

FREE SPEECH IN AN INTERNET ERA

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I. INTRODUCTION

Some believe that the development of the internet has led to enhanced political involvement, potentially leading to a golden era of democratic participation.¹ As one commentator noted, “What we are finally seeing . . . is a realization of that ideal that Adams and Jefferson and Paine and before him Voltaire and Plato had . . . that ideal of having everybody have a shot at participating in this discussion.”² And, in many respects, there is validity to that perception. A large percentage of the population now has internet access as well as personal computers and smart phones, which allow them to easily communicate on a mass scale, and allow them to attempt to influence the political process.

However, this “golden era” has come with costs. Although the internet has enabled ordinary individuals to more easily engage politically, it has also enabled them to create a level of mischief in the democratic process. The internet has created a platform for the distribution of “fake news,” has enabled foreign governments and foreign actors to meddle in U.S. elections, and has arguably created a “wild west” of free expression.

This Article does several things. First, it explains why the internet is such a democratic medium, and how that medium has transformed the political process. Second, it discusses the potential mischief that can be created by those who misuse the internet, and explores why it is not easy to remedy such mischief. Finally, the Article turns to the question of possible remedies for the mischief.

II. THE INTERNET AS THE REALIZATION OF AN IDEAL

The internet is revolutionary because it is the first speech technology that is not controlled by so-called “gatekeepers”—individuals (e.g., newspaper

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¹ Portions of this Article are derived from RUSSELL L. WEAVER, *FROM GUTENBERG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY, AND THE IMPLICATIONS FOR DEMOCRACY* (2d ed. 2019) [hereinafter *FROM GUTENBERG TO THE INTERNET*].

² Liane Hansen & Davar Ardalan, *Looking at the Future of ‘E-Politics,’* NPR (June 29, 2008), <http://www.npr.org/templates/story/story.php?storyId=91963952> (quoting Chuck DeFeo, vice president and general manager of the Web site Townhall.com).

editors) who have the ability to decide whether and to what extent ordinary people can access that technology.³ Throughout history, virtually all advances in speech technology came with gatekeepers who were able to control access to those technologies.⁴

Early in human history, the only means of communication were through oral and handwritten works. Before the invention of the printing press, most manuscripts were created by hand, a process that was extremely slow.⁵ Only a small number of people, usually monks, were able to devote the time needed to create manuscripts, let alone multiple copies of manuscripts.⁶ Indeed, for seven centuries, from the Fall of the Roman Empire until the twelfth century, “the monasteries and other ecclesiastical establishments associated with them . . . enjoyed an almost complete monopoly of book production and so of book culture.”⁷ During this time, many people were illiterate, and most were consumed with the task of earning a living and could not devote the time necessary to create (or, for that matter, to read) written works.⁸ Since monks usually wrote in Latin and focused on religious texts, their works were not accessible to the masses who were not literate in their own languages, much less in Latin.⁹

Communication was radically transformed in the fifteenth century when Johannes Gutenberg conceived the idea of movable type, which ultimately led to the development of the printing press.¹⁰ Rather than being forced to laboriously handwrite each page of a book, Gutenberg’s invention made it

³ See FROM GUTENBERG TO THE INTERNET, *supra* note 1, at 67–114.

⁴ *Id.* at 21–38, 47–60.

⁵ See Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students*, 43 SANTA CLARA L. REV. 1, 4 n.2 (2002) (noting that, prior to development of the printing press, printed documents were handwritten by monks who functioned as scribes); Peter K. Yu, *Of Monks, Medieval Scribes and Middlemen*, 2006 MICH. ST. L. REV. 1, 7 (2006) (“Notwithstanding the Church’s active participation, the production of knowledge remained parochial. The copying of books was also slow, tedious, and very time-consuming; it took years for a scribe to complete ‘a particularly fine manuscript with colored initials and miniature art work.’”).

⁶ See Katie Lula, *Neither Here Nor There But Fair: Finding an International Copyright Legal System Between East and West, Past and Present*, 8 ASIAN-PAC. L. & POLICY J. 96, 101 (2006); Jay H. Perlman & Lawrence T. Greenberg, *The Internet Reformation: Gutenberg and Martin Luther on Wall Street*, WALLSTREETLAWYER.COM: SEC. ELEC. AGE, July, 2000, at 9, 4 No. 2 GLWSLAW 9.

⁷ See LUCIEN FEBVRE & HENRI-JEAN MARTIN, *THE COMING OF THE BOOK: THE IMPACT OF PRINTING 1450–1800*, 15 (1976).

⁸ See *id.*; Nicholas Wade, *In Dusty Archives, A Theory of Affluence*, N.Y. TIMES (Aug. 7, 2007), <https://www.nytimes.com/2007/08/07/science/07indu.html> (“For thousands of years, most people lived in abject poverty, first as hunters and gatherers, then as peasants or laborers. But with the Industrial Revolutions, some societies traded this ancient poverty for amazing affluence.”).

⁹ See Wade, *supra* note 8; Lasso, *supra* note 5, at 4 n.2.

¹⁰ See DAVID CROWLEY & PAUL HEYER, *COMMUNICATION IN HISTORY: TECHNOLOGY, CULTURE, SOCIETY* 82 (5th ed. 2007) [hereinafter *COMMUNICATION IN HISTORY*] (“[Printing] was the major cultural/technological transformation in the history of the West . . . [and] along with numerous other developments, marked the transition between the end of the Middle Ages and the dawn of the modern era.”).

possible for individuals to relatively quickly create multiple copies of documents¹¹—newspapers, fliers, pamphlets, and other documents—and it allowed them to do so in their own languages.¹² Thus, the ability to create books was no longer the sole province of monks and university scribes,¹³ and printing presses rapidly spread across Europe.¹⁴ The printing press ultimately led to dramatic societal changes, including “the Renaissance, the Scientific Revolution, and the Protestant Reformation,” as well as to changes in governmental theory and structure.¹⁵

Although the printing press had the undeniable effect of increasing the potential for communication, and of enabling significant numbers of individuals to engage in mass communication, it was subject to “gatekeepers” who controlled access to that technology. Of course, printing press and newspaper owners had easy access to the technology and could readily communicate their ideas and their criticisms of government to their fellow citizens. However, few people who had ready access to printing presses. Printing presses were expensive because the business required a large investment in lead type, and few people could afford the cost.¹⁶ Those who did not own printing presses often had limited options for accessing print technology to communicate their views, and could be subject to the whims of the owners and operators of printing presses who could decide whom they would allow to access their presses (and, therefore, who could mass communicate). The net effect was that, even though the press revolutionized speech technology, the elite (e.g., governmental officials, newspapers, universities, and the rich who owned and controlled presses) were the primary beneficiaries of the new technology, and were the ones who were most able to use the printing press to disseminate their ideas.¹⁷ If the gatekeepers of the print media refused a publication request, and the speaker could not afford to pay a printer to publish his ideas, the speaker was left with only more primitive methods of communication (e.g., oral and handwritten methods).

The harnessing of electricity brought forth a host of new communications technologies. In addition to the telephone and the telegraph, broadcast

¹¹ See Lasso, *supra* note 5, at 4 n.2.

¹² See *id.*

¹³ See FEBVRE & MARTIN, *supra* note 7, at 105.

¹⁴ See *id.* at 167–215.

¹⁵ George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J. L. & TECH. 10, P8 (2007). See also Lasso, *supra* note 5, at 5 (“The 17th century became known as ‘the century of genius’ in large part due to the explosion of creativity and new ideas fueled by printing.”).

¹⁶ See Edward A. Coleman, *Heavy Metal Mayhem: The Ongoing Public Nuisance of Lead Paint*, 37 RUGERS L. REC. 310, 312 (2010).

