair access to address their grievances in a court of law without fear of heavy sanctions being imposed.³⁴⁶ Furthermore, in cases where the court finds that the plaintiff did not bring his or her frivolous case in bad faith, lighter

337. See *supra* Part III.A.

338. Keeling, *supra* note 317, at 1143-44.

339. *Id.*

340. *Id.* at 1071.

341. See *id.* at 1149.

342. See *id.* at 1154.

343. Prather & Brand, *supra* note 198, at 729.

344. See Keeling, *supra* note 317, at 1155.

345. See *supra* Part III.A.

346. See Keeling, *supra* note 317, at 1155.

sanctions, in the form of attorneys' fees, which are already the predominant method of imposing sanctions, may be issued.³⁴⁷

For those who do intentionally bring a SLAPP action to intimidate the free press, an example must be made in order to discourage others from following suit by issuing sanctions which are far more punishing than simply awarding attorneys' fees to the opposing side.³⁴⁸ To both punish those who bring SLAPP actions while at the same time emboldening SLAPP victims, courts should allow such defendants attacked in a meritless way to "SLAPPback" via a uniform anti-SLAPP legislative effort.³⁴⁹ Noted, there are currently no federal anti-SLAPP measures, and most jurisdictions do not subscribe to the notion.³⁵⁰ Those that do, however, allow victims of SLAPP actions to recover against malicious plaintiffs and, if successful, be awarded damages for emotional distress and punitive damages, among other monetary awards.³⁵¹ This legislative effort should be undertaken on a federal level, as news broadcasting reaches all corners of the country and the chilling effects of SLAPP actions may hold great repercussions for the public at large.³⁵²

V. CONCLUSION

The advent and spread of fake news, as well as the baseless attacks on legitimate news media as "Fake News," are troubling and sometimes dangerous developments in the discourse of our country.³⁵³ Although states have defamation laws and regulations, and some states have anti-SLAPP legislation, neither of these systems are perfect on their own.³⁵⁴ It remains possible to levy meritless and costly attacks on legitimate news sources for factual stories they have written; at the same time, intentionally fake news is difficult to combat due to the great importance the American people place on the freedom of speech.³⁵⁵ In the end, the best way to police both issues is to have broadcasters affirm their

347. *Id.* at 1072.

348. *Id.* at 1143-44.

349. Klein & Wueller, *supra* note 145, at 7.

350. *See supra* note 202.

351. *SLAPPING Back*, CAL. ANTI-SLAPP PROJ., <https://www.casp.net/sued-for-freedom-of-speech-california/defending-against-slapp/slappback-awards> (last updated Feb. 28, 2016). As an example of a successful "SLAPPback" action, *Tanner v. DeCom Medical Waste Systems* involved a hospital worker who had been the victim of a SLAPP action for writing to a newspaper and criticizing a company. *See* JVR No. 76078, 1991 WL 449691 at *1 (Mo. Cir. 1991). She was awarded \$86,500,000 for her trouble. *Id.*

352. *See supra* Part II.C.

353. *See supra* Part II.C.

354. *See supra* Part III.

355. *See supra* Part III.

allegiance to a unified code of ethics which condemns the publishing of fake news, while granting to legitimate news broadcasters the ability to “SLAPPback” against those who would abuse the courts to intentionally silence or deter public participation.³⁵⁶

*Christopher M. Abiuso**

356. *See supra* Part IV.

* J.D. Graduate 2019, Maurice A. Deane School of Law at Hofstra University. First, I would like to thank my parents, Leonard and Martha Abiuso, and my brother, Gregory Abiuso, for their ceaseless love and support. Thank you to the Maurice A. Deane School of Law, including Judge Prudenti and its faculty and staff, for providing me with opportunities for growth, rewarding challenges, and endless ambition. Thank you to my advisor, Professor Irina Manta, for your guidance and support throughout the Note writing process and the three classes I've taken with you. Additional thanks to my student Note Editor, Michelle Roter, for all your hard work and the long hours I now know that go into reviewing and revising Notes throughout the writing process. I would also like to thank Hunter Blain, Yaroslav Mankevych, and Kayley Sullivan, my fellow Notes Editors Matthew Murray, Rebecca Stein, and Veronica Pareja, and the rest of Volume 47. Additionally, I would like to thank Amy ElSayed, Madelyn Nicolini, Sabrina Salama, Juliana Spano, and the rest of Volume 48, without whom this publication would not be possible. Special thanks to my wonderful friends, Matthew Nevola, Shannon Fillmore, Brendan LoPuzzo, Alexandra Davidson, Nicholas Testa, Alexander Dean, Guy Mladinov, Nicholas Englese, Robert Buith, and A.J. Assante.