

## COMMENTS

### FAKE NEWS AND RACIAL, ETHNIC, AND RELIGIOUS MINORITIES: A PRECARIOUS QUEST FOR TRUTH

*Kimberly Grambo\**

#### I. FAKE NEWS AND THE AGE OF THE INTERNET

The years following the 2016 American Presidential election forced a reckoning with the role that misinformation played in our country's increasing political polarization. Today, consumers of online news media are still confronted with a seemingly impossible task: mitigating the effects of fake news without excessively burdening free speech. "Fake news" is an inherently mischievous sub-genre of a broader category of misinformation. Specifically, some psychologists and social scientists define it as one that "mimics the output of the news media in form, but not in organizational process or intent—e.g., lacking editorial norms and processes to weed out the untrue in favor of the true."<sup>1</sup> As a result of several economic and psychological qualities intrinsic to the dissemination of information online, this new sub-genre of misinformation is powerful at shaping public opinion, as the sensationalist rhetoric of the 2016 election evidenced.<sup>2</sup>

Fake news stories have not been limited to political topics, however. From merely biased coverage to utter fabrications, a wide variety of misinformation packaged as "news," has impacted religious, ethnic, and racial groups whose identities are wrapped up in our increasing national polarization.<sup>3</sup>

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\* Articles Editor, *University of Pennsylvania Journal of Constitutional Law*, Volume 21. University of Pennsylvania Law School, J.D. 2019; University of Michigan, B.A. 2012. Special thanks to Professor Seth Kreimer for his guidance on this project, and to my family for their patience and support.

<sup>1</sup> Gordon Pennycook & David Rand, *Who Falls for Fake News? The Roles of Bullshit Receptivity, Overclaiming, Familiarity, and Analytic Thinking*, J. PERSONALITY (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3023545](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3023545).

<sup>2</sup> See Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON PERSP. 211, 212, 230 (debating whether fake news actually influenced the ultimate outcome of the election but offering evidence of a strong polarizing effect).

<sup>3</sup> Steven Seidenberg, *Lies and Libel: Fake News is Just False, but Its Cure May Not Be So Simple*, ABAJ., July 2017, at 48.

When the World Economic Forum convened in early 2017 to address fake news, the conversation was not limited to electoral politics or insidious foreign influence. It approached the issue as a more encompassing crisis of global human rights, of which the threat to the democratic process is but one part.<sup>4</sup> When fake news stories spread false narratives about vulnerable minority groups, an entirely different set of questions arises relating to the balance between First Amendment rights and threats to public order.

Fake news that spreads misinformation about minority groups may be construed as a form of group defamation, which many countries around the world place within the reach of government oversight, sometimes even through criminal law.<sup>5</sup> Critically, the United States tends to shy away from “hate speech laws,” as a concept, but in the context of fake news, culpability stems less from contempt for the creator’s expressive intent and more from its effect.<sup>6</sup> Fake news that falsely and negatively portrays a particular ethnic, racial, or religious group has the power to impute a “terrible criminality.”<sup>7</sup> It implies an unworthiness of citizenship or even dehumanizes individual members of those groups. History is littered with violent examples demonstrating why society should aim to prevent these effects.

“Group defamation” laws of the type upheld by the Supreme Court in *Beauharnais v. Illinois*<sup>8</sup> have fallen out of favor in the United States since the 1950s, but several other countries have recently relied on similar laws to curb the effects of non-political fake news. In response to fake news that has stirred up animosity towards recently arrived immigrant populations, Germany recently expanded its existing group defamation laws to include liability for intermediaries such as Google and Facebook.<sup>9</sup> In a more extreme example,

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<sup>4</sup> Alison Griswold, *The World Economic Forum is Treating Fake News as an Urgent Matter of Global Human Rights*, QUARTZ (Jan. 25, 2017), <https://qz.com/889506/world-economic-forum-davos-fake-news-facebook/>. Of course, the integrity of democratic institutions and free media are collectively a part of the broader landscape of human rights enshrined in international human rights treaties such as the Universal Declaration of Human Rights (“UDHR”) and the International Covenant on Civil and Political Rights (“ICCPR”). See generally Louis Henkin, *Group Defamation and International Law*, in GROUP DEFAMATION AND FREEDOM OF SPEECH: THE RELATIONSHIP BETWEEN LANGUAGE AND VIOLENCE 123, 126–128 (Freedman ed., 1995).

<sup>5</sup> JEREMY WALDRON, *THE HARM IN HATE SPEECH* 39–41 (2012).

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

<sup>7</sup> *Id.* at 45–47.

<sup>8</sup> 343 U.S. 250, 266 (1952); see *infra* Part II (discussing the reasons behind this shift).

<sup>9</sup> Katy O’Donnell, *Germany’s New Online Hate Speech Code Pushes Big Fines and Debate*, POLITICO (Oct. 2, 2017), <https://www.politico.eu/article/hate-speech-germany-twitter-facebook-google-fines/>. German officials in the summer of 2018 blamed “fake news” on social media for “helping to stoke rioting” after a German man was allegedly killed by asylum seekers from Iraq and Syria. See Jamie Dettmer, *German Officials: ‘Fake News’ Helped Stoke Anti-Migrant Riot*, VOICE OF AM. (Aug. 29, 2018), <https://www.voanews.com/a/german-officials-fake-news-helped-stoke-anti-migrant-riot/4549276.html>. At points, the right-wing anti-migrant protest gathered over 5,000 participants,

amidst increased ethnic violence in Myanmar's Rakhine state, political leaders have been defending draconian defamation laws under the guise that they are necessary to curb fake news relating to the violence.<sup>10</sup>

Though the American collective consciousness seems primarily focused on the political ramifications of fake news, stories that inflict dignitary harm on individual members of minority groups are also of great concern to the national welfare. However, addressing non-political fake news would involve novel First Amendment questions as to the public's capacity to inoculate itself against fake news in the absence of regulation and alternatively, the government's ability to properly administer a solution to the problem.

This Comment will assess multiple approaches to regulating non-political fake news from a First Amendment perspective, with a passive approach embracing gradual inoculation on one end of the spectrum, to an active approach focused on criminal group libel at the other. However, ideology and abstract legal doctrine alone do not necessarily point to the best answer in practice, especially where it pertains to an outcome-oriented goal like the protection of vulnerable minority groups from campaigns of hatred. The lessons of the past and modern practical concerns indicate that even if legally justifiable, active approaches are less-attractive solutions than passive ones. Yet, this Comment ultimately concludes that neither approach is likely to succeed absent public reckoning with the new values of a "post-truth" America.

## II. IDAHO AND THE DOMESTIC THREAT

In 2016, residents of Twin Falls, Idaho were invited via Facebook to join an anti-immigrant, anti-Muslim rally in their small town. The event sought to protest a "huge upsurge of violence towards American citizens" by Muslim refugees settled there.<sup>11</sup> Forty-eight Facebook users indicated that they were

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described by observers to have been "hunting down certain groups and calling for vigilante justice."  
*Id.*

<sup>10</sup> Antoni Slodkowski, *Myanmar Mulls Change To Law Seen As Violating Free Speech: Suu Kyi*, REUTERS (July 6, 2017), <https://www.reuters.com/article/us-myanmar-military-journalists/myanmar-mulls-change-to-law-seen-as-violating-free-speech-suu-kyi-idUSKBN19R0GV>; see also *Rohingya Crisis: Suu Kyi Says 'Fake News Helping Terrorists'*, BBC (Sept. 6, 2017), <http://www.bbc.com/news/world-asia-41170570> ("Myanmar's de-facto leader Aung San Suu Kyi has claimed that the crisis in Rakhine state is being distorted by a 'huge iceberg of misinformation.'").

<sup>11</sup> See Scott Shane, *Purged Facebook Page Tied to the Kremlin Spread Anti-Immigrant Bile*, N.Y. TIMES (Sept. 12, 2017), [https://www.nytimes.com/2017/09/12/us/politics/russia-facebook-election.html?\\_r=0](https://www.nytimes.com/2017/09/12/us/politics/russia-facebook-election.html?_r=0); see also Kevin Poulsen et. al., *Exclusive: Russia Used Facebook Events to Organize Anti-Immigrant Rallies on U.S. Soil*, DAILY BEAST (Nov. 9, 2017), <https://www.thedailybeast.com/exclusive-russia-used-facebook-events-to-organize-anti-immigrant-rallies-on-us-soil>.

“interested” in attending.<sup>12</sup> Four live humans, mobilized by fears for the safety of their town, actually appeared.<sup>13</sup> Yet the invitations, and the event that they advertised, were fake. Not only did they originate from accounts in Russia rather than from concerned neighbors in Idaho but, on a more fundamental level, the march it advertised addressed a threat rooted in and cultivated by fake news in and of itself.

As with many of the fake news articles that have circled American news feeds, the story that instigated this debacle held a grain of truth, albeit a small one.<sup>14</sup> This grain of truth betrays a core tenet of fake news: it roots itself in an existing rumor, partisan conflict or, as in this case, a brooding, fear-based prejudice. In Twin Falls, the thread began with the government refugee-resettlement program and growing sentiment that the government was prioritizing and protecting outsiders to the detriment of long-time residents of the town.<sup>15</sup> Then came reports and eventually charges of “lewd and lascivious behavior” brought by local law enforcement against a five-year-old American child by seven- and ten-year-old Muslim immigrant boys in a public laundry room. Fake news reports infected with xenophobic rhetoric by anti-Islam websites like “Jihad Watch” began cropping up on social media.<sup>16</sup> By the time Breitbart News arrived on the scene, its reporter had supposedly been sent to cover the “Islamic takeover” of the town by Syrian refugees. The assault had been covered as a “horrific gang rape” downplayed by local officials accused of being “Shariah supporters.”<sup>17</sup> In reality, New York Times journalist Caitlin Dickerson reported that no Syrians had ever been resettled in Twin Falls, and police and parents had swiftly and privately dealt with the original isolated incident in the laundry room between three children.<sup>18</sup>

While the implication of foreign influence embedded in the origins of anti-immigrant march invitations on Facebook is alarming, perhaps more frightening is how effectively those fictional stories laid the foundation for the fabricated rally to be taken seriously. Recently, fake news relating to the “Migrant Caravan” of primarily Honduran asylum seekers traveling to the Mexican-American border in October of 2018 exemplify how the overlay of fake news can obfuscate our collective perception of an actual security

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<sup>12</sup> Poulsen et. al., *supra* note 11.

<sup>13</sup> *Id.*

<sup>14</sup> Caitlin Dickerson, *How Fake News Turned a Small Town Upside Down*, N.Y. TIMES (Sept. 26, 2017), <https://nyti.ms/2ypNiAh>.

<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

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

threat.<sup>19</sup> It is unclear the degree to which fake news informed the Trump Administration's unprecedented but largely unquestioned declaration that it would send over 5,000 active-duty troops to support Customs and Border Patrol in late November 2018.<sup>20</sup> However, prior to the deployment, the President had declared a "national emergency" at the border, but only after retweeting several debunked news stories alleging that "Middle Eastern" terrorists were among the caravan, which suggests that fake news may have played some role in his assessment of the situation.<sup>21</sup> Meanwhile, on-site organizations like the American Civil Liberties Union lambasted the gross qualitative and quantitative overestimation of the threat actually posed by the caravan, declaring the decision to deploy military forces a "huge waste of taxpayer money" that would only "further terrorize and militarize our border communities."<sup>22</sup>

Beyond what this episode says about the complexities of national security under the current administration, a larger statement can be made about fake news as a foundation for public manipulation. Particularly where targeted misinformation seeks to demonize a segment of the population, these episodes illustrate how quickly the transition from a digital mob to a real one can occur.<sup>23</sup>

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<sup>19</sup> Emily Dreyfuss, *Alert: Don't Believe Everything You Read About the Migrant Caravan*, WIRED (Oct. 23, 2018), <https://www.wired.com/story/mexico-migrant-caravan-misinformation-alert/>.

<sup>20</sup> Manuela Tobias, *How Many Troops Has Donald Trump Sent to the U.S. Border So Far?*, POLITIFACT, (Nov. 15, 2018), <https://www.politifact.com/truth-o-meter/statements/2018/nov/15/eric-swalwell/how-many-troops-has-donald-trump-sent-us-border/> ("As of Nov. 14, about 5,900 active duty troops have been sent in addition to about 2,100 National Guardsmen. The Defense Department anticipates the number to fluctuate between 5,500 and 7,000.").

<sup>21</sup> Meegan Vazquez, *Trump's Making the Migrant Caravan a Political Issue. Here are the Facts*, CNN POLITICS (Oct. 23, 2018), <https://www.cnn.com/2018/10/22/politics/donald-trump-migrant-caravan-fact-check/index.html>. It should be noted that the U.S. intelligence community had been considering mass Central American migration to the United States as a threat to national security since the Obama administration. Nolan Rappaport, *Intelligence Community Views Migration from Central America as a Threat to National Security*, HILL (Feb. 4, 2019). However, the import of the decision to engage the "largest U.S. active-duty mobilization along the U.S.-Mexico boundary in decades" one week before U.S. midterm elections, viewed in light of the President's quickly debunked tweets about the Caravan's links to Islamic terrorism should not be understated. Dan Lamothe & Nick Miroff, *U.S. will deploy 5,200 Additional Troops to the Mexican Border, Officials Say*, WASH. POST (Oct. 29, 2018), [https://www.washingtonpost.com/world/national-security/white-house-prepares-large-troop-deployment-to-deter-migrant-caravan/2018/10/29/e13a360e-db84-11e8-b732-3c72cbf131f2\\_story.html](https://www.washingtonpost.com/world/national-security/white-house-prepares-large-troop-deployment-to-deter-migrant-caravan/2018/10/29/e13a360e-db84-11e8-b732-3c72cbf131f2_story.html).

<sup>22</sup> *ACLU Comment on Trump Administration Sending Army to Southern Border*, AM. CIVIL LIBERTIES UNION (Oct. 29, 2018), <https://www.aclu.org/news/aclu-comment-trump-administration-sending-army-southern-border>.

<sup>23</sup> Nina Mast, *In Urban Sweden and Heartland America, Xenophobic Fake News Looks the Same*, SALON (Jan. 2, 2018), [https://www.salon.com/2018/01/02/in-urban-sweden-and-heartland-america-xenophobic-fake-news-looks-the-same\\_partner/](https://www.salon.com/2018/01/02/in-urban-sweden-and-heartland-america-xenophobic-fake-news-looks-the-same_partner/). For proposed solutions, see, generally, Nicky Wolf, *How to Solve Facebook's Fake News Problem: Experts Pitch Their Ideas*, GUARDIAN (Nov. 29, 2016),

Dissenting in *Abrams v. United States*, Justice Oliver Wendell Holmes mused that governmental regulation of speech under the First Amendment is “an experiment, as all life is an experiment.”<sup>24</sup> Holmes radically envisioned an evolving and responsive approach to speech, in acknowledgement that some cases will test the comfort of the American people and the judiciary. In line with that experimental approach, Holmes continued: “we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death,” with the caveat of course, “unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”<sup>25</sup> Holmes identified a tipping point of urgency, beyond which government intervention through criminal sanction is not only justifiable, but necessary. In 1919, when he wrote his famous dissent in *Abrams*, Holmes did not believe that point had been surpassed when several Russian nationals had distributed anti-capitalist pamphlets violating the Espionage Act.<sup>26</sup> Given the unpredictable landscape of social news media today, it remains to be seen whether fake news that foments animosity towards religious, ethnic, or racial groups can and will “threaten immediate interference with the lawful and pressing purposes of the law” that would justify a government response from his foundational perspective.<sup>27</sup> There is no better time to revisit Holmes’ tipping point than today, amidst a technological and informational revolution that presents equally unprecedented opportunities for growth and devastation.

As of now, however, the Supreme Court seems relatively unconcerned with “devastation,” and far more excited about “growth,” at least as it pertains to freedom of speech online. In 2017, it made one of its first pronouncements on the First Amendment implications of social media regulation, in the case of *Packingham v. North Carolina*.<sup>28</sup> “Today, one of the most important places to exchange views is cyberspace, particularly social media,” Justice Kennedy noted, before striking down a statute that would have severely restricted access to social media sites by sexual predators.<sup>29</sup> The opinion was openly hesitant to legislative restrictions on this new frontier: “[T]he Court must exercise extreme caution before suggesting that

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<https://www.theguardian.com/technology/2016/nov/29/facebook-fake-news-problem-experts-pitch-ideas-algorithms>.

<sup>24</sup> 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 630–31.

<sup>27</sup> *Id.* at 630.

<sup>28</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017).

<sup>29</sup> *Id.*

the First Amendment provides scant protection for access to vast networks in that medium,” Justice Kennedy warned, with five justices behind him.<sup>30</sup>

While he was addressing access to the internet more broadly, and not constitutional protections for online content, Kennedy’s deferential approach to a liberated internet is consistent with the Court’s trend over the last century of preferring a free marketplace of ideas to a government-regulated one. It indicates the Court’s strong position that the freedom of the media online is highly valued.