¹⁷ See Yu, *supra* note 5, at 11.

technologies (radio and television) were invented.¹⁸ Electricity was transformational because it allowed information to move far more quickly than people could move. Before the invention of the telegraph, a transcontinental message would first be shipped by train to St. Joseph, Missouri, and then would proceed via horseback, requiring ten days to two weeks.¹⁹ Following the invention of the telegraph, and the establishment of a national telegraph system, a message could be sent across the entire U.S. in a matter of seconds.²⁰ Radio made it possible to broadcast sound over long distances without wires,²¹ and television similarly enabled the transmission of pictures.²² Thus, during World War II, Americans could sit in their living rooms and listen to President Roosevelt's Fireside Chats, as well as Edward R. Murrow's reporting on the Battle of Britain.²³

Despite its revolutionary nature, the telegraph was not easily accessible by private individuals. Except for the wealthy, who could afford to have telegraph lines in their homes, an individual who wanted to send a telegram was forced to take the message to the telegraph office, which would transmit the message to a telegraph office near where the recipient lived, and then the recipient telegraph company would arrange delivery.²⁴ Moreover, the telegraph could not be accessed by everyone because it required literacy, as well as mastery of the Morse Code,²⁵ and the cost was beyond the means of most people.²⁶ Thus, few private individuals (except the wealthy or corporations, including newspapers) could use the telegraph as a routine or ordinary means of communication.²⁷

Broadcasting via both radio and television also came with gatekeepers. There were two major problems. First, broadcast equipment was expensive and beyond the reach of ordinary people. As a result, most broadcast stations were controlled either by rich individuals or by corporations. Moreover, in

¹⁸ See FROM GUTENBERG TO THE INTERNET, *supra* note 1, at 39–40, 42–45.

¹⁹ See Tom Standage, *Telegraphy – The Victorian Internet*, in COMMUNICATION IN HISTORY, *supra* note 10, at 131.

²⁰ See *id.*

²¹ See Matt Bai, *Pushing the Presidential Message Into the Broadband Age*, N.Y. TIMES, Jan. 25, 2011, at A12 (“Presented with the new primacy of radio, for instance, Franklin D. Roosevelt developed the “fireside chats” that many Americans remembered long after his death, largely because they transformed the president from an abstraction in people’s lives to a presence in their homes.”).

²² COMMUNICATION IN HISTORY, *supra* note 10, at 243.

²³ See FROM GUTENBERG TO THE INTERNET, *supra* note 1, at 43.

²⁴ See Tom Standage, *Telegraphy – The Victorian Internet*, in COMMUNICATION IN HISTORY, *supra* note 10, at 132.

²⁵ See COMMUNICATION IN HISTORY, *supra* note 10, at 119.

²⁶ See Tom Standage, *Telegraphy – The Victorian Internet*, in COMMUNICATION IN HISTORY, *supra* note 10, at 132 (“Sending and receiving messages—which by the early 1850s had been dubbed ‘telegrams’—soon became part of everyday life for many people around the world. But because this service was expensive, only the rich could afford to use the network to send trivial messages; most people used the telegraph strictly to convey really urgent news.”).

²⁷ See *id.*

order to operate a broadcast station, the operator must first obtain a license from the Federal Communications Commission.²⁸ Since radio and television signals could reach much farther than the human voice, and there were a limited number of broadcast waves, there was a potential for interference if too many people attempted to use the same broadcast waves at the same time.²⁹ Under U.S. federal law, only those who hold one of a limited number of licenses can operate radio or television stations.³⁰ As the U.S. Supreme Court recognized in *Red Lion Broadcasting Co. v. F.C.C.*,³¹ a “lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized.”³²

Broadcasting was ultimately supplemented by both cable and satellite television. Cable was advantageous because that technology made it possible for subscribers in remote areas to receive clearer pictures and because it offered viewers far more programming than they could receive over the air waves.³³ Satellites employed “transponders” that allowed them to receive and transmit information, and they functioned like wireless technologies because they enabled communicators to circumvent existing cable and telephone lines and communicate directly through the medium of electronic signals.³⁴ Both satellite and cable television systems contained a multitude of channels, far beyond those offered on traditional broadcast television. However, both came with one major drawback: ordinary people could not necessarily access those technologies to convey their views. Both systems required huge investments of capital that were beyond the means of ordinary individuals. Although some cable systems created “public access” channels, generally ordinary individuals did not have guaranteed access.

The internet was a game changer in terms of the ability of ordinary people to communicate with each other. For one thing, the internet was relatively inexpensive. Even those who could not afford to own computers could access the internet for free at the public library, or inexpensively at a cybercafé. Of course, a personal computer was not absolutely necessary once smart phones came into being.

The communications revolution sparked by the internet has been as transformational as the revolution sparked by Gutenberg’s invention of the

²⁸ See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

²⁹ *Id.* at 387–88.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 388.

³³ Ruth Schwartz Cowen, *The Social Shape of Electronics*, in *COMMUNICATION IN HISTORY*, *supra* note 10, at 313.

³⁴ See *id.*

printing press. Much of the internet's impact is due to the fact that it is largely free of the traditional gatekeepers. Because the internet is so easy to access, effectively at a smart phone user's finger tips, ordinary people are in control. They are free to communicate with whomever they wish to communicate in the way that they wish to communicate.

The effects of the internet revolution are evident virtually everywhere. On a social level, social media platforms (e.g., Facebook) have allowed people to connect in ways that were previously impossible. People in relatively far-flung places can stay connected, not only through email, but also through social media platforms. The internet has also revolutionized American politics, as well as in countries around the world. The internet played a role in the Tunisian and Egyptian revolts during the Arab Spring³⁵ and in bringing about change in such diverse places as Russia³⁶ and China.³⁷ In the United States, politicians are increasingly using internet tools in their political movements and political campaigns, and the internet has sometimes been transformational.³⁸

III. THE MISCHIEF THAT CAN RESULT FROM EASE OF ACCESS

Of course, the great strength of the internet—that ordinary people can use it to mass communicate—is also the internet's greatest weakness. As previously noted, the internet can be used to cause much mischief, and it is easy for individuals to abuse it.³⁹

A. The Distribution of Fake News

One potential misuse involves the distribution of so-called “fake news.” Perhaps the most famous fake news event involved an incident that occurred at Comet Ping Pong, a pizzeria, during the 2016 presidential election.⁴⁰ The event followed online allegations suggesting that former presidential candidate Hillary Clinton and her campaign manager were operating a child sex abuse ring out of a pizzeria.⁴¹ Even though the allegations were untrue, the restaurant received a series of threatening phone calls, and then a man

³⁵ See FROM GUTENBERG TO THE INTERNET, *supra* note 1, at 73–83.

³⁶ *Id.* at 72–73.

³⁷ *Id.* at 83.

³⁸ *Id.* at 84–114.

³⁹ *Id.* at 139.

⁴⁰ See Jennifer Ludden, *Armed Man Threatens D.C. Pizzeria Targeted by Fake News Stories*, NPR (Dec. 5, 2016), <https://www.npr.org/2016/12/05/504467162/armed-man-threatens-d-c-pizzeria-targeted-by-fake-news-stories>.

⁴¹ *Id.*

entered the pizzeria and fired a rifle, believing that he was acting to protect abused children.⁴²

But there are lots of other examples of fake news,⁴³ especially involving efforts to introduce disinformation into the political process,⁴⁴ as well as to manipulate the outcome of elections.⁴⁵

B. Propagation of Hateful Speech

In addition to using the internet to engage in legitimate discourse, individuals can use it to disseminate harmful information such as child pornography⁴⁶ and hate speech,⁴⁷ and the internet can be used by sexual predators⁴⁸ and online gamblers. Holocaust denial is a particular problem. There has been a significant increase in the number of Holocaust deniers in recent years⁴⁹ because the internet makes it much easier for Holocaust deniers to communicate their ideas.⁵⁰ In addition, the internet is accessible, not only by political activists, but also by terrorists.⁵¹ The risk is that governments will focus on dangerous speech as a justification for restricting legitimate internet communications, especially speech related to the political process, in much the same way that earlier governments sought to restrict the printing press through licensing restrictions and the crime of seditious libel.