This Comment will thus address the likelihood that the judiciary will leave the fake news problem to information consumers to solve, while keeping in mind that economic, sociological, and psychological considerations of false content and online media are more complex than any threat to the marketplace ever seen before. It will use the Court’s most recent pronouncement regarding a passive approach to truth-seeking under the First Amendment in *United States v. Alvarez* as a model for analysis.<sup>31</sup> However, given the unique character of fake news on social media, *Alvarez*’s passive approach poses ideological and practical problems. Additionally, it raises historically-rooted suspicions of government intervention in news media, particularly when Holmes’ tipping point becomes a call for an “immediate check” on dangerous speech.<sup>32</sup>

### III. FALSE SPEECH IN AN UNFREE MARKETPLACE

While there may be little in the way of Supreme Court precedent regarding social media law and the First Amendment as of yet, the courts have often addressed the subject of false speech. Another idea put forth by Justice Holmes in his *Abrams* dissent has shaped First Amendment jurisprudence on “truth” in the last century, that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>33</sup> It is a useful maxim, in that it smartly excuses the courts from having to wade into the murky waters of separating the true from the false in discussions of First Amendment values. Underlying this statement, however, is a questionable assumption: that each thought subject to the protection of First Amendment protection “plays the market” fairly. In a complex framework like social media, where algorithms and clicks guide competition of ideas, the metaphor feels outdated. It exposes a dangerous flaw in a

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<sup>30</sup> *Id.* Meanwhile, Justice Alito indicated his hesitance to extend unfettered protection in this area, in contrast to the fervor of the majority: “The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks.” *Id.* at 1738 (Alito, J. concurring).

<sup>31</sup> *United States v. Alvarez*, 567 U.S. 709 (2012).

<sup>32</sup> *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

<sup>33</sup> *Id.*

“hands-off” approach to fake news and calls into question whether the information consumer will be able to sort true from false news online without intervention.

Despite being almost one hundred years old, the “marketplace of ideas” justification for protecting false speech persists into the age of the internet. More recently, the Supreme Court’s 2012 decision in *United States v. Alvarez* defended the merits of a general constitutional protection for false factual statements, citing “the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.”<sup>34</sup>

In *Alvarez*, the Court reviewed under strict scrutiny whether the Stolen Valor Act of 2005 was narrowly tailored enough to actually achieve a compelling state interest in “protecting the integrity of the military honors system.”<sup>35</sup> This involved an analysis of the causal link between defendant Alvarez’s admittedly false claim that he had won a medal of honor and the subsequent dilution of the honor itself, and whether counter-speech might also achieve the Act’s purpose.<sup>36</sup> Critically, the Court attacked the Government’s failure to show that unchallenged claims under the act actually “undermine the public’s perception of the military and the integrity of its awards system.”<sup>37</sup> It also posited that a readily accessible database (perhaps online) of recipients of the Medal of Honor would be a less restrictive means of remedying the factual error.<sup>38</sup> These two criticisms reiterated the Court’s century-old belief that the marketplace of ideas would and could correct itself as to Mr. Alvarez’s lie about the Medal of Honor, and that government interference was unnecessary here.

Of course, the stakes in *Alvarez* were of a different magnitude than those stemming from a worldwide epidemic of fake news and ethnic, racial, and religious polarization. That is, fake news implicates a more complex ratio of

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<sup>34</sup> *Alvarez*, 567 U.S. at 718 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964)). *But see* Alan K. Chan & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1443 (2015) (“The Supreme Court has long suggested that ‘there is no such thing as a false idea,’ premised on the notion that truth is optimally derived from free and open discourse, including the rebuttal and challenge of even the most outrageous or ‘false’ ideas or beliefs. Untruthful statements of fact are another matter, because they are said to neither advance public discourse nor promote individual self-realization.” (footnotes omitted) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974)).

<sup>35</sup> *Alvarez*, 567 U.S. at 725.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 728.

<sup>38</sup> *Id.* at 729.



value to harm.<sup>39</sup> In 1942, the Supreme Court, in deciding *Chaplinsky v. New Hampshire*, delineated several categories of speech as “utterances [that] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>40</sup> While this list has since evolved, false statements as a generalized category are still not considered by the Supreme Court to be “low value” forms of speech requiring policing. As such, the facts at issue in *Alvarez* allowed the Court to easily sweep the plaintiff’s pointless lies into the bin of benign speech having no value, but also no harm. Rather than correcting these statements through legislation, the marketplace of ideas could take it from there; information consumers could google Alvarez’s name and correct the lie, the medal of honor would retain its integrity, and no further intervention would be required.

*Alvarez* must be distinguished on two dimensions, however, when assessing the appropriateness of the passive, marketplace of ideas approach applied there as a solution to the fake news problem. First, for the purposes of the *Chaplinsky* “value” assessment, news organizations occupy a special place under the First Amendment, though there is yet no wholesale exemption from liability for the media.<sup>41</sup> This complex landscape should be contrasted with the narrower inquiry relating to petitioner Mr. Alvarez as a private individual lying for personal gain. The extent of the media privilege is a nuanced one, with absolute protections for political criticism and from prior restraint on one end of the spectrum, and the ever-shrinking but

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<sup>39</sup> *Id.* at 717 (citing *United States v. Stevens*, 559 U.S. 460, 470 (2010)). In his majority opinion in *Alvarez*, Justice Kennedy rejected the concept of a “free-floating test for First Amendment coverage” based on “ad hoc balancing of relative social costs and benefits.” *Id.* at 717. Rather, he acknowledged that certain content-based restrictions on speech may be allowed where they are historically rooted, for example, the familiar categories of fighting words and obscenity. *Id.*

<sup>40</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The *Chaplinsky* list has evolved over the years to include exceptions that the court had not yet considered in 1942, including fraud and child pornography. See *New York v. Ferber*, 458 U.S. 747 (1982); *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (holding that the First Amendment also protects “commercial speech”). Subsequent refinements to the categorical approach as a framework aside, (namely *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)) the conceptual evaluation was still relied on by the court as of *Alvarez*, 567 U.S. at 717–18.

<sup>41</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (“The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation.”); cf. GRUNDGESETZ [GG I][BASIC LAW], translation at [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0026](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0026). In Germany, “when cases present facts in which human dignity and free speech collide, free speech usually must give way.” Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as A Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549, 1553–54 (2004). “The First Amendment, by way of contrast, makes no provision for rights balancing; on its face, the right to free speech is absolute.” *Id.*

persistent availability of malicious libel liability for defamation of non-public figures on the other.<sup>42</sup> Yet, the Court has repeatedly acknowledged the unique danger restrictions on news organizations pose to society. Namely, the expressive nature of publication and its democratic, truth-seeking, discourse-stimulating value to information consumers is fundamental to the American way of life.<sup>43</sup>

Second, *Alvarez* should be distinguished from the fake news inquiry in that it was the first time that the court had addressed a measure that sought to criminalize falsity alone without regard to the harm it causes. Kennedy is careful to differentiate the facts in *Alvarez* from defamation, for example, where there is other “legally cognizable harm associated with a false statement.”<sup>44</sup>

Interestingly, despite that “false statements” are not on the list of categorical, tradition-backed exceptions to full First Amendment protection stemming from *Chaplinsky*, the narrower, common-law-rooted category of defamation still appeared on Kennedy’s updated list in his 2012 *Alvarez* opinion.<sup>45</sup> The precarious relationship between defamation law and the modern First Amendment will be discussed later in this analysis, particularly the qualified nature of Kennedy’s reference to defamation as a category receiving diminished constitutional protection.<sup>46</sup> However, for the time being, it suffices to forecast that the Supreme Court’s endorsement of the marketplace of ideas as a justification for protecting false speech might be inapplicable where that false speech attaches unique societal values, or is particularly harmful.

Evaluation of a hands-off approach to fake news encapsulates precisely that scenario: an intersection of “freedom of the press” values and harm to the peace or to individuals or groups within society. The spread and effects of fake news are predicated on a social platform that challenges many

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<sup>42</sup> See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES \*151–52 (“Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.”); *Near v. Minnesota*, 283 U.S. 697, 713–714 (1931) (claiming a statute allowing public authorities to file suit against publishers for “defamatory matter” forms the “essence of censorship”).

<sup>43</sup> More specifically, while the court succinctly ponders the chilling effects of regulating private false speech in *Alvarez*, chilling effects on news organizations may be particularly of issue for these purposes. 567 U.S. at 716; see also *Gertz*, 418 U.S. at 340–42; *Near*, 283 U.S. at 713–15; *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971). These chilling effects and efforts to mitigate them will be discussed further in Part III.

<sup>44</sup> *Alvarez*, 567 U.S. at 718–19.

<sup>45</sup> *Id.* at 717.

<sup>46</sup> Current reservations on the application of the categorical approach to defamation, such as developments after *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in libel law under the First Amendment, will be discussed *infra* Part III.

traditional assumptions about the way that the citizenry engages with new information.<sup>47</sup> These assumptions formed the basis for a theory of First Amendment protection for false factual statements that may no longer apply. Yet, on the other side, the Court's fear of censoring or even chilling any slightly less objectionable media (particularly online, as referenced in *Packingham*) presents a compelling counterargument to government intervention.<sup>48</sup> In 2012, the Supreme Court confidently rejected the Government's attempts to criminalize false speech in *Alvarez*, again putting its faith in the power of the marketplace of ideas. However, the unique nature of the fake-news epidemic presents an altogether different case, both in the value of the speech to society, and in the harm that it causes.<sup>49</sup>

#### A. *The Value of Fake News*

In contrast to the petty lies at issue in *Alvarez*, fake news stories defaming minority groups can be more socially destructive, making reliance on the corrective power of the marketplace of ideas more dubious. To illustrate, a study of the most popular election articles in the three months leading up to the 2016 United States presidential election found that the top twenty fake news stories had more engagement (shares, reactions, and comments) on Facebook than the top twenty articles from major news outlets.<sup>50</sup> Beyond highlighting the sheer magnitude of the problem, this study is telling for several other reasons. It points to three unprecedented problems posed by misinformation online, as distinct from traditional forms of news media.

First, the new incentive structures behind news production call into question the heightened value that media has generally enjoyed as an essential but rarefied outlet for informing the public. Second, fake news is as resilient as "real" news and can compete in a social marketplace just as well. Third, the least correctable fake news stories may also hold the greatest potential to cause social harms. This section will explore ways in which Holmes' century-old justification for protecting false factual information fails to address the challenges that arise when the digital revolution, human psychology, and existing social tension meet.

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<sup>47</sup> See *infra* Part II.

<sup>48</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017) ("Foreclosing access to social media altogether thus prevents users from engaging in the legitimate exercise of First Amendment rights").

<sup>49</sup> *Alvarez*, 567 U.S. at 729–30.

<sup>50</sup> Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook*, BUZZFEED NEWS (Nov. 16, 2016), [https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm\\_term=.uwmnD8LZw#.omoYGDJye](https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm_term=.uwmnD8LZw#.omoYGDJye).

From the perspective of the First Amendment, the unique values ascribed to the freedom of the press, as compared to the freedoms associated with private speech, are changing rapidly as the lines between those two formerly distinct categories blur. First Amendment scholar Eugene Volokh noted in 1995 that two of the underlying premises of the First Amendment—that to speak and have a platform to do so was an investment, and that, as a result, information consumers had a scarcity of information to consume—are flipped in the age of the internet.<sup>51</sup> These understandings were bound closely to the conception of a free press having particular value in the marketplace of ideas, based on the “natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interest.”<sup>52</sup> The value acknowledged here extends beyond the mere assertion that the press enjoys particular freedom as the “fourth pillar” of American democracy and more broadly to its vital function in uncovering and disseminating truth to the public. Volokh’s early assertions about the increased accessibility of public platforms mentioned above have arguably stood the test of time. However, his subsequent prediction that the online revolution would only strengthen the marketplace of ideas theory may not have accounted for the distortive effects of social media, where anyone can be (or pretend to be) a journalist in righteous pursuit of truth.

The creation and dissemination of fake news requires little to no investment. Accordingly, the content in the marketplace of ideas is now more than what a publisher deems worthy.<sup>53</sup> In reducing the costs to participate in journalism, traditional media with professional reporters, advertising teams, and fact-checkers face dwindling profits, while “cheap speech” creators (fake news “writers” among them) with startup costs approaching zero conversely find that the business can be extremely lucrative. “If the goal is to maximize an audience (and therefore ad revenue) already facing a glut of down-the-middle serious news, then the trick is to hype and promote any kind of row to get a huge influx of partisan readers,” says James Ball in his 2017 book on fake news.<sup>54</sup> “If a story is going to go unchecked . . . why not make it up entirely and reduce costs even further?”<sup>55</sup>

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<sup>51</sup> Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1807 (1995).

<sup>52</sup> *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243 (1936).

<sup>53</sup> *See id.* at 244–45, 249–50 (discussing the importance of attempts to lessen this bottleneck effect by removing additional barriers like excess taxes, particularly on “cheap” newspapers available to the masses); *see also* Alexander Smith & Vladimir Banic, *Fake News: How a Partying Macedonian Teen Earns Thousands Publishing Lies*, NBC NEWS (Dec. 9 2016), <https://www.nbcnews.com/news/world/fake-news-how-partying-macedonian-teen-earns-thousands-publishing-lies-n692451> (featuring an interview with a fake-news entrepreneur who notes that stories about Trump are his most profitable).

<sup>54</sup> JAMES BALL, *POST-TRUTH: HOW BULLSHIT CONQUERED THE WORLD* 11 (2017).

<sup>55</sup> *Id.*

The rise of the “attention industry,” and the growing importance of advertising to the news business model means that some news content is now created with a very different motivation than to inform the public and “seek truth.”<sup>56</sup> In the world of cheap speech and fake news, informational content and educative effect are secondary concerns to profit margin.

On top of this, the injection of “social” components to our news-sharing behaviors further complicates the values the publisher aims to maximize. Media scholars Charlie Beckett and Mark Deuze have attempted to understand modern journalism in the context of its “emotionally charged networked environment,” and cite economic, technological and behavioral factors pushing news media to change their approach to capturing audiences through emotional appeal.<sup>57</sup> They note that the precious craft of modern news professionals is now “blended into people’s digital mobile lives alongside kittens, shopping, sport, music, online dating and mating rituals, pornography, and games,” which forces news operations to consider entertainment value more than ever.<sup>58</sup>

This shift in focus has led to a body of psychological research into the creation of “clickbait,” or the practice of styling online articles with titles engineered to trigger an irresistible urge to click on them.<sup>59</sup> A study through Stanford University on the motivators of Facebook content creators revealed that Facebook’s business model forces media sources to design content and headlines to elicit readers’ emotional responses.<sup>60</sup> Journalists surveyed “contended that Facebook’s ad revenue business model emphasizes clickbait over quality content and that profit off the spread of fake news will outweigh incentives to effectively deal with the problem.”<sup>61</sup> This is one of many reasons why resorting to intermediary regulation of fake news is unlikely to be widely supported among the tech companies that profit from fake news.<sup>62</sup> More broadly, however, forms of fake news that exploit our emotional responses for profit erode the traditional conception of journalism’s vital role in the marketplace of ideas.

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<sup>56</sup> JACOB FINKEL ET AL., FAKE NEWS AND MISINFORMATION 113 (2017), <https://www-cdn.law.stanford.edu/wp-content/uploads/2017/10/Fake-News-Misinformation-FINAL-PDF.pdf>.

<sup>57</sup> Charlie Beckett & Mark Deuze, *On the Role of Emotion in the Future of Journalism*, SOCIAL MEDIA + SOCIETY, July–Sept. 2016, at 1.

<sup>58</sup> *Id.* at 2.

<sup>59</sup> See *An Emerging Science of Clickbait*, MIT TECH. REV. (Mar. 25, 2016), <https://www.technologyreview.com/s/536161/an-emerging-science-of-clickbait/> (noting a trend whereby “[r]esearchers are teasing apart the complex set of links between the virality of a Web story and the emotions it generates”).

<sup>60</sup> FINKEL ET AL., *supra* note 56, at 33.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 88.

Should the Supreme Court find itself presiding over a case involving fake news and social media, however, it would not be the first time that economic and entertainment value drivers have entered the judicial calculus. The Court's early evaluation of older forms of media is instructive as to how fake news under the First Amendment may be treated. In short, where the emotions of an audience are manipulated for profit, the degree of expressive intent matters.