⁴² *Id.*

⁴³ See FROM GUTENBERG TO THE INTERNET, *supra* note 1, at 139–46.

⁴⁴ *Id.* at 143–47.

⁴⁵ *Id.* at 158–65.

⁴⁶ See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *Ferber v. New York*, 458 U.S. 747 (1982).

⁴⁷ See Russell L. Weaver, Nicholas Delpierre, & Laurence Boissier, *Holocaust Denial and Governmentally Declared “Truth”: French and American Perspectives*, 41 TEX. TECH L. REV. 495, 495–96 (2009); see also Ian Lovett, *U.C.L.A. Student’s Video Rant Against Asians Fuels Firestorm*, N.Y. TIMES, Mar. 16, 2011, at A21 (referring to a negative portrayal of Asians posted on YouTube by a student).

⁴⁸ See Trymaine Lee, *Keeping Predators Away from “Spacebook,”* N.Y. TIMES (Jan. 29, 2008), <http://cityroom.blogs.nytimes.com/2008/01/29/keeping-predators-away-from-spacebook/?scp=1&sq=Keeping%20Predators%20Away%20from%20%E2%80%9Cspacebook,%E2%80%9D&st=cse>.

⁴⁹ See, e.g., Richard E. Hardwood, *Did Six Million Really Die?*, available at <http://www.ihr.org/books/harwood/dsmrd01.html> (last visited Jan. 25, 2020); see also Raffi Berg, *The Fight Against Holocaust Denial*, BBC NEWS (Apr. 14, 2005), <http://news.bbc.co.uk/1/hi/world/europe/4436275.stm>.

⁵⁰ See Berg, *supra* note 49; Christopher Wolf, *A Comment on Private Harms in the Cyber-World*, 62 WASH. & LEE L. REV. 355, 360 (2005) (“[H]ate has gone high tech. Hatemongers used to meet in dingy basements; now they meet online. And instead of sending their propaganda in plain brown wrappers to a limited audience, they use the Internet to distribute graphic racist images, Holocaust denials, and venomous music around the globe.”).

⁵¹ See Russell L. Weaver, *Brandenburg and Incitement in a Digital Era*, 80 MISS. L.J. 1263, 1264 (2011) (discussing the fact that terrorists, and others intent on inciting civil and social disobedience, have used the internet to further their ends and are likely to continue doing so).

C. Interference in Elections

A second way that the internet can be misused is when foreign governments attempt to meddle in the elections of other countries. During the 2016 presidential election, there were claims that the Russian government attempted to interfere in the U.S. presidential election in an effort to help ensure Donald Trump's election,⁵² as well as to destabilize the U.S. political system, "remove faith in America,"⁵³ and undermine Democratic candidate Hillary Clinton.⁵⁴ One blog post referred to Hillary as "pure evil," and one Russian operative claimed that he was reprimanded for not producing enough posts critical of Clinton.⁵⁵ It was also alleged that the Russian-backed Internet Research Agency (IRA) created literally "hundreds of fake accounts and pages on social media during and after the 2016 U.S. election."⁵⁶ Although Facebook was the IRA's favored platform, it also used Twitter, PayPal, and YouTube,⁵⁷ buying Facebook advertisements and organizing U.S. protest rallies beginning in 2015.⁵⁸

IV. POSSIBLE REMEDIES

Although the internet can be used for evil, it is not clear that there are any effective remedies for the mischief. Or, more to the point, the remedies for the ills may be worse than the disease.

A. Potential Remedies for Election Interference

One thing that can be done, and that can be potentially effective, is to prohibit foreigners from attempting to interfere in U.S. elections, but laws already exist prohibiting such interference.⁵⁹ The difficulty relates to enforcement. The very nature of the internet—the fact that virtually anyone can access it and that information can easily be sent across international

⁵² See Dustin Volz, *Pence Points Finger at Russia for 2016 Election Meddling*, WALL ST. J., Aug. 1, 2018, at A7.

⁵³ See David W. Hawpe, *Review: 'The Plot to Hack America' and How Russia Tried to Steal the 2016 Election*, COURIER J. (Mar. 28, 2018), <https://www.courier-journal.com/story/entertainment/books/2018/03/28/kentucky-author-forum-book-review-plot-hack-america-malcom-nance/457421002/>.

⁵⁴ See Neil MacFarquhar, *Inside Russia's Troll Factory: Turning Out Fake Content at a Breakneck Pace*, N.Y. TIMES, Feb. 19, 2018, at A11.

⁵⁵ See *id.*

⁵⁶ See Deepa Seetharaman & Robert McMillan, *Fake Accounts Sought Ties to Real Groups*, WALL ST. J., Aug. 3, 2018, at A4.

⁵⁷ See Sheera Frenkel & Katie Benner, *To Stir Discord in 2016, Russians Turned Most Often to Facebook*, N.Y. TIMES (Feb. 17, 2018), <https://www.nytimes.com/2018/02/17/technology/indictment-russian-tech-facebook.html>.

⁵⁸ *Id.*

⁵⁹ See, e.g., 52 U.S.C. § 30121 (2012); 36 U.S.C. § 510 (2012); 11 C.F.R. § 110.20 (2019).

borders—makes enforcement extremely difficult. To the extent that foreign governments attempt to interfere in elections, the U.S. government can attempt to sanction those governments. However, as with Russia’s efforts to interfere in the 2016 U.S. presidential election, the foreign interference may be carried out by a virtual army of individuals employed within an agency of that government.⁶⁰ It will be the rare case when U.S. law enforcement can specifically identify those individuals, much less gain jurisdiction over and sanction them. To the extent that the interference is perpetuated by lone wolves, who simply want to have fun by interfering in a foreign election, enforcement difficulties may be equally great.

B. Remedies for “Harmful Speech”

To the extent that the mischief comes from hate speech, or fake news, the remedies can be even more problematic. In the United States, the law is clear that the government may prohibit child pornography,⁶¹ at least to the extent that the pornography is not virtually created,⁶² and can also prohibit terrorist speech.⁶³ It is unlikely that speech can be prohibited in the United States simply because it involves so-called “hate speech.”⁶⁴

In this area of the law, the United States diverges from the laws of many other nations. For example, some nations restrict even political speech, including artistic routines that involve comment on current affairs.⁶⁵ In addition, some nations ban certain political symbols (e.g., Nazi symbols),⁶⁶ and prohibit individuals from denying the Holocaust.⁶⁷ For example, the French Gayssot law (named for the bill’s sponsor) prohibits anyone from denying the Holocaust,⁶⁸ as well as from challenging the findings of the

⁶⁰ See *supra* Part III.C.

⁶¹ See *Ferber v. New York*, 458 U.S. 747, 764 (1982).

⁶² See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002).

⁶³ See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 39 (2010).

⁶⁴ See *supra* note 47.

⁶⁵ See Alissa J. Rubin, *For Hateful Comic in France, Muzzle Becomes a Megaphone*, N.Y. TIMES (Mar. 10, 2014), <https://www.nytimes.com/2014/03/11/world/europe/for-hateful-comic-in-france-muzzle-becomes-a-megaphone.html> (noting that anti-Semitic comedian Dieudonné M’bala M’bala’s performances have been banned in some cities in France).

⁶⁶ See Andreas Stegbauer, *The Ban of Right-Wing Extremist Symbols According to Section 86a of the German Criminal Code*, 8 GERMAN L.J. 173, 181–82 (2007).

⁶⁷ LUDOVIC HENNEBEL & THOMAS HOCHMANN, *GENOCIDE DENIALS AND THE LAW* 199 (2011).