For example, in affirming an Ohio film-censorship law in 1915, the Supreme Court in *Mutual Film v. Ohio* held that "The exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press of the country, or as organs of public opinion."<sup>63</sup> Films, although "vivid, useful and entertaining," were seen as being "capable of evil," largely as a result of the emotive quality of their imagery.<sup>64</sup> Film as a medium was, of course, eventually brought back under the governance of the First Amendment in *Joseph Burstyn, Inc. v. Wilson*, and remains there today from the modern acknowledgement that it can "affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression."<sup>65</sup> Yet, critically, the Court did not go so far as to extend protection beyond the point where "the capacity for evil" is exacted through film, instead suggesting that while a prior restraint on these types of media would be inappropriate, post-hoc controls might still be available where necessary.<sup>66</sup>

Consistent with that caveat, the Court has been less protective of for-profit private, but defamatory speech. The Supreme Court has previously made pronouncements on defamatory speech that is made "solely in the individual interest of the speaker and its specific business audience."<sup>67</sup> As it related to erroneous credit reports, the Supreme Court in *Dun & Bradstreet, Inc. v. Greenmoss* approved of a defamation suit that did not relate to issues of "public interest."<sup>68</sup> Accordingly, it did not raise quite the same expression-

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<sup>63</sup> *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 244 (1915).

<sup>64</sup> *Id.*

<sup>65</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

<sup>66</sup> *Id.* at 502.

<sup>67</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 762 (1985).

<sup>68</sup> *Id.* Whether or not fake news stories about groups relate to the public interest is another measure entirely, though scholars have made arguments that group libel is akin to private libel of everyday individuals, just on a different scale. WALDRON, *supra* note 5, at 127. Assuming that this type of speech would not be found to be "public speech," the majority in *Greenmoss* indicates that while *Gertz* asserts that the state interest in public speech is "irrelevant," for non-public speech, the state interest may be taken into consideration in a defamation suit. *Greenmoss*, 472 U.S. at 780 n.5 (1985) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-46 (1974)). This distinction will be explored further in Part III.

quashing concerns associated with film censorship.<sup>69</sup> The court refrained from applying the full force of First Amendment scrutiny<sup>70</sup> where speech was both unlikely to be deterred by incidental state regulation because it is motivated by profit, and where it was more “objectively verifiable” than speech deserving of greater protection.<sup>71</sup>

Given the myriad forms of fake news, varying from easily debunked clickbait (perhaps with solely economic incentives) to complex conspiracy theories (written by authors who truly believe them), refusing First Amendment protection for lack of clear informative or expressive purpose would not be universally appropriate, if at all. For one, social scientists studying fake news take care (albeit colloquially) to differentiate “bullshitters” from “liars” in this context.<sup>72</sup> While the latter cares deeply about the truth and seeks to subvert it with some purpose, the former is simply unconcerned with the truth—the “bullshit” created serves no purpose other than to capture the reader’s attention.<sup>73</sup> From expressive and protected films in *Joseph Burstyn*, to entrepreneurial and unprotected credit reports in *Dun & Bradstreet*, the craft of fake news “bullshitters” may fall closer to the latter. This might further distinguish lying (and perhaps truly confused or deluded) defendants like Alvarez from professional-grade fake news entrepreneurs. These underlying motivations would be a consideration in some extreme cases, for example, where “journalists” have openly admitted to creating and soliciting highly deceptive content solely for attracting clicks and generating advertising revenue.<sup>74</sup>

Volokh’s argument about lower barriers to entry and an increase in content likewise disrupts the nature of “public discourse” as understood by free-press absolutists, particularly in the context of fake news. Considering the unique psychological mechanisms through which information about other racial, religious, or ethnic groups is processed, the way information consumers interact with content today challenges whether the assumptions underlying Holmes’ “search for truth” even apply to social media.

Notably, the aforementioned statistic about how fake news fared as well on social media as actual news, refers to “engagement” as a measure of success, rather than traffic or actual readership.<sup>75</sup> This subtle distinction

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<sup>69</sup> See *supra* note 63.

<sup>70</sup> In this instance, the “full force” argument would indicate a requirement that a state interest be “substantial.” *Greenmoss*, 472 U.S. at 760.

<sup>71</sup> *Id.* at 762 (citing *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 n.24 (1976)).

<sup>72</sup> Pennycook, *supra* note 1, at 39.

<sup>73</sup> *Id.*

<sup>74</sup> *Planet Money: Finding the Fake-News King (Episode 739)*, NPR (Dec. 2, 2016) (downloaded using iTunes).

<sup>75</sup> Silverman, *supra* note 50.

represents a significant change in the way that information consumers interact with the news. In effect, it reveals an important aspect of fake news in the attention economy: where the goal is maximizing clicks, the goal of fake news is less to be read than to be shared.<sup>76</sup>

These goals rebut a fundamental premise of the marketplace of ideas theory: that the persistence of an idea correlates to its truth. The failure of a news article to be read and spread today may just as well be attributed to a marketing and algorithmic failure as a journalistic oversight. In addition to using clickbait techniques to drive revenue through clicks, the way content is displayed online is also subject to the new rules of the attention economy.<sup>77</sup> Beyond the more superficial effectiveness of clickbait science, studies on news sharing behaviors have shown that the psychological processes involved in the decision to repost a particular article on social media do not trigger regions of the brain used in analytic thought-processing. Critically, as a result, the decision to share is less related to a belief in the accuracy of the article.<sup>78</sup> Rather, in many instances, this behavior is hypothesized to be driven instead by concerns about reputation or virtue signaling.<sup>79</sup>

Additionally, social media platforms have come under fire for the proliferation of “filter bubbles,” or echo chambers created when algorithms behind users’ news feeds are programmed to selectively display content in line with those users’ existing beliefs.<sup>80</sup> There is conflicting evidence as to the consequences of these algorithms on the dissemination of fake news, with technology companies claiming that “the related filter-bubble effect is due to the user’s network and past engagement behavior – such as clicking only on certain news stories) that is, it is not the fault of the newsfeed algorithm but the choices of users themselves.”<sup>81</sup> These studies have been challenged by

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<sup>76</sup> The most well-cited example of this is an NBC report that Macedonian teenagers were able to make tens of thousands of dollars creating fake news in the later stages of the U.S. election. Smith & Banic, *supra* note 53. This effect is not limited to electoral politics however. See Dickerson, *supra* note 14 (highlighting how fake news outlets created an inaccurate story about an alleged sexual assault in a small Idaho town). Notably, research in 2019 has shown that about 8.5% of American Facebook users actually shared fake news stories in 2016, a smaller percentage than expected, but still a staggering figure given the sheer number of Facebook users nationally. Guess et al., *Less Than You Think: Prevalence and Predictors of Fake News Dissemination on Facebook*, 5 SCI. ADVANCES 1 (Jan. 9, 2019), <https://advances.sciencemag.org/content/5/1/eaau4586/tab-pdf>.

<sup>77</sup> Pennycook, *supra* note 1, at 38 (citing Jillian A. Jordan et al., *Why Do We Hate Hypocrites? Evidence for a Theory of False Signaling*, 28 PSYCHOL. SCI. 356 (2017); Martin A. Nowak & Karl Sigmund, *Evolution of Indirect Reciprocity* (Int’l Inst. for Applied Sys. Analysis, Interim Report IR-05-079, 2005), <http://pure.iiasa.ac.at/id/eprint/7763/>).

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

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

<sup>80</sup> Dominic DiFranzo & Kristine Gloria-Garcia, *Filter Bubbles and Fake News*, 23 XRDS MAG., April 2017, at 33.

<sup>81</sup> *Id.* at 33–34. Of course, this conflicting evidence comes from a study performed by Facebook in 2015 and should be evaluated in that context.



social and computer scientists who note that this attempt by technology giants to deflect responsibility for shaping individual opinion misses the point: these algorithms constitute a worrisome form of censorship, self-imposed or not.<sup>82</sup> In light of the well-documented human susceptibility to false information in social situations, particularly that arguments from “in-group sources” are viewed less critically, the effects of filter bubbles make the likelihood of correction even lower.<sup>83</sup> In Holmes’ view, the value of information depends on its contribution to discourse in the marketplace of ideas, and discourse requires active manipulation of ideas.<sup>84</sup> From this understanding, then, extending the same First Amendment protection to fake news would be more difficult to justify on the basis of its meager contribution to an algorithmically engineered and often mindless dialogue.

Harkening back to early Supreme Court decisions that defended the unique ability for the press to “shed . . . more light on the public and business affairs of the nation than any other instrumentality of publicity,”<sup>85</sup> it is unclear where fake news falls. Particularly as it pertains to non-political fake news relating to private parties, its informational and expressive value to the marketplace of ideas is questionable.<sup>86</sup> That said, in *Alvarez*, a mere failure to affirmatively add value to the marketplace was still insufficient to remove First Amendment protection for false speech, and additional effects must also be considered.<sup>87</sup>

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<sup>82</sup> *Id.* at 34. (“Specifically, [social scientist] Zeynep Tufekci rebutted many of the findings and methodology of the study, accusing it of under-playing its most important conclusion that the newsfeed algorithm decides placement of posts and this placement greatly influences what users click and read. Tufekci also highlighted that the sampling was not random and thus cannot be generalized across all Facebook users.”).

<sup>83</sup> See generally Rod Bond & Peter Smith, *Culture and Conformity: A Meta-Analysis of Studies Using Asch’s (1952b, 1956) Line Judgment Task*, 119 PSYCH. BULLETIN 111, 111–137 (1996); D.J. Flynn, et al., *The Nature and Origins of Misperceptions: Understanding False and Unsupported Beliefs about Politics*, 38 ADVANCES POL. PSYCHOL. 129 (2017).

<sup>84</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>85</sup> *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936).

<sup>86</sup> The theory proposed by the *Alvarez* majority that the prevention of chilling effects is a value associated with the otherwise valueless speech will be addressed in Part III.

<sup>87</sup> *United States v. Alvarez*, 567 U.S. 709, 715 (2012). Finally, it should be noted that the insinuation by the *Alvarez* majority that the prevention of chilling effects is a value associated with the otherwise valueless speech will be addressed in a discussion of government intervention Part III. *Id.* For the purposes of this analysis, however, reducing a chill on speech will be treated as a value associated with declining to regulate, not a value inherent to the speech itself.

### B. *The Harm of Fake News*

In addition to the value of false speech, the Court in *Alvarez* also considered its harms.<sup>88</sup> It is not enough to simply show that some forms of fake news have limited informational value and fail to contribute to public discourse. The Government's failure to demonstrate that Alvarez's lie damaged the military in some concrete way was critical to the court's finding that the lie was protected.<sup>89</sup> On top of the aforementioned distortionary effects on the marketplace of ideas itself, fake news that defames particular social groups obviously involves a distinct dignitary harm to those individuals and a harm to a peaceful society. These are typical of the damages historically addressed by a criminal libel suit in particular,<sup>90</sup> though the stakes with fake news and modern technology are notably higher than ever before. The unique medium of the social mediascape can amplify these harms exponentially.

As to the effect of fake news, the aforementioned motivation to create content that will generate profit betrays a dangerous incentive to capitalize on existing social tensions if that is what audiences are psychologically primed to click on. A growing body of research explores the idea that certain forms of fake news not only have a higher tendency to "go viral," but are also more persistent in the news landscape because they are harder to debunk.<sup>91</sup> As such, even a "debunked" news story may still be able to turn a profit. This may mean that there is no incentive to make fake news any more accurate than the bare minimum required for the initial click.

Researchers at Dartmouth College have studied the effects of misinformation on the human psyche, and their conclusions, along with others in the field, have slowly narrowed in on a set of factors that perpetuate certain types of fake news and render corrective information less effective.<sup>92</sup> Some of their findings are more mechanical: for example, graphical rather than textual corrections to fake news stories are more persuasive.<sup>93</sup> However, other findings reveal that there are powerful incentives behind the reckless

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<sup>88</sup> *Id.* at 725–26.

<sup>89</sup> *Id.* at 719, 726.

<sup>90</sup> Robert Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 702–703 n. 67 ("The function of [common law libel] was epitomized in the law of seditious libel, which punished as a crime any speech that may tend to lessen the King in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people." (internal brackets and quotations omitted)).

<sup>91</sup> See generally Flynn, *supra* note 83, at 130–31 (summarizing studies on the effects of misperceptions and corrective information over the last eight years).

<sup>92</sup> *Id.* at 131–133.

<sup>93</sup> *Id.* at 131.

creation of incendiary defamatory content, and further explain why information consumers struggle to sort through it all.

In this environment, it appears that the creation of fake news that preys on the existing fears of a particular group may be more profitable because it is more likely to be engaged with, and that this type of content is less likely to be corrected in the long run. “Directionally motivated reasoning” or “affirmation bias” here refers to a tendency of information consumers to seek out content that reinforces their existing preferences, whether it be partisan leanings or pre-formed opinions.<sup>94</sup> This suggests a positive feedback loop for certain kinds of fake news: if a given group is more attracted to certain headlines that float around in their newsfeeds, they are more likely to click.

To complicate matters, the entities paying for those clicks often have no idea what content brought their future customers to click on their online advertisements in the first place. This is because a large portion of online advertising is automated, meaning that advertisers rarely choose where they place their ads; they simply bid for space on high-traffic content.<sup>95</sup> If more clicks yields higher profits, this incentivizes the production of more fake news, especially where there is little to no human oversight.

Contrasted with Mr. Alvarez’s easily fact-checked statement that he received the Medal of Honor, the research above tells us that certain types of fake news may be far more resilient. Aside from indicating why some fake news is believable in the first place, self-affirming reasoning also tends to explain why, when confronted with certain types of false information, attempts to correct it may be less or even entirely unpersuasive.<sup>96</sup>

More frighteningly as it pertains to fake news that stokes existing ethnic, racial, or religious conflicts, however, studies show that this persistence is particularly strong where the information relates to an identity threat.<sup>97</sup> If

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<sup>94</sup> *Id.* at 132 (citing Bolsen, Druckman, & Cook, *Citizens’, Scientists’, and Policy Advisors Beliefs About Global Warming*, 658 ANNALS AM. ACAD. ARTS & SCI. 271, Mar. 2015; Charles S. Taber & Milton Lodge, *Motivated Skepticism in the Evaluation of Political Beliefs*, 50 AM. J. POL. SCI. 755 (2006); Kevin J. Mullinix, *Partisanship and Preference Formation: Competing Motivations, Elite Polarization, and Issue Importance*, 38 POL. BEHAV. 383 (2016)).

<sup>95</sup> Pagan Kennedy, *How to Destroy the Business Model of Breitbart and Fake News*, N.Y. TIMES (Jan. 7, 2017), <https://www.nytimes.com/2017/01/07/opinion/sunday/how-to-destroy-the-business-model-of-breitbart-and-fake-news.html>. *The New York Times* reports that a campaign to expose large advertisers who purchase ad space on websites, like *Breitbart News*, that frequently peddle in false or misleading content that “incite violence and discrimination against minority groups” has been relatively effective in changing company policies, and now more advertisers than ever are more conscientious about where to place ads online.

<sup>96</sup> Flynn, *supra* note 83, at 143–44. (“[C]onditions such as polarization, party cues, and others . . . lead to misperceptions about some (but certainly not all) political facts.”).

<sup>97</sup> Garrett et al., *Undermining the Corrective Effects of Media-Based Political Fact Checking? The Role of Contextual Cues and Naïve Theory*, 63 J. COMM. 617, 620 (2013) (“Naïve theories which imply that a group,

people will tend to reason their way towards conclusions that “reinforce existing loyalties rather than conclusions that objective observers might deem ‘correct,’” this would indicate that groups are less likely to be corrected on information that pertains to other “out” groups, particularly those that they already perceive as threatening.<sup>98</sup>

This suggests that fake news is particularly persistent where it exploits existing tensions between groups, and this effect may be amplified where one of those groups is perceived to threaten the existing social order.<sup>99</sup> The nature and popularity of anti-immigrant disinformation during the 2016 election is an example of this effect. A 2017 study from the Berkman Klein Center at Harvard University noted that during the 2016 election, immigration was the most covered subject on social media, and that *Breitbart News* was responsible for more shared immigration content than any other major news source.<sup>100</sup> Critically, however, *Breitbart's* immigration stories were primarily framed in terms of “fear of Muslims and Islam, expressed both in cultural and physical security terms,” and relied less on traditional economic or resource-based conservative rhetoric.<sup>101</sup> The study noted that while the impact of profit-driven clickbait on the election itself may have been minimal, more subtle “disinformation and propaganda” from partisan sites like *Breitbart* were primarily effective in “reorienting the public

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whether it is defined by religion, race, ideology, or something else, threatens the dominant social order can be particularly powerful.”).

<sup>98</sup> Flynn, *supra* note 83 at 133 (citing Gerber, Green & Larimer, *Social Pressure and Voter Turnout: Evidence from a Large-Scale Field Experiment*, 102 AM. POL. SCI. REV. 33 (2008); Alan S. Gerber & Todd Rogers, *Deceptive Social Norms and Motivations to Vote: Everybody's Voting and So Should You*, 71 J. POL. 178 (2009); Paluck 2011; Jonathan Meer, *Brother, Can You Spare a Dime? Peer Pressure in Charitable Solicitation*, 95 J. PUB. ECON. 926 (2011); Bryan Bollinger & Kenneth Gillingham, *Peer Effects in the Diffusion of Solar Photovoltaic Panels*, 31 MARKETING SCI. 900 (2012); Robert M. Bond et al., *A 61-Million-Person Experiment in Social Influence and Political Mobilization*, 489 NATURE 295 (2012); Felipe Kast, Stephan Meier & Dina Pomeranz, *Under-Savers Anonymous: Evidence on Self-Help Groups and Peer Pressure as a Savings Commitment Device*, (Inst. for the Study of Labor, Discussion Paper No. 6311, 2012), <https://pdfs.semanticscholar.org/7c79/a0fc01b59924a1e2b6951cc55bd842b03a8e.pdf>; Elizabeth L. Paluck & Hana Shepherd, *The Salience of Social Referents: A Field Experiment on Collective Norms and Harassment Behavior in a School Social Network*, 103 J. PERSONALITY & SOC. PSYCHOL. 899 (2012), in support of the proposition that “humans are heavily influenced by their peers and social contacts.”).

<sup>99</sup> In line with these findings, it is interesting to note that, “reminders of social difference or cues about outgroup membership may also reduce the effectiveness of corrections.” Flynn, *supra* note 83, at 130.

<sup>100</sup> FARIS ET AL., *PARTISANSHIP, PROPAGANDA & DISINFORMATION, ONLINE MEDIA & THE 2016 U.S. PRESIDENTIAL ELECTION* 6, 13 (2017).

<sup>101</sup> *Id.* at 95 (The [*Breitbart*] headlines appear to have been designed to propagate fear of immigrants in general, but with a heavy Islamophobic focus. Among the top 20 most shared stories, nine referenced Muslims, five referenced crime or terrorism, two mentioned disease, and eight cited specific large numbers of immigrants.”).

conversation” on controversial topics.<sup>102</sup> As it pertained to immigration, *Breitbart* was able to draw readers and amplify existing biases with mixed-truth coverage, punchy, alarming headlines, and exploitation of existing stereotypes and fears.<sup>103</sup> Given the psychology of social media sharing behaviors noted above and resulting incentives to create semi-true content that exploits identity threats, it is perhaps not a coincidence that an outlet using these tactics skyrocketed to the most-shared news source of the election in a matter of months.<sup>104</sup>

Compared to other potential targets of fake news, minority groups are particularly susceptible to online defamation for the above reasons, and that vulnerability is easily translated into violence off-screen. The race to the bottom by content creators is not new, as will be discussed with the increased popularity of the radio and worries about the destructive power of “sensationalist” media between world wars.<sup>105</sup> However, in the new paradigm, where content is cheap, attention is expensive, profit margin is wide, and risk is zero, these effects are not only intensified—they are incentivized.

For example, studies show that media coverage of immigrants is strongly correlated with public opinions of those populations on a macro level.<sup>106</sup> In Europe, research shows that even mere overestimations about the percentage of the total population comprised of immigrants “are associated with anti-immigrant attitudes and policy preferences.”<sup>107</sup> Furthermore, social dynamics in opinion formation are incredibly important to the physical realization of hatred, with Koopmans and Olzak finding in 2004 that

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<sup>102</sup> *Id.* at 20.

<sup>103</sup> *Id.* at 95.

<sup>104</sup> Clare Malone, *Trump Made Breitbart Great Again*, FIVETHIRTYEIGHT (Aug 18, 2016), <https://fivethirtyeight.com/features/trump-made-breitbart-great-again/> (detailing the meteoric rise of *Breitbart* readership in the months preceding the 2016 election, to 18 million readers or 9% of the market at one point).

<sup>105</sup> A. BRAD SCHWARTZ, BROADCAST HYSTERIA: ORSON WELLES’S WAR OF THE WORLDS AND THE ART OF FAKE NEWS 226 (2017).

<sup>106</sup> Hajo Boomgaarden & Rens Vleigenthart, *How News Content Influences Anti-Immigration Attitudes: Germany, 1993–2005*, 48 EUR. J. POL. RES. 516, 518–19 (2009) (“News media can influence people’s readiness to categorize others. By emphasizing the ethnicity of news subjects, news media can contribute to a sense of in-group belonging and, accordingly, to out-group hostility.”).

<sup>107</sup> Flynn, *supra* note 83, at 130. This effect has been seen less clearly in the United States, with Hopkins et al. finding in 2017 that “perceptions of immigrant populations may be more a consequence than a cause of attitudes toward immigration.” Hopkins et al., *The Muted Consequences of Correct Information About Immigration*, at 319 (June 18, 2018), <https://escholarship.org/uc/item/8nc847x1#main>. That said, the researchers did not find that this “necessarily cast doubt on the power threat theory writ large.” For one, it is consistent with the hypothesis that fake news tends to further polarize existing beliefs, and it “simply suggests that other mechanisms are needed to explain why people perceive an outgroup as threatening based on its presence in a particular geographic context.” *Id.*

visibility and proposed support for right-wing violence in the news actually correlates significantly with violence against minority ethnic groups.<sup>108</sup> More recently in Germany, government officials have even conceded to the link between violent, far-right activity and fake news after several false stories on social media stoked the most severe anti-immigrant rioting that the country had seen in decades.<sup>109</sup>

The vast literature documenting the exacerbating effects of unchecked defamatory content on existing tension spans from the Holocaust<sup>110</sup> to the Rwandan genocide<sup>111</sup> and the current ethnic cleansing of Rohingya Muslims in Myanmar.<sup>112</sup> The United States is not immune, and if there is any lesson to be learned from the fake-news-inspired protest in Twin Falls, Idaho, it is that the corrosive effects of misinformation act quickly and unpredictably.<sup>113</sup>

Returning to the *Alvarez* dichotomy, then, the marketplace of ideas justification for protecting fake news appears relatively weak, since its potential harm seems to outweigh its value.<sup>114</sup> Despite being a part of the indispensable “fourth pillar” of American democracy, fake news does little to uphold democratic functions typically underlying a more unbending theory of press freedom. In fact, its perpetuation via social media undermines its ability to inform productive discourse in general, much less discourse of democratic importance. Furthermore, given the psychological and economic factors at play with fake news online, the marketplace is less able to correct for this imbalance. The logical conclusion might be that a passive approach depending on that illusory corrective power would be ineffectual and may leave affected groups vulnerable. Then again, a shift from reliance on the marketplace of ideas to government intervention is equally

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<sup>108</sup> Ruud Koopmans & Susan Olzak, *Discursive Opportunities and the Evolution of Right-Wing Violence in Germany*, 110 AM. J. SOC. 198, 223–24 (2004).

<sup>109</sup> Dettmer, *supra* note 9.

<sup>110</sup> See Laraine R. Fergenson, *Group Defamation: From Language to Thought to Action*, in GROUP DEFAMATION AND FREEDOM OF SPEECH 71, 74–75 (Monroe H. Freedman & Eric M. Freedman eds., 1995) (discussing Nazi propaganda during World War II).

<sup>111</sup> David Yanagizawa-Drott, *Propaganda vs. Education: A Case Study of Hate Radio in Rwanda*, in THE OXFORD HANDBOOK OF PROPAGANDA STUDIES 378, 378–81, 389 (Jonathan Auerbach & Russ Castronovo eds., 2013).

<sup>112</sup> Nick Baker, *How Social Media Became Myanmar's Hate Speech Megaphone*, MYANMAR TIMES (Aug. 5, 2016), <https://www.mmtimes.com/national-news/21787-how-social-media-became-myanmar-s-hate-speech-megaphone.html>; Associated Press, *Authorities Find Rape Case Causing Mandalay Unrest Was Faked*, IRRAWADDY (Jul. 21, 2014), <https://www.irrawaddy.com/news/burma/authorities-find-rape-case-causing-mandalay-unrest-faked.html>.

<sup>113</sup> See generally Dickerson, *supra* note 14 (describing how quickly a fake news story and misinformation about a small Idaho town spread across the United States).

<sup>114</sup> This model of analysis is, again, based on the simple categorical approach put forth in *Chaplinsky v. New Hampshire* for determining when First Amendment protection should uniformly retreat from a particular area of speech. 315 U.S. 568, 572 (1942).

undesirable, as Part III will address. The more apt question in the interim may be one of time and scale, and whether the failure of the marketplace of ideas necessarily means that a resort to the law is warranted in spite of human adaptability.

*C. Historical Precedents of a Hands-off Approach to New Technology*

As the American public moves further from the reality that informed its original conceptions of free expression, some suggest that the marketplace of ideas was never a useful metaphor for justifying the protection of factually false information in the first place.<sup>115</sup> Zachary Price of U.C. Hastings Law School acknowledges that under the First Amendment, Americans have “enlightenment protections without enlightenment minds.”<sup>116</sup> Given the human infallibility before the insidious influences of the internet, he says it is unproductive to imagine that the marketplace theory could ever work in reality.<sup>117</sup> However, in his 2018 article, “Our Imperiled Absolutist First Amendment,” Price defends an interpretation that would still refuse government intervention on the issue of fake news.<sup>118</sup>

If suspicion of government led to the rise of the current, inflexible formulation for protecting free expression, and the government is composed of individuals equally susceptible to the manipulations of fake news, Price contends that it is only “more imperative to keep the channels of communication open to competing viewpoints.”<sup>119</sup> That said, any solution that avoids government interference is a more pragmatic extension of the marketplace of ideas theory: it nonetheless places the power to distinguish true from false in the hands of the information consumer. As discussed above, however, the entrepreneurs of online deception might again prove the creaky First Amendment foundation too weak to withstand to such a dangerous development in the fight against unwarranted group-based prejudice.

The absence of government intervention into open discourse is frequently justified by the idea that, when forced to confront certain low-value speech, the populace eventually develops immunities to the harms it incurs.<sup>120</sup> Some legal scholars go so far as to view this immunity not only as a mere byproduct

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<sup>115</sup> Zachary Price, *Our Imperiled Absolutist First Amendment*, 20 U. PA. J. CONST. L. 817, 835–36 (2018).

<sup>116</sup> *Id.* at 831.

<sup>117</sup> *Id.* at 834–35.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 835.

<sup>120</sup> *Id.* at 836.

of tolerance, but as having an important social value of its own.<sup>121</sup> However, given that the “absolutist” conception of the First Amendment is largely a still growing development of the last hundred years or less,<sup>122</sup> the limits of our collective immune system have only been tested a few times. Price suggests that in the face of fake news, “the public will gradually inoculate itself against online manipulation, much as it eventually did with respect to earlier forms of propaganda.”<sup>123</sup> This warrants another examination into how closely the analog past mirrors our digital present and whether the passive approach’s success in the past means that it will work in the future. While the particular problems posed by social media-driven fake news are novel, the best comparison might be drawn between the internet age and the advent of the radio—hailed less than a century ago as a dangerous new medium for large scale misinformation arising in a similarly charged time.

In the years between the world wars, when radio first began proliferating as a means of delivering media to the public, fears of mass violence in response to inciting fascist propaganda sound eerily familiar today. “The greatest organizers of mass hysterias and the mass delusions today are states using the radio to excite terrors, incite hatreds, inflame masses,” one well-known radio personality commented about the rapidly spreading technology.<sup>124</sup> Aside from its scale, radio as a medium was unique in its ability to stir passions, particularly the emotive quality of the human voice. “Charismatic leaders, such as Adolf Hitler and Josef Goebbels, the Third Reich’s Minister of Popular Enlightenment and Propaganda, used high-pitched vocal frenzies to produce mass hysteria and emotion in their listeners . . . in ways that print could not,” noted Tiffany McKinney in a policy exploration of Radio Propaganda Disarmament.<sup>125</sup> American talk radio

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<sup>121</sup> Lee C. Bollinger, *Rethinking Group Libel*, in *GROUP DEFAMATION AND FREEDOM OF SPEECH: THE RELATIONSHIP BETWEEN LANGUAGE AND VIOLENCE* 243, 248-49 (Monroe H. Freedman & Eric M. Freedman eds., 1995).

<sup>122</sup> See Price, *supra* note 115, at 820 (suggesting that the First Amendment was largely dormant through the 1930s and 1940s and adopted a more absolutist line in response to Jim Crow laws). Alexander Meiklejohn’s article, aptly titled, *The First Amendment is an Absolute*, is also widely cited as providing an influential overview of First Amendment Absolutism, though he suggests that the *Schenck v. United States* decision, 249 U.S. 47 (1919) was the true genesis of the debate about absolutism today. Alexander Meiklejohn, *The First Amendment is Absolute*, 1961 SUP. CT. REV. 245.

<sup>123</sup> Price, *supra* note 115, at 836.

<sup>124</sup> Adrian Chen, *The Fake-News Fallacy*, *NEW YORKER* (Sept. 4, 2017), <https://www.newyorker.com/magazine/2017/09/04/the-fake-news-fallacy> (quoting Dorothy Thomas).

<sup>125</sup> Tiffany McKinney, *Radio Jamming: The Disarmament of Radio Propaganda*, 13 *SMALL WARS & INSURGENCIES* 111, 112–13 (2002) (“Moreover, unlike print, the special characteristics of radio allow the menace of radio hate propaganda to be multiplied many times over. Broadcasts, for instance, can be copied for multiple hearings and easily leave the confines of the station’s local listening area, reaching citizens in distant areas of the country and even in other parts of the world. A radio wave takes only 1/7th of a second to encircle the entire globe.”).



personality Father Charles Coughlin successfully wielded similarly manipulative techniques, including scapegoating, name-calling, and appeals to prejudice and bigotry to target minorities amidst populist appeals in the 1930s.<sup>126</sup> In this way, clickbait science is not the first mass campaign of emotionally evocative misinformation to reach American shores.

The international community responded to this new media by cracking down on radio broadcasts referred to then as “fake news.” These fears inspired resolutions from the League of Nations in 1927 opposing all news that was “obviously inaccurate, highly exaggerated, or deliberately distorted.”<sup>127</sup> The United States clung to its comparatively strong protections of free press and resisted these “fake news” resolutions, insisting that false news on the radio required more press freedom, not less.<sup>128</sup> However, that is not to say that the United States lacked any government-administered domestic protection from dangerous misinformation.<sup>129</sup>

Although group libel had yet to be affirmed as a response to defamation of targeted minorities, a hands-on regulatory scheme referred to as the “Public Interest Theory” dominated American broadcast media law during this time. The theory was a response to public worries that, given radio’s power over public opinion, a laissez-faire approach to the First Amendment relying on the marketplace of ideas would fail.<sup>130</sup>

Central to effectuating the Public Interest Theory, the Federal Communications Commission (“FCC”) adopted the fairness doctrine in 1949.<sup>131</sup> The rule imposed an affirmative obligation on radio and television broadcasters to cover important and controversial issues of public interest, providing equal access to competing viewpoints on those issues.<sup>132</sup> Additionally, attacks made “upon the honesty, character, integrity or like personal qualities of an identified person or group” mandated structured opportunities for the attacked to respond.<sup>133</sup> It was understood that the radio required these regulations: not only were the means of content production and dissemination too limited to an elite, non-representative few, but the

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<sup>126</sup> Jack Kay et al., *From Coughlin to Contemporary Talk Radio: Fallacies & Propaganda in American Populist Radio*, 5 J. RADIO STUD. 9, 11–13 (1998).

<sup>127</sup> WILLIAM PRESTON JR. ET AL., HOPE AND FOLLY: THE UNITED STATES AND UNESCO, 1945–1985, at 27 (1989).

<sup>128</sup> *Id.* at 27–28.

<sup>129</sup> *Id.*

<sup>130</sup> Note, *Offensive Speech and the FCC*, 79 YALE L.J. 1343, 1345–46 (1970).

<sup>131</sup> Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a “Chilling Effect”? Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279, 279 (1997).

<sup>132</sup> *Id.* at 279–80.

<sup>133</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 373–74 (1969).

radio was “the most influential medium for communicating ideas and shaping consciousness that has ever existed.”<sup>134</sup>

Historian A. Brad Schwartz offers a defense of the fairness doctrine in his book on the predecessors of fake news, noting that “When news is forced to compete for ratings, journalism all too easily gives way to sensationalism...[and] [t]his can lead to a dangerous form of fake news with long-lasting repercussions.”<sup>135</sup> Schwartz’s note on the tendencies of a “capitalist” media poignantly foreshadows the phenomena that have allowed fake news online to be so profitable, and so dangerous absent regulation.