⁶⁸ Loi 90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xénophobe [Law 90-615 of July 13, 1990 for the Punishment of Any Racist, Anti-Semitic or Xenophobic Act], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 14, 1990, p. 8333 (“La loi Gayssot”). This bill “inserted a new provision (Section 24 *bis*) into the 1881 Freedom of the Press Act” and imposes one year in prison, a €45,000 fine, or both, on anyone “who disputes the existence of one or more crimes against humanity as defined” by French and international law. HENNEBEL & HOCHMANN, *supra* note 67, at 199.

Nuremberg War Crimes Tribunal.⁶⁹ Likewise, some nations prohibit blasphemy,⁷⁰ as well as speech that degrades human dignity.⁷¹

The situation is quite different in the United States. Freedom of expression has been accorded a preferred position in the U.S. constitutional hierarchy. Even though free speech absolutism has been rejected, free speech claims frequently prevail over other countervailing interests, including intentional infliction of mental and emotional distress,⁷² many defamation claims,⁷³ and even many privacy claims.⁷⁴ In recent years, the United States has gravitated to the position that the government's ability to restrict or control speech should be limited, especially when the restriction is based on the content of speech (except for certain limited categories of speech) or the views expressed in that speech.⁷⁵

U.S. speech protections derive from a couple of different sources. First, they are an outgrowth of the democratic system. If the power to govern derives from the consent of the governed,⁷⁶ freedom of expression is not simply a luxury, but rather is a cornerstone of the governmental system.⁷⁷ Indeed, as the U.S. Supreme Court has recognized, "speech concerning public affairs is more than self-expression; it is the essence of self-government"⁷⁸ and is "essential . . . to the maintenance of democratic institutions."⁷⁹

However, the U.S. position on free speech has also been influenced by history, including governmental attempts to repress and control free speech. As new speech technologies were developed, governments actively

⁶⁹ Weaver, Delpierre, & Boissier, *supra* note 47, at 509. The findings of the NWCT have been integrated into French law and are regarded as *res judicata*. *Id.* This integration is important because French law prohibits individuals from discrediting a court decision through words, images, or actions of any kind under such circumstances as to cause damage to the authority of justice or its independence. *Id.* The crime is punishable by a €7,500 fine. *Id.* Because the Nuremberg Tribunal's findings are binding under French law, the Gayssot law makes the French criminal law applicable to the NWCT's findings. *Id.*

⁷⁰ Ruti Teitel, *Militating Democracy: Comparative Constitutional Perspectives*, 29 MICH. J. INT'L L. 49, 55 (2007).

⁷¹ See Russell L. Weaver, Duncan Fairgrieve & Francois Lichere, *The Creation of Transnational Administrative Structures Governing Internet Communication*, 78 MO. L. REV. 527, 542 (2013).

⁷² See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 451–58 (2011); *Hustler Magazine v. Falwell*, 485 U.S. 46, 56–57 (1988).

⁷³ See, e.g., *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 156–59 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 283–92 (1964).

⁷⁴ See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 394–98 (1967).

⁷⁵ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–86 (1992).

⁷⁶ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁷⁷ See *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964); see also *Sullivan*, 376 U.S. at 270 (noting that the First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

⁷⁸ *Garrison*, 379 U.S. at 74–75.

⁷⁹ *McDonald v. City of Chicago*, 561 U.S. 742, 875 (2010) (Stevens, J., dissenting).

attempted to restrict or control their use.⁸⁰ In the case of Gutenberg's printing press, the situation was no different. Even though many governments might have been keen to use the printing press for their own purposes, they were not necessarily keen on the idea of allowing ordinary people to use the printing press to propagate their own ideas, or to communicate with each other.⁸¹ Understandably fearful that the press might be used to undermine their monarchical positions, many kings took steps to restrain its "evils"⁸² and to impose restrictions on the ability of individuals to access print technologies.⁸³ These "restrictions were the official response to the new, disquieting idea that [the press] would provide a means for mass communication."⁸⁴

Restrictions on the printing press took various forms. Realizing that printers were the pressure point for the communication of new knowledge, "printers and booksellers were . . . at the mercy of inquiries which might commit them to prison and often the stake."⁸⁵ As one commentator noted, "What better way to root out heresy than to punish severely those who initiated the publication of suspected books?"⁸⁶ As a result, French Protestant printers were forced to flee to other countries,⁸⁷ and Reformation literature publishers were persecuted in Saxony.⁸⁸ Throughout Europe, publishers were fined, imprisoned, or executed.⁸⁹ As a result, there was a period when publishing "was in total subjection to authority" and "originality was shunned."⁹⁰ Indeed, it was "difficult for even the most orthodox printer, however obedient, to avoid the rigours of censorship" as printers and booksellers fell under constant surveillance "by the Church, or rather by both

⁸⁰ See John B. Thompson, *The Trade in News*, in COMMUNICATION IN HISTORY, *supra* note 10, at 115–16.

⁸¹ See *id.* at 116 ("In the states and principalities of Germany and Italy the degree of official control varied from one state to another, but newspapers were generally allowed more leeway in reporting foreign news than in discussing domestic politics.").

⁸² *Thomas v. Chicago Park District*, 534 U.S. 316, 320 (2002).

⁸³ See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 800–01 (1978) ("Soon after the invention of the printing press, English and continental monarchs, fearful of the power implicit in its use and the threat to Establishment thought and order—political and religious—devised restraints, such as licensing, censors, indices of prohibited books, and prosecutions for seditious libel, which generally were unknown in the pre-printing press era."); see also William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 97–98 (1984); NORMAN L. ROSENBERG, *PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL* (1986); M. LINDSAY KAPLAN, *THE CULTURE OF SLANDER IN EARLY MODERN ENGLAND* (1997).

⁸⁴ *First Nat'l Bank of Boston*, 435 U.S. at 801.

⁸⁵ See FEBVRE & MARTIN, *supra* note 7, at 150.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 192.

⁸⁹ *Id.* at 115, 150–55

⁹⁰ *Id.* at 153.

the Catholic and the new Protestant Churches, and also by numerous secular authorities.”⁹¹

Restrictions on press freedom varied from country-to-country. Prior to the French Revolution, the French government imposed licensing restrictions and censorship.⁹² A 1563 edict required that all books be licensed prior to publication, and provided that censors would determine whether a license should be granted.⁹³ France also banned certain books.⁹⁴ Although French presses were relatively free for a brief period following the French Revolution, Napoleon imposed press restrictions.⁹⁵ Censorship was likewise imposed in Italy with Catholic Church officials involved in the repression.⁹⁶ In Germany, the government granted the Catholic Church the power to censor publications and to prohibit “heretical” works,⁹⁷ and the Archbishop of Mainz instructed two priests to examine all books, and forbade the publication of any book that had not received his prior approval.⁹⁸ In response to Martin Luther’s attack on indulgences, Emperor Charles V commanded that his writings be burned.⁹⁹

The English also imposed major restrictions on press freedom. The English government controlled the content of printing through licensing schemes.¹⁰⁰ The government also licensed and limited the total number of printing presses that could exist.¹⁰¹ The goal was to control the flow of information by limiting the number of people who could print material.¹⁰² Under the Printing Act of 1662, the British Parliament went further and “prescribed what could be printed, who could print, and who could sell.”¹⁰³ The Act required a printer to obtain a license to print, and (of course) allowed the government to withhold permits from those whose views it found

⁹¹ *Id.* at 154.

⁹² See John B. Thompson, *The Trade in News*, in COMMUNICATION IN HISTORY, *supra* note 10, at 116 (“In France, a centralized and highly restrictive system of licensing, supervision and censorship existed until the Revolution.”).

⁹³ See FEBVRE & MARTIN, *supra* note 7, at 246.