Today, the rest of the international community has (at least ostensibly) fallen more in line with the American view on truth in journalism, embracing the right of the media to be free from criminal sanctions for publishing false information.<sup>136</sup> Domestically, the fairness doctrine escaped First Amendment attack in 1969, when *Red Lion Broadcasting Company* challenged the FCC’s ability to force them to allow a defamed author to respond to criticism made on its airwaves.<sup>137</sup> Instead of viewing the fairness doctrine as a hindrance to the marketplace of ideas, the Supreme Court saw government intervention into broadcasting as facilitating it, by promoting discourse in the public interest.<sup>138</sup> It remained the law of the land for decades, only coming to an end after an FCC vote in 1987. By that time, there was enough competition in the broadcasting industry that enforcing diversity of viewpoints no longer seemed necessary.<sup>139</sup>

There are many parallels between the early years of both the radio and the internet. However, the comparison is far from perfect, and a view that our collective adaptability to propagandistic radio broadcasting indicates resilience in the face of online misinformation may be overly-optimistic.

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<sup>134</sup> Note, *supra* note 130, at 1351.

<sup>135</sup> A. BRAD SCHWARTZ, *BROADCAST HYSTERIA: ORSON WELLES’ WAR OF THE WORLDS AND THE ART OF FAKE NEWS* 227 (2015).

<sup>136</sup> During a Universal Periodic Review of Cameroon, the United Nations Human Rights Committee stated that “the prosecution and punishment of journalists for the crime of publication of false news merely on the ground, without more, that the news was false, [is] in clear violation of Article 19 of the [ICCPR].” U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations, ¶24, CCPR/C/79/Add.116 (Nov. 1999). For more information about the international legal attitude towards fake news, see U.N. Human Rights Comm., General Comment No. 34, Article 19: Freedoms of Opinion and Expression, CCPR/C/GC/34 (Sept. 12, 2011), particularly recommendations 33 and 34, 47 and 49, relating to necessity and proportionality of restrictions on free speech, decriminalization of defamation and memory laws.

<sup>137</sup> *Red Lion*, 395 U.S. at 389–90.

<sup>138</sup> *Id.*

<sup>139</sup> Robert D. Hershey Jr., *F.C.C. Votes Down Fairness Doctrine in a 4-0 Decision*, N.Y. TIMES (Aug 5, 1987), <http://www.nytimes.com/1987/08/05/arts/fcc-votes-down-fairness-doctrine-in-a-4-0-decision.html>.

To start, one of the primary drivers of the fairness doctrine as a response to radio and not newspapers was the fact that control of the airwaves was extremely restricted, and therefore more susceptible to the biases of a few broadcasting companies.<sup>140</sup> This was not the case for newspapers, and is obviously not the case with the internet, where means of publication have never been more accessible.<sup>141</sup> A more interesting comparison arises, however, between the top few broadcasting companies in the 1940's and Silicon Valley's major social media players, who largely control how we view and interact with news content today.<sup>142</sup> While any particular biases woven into the confidential algorithms of Facebook and Twitter may be opaque, it is clear that advertising revenue is the major driver of high-level decisions about what populates our news feeds.<sup>143</sup> Suggestions that major social media platforms should adopt a "public interest" agenda that would interfere with bottom lines may be naïve given the profit margins at issue.<sup>144</sup>

It is unsurprising, then, that intermediaries have been the focus of conversations about how best to tackle fake news through regulation.<sup>145</sup> As one extreme example, Germany's 2017 NetzDG regulation made waves by imposing heavy fines on social media platforms that fail to promptly remove fake news from its platform.<sup>146</sup> This type of legislation would be difficult to implement smoothly in the United States, given that Germany's law relies on an existing set of private hate speech laws that have no American counterparts and would face daunting First Amendment barriers.<sup>147</sup> Constitutional concerns aside, it also would require an overhaul of the American laws governing intermediary liability, which currently exempt

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<sup>140</sup> *Red Lion*, 395 U.S. at 392.

<sup>141</sup> See Volokh, *supra* note 51, at 1806–07.

<sup>142</sup> See DiFranzo, *supra* note 80, at 32–33.

<sup>143</sup> Zeynep Tufekci, *Yes, Big Platforms Could Change Their Business Models*, WIRED (Dec. 17, 2018), <https://www.wired.com/story/big-platforms-could-change-business-models/>.

<sup>144</sup> Peter Cohan, *Does Facebook Generate Over Half of Its Ad Revenue From Fake News?*, FORBES (Nov. 25, 2016), <https://www.forbes.com/sites/petercohan/2016/11/25/does-facebook-generate-over-half-its-revenue-from-fake-news/#4e496aa6375f> (suggesting that it would be difficult to calculate precisely how much money Facebook makes off of fake news, though "[i]t might be possible to estimate how much Facebook ad revenue comes from fake news by multiplying the proportion of time the user spends reading the fake news by Facebook's total ad revenue." Cohan continues that "Facebook generated \$7 billion in third-quarter revenue from two million monthly advertisers seeking to reach its 1.6 billion users—noting that fake news accounted for more shares, reaction, and comment than real news.").

<sup>145</sup> Paul Levinson, *Government Regulation of Social Media Would Be a "Cure" Far Worse Than the Disease*, CONVERSATION (Nov. 28, 2017), <https://theconversation.com/government-regulation-of-social-media-would-be-a-cure-far-worse-than-the-disease-86911>.

<sup>146</sup> *Germany Starts Enforcing Hate Speech Law*, BBC NEWS (Jan. 1, 2018), <http://www.bbc.com/news/technology-42510868>.

<sup>147</sup> Diana Lee, *Germany's NetzDG and the Threat to Online Free Speech*, CASE DISCLOSED (Oct. 10, 2017), <https://law.yale.edu/mfia/case-disclosed/germanys-netzdg-and-threat-online-free-speech>.

many internet service providers from responsibility for content posted on their platforms under Section 230(c) of the Communications Decency Act.<sup>148</sup>

The first mandated annual report released in July 2018 by the entities regulated by NetzDG (primarily Twitter, YouTube, and Facebook) elaborating on their compliance indicated that takedown rates varied widely between tech giants. For the most part, no fines had been levied, and in most cases the allegedly offending content has remained online.<sup>149</sup> On the whole, however, it is poignant to recall that Facebook's previous attempts to debunk false content failed to prevent that content from persisting in and corrupting the marketplace of ideas. As such, it is yet unclear how effective NetzDG has been at attacking the overarching persistent effects of fake news on Facebook, even where content is removed.<sup>150</sup>

At a more foundational level, it seems that some of social media's most distorting features as a news platform are too deeply baked into its core to remedy with an algorithm tweak or new user interface.<sup>151</sup> From the failure of sharing behavior to trigger analytical thought processes to the perverse economy of racist clickbait, social media was perhaps primed for an onslaught of fake news from its inception.<sup>152</sup>

This is by no means a suggestion that these platforms be abandoned as a news source altogether, nor should the preceding discussion be viewed as an unqualified endorsement of the fairness doctrine or government imposition of intermediary-level liability as a solution to fake news. However, public pressure on companies like Facebook to "fix" fake news by whatever means necessary have led to some interesting developments since the 2016 election. In late 2017, Facebook announced its intention to tweak its algorithms so

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<sup>148</sup> 47 U.S.C. § 230(c) (2012).

<sup>149</sup> Dorothee Baumann-Pauly, *German Companies Report on the Implementation of New Hate Speech Law*, N.Y.U. STERN CTR. FOR BUS. & HUM. RTS., (Aug. 7, 2018). <https://bhr.stern.nyu.edu/blogs/2018/8/7/german-companies-report-on-the-implementation-of-new-hate-speech-law>.

<sup>150</sup> Linda Kinstler, *Germany's Attempt to Fix Facebook is Backfiring*, ATLANTIC (May 18, 2018), <https://www.theatlantic.com/international/archive/2018/05/germany-facebook-afd/560435/>.

<sup>151</sup> See Zeynep Tufekci, *Algorithmic Harms Beyond Facebook And Google: Emergent Challenges of Computational Agency*, 13 COLO. TECH. L.J. 203, 208, 215–17 (2015) (discussing the impacts of algorithmic gatekeepers on public discourse and society generally).

<sup>152</sup> In addition to the hostility of the First Amendment to "hate speech" laws of the sort that paved the way for Germany's NetzDG legislation, intermediary liability would face another challenge in Section 230 of the Communications Decency Act, which would insulate companies like Google and Facebook from liability for the content they host. 47 U.S.C. § 230(c) (2011); FINKEL ET AL., *supra* note 56, at 29. Suggestions have been made in this vein that a solution to fake news bearing resemblance to the takedown scheme provided for under the Digital Millennium Copyright Act might be appropriate, were it likewise permitted an exception under the CDA. FINKEL ET AL., *supra* note 56, at 29. These suggestions have also been met with criticism, in that it would simply replace a government censor with a private one, and in fear that overzealous or sloppy enforcement would be more difficult to combat. Daphne Keller, *Making Google the Censor*, N.Y. TIMES (Jun. 12, 2017), <https://www.nytimes.com/2017/06/12/opinion/making-google-the-censor.html>.

that more user-generated content and less news media and promotional content would feature in users' news feeds.<sup>153</sup> News media companies have noted this change with disdain, many having recently expended precious resources to conform to the new rules of social media.<sup>154</sup> However, it may overall prove to be a beneficial change for the information consumer and the industry as a whole, creating a healthier distance between "social" and the "media."<sup>155</sup>

#### IV. CRIMINAL GROUP LIBEL AND A JUSTIFIED SUSPICION OF GOVERNMENT

After evaluating the many issues with a solution to fake news that relies on the marketplace of ideas, the alternative of active government intervention must be considered as well. One of the most compelling avenues for such intervention would be through defamation law. Justice Kennedy refers to defamation in *Alvarez* as a traditionally permissible form of government regulation targeting false speech that causes discrete harms. Criminal group libel laws, specifically, have a controversial past in the United States as a tool for combating speech that causes harm to minority groups.<sup>156</sup> The rise and fall of these laws in various social and political contexts is a telling indicator of how a government-administered solution would fare today as a legal antidote to religiously, racially, or ethnically charged fake news. Ultimately, as flawed as a passive approach to fake news might be, the

<sup>153</sup> Mark Zuckerberg, FACEBOOK (Jan. 11, 2018, 7:28 PM), <https://www.facebook.com/zuck/posts/10104413015393571>.

<sup>154</sup> See Franklin Foer, *Facebook Finally Blinks*, ATLANTIC (Jan. 11, 2018), <https://www.theatlantic.com/technology/archive/2018/01/facebook/550376/> ("Facebook has encouraged media to become dependent on it" but in light of these changes, "media should now thank it. Facebook . . . has forced media to face the fact that digital advertising and ever-growing web traffic will never sustain the industry, especially if that traffic comes from monopolies like Facebook hoping to claim the entirety of digital-advertising dollars for themselves."); Aja Romano, *Facebook Wants To Show You More News From Your Friends — And Less News From Journalists*, VOX NEWS (Jan. 12, 2018), <https://www.vox.com/2018/1/12/16882536/facebook-news-feed-changes>.

<sup>155</sup> Foer, *supra* note 154. There has been little study on the longer-term effects of Facebook's algorithm shift since early 2018, but it is clear that digital publishers have been attempting to diversify their traffic flows to adapt, some more successfully than others. Kathleen Chaykowski, *Facebook's Latest Algorithm Change: Here Are the News Sites that Stand to Lose the Most*, FORBES (Mar. 6, 2018), <https://www.forbes.com/sites/kathleenchaykowski/2018/03/06/facebooks-latest-algorithm-change-here-are-the-news-sites-that-stand-to-lose-the-most/#b3d32c834ec4>; Jim Waterson, *As HuffPost and BuzzFeed Shed Staff, Has the Digital Content Bubble Burst?*, GUARDIAN (Jan. 24, 2019), <https://www.theguardian.com/media/2019/jan/24/as-huffpost-and-buzzfeed-shed-staff-has-the-digital-content-bubble-burst>.

<sup>156</sup> See A. JAY WAGNER & ANTHONY L. FARGO, CRIMINAL LIBEL IN THE LAND OF THE FIRST AMENDMENT 1 (2015), for a map of states that still have criminal libel laws. As of their last tally in 2015, there were fourteen such states. *Id.* at 27 n.76.

historical unpopularity and questionable utility of group libel is evidence that it is an even less attractive option for today's novel issues.

Before engaging on matters of practical significance, however, the first hurdles to address are the theoretical justification and constitutionality of such a defamation-based solution. Since James Madison's early rebuke of the Alien and Sedition Acts in the 1800 Report on the Virginia Resolutions, criminal defamation laws have generally been subject to judicial suspicion, particularly as applied to the media.<sup>157</sup> Yet, there are several reasons why some of the most widely cited justifications for extending protection to false statements might permit a resort to criminal libel law for non-political fake news that targets minority citizens. More broadly, suggestions that fake news is entitled to the full force of constitutionally-mandated "freedom of the press" based on a marketplace of ideas theory are unconvincing, as discussed at length in Part II. More narrowly, however, under a purely "self-governance" theory of First Amendment protection, fake news that relates to private individuals is not a part of the cherished category of political discourse, as will be addressed in this section. From these understandings, and the bare fact that the Supreme Court's last word on group libel was to find it constitutional in 1952, this analysis will proceed to evaluate it as a legally plausible, though ultimately unwise alternative to the passive approach described in Part II.<sup>158</sup>

Discussed here as a potentially ripe response to fake news, criminal group libel laws can be distinguished from other forms of speech regulation on four grounds. These distinctions illuminate its particular appropriateness as a means to combat non-political fake news targeting individual members of minority groups. First, and most obviously, fake news would be regulated as libel rather than slander. Aside from the fact that it is written and not spoken, fake news as libel would not implicate "the immediate flare-up of insult and offense that 'hate speech' connotes," in the words of Jeremy Waldron.<sup>159</sup> Rather, it is when expression that tends to call into question the humanity of others "becomes established as a visible or tangible feature of the environment" that the harm truly occurs, thus inviting recourse to the law.<sup>160</sup> The persistent effect of written speech is heightened with difficult-to-debunk content like fake news on social media, as noted in Part III.

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<sup>157</sup> James Madison, *Report on the Virginia Resolutions*, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 575 (Jonathan Elliot ed., 1836); see *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1963); *Near v. Minnesota*, 283 U.S. 697, 714 (1931); cf. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>158</sup> *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952).

<sup>159</sup> WALDRON, *supra* note 5, at 45.

<sup>160</sup> *Id.* at 45–47.

Second, in attempting to prevent mass violence against groups of individuals sparked by fake news, a solution that targets a public harm would be more appropriate, suggesting a resort to criminal, rather than civil law. The traditional civil tort foundations of defamation between private individuals extended largely to addressing harms to individual honorific, dignitary, and property rights.<sup>161</sup> To the extent that this encompasses a broader aim than to simply resolve private disputes, it is limited to the (now purely metaphorical) old English interest in preventing “duels.”<sup>162</sup> Meanwhile, criminal laws relate more to the relationship between the individual, the public, and the state.<sup>163</sup> In this way, the problem of fake news and defamed minority groups leans more towards government over private enforcement, in that it addresses harms felt both at individual and societal levels.

Third, (and especially in the context of a libel against the press) a criminal libel law targeting only existing fake news articles should be distinguished from a prior restraint on speech. *Near v. Minnesota* approached an instance of group defamation as a “public nuisance,” though the remedy was simply a prohibition on further publication.<sup>164</sup> *Near* famously rebuked this as prior restraint on publication, under a “conception of the liberty of the press as historically conceived and guaranteed,” so long ago as the time of Blackstone.<sup>165</sup> Libel, by contrast, stood on solid foundation for “punishment for the abuse of the liberty accorded to the press is essential to the protection of the public,” and as such, “common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions.”<sup>166</sup> While today, libel is subject to First Amendment scrutiny, it theoretically receives less of a categorical rebuke for its post-hoc nature, which would tend to chill far less speech than other forms of pre-emptive government restraint.<sup>167</sup> Applied to

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<sup>161</sup> Post, *supra* note 90, at 720.

<sup>162</sup> *Id.* at 704–05 n.83.

<sup>163</sup> *Id.*

<sup>164</sup> *Near v. Minnesota*, 283 U.S. 697, 707 (1931). Though styled as a “public nuisance” case, interestingly enough, one of the charges at issue in *Near* was “malicious, scandalous, and defamatory articles,” concerning, among others, “the Jewish race.” Justice Butler’s dissent found the racialized and abusive content at issue particularly disturbing, and worthy of sanction. *Id.* He noted that “existing libel laws are inadequate effectively to suppress evils resulting from the kind of business and publications that are shown in this case.” *Id.* at 737 (Butler, J., dissenting). Butler lamented the failures of a system that invalidated the Minnesota statute, thus exposing the community “to the constant and protracted false and malicious assaults of any insolvent publisher who may have purpose and sufficient capacity to contrive and put into effect a scheme or program for oppression, blackmail or extortion.” *Id.* at 737–38.

<sup>165</sup> *Id.* at 713 (majority opinion).

<sup>166</sup> *Id.* at 715.

<sup>167</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

fake news, any speech restriction imposed would need to act only against stories that are already swirling around social media, and not as a forward-looking prohibition on creators, hosts, publishers, or sharers. In short, libel is the best way to achieve this without running afoul of *Near*.

Finally, the proposed criminal defamation law would target only non-political fake news, which is where criminal “group” libel comes into play. In contrast to criminal libel more generally, criminal group libel is a vindication of a public right through a private right. In other words, it seeks to protect individual members of groups, not individuals themselves. Criminal defamation, as a doctrine, has often been tied up in concerns about its specific tendency to undermine democracy.<sup>168</sup> Well-founded worries about giving the censorial power to the government have directly inspired many of the most significant modern refinements to the First Amendment treatment of defamation: to protect critics of the government from interference or even prosecution by the government.<sup>169</sup> However, a patently false tale about a fictional immigrant or racial minority has little to do with the hallowed Madisonian understanding that “[t]he value and efficacy of the [right of electing the members of the government] depends on the knowledge of the comparative merits and demerits of the candidates for public trust.”<sup>170</sup> The concept of a group libel law (a distinctly non-political cousin of the outmoded seditious libel law) grew precisely out of this non-political exception to Madison’s suspicion of criminal defamation. Instead of protecting the state itself, group libel combats defamation impacting group members’ acceptance into society, their occupational and educational opportunities, their citizenship, or even their humanity.<sup>171</sup>

Constitutional legal scholar Robert Post has described the common law of defamation as an “intellectual wasteland, perplexed with minute and barren distinctions.”<sup>172</sup> Although often fuzzy and overlapping, the four distinctions listed above are nonetheless useful to this exercise, which aims to rectify a specific but multidimensional type of harm as narrowly as possible. Regulating political fake news as opposed to non-political fake news, for example, would involve an entirely different calculus here, as would a law targeting fake news that targets a specific individual, rather than a larger minority group.

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<sup>168</sup> See 47 U.S.C. § 230(c) (2012).

<sup>169</sup> *Ashton v. Kentucky*, 384 U.S. 195, 200–01 (1966); *Garrison v. Louisiana*, 379 U.S. 64, 71 (1964). See *Sullivan*, 376 U.S. at 283; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343–44 (1974), for a similar effort in a civil libel context.

<sup>170</sup> Madison, *supra* note 157, at 575.

<sup>171</sup> WALDRON, *supra* note 5, at 57.

<sup>172</sup> Post, *supra* note 90, at 691 (internal quotation marks omitted) (quoting F. POLLOCK, *THE LAW OF TORTS* 243 (13th ed. 1929)).



Among the potential solutions to the problem of racially, ethnically, or religiously charged fake news today, criminal group libel is a tempting one. Functionally, its deep historical roots in common tort law establish a relatively neat legal framework around which duty, causation, and harm might be framed.<sup>173</sup> Although libel is no longer wholly thought to exist outside of constitutional scrutiny, group libel targeted narrowly in terms of race, religion, and ethnicity fails to clearly sound the alarm bell of unwieldy government censorial power over *political* criticism. Despite popular resistance among legal scholars and free speech advocates, this would not be the first foray that the United States has taken into a government-administered solution to ethnic, religious, or racial defamation. This historical background is critical in addressing real<sup>174</sup> and hypothetical arguments<sup>175</sup> for the return of group libel today.

#### A. *The Tempting Precedent of Group Libel in America*

The uniquely American pursuit of social justice through criminal defamation began in 1908 with a local film censorship law, drafted by a Jewish lawyer in Chicago named Adolf Kraus.<sup>176</sup> The first of its kind, it has been suggested that his law was likely a reaction to the release of *The Clansman*, a racially charged and highly offensive novel, as well as “sensationalist” accounts of Jewish criminals published in *McClure’s Magazine*. “For Jews and African Americans, the pain of social exclusion, the shame of accusations of criminality, and the fear of violence motivated their efforts to reform racial representations in popular culture, converging, in particular, on the censorship of the new medium of motion pictures.”<sup>177</sup> The law was unusual among other similar censorship legislation at the time for two reasons. First, it specifically aimed to curtail *racial* offense through certain types of media, and second, the law was not limited to film.<sup>178</sup> Kraus’s city-wide law was eventually introduced to the Illinois state legislature in 1915 by Robert Raymond Jackson, a Black state representative from Chicago, and a

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<sup>173</sup> See generally Post, *supra* note 90, at 692 (acknowledging that reputation is a “mysterious thing,” but exploring how defamation law has, over hundreds of years, created a framework for addressing various forms of harm to it).

<sup>174</sup> Philosopher Peter Singer has endorsed the idea that group libel should be revisited to combat fake news, given the aforementioned threat to democracy, and the appeal of a criminal legal solution. Peter Singer, *Free Speech and Fake News*, FINANCIAL ADVISOR (Jan. 9, 2017), <https://www.famag.com/news/free-speech-and-fake-news-30761.html?section>.

<sup>175</sup> WALDRON, *supra* note 5, at 64.

<sup>176</sup> M. ALISON KIBLER, CENSORING RACIAL RIDICULE 116 (2015); Ellen C. Scott, *Black “Censor,” White Liberties: Civil Rights and Illinois’s 1917 Film Law*, 64 AM. Q. 219, 221 (2012).

<sup>177</sup> KIBLER, *supra* note 176, at 116.

<sup>178</sup> Scott, *supra* note 176, at 223.

version of it was passed in 1917.<sup>179</sup> Censorship of this sort gelled with Jackson's unique vision for racial equality, which prioritized protecting the image of African Americans from threatening stereotypes as a conduit to protection from physical harm.<sup>180</sup> From a legal perspective, the law faced little scrutiny under the First Amendment: at that time, libel still generally fell outside of the scope of constitutional speech protection and the Supreme Court had categorically upheld film censorship in *Ohio v. Mutual Films* two years earlier.<sup>181</sup> A more searching inquiry into the legality of these types of laws was simply yet to come.

A broader, nationwide fascination with "group libel," (as it is known today) began in 1942, and carried the conversation from the movie theater to the front lines of World War II and defense of democracy from fascism.<sup>182</sup> Attorney-turned-sociologist David Riesman lamented "the systematic avalanche of falsehoods which are circulated concerning the various groups, classes, and races which make up the countries of the western world" in a series of articles about charged propaganda.<sup>183</sup> As a Jewish German-American intellectual, Riesman's analysis was framed around an ongoing genocide within which he undeniably found himself at the center, though his articles found broad appeal around the country.<sup>184</sup>

Riesman saw group libel as largely misunderstood and underutilized in the United States. He found this to be the result of the American tendency to view "reputation" as merely a capitalistic asset.<sup>185</sup> Yet, to Riesman, "reputation" had an intrinsic value critical to the safety of minority groups and democracy as a whole.<sup>186</sup> However, acknowledging an American emphasis on protecting values of self-governance, Riesman noted that any group libel law adopted "must be discriminating in judging what sorts of criticism—though mistaken in fact—further democratic cause and which sorts of defamatory falsehood hinder it."<sup>187</sup> Despite this Madisonian homage, Riesman ultimately found that the risks of abuse were outweighed by the risk of mass violence that opposed the use of group libel.<sup>188</sup>

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<sup>179</sup> *Id.* at 224.

<sup>180</sup> *Id.* at 231, 235.

<sup>181</sup> 236 U.S. 230, 244–45 (1915).

<sup>182</sup> Evan P. Schultz, *Group Rights, American Jews, and the Failure of Group Libel Laws, 1913–1952*, 66 BROOK. L. REV. 71, 124 (2000).

<sup>183</sup> David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 727 (1942).

<sup>184</sup> *Id.* at 727; SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* 79–80 (1994).

<sup>185</sup> Riesman, *supra* note 183, at 731.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 755.

Ten years later, the Supreme Court of the United States agreed with Riesman, handily upholding a criminal libel statute in *Beauharnais v. Illinois*, again under the understanding that libel categorically fell entirely outside of First Amendment protection.<sup>189</sup> The challenge before the Court concerned none other than Adolf Kraus and Robert Raymond Jackson's 1917 Illinois film censorship law. In that case, Joseph Beauharnais, the president of the White Circle League of America, was charged criminally for distributing a pamphlet which defamed the African-American race. The leaflet advocated for the protection of the white race from "mongreliz[ation]" and "rapes, robberies, guns, knives, and marijuana of the negro," in such a way that it unlawfully exposed African Americans to "contempt, derision, or obloquy" or was "productive of breach of the peace or riots."<sup>190</sup>

The Illinois statute, so hard-won in the state legislature by Assemblyman Jackson thirty-five years earlier, was scrutinized by a court that had witnessed tragedy unanticipated when it was written in 1917. The majority's defense of the statute in *Beauharnais* noted that "Illinois did not have to . . . await the tragic experience of the last three decades to conclude that willful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community."<sup>191</sup> The immediacy of the racial tensions in Chicago at the time certainly played a role in Frankfurter's opinion. However, on a larger scale, it seemed as if the horrors of World Wars I and II were also fresh enough to fortify a state interest in regulating speech unworthy of First Amendment protection for its divisive power.

Meanwhile, the dissenters hinted that the decision could be perverted in practice, with Justice Douglas commenting, "Today a white man stands convicted for protesting in unseemly language against our decisions invalidating restrictive covenants. Tomorrow a Negro will be hailed before a court for denouncing lynch law."<sup>192</sup> However, the fact that the libel statute evaded true First Amendment analysis at the time meant that a rational basis was all that was required for it to pass constitutional muster. Attempts to reframe Mr. Beauharnais' pamphlet within abstract discursive values or the nature of democracy failed before the post-World War II reckoning with the destructive power of the disillusioned masses.<sup>193</sup> Ultimately, Douglas's practical concerns about group libel were defeated by the majority's analysis

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<sup>189</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952).

<sup>190</sup> *Beauharnais*, 343 U.S. at 251–52; WALDRON, *supra* note 5, at 48.

<sup>191</sup> *Beauharnais*, 343 U.S. at 258–59.

<sup>192</sup> *Id.* at 286 (Douglas, J., dissenting).

<sup>193</sup> *Id.* at 301 (Jackson, J., dissenting).

of the dominant social risk at the time. As David Riesman had conceived of it, “[i]n more or less democratic lands . . . the threat of fascism and the chief dangers to freedom of discussion do not spring from the ‘state,’ but from ‘private’ fascist groups in the community.”<sup>194</sup> With the affirmation of Joseph *Beauharnais*’ conviction, fears of government abuse were suspended before the greater threat posed by societal bigotry writ large, just long enough for the affirmative restriction on speech to hold up.<sup>195</sup>

### B. Practical Concerns and Subsequent Legal Developments

Today, the legal status of group libel laws is a topic of much debate.<sup>196</sup> Their lurking presence in some state criminal codes is especially important to note in evaluating its appropriateness in a new context: fake news that defames minority groups.<sup>197</sup> While its technical legal foundations have been eroded, *Beauharnais* has never been explicitly overruled.<sup>198</sup> In fact, it is still cited, albeit furtively, for the proposition that libel carries with it a diminished First Amendment value.<sup>199</sup> In 1964, The Supreme Court held in *New York Times v. Sullivan*, 376 U.S. 254 (1964), that private libel was no longer fully immune from First Amendment scrutiny, which is the most frequently cited roadblock to any proposed resuscitation of *Beauharnais*.<sup>200</sup> Subsequent extension of the *Sullivan* “actual malice” requirement to cases involving even private figures has restricted its applicability beyond vindication of democratic purposes and into a more encompassing protection of the press

<sup>194</sup> Riesman, *supra* note 183, at 779. Reisman continued: “In this state of affairs, it is no longer tenable to continue a negative policy of protection from the state; such a policy, in concrete situations, plays directly into the hands of the groups whom supporters of democracy need most to fear.” *Id.* at 779–80.

<sup>195</sup> *Id.* at 778–79.

<sup>196</sup> WALDRON, *supra* note 5, at 52. See generally WALKER, *supra* note 184, at 77–78 (contextualizing the historical legal status of group libel laws); Kristen Grauer, *From Beauharnais to Sullivan*, 4 DARTMOUTH L.J. 21, 28 (2006) (suggesting that it remains an “open question” whether group libel laws remain protected by the Constitution).

<sup>197</sup> See COMMITTEE TO PROTECT JOURNALISTS, CRITICS ARE NOT CRIMINALS (2016), <https://cpj.org/x/6761> (discussing the status of state level criminal defamation laws in the United States, noting that at least one state—Massachusetts—retains a group libel statute, though many more still have broader criminal defamation laws).

<sup>198</sup> WALDRON, *supra* note 5, at 61–62.

<sup>199</sup> See, e.g., *United States v. Alvarez*, 567 U.S. 709, 747 (2012) (Alito, J., dissenting) (discussing types of false information that are not within the First Amendment’s protection, noting that the “prevention and punishment” of libel “have never been thought to raise any Constitutional problem” (citing *Beauharnais v. Illinois*, 343 U.S. 250, 256 (1952)).

<sup>200</sup> WALDRON, *supra* note 5, at 28 (citing ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT* 158–59 (2007)). Waldron contests both this proposition, which he refers to as a “consensus,” and the broader idea that *Sullivan* “removed . . . the whole category of libel from the list of exception to the protection of free speech” altogether. *Id.* at 52.

generally.<sup>201</sup> Furthermore, in 1992, the categorical approach endorsed in *Chaplinsky* was further complicated by the imposition of a “viewpoint neutral” requirement in *R.A.V. v. City of St. Paul*.<sup>202</sup> However, despite these legal developments, social context can inform First Amendment jurisprudence in significant ways, as the rise of group libel in the United States over a tumultuous span of almost forty years demonstrates.<sup>203</sup>

While the Court’s more lax approach to government speech regulation allowed group libel to be upheld in *Beauharnais*,<sup>204</sup> it is important to remember that an urgent social need at the time seemed to require this result.<sup>205</sup> Lee Bollinger noted several years after *R.A.V.* that while he did not then believe that a criminal group libel law would necessarily stand up in the Supreme Court, “a change in social conditions and a corresponding change of heart about group libel would not find the First Amendment jurisprudence

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<sup>201</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *see also Snyder v. Phelps*, 562 U.S. 443, 454–55 (2011) (finding a protest of the Westboro Baptist Church to be speech “fairly characterized as constituting speech on a matter of public concern” (citing *Connick v. Myers*, 461 U.S. 138, 146 (1983))); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988) (White, J., concurring) (holding a televangelist to be a “public figure” who could not recover tort damages from a caricature); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–46 (1974) (holding that private individuals “are therefore more vulnerable to injury [from defamatory statements], and the state interest in protecting them is correspondingly greater”); *Garrison v. Louisiana*, 379 U.S. 64, 76 (1964) (extending the “actual malice” test to statements attacking “the personal integrity” of Louisiana judges).

<sup>202</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). The commonly held belief after *R.A.V.* is that the *Chaplinsky* categorical approach case was too simplistic, and the court could no longer proceed on that line of analysis. It is unclear how group libel would fare after *R.A.V.*, given that on its face, a regulation that bans libel but only certain types may not be viewed as “viewpoint neutral” under the new conception. The Court, in dicta, addressed this problem briefly in its majority opinion, noting that while “libel” might still be proscribable, a regulation that only targeted certain forms of libel might not stand up. *R.A.V.*, 505 U.S. at 387; *see also* Elena Kagan, *Regulation of Hate Speech and Pornography after R.A.V.*, 60 U. CHI. L. REV. 873, 876 (1993) (“Exceptions to the viewpoint neutral rule exist, although the Court rarely has seen fit to acknowledge them as such; in a number of areas of First Amendment law, and especially when so-called low-value speech is implicated, the Court breezily has ignored both more and less obvious forms of viewpoint preference.” (internal brackets omitted)). Kagan mentions that commercial speech, as an example, is an area especially prone to such exceptions, which perhaps only strengthens earlier arguments that particular forms of commercially-driven fake news might face an interesting evaluation under current First Amendment precedent. *Id.* at 876 n.13.

<sup>203</sup> As for eluding the *R.A.V.* evolution, Kagan has suggested, for example, that placing the narrower category of group libel, which has a “built in” viewpoint discrimination as a category again outside of scrutiny. *Id.* at 899.

<sup>204</sup> *See, e.g., Beauharnais*, 343 U.S. at 257–58 (noting that libel is not subject to First Amendment scrutiny); *Mut. Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 247 (1915) (holding that film is not entitled to First Amendment protection).