⁹⁴ *Id.* at 304.

⁹⁵ See John B. Thompson, *The Trade in News*, in COMMUNICATION IN HISTORY, *supra* note 10, at 116 (noting that Napoleon “instituted a strict system of censorship and control”).

⁹⁶ See FEBVRE & MARTIN, *supra* note 7, at 245.

⁹⁷ *Id.* at 244.

⁹⁸ *Id.*

⁹⁹ *Id.* at 290.

¹⁰⁰ See *Thomas v. Chicago Park District*, 534 U.S. 316, 320 (2002).

¹⁰¹ See Edward Lee, *Guns and Speech Technologies: How the Right to Bear Arms Affects Copyright Regulations of Speech Technologies*, 17 WM. & MARY BILL OF RTS. J. 1037, 1072 (2009).

¹⁰² See *Thomas*, 534 U.S. at 320.

¹⁰³ William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 248 (1982).

objectionable (often materials critical of the government).¹⁰⁴ The British licensing scheme also prohibited the publication of any book or pamphlet without a license specifically authorizing publication, and required those who wished to obtain a license to submit their work for review.¹⁰⁵ Of course, if a proposed publication contained material that the censor deemed objectionable, the license could be denied.¹⁰⁶ Under the Stamp Act of 1712, taxes were levied on each page as well as on each advertisement that a newspaper contained.¹⁰⁷

Perhaps the most draconian restriction on printing involved the Star Chamber's 1606 decision in *de Libellis Famosis*.¹⁰⁸ That decision created the crime of seditious libel, which replaced, in part, the criminal offense of constructive treason,¹⁰⁹ and made it a crime to criticize the government or governmental officials (and, at one point, the clergy as well).¹¹⁰ The crime was enforced by "threats of punishment, litigation costs, and stigma,"¹¹¹ and was justified by the notion that criticism of the government "inculcated a disrespect for public authority."¹¹² "Since maintaining a proper regard for government was the goal of this new offense, it followed that truth was just as reprehensible as falsehood" and therefore was not a defense.¹¹³ Indeed, truthful criticisms were punished more severely than false criticisms because it was assumed that true criticisms were potentially more damaging to the government.¹¹⁴

In the American colonies, there were similar efforts to control printing: "Often colonial governors distrusted printers and hesitated to give them permission to establish themselves, keeping a very close watch on them after

¹⁰⁴ See *Thomas*, 534 U.S. at 320; *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) ("The struggle for the freedom of the press was primarily directed against the power of the licensor.").

¹⁰⁵ See *Thomas*, 534 U.S. at 320; see also FRED S. SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND, 1476-1776: THE RISE AND DECLINE OF GOVERNMENT CONTROLS* 240 (1952).

¹⁰⁶ See *Thomas*, 534 U.S. at 320.

¹⁰⁷ See John B. Thompson, *The Trade in News*, in *COMMUNICATION IN HISTORY*, *supra* note 10, at 115-16 ("The Stamp Act of 1712 required newspaper proprietors to pay one penny for every printed sheet and one shilling for every advertisement. Subsequent acts increased the amounts and broadened the basis for the application of the law. The Stamp Acts were bitterly opposed and became a rallying point in the struggle for the freedom of the press.").

¹⁰⁸ *de Libellis Famosis*, (1606) 77 Eng. Rep. 250 (Star Chamber).

¹⁰⁹ See Mayton, *supra* note 83, at 98-102.

¹¹⁰ *Id.* Indeed, in *de Libellis Famosis*, the defendants had ridiculed high clergy. *Id.*

¹¹¹ *Id.* at 91.

¹¹² *Id.* at 103; see also Matt J. O'Laughlin, *Exigent Circumstances: Circumscribing the Exclusionary Rule in Response to 9/11*, 70 *UMKC L. REV.* 707, 720-21 (2002) (referring to the seditious libel prosecution of John Wilkes during the reign of George III).

¹¹³ Mayton, *supra* note 83, at 103; see also William R. Glendon, *The Trial of John Peter Zenger*, 68 *N.Y. ST. B.J.* 48 (1996).

¹¹⁴ See Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in America*, 89 *J. CRIM. L. & CRIMINOLOGY* 111, 184 n.290 (1998); see also Glendon, *supra* note 113, at 48 ("Indeed it was said that the greater the truth, the greater the libel.").

they had done so.”¹¹⁵ There were also attempts to censor publications.¹¹⁶ Although licensing expired in the late eighteenth century,¹¹⁷ the British maintained restrictions on speech in the American colonies,¹¹⁸ restrictions which were believed to have motivated the American colonists to demand protection for free expression in the U.S. Constitution.¹¹⁹ In the colonies, governmental officials serving as censors were required to approve the content of newspapers prior to publication,¹²⁰ a practice to which the American colonists objected.¹²¹

C. Remedies for “Fake News”

The more difficult question is whether the U.S. legal system can offer satisfactory remedies for demonstrably false speech. There has always been a debate between the free speech absolutists, who claim that the U.S. government and the states have no power to regulate or limit speech, and those who believe that restrictions are appropriate.¹²² For example, Justice Black is one who argued for a more absolutist view of the First Amendment, citing its “unequivocal command that there shall be no abridgment of the rights of free speech and assembly,” which “shows that those who drafted our Bill of Rights did all the ‘balancing’ that was to be done in this field.”¹²³ Justice Black distinguished between pure speech (which he viewed as absolutely protected) and conduct (which might be subject to regulation), emphasizing that the “very object of adopting the First Amendment . . . was to put the freedoms protected there completely out of any congressional control.”¹²⁴ Of course, Black’s absolutist view ultimately did not prevail,¹²⁵

¹¹⁵ FEBVRE & MARTIN, *supra* note 7, at 210.

¹¹⁶ *See id.*

¹¹⁷ For a discussion of the history of seditious libel, see generally THE LAW COMMISSION, WORKING PAPER NO. 72, CODIFICATION OF THE CRIMINAL LAW: TREASON, SEDITION AND ALLIED OFFENSES (1977), available at <http://www.lawcom.gov.uk/app/uploads/2016/08/No.072-Codification-of-the-Criminal-Law-Treason-Sedition-and-Allied-Offences.pdf>; Judith Schenck Koffler & Bennett L. Gershman, *National Security and Civil Liberties: The New Seditious Libel*, 69 CORNELL L. REV. 816 (1984).

¹¹⁸ *See* RUSSELL L. WEAVER, ANDREW T. KENYON, DAVID F. PARTLETT & CLIVE P. WALKER, THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION AND FREE SPEECH 6 (2006) [hereinafter RIGHT TO SPEAK ILL].

¹¹⁹ *See* Thomas v. Chicago Park District, 534 U.S. 316, 320 (2002).

¹²⁰ *See* H.W. BRANDS, THE FIRST AMERICAN: THE LIFE AND TIMES OF BENJAMIN FRANKLIN 31 (2000) (“Declaring that the tendency of the *Courant* was ‘to mock religion and bring it into disrespect,’ the General Court ordered that ‘James Franklyn, the printer and publisher thereof, be strictly forbidden by this court to print or publish the New England *Courant*’ unless he submitted each issue of the paper to the censor for prior approval.”).

¹²¹ *See* Thomas, 534 U.S. at 320.

¹²² *See* Konigsberg v. State Bar of California, 366 U.S. 36, 60–61 (1961) (Black, J., dissenting).

¹²³ *Id.* at 61.