<sup>205</sup> *See Beauharnais*, 343 U.S. at 259 (“In the face of this history and its frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented.”).

unreceptive.”<sup>206</sup> He posited that “a significant rise in violence toward certain minority groups, especially if it were the product of a highly organized and conspiratorial extremist group, could yield a different result, even under existing Supreme Court precedents.”<sup>207</sup> Given the ease with which campaigns of fake news are created and disseminated, it is possible that even a campaign falling short of a “highly organized effort” might be able to generate widespread animosity towards a minority group (particularly one posing an identity threat to the majority). The widespread defamation of a small refugee population in Twin Falls, Idaho is an excellent example of how little overarching strategy would be required to realize such an effort, beyond a mastery of clickbait science and a receptive social media audience.<sup>208</sup>

In light of this uncertainty, the drawbacks of group libel must be addressed. The lessons of American experimentation with group libel in the twentieth century do not stop at an observation of its oscillating popularity amidst varying degrees of social strife. This history also suggests that, in addition to the unraveling of its theoretical legal foundations, group libel’s overall decline over time was also a result of its impracticality as an enforcement mechanism for the rights of minority groups. From the inaptitude of litigation to effectively quash dangerous falsehoods to problems associated with a government-wielded censorial power, criminal group libel would be an unattractive solution to combat fake news, even if constitutional.

To start, there are several purely functional concerns with libel law as an alternative “truth seeking” mechanism to the marketplace of ideas. The English foundations of libel law provided no defense for truth, under the premise that “the greater the truth, the greater the libel.”<sup>209</sup> Today, however, the defense is viewed as a necessary protection of free speech and legitimate publication in a modern society.<sup>210</sup> While sensible in theory, the defense of truth poses many problems to preventing the spread of stereotypes and falsities amongst susceptible information consumers through libel law.

First and most obvious of those issues is the difficulty of tracing layered fake news trails like the alleged “Islamic Takeover” of Twin Falls, Idaho, coverage of which was riddled with falsehoods rooted in an iota of truth.<sup>211</sup> In a sense, the most damaging fake news campaigns are destined to be the most difficult to detangle under modern libel law. Notably, Justice

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<sup>206</sup> Lee Bollinger, *Rethinking Group Libel*, in *GROUP DEFAMATION AND FREEDOM OF SPEECH*, *supra* note 121, at 243.

<sup>207</sup> *Id.*

<sup>208</sup> See generally Dickerson, *supra* note 14.

<sup>209</sup> Riesman, *supra* note 183, at 735.

<sup>210</sup> Note, *Group Libel Laws: Abortive Efforts to Combat Hate Propaganda*, 61 *YALE L.J.* 252, 262 (1952).

<sup>211</sup> See *supra* Part II.

Frankfurter largely avoided the conversation about the truth of the defamatory statements in *Beauharnais*. Rather, he deferred to the trial court, which rejected the defendant's offer to prove the truth of the matters.<sup>212</sup> By couching this evasion within the *Chaplinsky* conception that abusive words have such "slight social value as a step to truth," Frankfurter hinted that truth was, in a sense, irrelevant to the inquiry, given the injury or incitement that such abuse causes.<sup>213</sup> Subsequent legal precedents modifying *Chaplinsky* aside,<sup>214</sup> a discussion of truth would be harder to avoid in a suit pertaining less to opinion than disputed fact, for example, in a libel suit about a contested news article or advertisement.<sup>215</sup>

Assuming that some discussion of truth would inevitably follow, the next hurdle would be harm incurred in that very search. Early critiques of the newly anointed group libel doctrine around the time of *Beauharnais* invoked the "sounding board" technique used by Nazis in Germany.<sup>216</sup> Libel suits were not only an opportunity to martyrize Nazis, but also provided an elevated platform for their propaganda, despite that the litigation was instigated precisely to challenge it.<sup>217</sup> Stateside, attempts in the 1930s to bring similar libel suits against Henry Ford for his anti-Semitic publication, *The Dearborn Independent*, were criticized by pragmatists for similar reasons.<sup>218</sup> Later, the American Jewish Committee ("AJC") defended its eventual categorical rebuke of group libel as a civil rights tool, worrying that a defense of truth might "turn the courtroom into a forum for discussion of such issues as whether or not Jews are evil."<sup>219</sup>

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<sup>212</sup> *Beauharnais v. Illinois*, 343 U.S. 250, 253–54 (1952).

<sup>213</sup> *Id.* at 257.

<sup>214</sup> See e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

<sup>215</sup> See generally *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>216</sup> Note, *supra* note 210, at 260.

<sup>217</sup> *Id.* at 260 n.38.

<sup>218</sup> Schultz, *supra* note 182, at 103. Although there was opposition to these lawsuits, one was eventually brought after 1924. *The Dearborn Independent* claimed in 1924 that "San Francisco attorney Aaron Sapiro and other Jews were using farm cooperatives to seize control of the nation's agricultural resources." *Id.* at 109. Sapiro filed suit against Ford on behalf of "myself and my race." *Id.* at 109. The case came to trial eventually, though after mistrial was declared, and Ford subsequently abandoned the suit. *Id.* at 109.

<sup>219</sup> See WALKER, *supra* note 184, at 83–86; Riesman, *supra* note 183, at 733 n.27; Symposium, *Federal Group Libel Legislation: Should Jews and Jewish Organizations Support or Oppose?*, NAT'L COMMUNITY REL. ADVISORY COUNCIL LEGIS. INFO. BULL., at 1, 7 (June 10, 1949) (on file with the American Jewish Congress archives). Interestingly, attempts to have Congress investigate Nazi and fascist groups in America led to the creation of the House Special Committee on Un-American Activities ("HUAC") in 1938, which soon switched its main focus to Communists. See WALKER, *supra* note 184, at 60. The HUAC eventually took on arguably anti-Semitic overtones in its hunts for Reds. *Id.*

The modern (and notably more light-hearted) equivalent of this problem is colloquially referred to as the “Streisand Effect,” named for Barbra Streisand’s futile attempts to prevent publication of photos of her home in 2003.<sup>220</sup> This phenomenon has already shown to have complicated the fake-news epidemic before any libel suits have even reached the courts. In December 2017, Facebook announced that it would no longer flag stories it hosts as “disputed,” since research had shown that this moniker had only served to increase the likelihood that users would click on the article flagged.<sup>221</sup> In the end, the “search for truth” in highly inflammatory content is a seemingly impossible one, given the realities of human psychology and the new rules of the news media landscape. Regulating fake news promoting intergroup conflict through libel might be legally justifiable in the proper social context. However, even within this conception, libel again falls short on grounds of functional utility.

The problems with group libel extend beyond the courts’ inability to uncover the truth. As with any law that gives the government a censorial power over speech, there is no guarantee that it will only be used in its intended context. Government mistrust is central to a critique of libel law as a tool for protecting minority groups on several levels. Most fundamentally, it demonstrates its limitations as a doctrine rooted in First Amendment rather than Fourteenth Amendment equal-protection ideals.<sup>222</sup> Though group libel was developed to protect vulnerable groups, its protections and powers are not restricted in their use solely to the groups that may have developed or advocated for them. Modern libel law requires a defense of truth, though, especially in group conflict, “true” is not and cannot be a substitute for any individual’s definition of “right,” “moral,” or even “useful” in a campaign for social justice. More specifically, however, as it pertains to the press’s vital role in modern society, even legal developments like the “actual malice” requirement cannot fully prevent abuse and chilling effects. The inability of libel law to successfully account for its inherent malleability is exacerbated by a broader mistrust of government and the people who comprise it. For those

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<sup>220</sup> Mario Cacciottolo, *The Streisand Effect: When Censorship Backfires*, BBC NEWS (June 15, 2012), <http://www.bbc.com/news/uk-18458567>.

<sup>221</sup> Jeff Smith, Grace Jackson & Seetha Raj, *Designing Against Misinformation*, MEDIUM (Dec. 20, 2017), <https://medium.com/facebook-design/designing-against-misinformation-e5846b3aa1e2>.

<sup>222</sup> For a complementary discussion about the origins of the 1917 Illinois group libel law and a conception of censorship as an equalizing mechanism in a deeply racist society, see, e.g., Scott, *supra* note 176, at 241 (“In an era in which there was de facto censorship of black subjectivity, Jackson engaged in de jure censorship to promote black public recognition, a strategy of negotiation and appeasement of dominant paradigms, though not dominant Progressive Era ideologies concerning race or censorship. Jackson’s law is less a censorship law than an attempt to commandeer the existing censorial impulse to a racially liberatory purpose.”).



tackling fake news today, these concerns may ultimately be no different from those faced by civil rights activists almost one hundred years earlier.

Again, history speaks for itself: the 1917 Illinois film censorship-turned-group-libel statute in *Beauharnais* was a criminal law to be enforced by the state for the purpose of protecting vulnerable groups rather than further victimizing them. From a practical perspective, the law was questionably successful in this aim from the start, in large part because enforcement was the duty of a largely white police force.<sup>223</sup> The creation of adjunct citizen film-censorship boards was an attempt to mitigate this problem, but political forces yielded uneven access to those boards between certain minority groups, and even resulted in hostility between them.<sup>224</sup> Jackson's state censorship law failed to uniformly prevent the showing of *The Birth of A Nation*, the film adaptation of the novel *The Clansman*, which had inspired the law's initial drafter.<sup>225</sup>

Even David Riesman, the original instigator of the American group libel conception, eventually had his doubts once he saw the doctrine in use. Sometime after writing his original articles (but a year before *Beauharnais*) Riesman came full circle on his risk analysis pertaining to government regulation of this particular form of social justice advocacy.<sup>226</sup> Riesman never directly explained what led him to abandon his prior advocacy of criminal libel, but instances of confrontational, "militant" actions by Jewish advocacy groups to enforce censorship of anti-Semitic speakers (and even use of derogatory stereotypes in theatrical productions) was hypothesized to have played a role.<sup>227</sup> By that point, several other prominent Jewish groups had abandoned support of the doctrine, including the AJC, as early as 1935.<sup>228</sup> One of the earlier proponents of these laws, the AJC had decided that other

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<sup>223</sup> *Id.* at 237–38.

<sup>224</sup> KIBLER, *supra* note 176, at 167, 170 ("Jews, particularly Jewish women, gained more power in censorship than other racial groups. Uneven access, as well as ongoing doubts about the wisdom of protecting of *any* racial minority through censorship, led to complaints about the unfair politics of Chicago censorship.")

<sup>225</sup> KIBLER, *supra* note 176, at 164; Scott, *supra* note 176, at 237.

<sup>226</sup> See generally WALKER, *supra* note 184, at 99–100.

<sup>227</sup> *Id.* at 99–100, 106. For more information about Riesman's post-war views on complex Jewish identity politics, see generally Susan A. Glenn, *The Jewish Cold War: Anxiety and Identity in the Aftermath of the Holocaust*, in 24 DAVID W. BELIN LECTURE IN AM. JEWISH AFF. (Jean & Samuel Frankel Center for Judaic Studies, 2014).

<sup>228</sup> Schultz, *supra* note 182, at 129 ("While the AJC decided to oppose group libel laws as early as 1935, other Jewish organizations took longer to develop a set policy about the topic . . . . [F]our major Jewish defense organizations expressed their views about group libel in response to a bill offered in Congress that would ban defamatory material from the mails and from interstate commerce.")

methods of enforcing civil rights for the Jewish population, like education, would be more effective than a resort to criminal libel laws.<sup>229</sup>

Counterproductive enforcement only continued after the Supreme Court upheld the constitutionality of criminal group libel. Unsurprisingly, Douglas's dissent in *Beauharnais* indeed proved prophetic, and in the wake of *Brown v. Board of Education*, segregationists looking for new ways to fight the ever-expanding civil rights movement found a friend in libel law.<sup>230</sup> A campaign of targeted defamation suits aimed largely at northern, liberal media coverage of racial issues and statements by organizations like the NAACP aimed to divert precious resources from entities fighting the oppression of African Americans.<sup>231</sup>

A range of anti-segregationist leaders had brought suit: from Mississippi Sheriff Lawrence Rainey, over coverage of the murders of three civil rights activists, to James Earl Ray, the confessed assassin of Martin Luther King, Jr.<sup>232</sup> Interestingly, however, these lawsuits were individual civil libel claims, and yet the sentiment behind them encompassed much more than private feuds. The northern anti-segregationist publications at issue were viewed by Southerners as having attacked them as a people, and as a result, these falsehoods were causing dangerous divisions in American society.<sup>233</sup> *New York Times v. Sullivan* was one such defamation case, and in limiting the reach of libel law in the United States, its unexpected ruling helped to end what many

<sup>229</sup> *Id.* at 112. Among the other factors contributing to the abandonment of group libel amongst its earlier proponents in the Jewish community was a feeling of anxiousness about the idea of outwardly identifying as a distinct religious and ethnic group, when assimilation seemed to be the safest way to avoid conflict in America at the time. *Id.* at 116.

<sup>230</sup> Aimee Edmondson, *In Sullivan's Shadow: The Use and Abuse of Libel Law Arising from the Civil Rights Movement, 1960–89*, 37 JOURNALISM HIST. 27, 35 (2011); Christopher W. Schmidt, *New York Times v. Sullivan and the Legal Attack on the Civil Rights Movement*, 66 ALA. L. REV. 293, 294–96.

<sup>231</sup> Group libel was notably not the precise weapon of choice in these lawsuits, though likely only because it did not need to be. Prior to 1964, the government did not need to disguise its attacks within the more narrow framework of group-based defamation claims: maligned police commissioners, mayors and public officers could easily bring suit in their individual capacities without having to invoke the more complex dynamics involved in a *Beauharnais*-type lawsuit. Schmidt, *supra* note 230, at 307–08.

<sup>232</sup> Edmondson, *supra* note 230, at 32–33.

<sup>233</sup> Schmidt, *supra* note 230, at 305–06, 310. Although these cases are not a direct indictment of group libel, they nonetheless illustrate the danger libel poses in a highly polarized society. A common note of frustration to the plaintiffs in several of those defamation suits were allegations of police brutality, particularly when responding to civil rights demonstrations, a theme that continues to divide Americans even today. See Rob Kahn, *Three First Amendment Puzzles Raised by the Police Union Response to Speech Criticizing Police Conduct in Ferguson and New York City*, 8 ALA. C.R. & C.L. L. REV. 163, 194 (2017) (“[I]t is worth noting that the tolerant society envisioned by *Bollinger* has not come to pass in this particular context. Given how Ferguson and other, more recent police shootings shine a light on implicit bias, it is worth exploring whether such bias also extends to the speech we as a society feel is worth protecting.”).

saw as a wave of libel litigation threatening to exhaust the civil rights movement.<sup>234</sup>

### C. *Limitations of Modern Libel*

*Sullivan* is significant to this analysis both because it factually illustrates the misuse of libel laws during the civil rights movement, but also sketches out the limitations of how the modern era has approached preventing such abuse. While post-*Sullivan* developments in libel law do not clearly foreclose the constitutionality of a group libel solution to fake news, they also do not clearly address some of its major drawbacks. First, it is unclear whether protections like the “actual malice” standard would apply to a *group* libel suit. This is relevant to any liability imposed on the press, in particular, given that a law failing to require some measure of intent would criminalize too-wide of a range of news content beyond intentionally misleading fake news. Second, even in spite of the “actual malice” standard, government abuse might still occur through calculated libel enforcement against (instead of on behalf of) vulnerable ethnic, racial, and religious groups.<sup>235</sup> Third, beyond the damaging potential of enforcement itself, the resulting chilling effect on lawful news coverage would have potentially devastating impact, as would be the case with any criminal imposition on free speech.

It is uncontested that *Sullivan* was a step in the right direction towards addressing these issues, and its impact on libel liability, particularly for press coverage of public officials, should not be understated. Factually, *Sullivan* eerily mirrors what Justice Douglas foresaw in his *Beauharnais* dissent: an advertisement taken out by anti-segregationist groups, attempting to gain sympathy before northern liberals by weaving a poorly fact-checked complaint about treatment of protesters in Alabama. In a landmark decision, the Supreme Court stipulated a more stringent mens rea for civil libel: “actual malice,” rather than the typical presumption of malice through mere publication. Two years later, *Garrison v. Louisiana* would apply the *Sullivan* civil libel “actual malice” standard to criminal libel.<sup>236</sup>

*Sullivan* and *Garrison* were in many ways tied to Madisonian ideals of democratic justice, homages to the press’s unique role as “one of the great interpreters between the government and the people.”<sup>237</sup> In his *Sullivan*

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<sup>234</sup> Schmidt, *supra* note 230, at 325.

<sup>235</sup> See, e.g., Kahn, *supra* note 233, at 194–95 (assessing the racialized current First Amendment landscape surrounding issues of police brutality and implicit bias, and the flexible nature of “factual dispute” in these discussions).

<sup>236</sup> 379 U.S. 64, 67, 69 (1964). *Garrison* would also impose further requirements as to a defense of truth and statutory specificity on criminal libel laws. *Id.* at 70–73.