¹²⁴ *Id.*

¹²⁵ *See* New York v. Ferber, 458 U.S. 747 (1982); Miller v. California, 413 U.S. 15 (1973).

and the Court adopted a non-absolutist interpretation of the First Amendment: the individual who falsely shouts “fire” in a crowded theater may not claim the protection of the First Amendment.¹²⁶ Nevertheless, even though absolutist claims have been rejected, freedom of expression has been accorded a preferred position in the U.S. constitutional hierarchy, and free speech claims frequently prevail.¹²⁷

1. Possible Criminal Prosecutions

Can individuals who disseminate fake news be criminally prosecuted? As noted, the United States does not provide absolute protection for freedom of expression, and there are certain situations where virtually everyone would agree that speech can be curtailed, as well as punished. As the Court recognized in *United States v. Alvarez*,¹²⁸ there are regulations on false speech that courts have found permissible. These include laws that prohibit perjury, false statements made to government officials, and false representations “that one is speaking as a Government official or on behalf of the Government.”¹²⁹

Even though perjury can be prosecuted, that crime does not provide much of a bulwark against the proliferation of fake news. Most fake news is published either in the media, or on social platforms, and there are no “false statements” to government officials. Indeed, much fake news does not involve any attempt to speak as a government official or on behalf of the government. On the contrary, most such statements are made either through the traditional media, or social media platforms, with no attempt to mislead the government or to mislead the public into believing that the speaker is acting on behalf of the government.

Other attempts to prosecute fake news are likely to be met with much greater challenges. The mere fact that individuals make false statements does not mean that they can be criminally prosecuted. In the Stolen Valor Act, Congress made it a crime for individuals to falsely claim to have won the Congressional Medal of Honor.¹³⁰ In *Alvarez*, the Court flatly rejected the proposition that false speech has no value and, therefore, should be denied constitutional protection.¹³¹ In doing so, the Court expressed concern that the government might try to create something like the Truth Commission

¹²⁶ *Schenck v. United States*, 249 U.S. 47, 52 (1919); see also *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969).

¹²⁷ See *supra* notes 72–75 and accompanying text.

¹²⁸ 567 U.S. 709, 720 (2012).

¹²⁹ *Id.* (citing 18 U.S.C. §§ 1001, 912, 709).

¹³⁰ *Alvarez*, 567 U.S. at 515–16.

¹³¹ *Id.* at 718. The Court did note that certain types of false speech could be criminally prosecuted such as perjury or filing a false claim with the U.S. government. *Id.* at 720.

(referencing the Ministry of Truth in George Orwell's *Nineteen Eighty-Four*), and empower it with the authority to "compile a list of subjects about which false statements are punishable."¹³² The Court referred to this type of power as being a "broad censorial power," which the Court viewed as "unprecedented in this Court's cases or in our constitutional tradition," and one which involves "a chill the First Amendment cannot permit if free speech, thought and discourse are to remain a foundation of our freedom."¹³³

Alvarez is fully consistent with the Court's general free speech jurisprudence. In the United States, the legitimacy of our governmental system depends on the consent of the governed, and it is inconsistent with that system to give government the power to control, limit, and suppress the range of ideas that the people can hear or consider. In *Ashcroft v. ACLU*,¹³⁴ the Court stated that as "a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."¹³⁵ While *Ashcroft*'s observations are not entirely correct, in the sense that the government does have the power to prohibit certain types of speech,¹³⁶ the First Amendment generally deprives the government of the power to control either the content or the viewpoints espoused in political speech.¹³⁷

Indeed, it might be somewhat frightening if the government were allowed to prohibit "false information." Think about the current debate over climate change. Would it really be desirable to allow the government to declare the truth and to prosecute those who dissent? If given that power, the Obama administration might have banned statements by climate change deniers, but the Trump administration might be inclined to prosecute those who advocate that the climate is changing. Neither attempt to muzzle opposing viewpoints seems appropriate in a free and democratic society.

It is also not possible to prosecute fake news as criminal libel. At one point in history, governments had broad authority to prosecute seditious statements. This authority stemmed from the 1606 English Star Chamber decision in *de Libellis Famosis*.¹³⁸ The problem is that the modern equivalent of seditious libel, prosecution for criminal libel, is no longer possible in many countries, including the United States.¹³⁹

¹³² *Id.* at 723 (citing GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1949)).

¹³³ *Id.*

¹³⁴ 535 U.S. 564 (2002).

¹³⁵ *Id.* at 573 (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983)). See also *United States v. Alvarez*, 567 U.S. 709 (2012); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 756 (2011).

¹³⁶ See, e.g., *New York v. Ferber*, 458 U.S. 747 (1982).

¹³⁷ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

¹³⁸ *de Libellis Famosis*, (1606) 77 Eng. Rep. 250 (Star Chamber).

¹³⁹ See *Garrison v. Louisiana*, 379 U.S. 64, 77-79 (1964).

There is one situation when false speech might be prosecutable. As already mentioned above, there are U.S. laws that prohibit foreign meddling in U.S. elections.¹⁴⁰ Of course, under such laws, it does not matter whether the speech is true or false. The crime occurs when foreigners attempt to meddle in U.S. elections.¹⁴¹ Nevertheless, fake news can be prosecuted in that context (as can any attempt to meddle). As discussed above, the difficulty is whether the U.S. government can gain jurisdiction over the meddlers in order to conduct a criminal prosecution.

2. Injunctions

There is very little chance that governments can obtain injunctions designed to protect the public against fake news on either social media platforms or in the traditional media. In general, the courts have been extremely reluctant to issue prior restraints against speech. For example, in *Near v. Minnesota*,¹⁴² a county attorney sought an injunction against what he referred to as a “malicious, scandalous and defamatory” newspaper, *The Saturday Press*, after the newspaper published a series of articles alleging that “a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties.”¹⁴³ The mayor of Minneapolis was implicated in the allegations. Even though defamatory speech was not treated as protected speech at that time,¹⁴⁴ and would not be deemed protected speech for many years,¹⁴⁵ the Court held that an injunction would constitute an unconstitutional prior restraint on speech.¹⁴⁶ Viewing the injunction as censorship, the Court flatly stated that “[e]very 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.”¹⁴⁷ However, reflecting the law of the time, the Court recognized that if a newspaper published defamatory material, it could be held liable for damages after the fact: “[I]f he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.”¹⁴⁸

The Court subsequently extended the prohibition against injunctions to orders designed to protect national security. In *New York Times Co. v. United*

¹⁴⁰ See, e.g., 52 U.S.C. § 30121 (1972); 36 U.S.C. § 510 (2002); 11 CFR § 110.20 (2002).

¹⁴¹ *Id.*

¹⁴² 283 U.S. 697 (1931).

¹⁴³ *Id.* at 704.

¹⁴⁴ See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

¹⁴⁵ See *New York Times Co. v. Sullivan*, 376 U.S. 253 (1964).

¹⁴⁶ *Near*, 283 U.S. at 713–15.

¹⁴⁷ *Id.* at 713–14.

¹⁴⁸ *Id.* at 714.

States,¹⁴⁹ also known as the "Pentagon Papers" case, an employee who worked at the U.S. Department of Defense stole a classified document entitled "*History of U.S. Decision-Making on Viet Nam Policy*." When *The New York Times* and the *Washington Post*, to whom the employee had delivered them, sought to publish the documents, the U.S. government sought declaratory and injunctive relief to prevent the publication. Emphasizing that any "system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity," and that any attempt to impose such a restraint must be based on a "heavy burden of showing justification for the imposition of such a restraint," the Court concluded that the government had failed to meet its burden.¹⁵⁰ As a result, the newspapers were free to publish the document even though it had been stolen.

So, to the extent that government seeks to enjoin fake news, it will be forced to overcome the prohibition against prior restraints. Perhaps, since the government has the power to prohibit foreigners from meddling in U.S. elections, an injunction might be entered against a foreigner who attempted to meddle. However, to the extent that the foreigner is located outside the United States, an injunction might be rejected as futile. For foreigners located in the United States, the U.S. government has a simple and easy remedy: a criminal prosecution. For others, the possibility of injunctive relief seems remote.