<sup>237</sup> *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936).

opinion, Justice Brennan wasted no time in comparing a libel suit filed by a Commissioner of Montgomery, Alabama directly to the Sedition Act of 1798, stating that “[t]he right of free public discussion of the stewardship of public officials was . . . a fundamental principle of the American form of government.”<sup>238</sup> However, this was not a discussion of broad mistrust in government; it was simply a rejection of government’s ability to quash democratic discourse. In fact, both opinions presented an opportunity to expand the “actual malice” standard to more private libels, (à la *Beauharnais*), but only raised the criminal libel statute to distinguish it from one that permits cases to be brought by “public men” rather than a maligned social group.<sup>239</sup>

The doctrine was expanded beyond the purely political in subsequent cases, though the mens rea requirement for a group libel suit remedying private reputational harm from false factual “press” coverage remains opaque despite these holdings. As it pertains to libel, two bookend cases set out a range within which such a law might fit: *Gertz v. Robert Welch* expanded the press-protective scienter requirement of *Sullivan* to libel of public figures, while the Court refused to apply actual malice where matters were in the private interest of the two parties in *Dun and Bradstreet v. Greenmoss*.<sup>240</sup> On one hand, the fact that an audience is willing to click on a fake news article might indicate that it is of broader interest than the holding in *Greenmoss*, which dealt with private credit reports. On the other hand, the *Gertz* holding relied on a conception that public figures willfully thrust themselves into the spotlight. Because they are public figures having access to means of publicity, these potential plaintiffs would be less reliant on libel law to correct any defamation.<sup>241</sup> This logic would not apply to private citizens defamed by a fake news article. Even in the age of the internet, which arguably provides anyone a platform from which to issue “corrections,” this may still not satisfy *Gertz*, given the aforementioned difficulty in debunking particular forms of fake news.

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<sup>238</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 274–75 (1964).

<sup>239</sup> *Id.* at 268; *Garrison*, 379 U.S. at 70–71. Group libel was admittedly not clearly disrupted by *Garrison*, with the majority noting that “only narrowly drawn statutes designed to reach words tending to cause a breach of the peace. . . or designed to reach speech, such as group vilification, ‘especially likely to lead to public disorders,’ such as the statute sustained in *Beauharnais*.” *Garrison*, 379 U.S. at 70.

<sup>240</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343–44 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760–61 (1984).

<sup>241</sup> *Gertz*, 418 U.S. at 343–44.

Furthermore, an expansion of the “public figure” doctrine in parallel cases involving the application of the “actual malice” standard in intentional infliction of emotional distress (“IIED”) cases raise further questions.<sup>242</sup> *Hustler v. Falwell* (1988) extended the actual malice standard to suits for IIED for false factual statements made about a public figure, well-known Baptist minister Jerry Falwell.<sup>243</sup> However, in 2011, the Supreme Court took a different approach to its scienter analysis in *Snyder v. Phelps*, applying the actual malice standard based less on the identity of the defamed, but more on the public relevance of the defamatory content.<sup>244</sup> Despite that the plaintiff in *Snyder* was a private citizen, the court found that Westboro Baptist Church protesters at his son’s funeral were entitled to “actual malice” protection because their offensive signs related to matters of public interest.<sup>245</sup> The relevance of this latest development is unclear as it pertains to fake news, which might be distinguished on the basis that it falsely portrays itself as fact, while *Snyder* treated politically charged opinion. Fake news presents an interesting challenge to several aspects of this series of post-*Sullivan* decisions, though the gaps ultimately leave the question as to a group libel suit for enforcement against creators of fake news open.

All of this aside, the “actual malice” standard, conceived in *Sullivan* partly as a protective device for suits against publishers, may not be insurmountable in today’s online news landscape, even if applied. The advertisement at issue in *Sullivan* was approved and printed by the *New York Times* based on the fact that it was “endorsed by a number of people . . . whose reputation [the *Times*’ secretary] had no reason to question.”<sup>246</sup> Although no attempt was made to check the accuracy of its assertions,<sup>247</sup> this was famously not enough to trigger the new “actual malice” standard, since the plaintiffs failed to show knowledge that the statements were false.<sup>248</sup> This is a far cry from the state of mind of the creators and curators of some of the most notoriously viral fake news stories, many of whom have been open about their falseness and complete dearth of journalistic rigor.<sup>249</sup> Yet, despite these differences, intent

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<sup>242</sup> *Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967); *Associated Press v. Walker*, 389 U.S. 28 (1967); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Gertz*, 418 U.S. at 343–44.

<sup>243</sup> 485 U.S. 46, 46, 57 (1988).

<sup>244</sup> 562 U.S. 443, 453–55 (2011).

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

<sup>246</sup> KERMIT HALL & MELVIN I. UROFSKY, *NEW YORK TIMES V. SULLIVAN: CIVIL RIGHTS, LIBEL LAW AND THE FREE PRESS* 17 (2011).

<sup>247</sup> *Id.*

<sup>248</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964).

<sup>249</sup> Justin Coler, publisher of the infamous fake news report about the murder of an FBI agent who leaked Clinton emails was killed (which got 1.6 million views) says stories like this work because they “fit into existing right-wing conspiracy theories . . . Everything about it was fictional: the town, the people, the sheriff, the FBI guy. And then . . . our social media guys kind of go out and do a little

is a slippery element to prove in a courtroom, and the cost to a legitimate news organization would be devastating were a plaintiff to succeed despite the application of the heightened standard.<sup>250</sup>

At the surface, the *Sullivan* line of cases may have minimized the ability of any particular public official to bring criminal or civil libel claims against news media organizations covering civil rights movements. However, this would not prevent group libel from being used as a government-wielded bludgeon against anti-racist or anti-fascist groups today. Such a suit would merely require a complainant by any other name. Fear of any criminal libel law in the hands of the government stems from a broader fear than the acknowledgement of a government's inability to withstand criticism that underlies *Sullivan*. In addition to protecting itself through censorship, the government as an entity (rather than an individual) could equally act as a harbinger of hate if given prosecutorial power over which groups in society require the protection of the law.

This is partly to blame on the fact that oppression and defamation are readily reversible before the law. In *Sullivan*, it was asserted that the advertisement published by the *Times* "echoed prevailing stereotypes of the South as a racist, backward, and violent place,"<sup>251</sup> and while the plaintiffs in the case were indeed individual public officials, the advertisement was equally viewed as a defamation of all citizens of Alabama.<sup>252</sup> Furthermore, comparing these sentiments to the polarization of America today is only facilitated by the fact that the players are nearly the same as they were half a century ago. *The New York Times*, as a publication, continues to irritate conservative groups, and has been attacked widely on the right for failing to remain "neutral" in its coverage of partisan issues.<sup>253</sup> Conservative journalist

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dropping it throughout Trump groups and Trump forums and boy it spread like wildfire." *All Tech Considered: We Tracked Down A Fake-News Creator In The Suburbs. Here's What We Learned*, NPR (Nov. 23, 2016) (downloaded from npr.org). There are complications to this application and a potential parody defense, for example, *Hustler* raises the issue of news that is so obviously fake that a reasonable person would recognize it as fake. The Supreme Court noted that this type of flexibility would be necessary to prevent enforcement against purveyors of political cartoons. *Hustler v. Falwell*, 485 U.S. 46, 57 (1988).

<sup>250</sup> The ultimate question in civil cases becomes one of probability, luck and financing. After *Gertz*, private plaintiffs need to show actual malice to receive punitive damages, and without financing or evidence of actual malice, litigation might prove to be too costly. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). Meanwhile, a wealthy plaintiff with unlimited resources could have more leeway to litigate against an organization that he or she disliked. Expanding civil libel doctrine would only further exacerbate these effects.

<sup>251</sup> HALL, *supra* note 246, at 21–22.

<sup>252</sup> Schmidt, *supra* note 230, at 317.

<sup>253</sup> Joel B. Pollack, *James O'Keefe Busts New York Times Editor Explaining How Paper Sets Anti-Trump Narrative*, BREITBART NEWS (Oct. 17, 2017), <http://www.breitbart.com/big-journalism/2017/10/17/james-okeefe-new-york-times-shoe-narrative/>.

James O’Keefe’s “Project Veritas” has made it its mission to catch the publication in inaccuracies or prejudices. As an example, the project procured and released a “bust” video showing a *Times* editor explaining the difficulty in portraying the President in an unbiased light.<sup>254</sup>

There are non-political examples of libel law’s double-sided nature as an instrument of social justice, as well, which reveal how dangerous a criminal group libel law might be in unintended hands. In August of 2017, a conservative Christian media group, D. James Kennedy Ministries, filed a defamation lawsuit in Alabama against the Southern Poverty Law Center over “false and misleading descriptions of its services” published online.<sup>255</sup> The progressive legal group had implied that D. James Kennedy Ministries was a hate group because of its extreme anti-LGBT rhetoric.<sup>256</sup> This reality ultimately demonstrates that the Madisonian conception of democratic governance may only treat one form of government mistrust, beyond its tendency to control speech for self-perpetuation. Rather, it is a different form of mistrust—the recognition that government officials are human and thus equally susceptible to bias and misinformation—that would render group libel an ineffectual solution to non-political fake news.

Finally, as would be the case with nearly any criminal law involving speech, the chilling effects associated with a resuscitation of *Beauharnais* today would be a hidden but profound cost to bear. It is easier to answer questions about the constitutionality and functionality of a group libel solution to fake news than to predict how the public would understand a law that appears to regulate offense and bias. Real and disputed issues touching on ethnicity, race, and religion need the sanitizing effects of discussion, perhaps even more so than any other, given their sensitivity. It is possible that even a narrowly tailored group libel law might suffice to create a perceived ban on offense, and accidentally deter this ever-important discourse.

Yet, in application, it is unclear where, how, or to what degree chilling effects should figure into a First Amendment analysis, given their ephemeral nature.<sup>257</sup> Put simply, “[t]he chilling effect doctrine recognizes the fact that

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<sup>254</sup> *Id.*

<sup>255</sup> Valerie Richardson, *Christian Ministry Sues over Listing on Southern Poverty Law’s ‘Hate Map,’* WASH. TIMES (Aug 23, 2017), <https://www.washingtontimes.com/news/2017/aug/23/southern-poverty-law-center-hit-with-defamation-la/>.

<sup>256</sup> *Anti-LGBT*, SOUTHERN POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/anti-lgbt> (last visited May 1, 2019) (“Anti-LGBT groups on the SPLC hate list often link homosexuality to pedophilia, claim that same-sex marriage and LGBT people in general are dangers to children, that homosexuality itself is dangerous, support the criminalization of homosexuality and transgender identity, and that there is a conspiracy called the ‘homosexual agenda’ at work that seeks to destroy Christianity and the whole of society.”).

<sup>257</sup> As mentioned earlier, the *Alvarez* majority briefly alludes to arguments that avoidance of chilling effects might be a “value” to be considered in its calculation of whether to extend protection to

the legal system is imperfect and mandates the formulation of legal rules that reflect our preference for errors made in favor of free speech.”<sup>258</sup> Of course, this brings the analysis back to where it started, with calculation of value to harm and an open directive to protect the freedom of the internet because we have never known it any other way.<sup>259</sup>

## CONCLUSION

As the *Packingham* majority fervently acknowledged, the unregulated and decentralized environment that incubated social media has been hailed as a reason behind its success as a universally dominant news platform.<sup>260</sup> Yet, this same environment can also be blamed for its corruptibility as a communicative tool.<sup>261</sup> The American public’s failure to anticipate or detect fake news online is evidence that, especially where money is to be made, technology evolves at a faster rate than human psychology and sociology.

Previous campaigns to develop an informed citizenry in the face of technologically accelerated misinformation, like the “Public Interest Theory,” reflected a quest to institutionalize the ideals put forth in First Amendment values like democratic discourse and the marketplace of ideas. “During the 1940s and 1950s, educators and researchers devoted considerable attention to developing thinking skills within the general public,” through propaganda awareness groups, literary and debating societies, and even regulatory schemes like the fairness doctrine.<sup>262</sup>

Meanwhile, despite rising public concern about fake news today, Americans have yet to even agree on the precise nature of the problem.<sup>263</sup> In absence of organic cultural change, the question of government intervention has become a hot topic for debate. Although an active solution like group libel has been proposed and rejected here as an inappropriate remedy for defamatory non-political fake news, more passive alternatives like inoculation and tolerance seem equally unrealistic in the face of growing mistrust of fact-based reasoning as a whole.

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those statements. *United States v. Alvarez*, 567 U.S. 709, 723 (2012). It is unclear the extent to which the Court relied on this value in its analysis, though it did not outright reject the Respondent’s suggestion. *Id.*

<sup>258</sup> Frederick Schauer, *Fear Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 688 (1978).

<sup>259</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017).

<sup>260</sup> ADAM KLEIN, *FANATICISM, RACISM AND RAGE ONLINE: CORRUPTING THE DIGITAL SPHERE* 44 (2017).

<sup>261</sup> *Id.*

<sup>262</sup> Jack Kay, George W. Ziegelmueller & Kevin M. Minch, *From Coughlin to Contemporary Talk Radio: Fallacies & Propaganda in American Populist Radio*, 5 J. RADIO STUD. 9, 19 (1998).

<sup>263</sup> FINKEL ET AL., *supra* note 56, at 10.



Part of this problem may be one of linguistics: the term “fake news” covers a broad range of journalistic forms, from the clickbait and reckless unverified reporting that have primarily been the subject of this inquiry, to the more ubiquitous category of news that President Donald Trump does not like.<sup>264</sup> As a consequence, the term “fake news” is now wielded globally by authoritarian rulers seeking to undermine trust in all institutions, but particularly any media that contradicts them.<sup>265</sup> This analysis has explored how government mistrust should be a warning bell for any criminal censorial power, particularly in an already polarized society.

The problem is larger than an attempt to crush criticism, however. Embedded in the Trump Administration’s campaign to erode faith in “mainstream media,” conflation of any and all critical content with “fake news,” is a call to retreat from Madisonian democratic ideals and Holmes’ marketplace of ideas altogether.<sup>266</sup> Arguments about the merits of a government-administered solution to fake news versus a citizen-administered one seem futile in this context, where truth is altogether irrelevant.<sup>267</sup> Furthermore, the foundational principles of free speech in America are perhaps too abstract to serve the purposes of already vulnerable ethnic, racial, and religious groups who face other challenges beyond the daily swell of defamatory online content from travel bans at the border<sup>268</sup> to the threat of police brutality in their own neighborhoods.<sup>269</sup>

The First Amendment may overestimate the human capacity to resist clickbait that promises to soothe deep-seated insecurities and peddle in comforting stereotypes. It may fail to discern that within its aim of constraining government as a whole, it cannot control for the fallibility of the individuals who compose it. However, that does not mean that the pursuit

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<sup>264</sup> *Id.* at 10; Tamara Keith, *President Trump’s Description of What’s ‘Fake’ Is Expanding*, NPR (Sept. 2, 2018), <https://www.npr.org/2018/09/02/643761979/president-trumps-description-of-whats-fake-is-expanding> (noting that even Trump himself has admitted tacitly that his definition of “fake” includes any negative reporting about himself).

<sup>265</sup> FINKEL ET AL., *supra* note 56, at 10.

<sup>266</sup> Steven Erlanger, *‘Fake News,’ Trump’s Obsession, Is Now a Cudgel for Strongmen*, N.Y. TIMES (Dec. 12, 2017), [https://www.nytimes.com/2017/12/12/world/europe/trump-fake-news-dictators.html?\\_r=0](https://www.nytimes.com/2017/12/12/world/europe/trump-fake-news-dictators.html?_r=0).

<sup>267</sup> Amy Wang, *‘Post-truth’ Named 2016 Word of the Year by Oxford Dictionaries*, WASH. POST (Nov. 16, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/11/16/post-truth-named-2016-word-of-the-year-by-oxford-dictionaries/?utm\\_term=.08ae1269b859](https://www.washingtonpost.com/news/the-fix/wp/2016/11/16/post-truth-named-2016-word-of-the-year-by-oxford-dictionaries/?utm_term=.08ae1269b859). (“I have never been a fan of the word ‘post-truth,’ since it’s a facile way to describe basic human behavior since the first words were spoken,” *The Fact Checker’s* Glenn Kessler said in an email. “People have always been swayed by emotions and personal beliefs. As fact checkers, we give people the factual information and context for statements made by politicians. What people do with those facts is up to them.”).

<sup>268</sup> *See, e.g.*, Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

<sup>269</sup> Cassandra Chaney & Ray V. Robertson, *Racism and Police Brutality in America*, 17 J. AFR. AM. STUD. 480 (2013) (investigating how the public generally perceive police and how race and racism shape this discourse).

of truth is not an intellectual guidepost worth striving for. Particularly if we cannot rely on the State in this pursuit, we must take it on ourselves as individual members of diverse, but ever-threatened communities.