3. Defamation Actions

It may also be difficult for individuals, especially governmental officials or public figures, to recover defamation damages for fake news. At one point, the Court held that certain categories of speech, such as defamation, are not protected under the First Amendment. For example, in *Chaplinsky v. New Hampshire*,¹⁵¹ the Court held that defamatory speech receives no protection under the First Amendment to the U.S. Constitution.¹⁵² However, in *New York Times Co. v. Sullivan*,¹⁵³ the Court reversed its position. By and large, before the *New York Times* decision, most U.S. jurisdictions followed the British common law in their definition of the tort of defamation. The common law was very pro-plaintiff, and placed the burden of proof on the question of truth (e.g., whether the defendant's allegedly defamatory allegations were true or false) on the defendant.¹⁵⁴ Under the Alabama law at issue in *Sullivan*,

¹⁴⁹ 403 U.S. 713 (1971).

¹⁵⁰ *Id.* at 714.

¹⁵¹ 315 U.S. 568 (1942).

¹⁵² *Id.* at 571-72.

¹⁵³ 376 U.S. 254 (1964).

¹⁵⁴ See RIGHT TO SPEAK ILL, *supra* note 118, at 17-34.

the burden of proof also fell on the defendant.¹⁵⁵ *Sullivan* involved a major shift in approach. The Court declared a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹⁵⁶ Recognizing that “erroneous statement is inevitable in free debate,” the Court held that there must be “breathing space” for free expression.¹⁵⁷ As a result, a defamation plaintiff cannot prevail simply because a defamatory allegation is untrue.¹⁵⁸ A public official who brings a defamation suit must bear the burden of proof on the question of truth.¹⁵⁹ Moreover, in order to prevail, plaintiff must prove not only that defendant’s statement was untrue, but that it was made with “actual malice.”¹⁶⁰ In other words, plaintiff must prove that defendant knew the statement was false or acted in reckless disregard for whether it was true or false.¹⁶¹

In subsequent cases, the Court has extended constitutional protections to defamation lawsuits brought by non-public officials. In two decisions, *Curtis Publishing Co. v. Butts*¹⁶² and *Associated Press v. Walker*,¹⁶³ the Court held that “public figures” must prove actual malice in order to recover for defamation. In other words, just like public officials, public figures may not recover for defamation unless they can prove that the defendant’s defamatory statements were made with actual malice.

Defamation actions by private individuals are subject to lower evidentiary standards. For example, in *Gertz v. Robert Welch, Inc.*,¹⁶⁴ the Court refused to extend the actual malice standard to private individuals even though they may be involved in matters of public interest. Nevertheless, the Court held that there can be no liability without proof of fault, and that even private individuals may not recover presumed or punitive damages absent proof of actual malice.¹⁶⁵ In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,¹⁶⁶ the Court suggested that states have greater latitude to define defamation standards when a case involves a private individual involved in a matter of purely private interest. A state may allow recovery of even

¹⁵⁵ *New York Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964).

¹⁵⁶ *Id.* at 270.

¹⁵⁷ *Id.* at 271–72.

¹⁵⁸ *Id.* at 273.

¹⁵⁹ *Id.* at 279–80.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² 388 U.S. 130 (1967).

¹⁶³ 389 U.S. 28 (1967).

¹⁶⁴ 418 U.S. 323 (1974).

¹⁶⁵ *Id.* at 348–49.

¹⁶⁶ 472 U.S. 749 (1985).

presumed or punitive damages without a showing of actual malice.¹⁶⁷ Because of these changes in defamation standards, the level of defamation litigation in the United States has dropped to an extremely low level, leaving the print media with broad discretion about what to publish.¹⁶⁸

One might suspect that those who disseminate fake news could be effectively sued on a defamation theory. After all, if allegations are demonstrably false, the defense of truth disappears. In addition, even though public officials and public figures must satisfy the high bar of the actual malice standard, one would suspect that some fake news cases would involve news which is simply “made up” so that plaintiffs might be able to prove that defendants had the necessary mens rea. In other words, defendants knew that the “fake news” was false or at least acted in reckless disregard for truth or falsity. Of course, when private individuals are involved, the proof standards are even lower and therefore should be even easier to satisfy, especially if the matter is one that involves purely private matters.

However, defamation plaintiffs may be confronted by a couple of insurmountable obstacles when defamatory content is posted on the internet. Because of the extremely democratic nature of the internet—in the sense that virtually anyone can relatively quickly and easily gain access to the internet—there is a very real risk that potential defendants may be impecunious. If the defendant is a media organization, there may be sufficient wealth to recover an adverse judgment even though many media outlets are struggling today. However, if the defamation defendant is an individual who has chosen to disseminate false information, the individual may be judgment proof.

The other difficulty with possible defamation actions stems from the worldwide nature of the internet. Because the internet exists in every country, and because virtually anyone can gain access, it is possible for people all over the world to disseminate fake news. Moreover, information can easily cross national boundaries and a potential defamation defendant (or defendants) may be located in another country. As a result, even if plaintiffs can satisfy the very high standards imposed by U.S. defamation law, they may confront very real difficulties in gaining jurisdiction, and may be forced to litigate in foreign jurisdictions. Even if plaintiffs succeed in obtaining defamation judgments, they may encounter great difficulties in their efforts to enforce those judgments.

¹⁶⁷ *Id.* at 760–61.

¹⁶⁸ See RIGHT TO SPEAK ILL, *supra* note 118, at 185–89.

4. Wrongful Interference with Plaintiff's Business

Those who are harmed by fake news may have a business tort action available to them. And, indeed, when a case involves purely private interests, courts have even permitted injunctions against speech. For example, in *Schmoldt v. Oakley*,¹⁶⁹ when defendant parked his vehicle outside of plaintiff's dealership and hung lemons on it, the court concluded that defendant's actions were injurious to plaintiff's business and involved an effort to intimidate or coerce.

In these cases, there is a conflict between the First Amendment and the potential action for wrongful interference. However, if the allegation against the plaintiff's business is demonstrably false (e.g., the allegation that a child sexual abuse ring was being run out of the Comet Ping Pong pizzeria), and one can prove that defendant acted with malice, one could surmise that recovery would be permissible. Of course, the difficulties that arise here are the same ones that arise in defamation cases: whether it would be possible to locate the person who made the false statements, whether it is possible to obtain jurisdiction over the individual, and whether he/she is impecunious.

5. Intentional Infliction of Mental and Emotional Distress

Another potential basis for challenging fake news is through an action for infliction of mental and emotional distress. However, this cause of action faces similar obstacles as the other actions. In *Hustler Magazine v. Falwell*,¹⁷⁰ Hustler Magazine published a satirical advertisement portraying Jerry Falwell, a televangelist who founded a political movement known as The Moral Majority, as having been involved in an incestuous relationship with his mother in an outhouse. Falwell could not sue for defamation because the advertisement made clear that it involved a parody, and therefore there was no assertion of fact.¹⁷¹ The Court held that, in order to recover for intentional infliction of mental and emotional distress, Falwell was required to prove that Hustler made a false statement of fact and did so with actual malice in the *New York Times Co. v. Sullivan* sense.¹⁷² In a subsequent decision, not involving the print media, the Court reaffirmed the *Hustler* decision.¹⁷³

Of course, as with a defamation action, it may be possible to satisfy the actual malice standard when fake news is involved. But the same problems

¹⁶⁹ 390 P.3d 882 (Okla. 1964).

¹⁷⁰ 485 U.S. 46 (1988).

¹⁷¹ *Id.* at 48.

¹⁷² *Id.* at 56.

¹⁷³ See *Snyder v. Phelps*, 562 U.S. 443 (2011) (refusing to hold individuals liable even though they protested near a dead soldier's funeral, causing mental and emotional distress to the soldier's father).

that exist with regard to defamation cases will arise here: the potential defendant may be impecunious and also may be located outside the United States. As a result, it may be difficult to prevail in such an action, and also may be difficult to collect.

V. THE RISE OF NEW GATEKEEPERS?

Since much fake news is distributed through social media platforms, such as Facebook, some look to those platforms to provide a remedy against fake news. Since social media platforms are run by private companies, they are not subject to the First Amendment and have broad authority to choose which content to ban from their services, and they usually do so through their so-called “acceptable use” or “terms of service” policies,¹⁷⁴ policies which give them broad authority to exclude various types of content or even to terminate or limit service to users.¹⁷⁵ Facebook uses its policy to exclude various types of content that it deems inappropriate or unacceptable, and it employs a team of individuals who are authorized to take down content that they deem to be illegal or in violation of Facebook’s policy.¹⁷⁶ Twitter also has a terms of use policy, and it has indicated that it blocks Tweets from entering countries when the content would violate local law, and the government requests the blocking.¹⁷⁷ In addition to exercising broad discretion about what content to ban, social media platforms do not have to guarantee “due process” to their users, or provide any right of redress or appeal.¹⁷⁸

Most social media platforms are under pressure to deal with the problem of fake news and have taken steps to do so, and a large amount of content has been excluded from their platforms. In the first three months of 2018, Facebook closed some 583 million accounts that it characterized as “fake,” and took “moderation action” against some 1.5 billion accounts.¹⁷⁹ Of these, some 2.5 million involved hate speech, 1.9 million involved terrorist

¹⁷⁴ See Laura Sydell, *Corporations Are Drawn into WikiLeaks Controversy*, NPR (Dec. 13, 2010), <https://www.npr.org/2010/12/13/131979010/corporations-are-drawn-into-wikileaks-controversy> (“[NYU Professor] says terms-of-service agreements give these companies too much power. ‘Every corporate counsel at every large organization is basically paid to write a Web terms of service, which reads: “We can do anything at any time with no announcement and no recourse,” he said.’”).

¹⁷⁵ See Julian Barnes & Jeanne Whalen, *PayPal Drops WikiLeaks Donation Account*, WALL STREET J. (Dec. 4, 2010), <https://www.wsj.com/articles/SB10001424052748704767804575654681242073308>.

¹⁷⁶ See Issie Lapowsky & Steven Levy, *Here’s What Facebook Won’t Let You Post*, WIRED (Apr. 24, 2018), <https://www.wired.com/story/heres-what-facebook-wont-let-you-post/>.

¹⁷⁷ See Somini Sengupta, *When Twitter Blocks Tweets, It’s #Outrage*, N.Y. TIMES, Jan. 28, 2012, at A1.

¹⁷⁸ See Margot E. Kaminski & Kate Klonick, *Speech in the Social Public Square*, N.Y. TIMES, June 27, 2017, at A23.

¹⁷⁹ Alex Hern & Olivia Solon, *Facebook Closed 583m Fake Accounts in First Three Months of 2018*, GUARDIAN (May 15, 2018), <https://www.theguardian.com/technology/2018/may/15/facebook-closed-583m-fake-accounts-in-first-three-months-of-2018>.

propaganda, 3.4 million involved graphic violence and 21 million involved nudity and sexual activity.¹⁸⁰ YouTube deleted 8.3 million videos in a 3 month period for breaching its “community guidelines.”¹⁸¹

These moderation efforts implicate freedom of expression because social media platforms can use their policies to discriminate against beliefs that they favor, and to discriminate against beliefs or perspectives with which they disagree. Moreover, it is not clear how social media platforms will determine whether a particular post is demonstrably false and therefore qualifies as fake news. Facebook’s moderators are “overwhelmed” by the total volume of work.¹⁸² Purportedly, Facebook receives more than 6.5 million reports a week involving allegations of fake or improper accounts,¹⁸³ and Facebook’s moderators are sometimes forced to make decisions regarding the permissibility of content in as little as 10 seconds.¹⁸⁴ Whether the moderators can make sound decisions in that amount of time is far from clear.

Finally, it is not clear how effective moderation efforts can be. Just because content is banned from certain social media platforms does not remove that information from the internet entirely. For example, three internet companies (Google, Apple, and Facebook) moved aggressively to remove content produced by Alex Jones and his Infowars website as “hate speech.”¹⁸⁵ Although Twitter initially chose to leave Mr. Jones’ posts alone,¹⁸⁶ it eventually changed course and banned both Jones and Infowars from its platforms for allegedly violating Twitter’s terms of use policy.¹⁸⁷ However, following the various bans, Infowars has played up its role as a “martyr” by slapping “censored” labels on a number of its videos and initiating a “forbidden information” marketing campaign.¹⁸⁸ Moreover, Infowars remains readily available on the internet.¹⁸⁹ Indeed, following the bans (but before the Twitter ban) Jones saw an 8% bump in his Twitter followers (which translated to about 70,000 followers).¹⁹⁰ Of course, the difficulty for Jones and Infowars is that it has been banned from some of the

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Nick Hopkins, *Revealed: Facebook’s Internal Rulebook on Sex, Terrorism and Violence*, GUARDIAN (May 21, 2017), <https://www.theguardian.com/news/2017/may/21/revealed-facebook-internal-rulebook-sex-terrorism-violence>.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See Li Yuan, *The Infowars Hubbub, And China’s Chokehold*, N.Y. TIMES, Aug. 13, 2018, at B3.

¹⁸⁶ See *id.*

¹⁸⁷ See Kate Conger & Jack Nicas, *Twitter Bars Alex Jones and Infowars, Citing Harassing Messages*, N.Y. TIMES, Sept. 7, 2018, at B1.

¹⁸⁸ See Kevin Roose, *After the Ban On Infowars, What’s Next?*, N.Y. TIMES, Aug. 10, 2018, at B3.

¹⁸⁹ After reading a series of articles about how Infowars had been banned from various platforms, the author ran an internet search on August 28, 2018, and the site readily popped up. See <https://www.infowars.com/>.

¹⁹⁰ See Conger & Nicas, *supra* note 187.

most influential social media platforms, and therefore its ability to disseminate its message may be reduced.

VI. CONCLUSION

The internet is one of the most transformational speech technologies ever developed. Though there have been many speech inventions since Gutenberg's development of the printing press in the fifteenth century, including the telegraph, radio, television, cable, and satellite communications, most of those technologies came with "gatekeepers" who could control their use. As a result, although each of those technologies could be easily used by their owners (often corporations or wealthy individuals), they did not readily enable ordinary individuals to engage in mass communication.

The internet has been a game-changer because virtually anyone can own or control the means of communication. Nothing more is required than a smart phone and internet access. For those who cannot afford internet access, many businesses (e.g., Starbucks and McDonalds) offer free internet access. Those who cannot afford even a smart phone can gain free internet access through their local library. As a result, the internet has profoundly altered democratic discourse and enabled ordinary individuals to communicate on a broad basis.

Although the internet's accessibility is its greatest strength, it is also its greatest weakness. Just as individuals can easily use the internet to engage in political activism, they can also use it to disseminate fake news and to meddle in foreign elections. In addition, they can use it to disseminate child pornography and perpetrate fraud. In some respects, although the internet has enabled democratic participation, it also has led to the creation of a "wild west" of free speech.

It is uncertain whether there are any clear or effective remedies for the issue of fake news. Most of the traditional remedies will not work for one reason or another. Social media platforms have attempted to deal with fake news by removing such information from their websites. Of course, such actions evoke fear that social media companies may try to suppress ideas or political perspectives they do not like, or that they will favor their preferred viewpoints over other competing viewpoints. Nevertheless, the internet is a remarkably resilient medium. Even though social media platforms may attempt to ban certain individuals or organizations from their platforms, such individuals can remain on the internet although they may be denied access to some of the more influential social media platforms (e.g., Facebook).