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Uncommon Law: The Past, Present and Future of Libel Law in a Time of “Fake News” and “Enemies of the American People”

Jane E. Kirtley[†]

I. INTRODUCTION

After many years of comparative quiet, the United States is experiencing a growth in libel suits brought by both public officials and private figures. President Donald Trump has claimed that our current libel laws “are a sham and a disgrace and do not represent American values.”¹ Is it time to “open up our libel laws,” as he has called for?²

Doing away with the *New York Times v. Sullivan*³ rule is a dictator’s dream. Because government can control and manipulate information, any determination of truth or falsity that fails to recognize the fundamental right of the people to criticize government and to make their own independent interpretations is fundamentally flawed. The marketplace of ideas is imperfect, but essential to facilitate the search for truth. In fact, it is the essence of American values.

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¹ See Brian Naylor, *Trump Again Blasts Libel Laws, Calling Them ‘A Sham’*, NPR (Jan. 10, 2018), <https://www.npr.org/2018/01/10/577100238/trump-again-blasts-libel-laws-calling-them-as-a-sham> [<https://perma.cc/9ZLS-NVP7>].

² See Hadas Gold, *Donald Trump: We’re Going to ‘Open Up’ Libel Laws*, POLITICO (Feb. 26, 2016), <https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866> [<https://perma.cc/3SSL-4F3B>].

³ 376 U.S. 254 (1964).

Should the *New York Times v. Sullivan* actual malice standard⁴ be overturned, as suggested by Justice Thomas in February 2019?⁵ Should states curtail the fair and accurate reporting privilege protecting accurate accounts of government actions?⁶ Should the United States adopt standards of other countries around the globe that are less protective of free speech and more concerned with “truth”?⁷

Many would argue that governments have a duty to protect their citizens from “fake news.”⁸ But can we trust the government to define what is “true”? Recent initiatives abroad to enact laws to censor “fake news” in the wake of the COVID-19 pandemic demonstrate how problematic this can be.⁹ We must be careful not to cede those determinations to a governmental entity, nor to assume that their findings on a controversial issue are the truth.

II. BACKGROUND

Until 1964, libelous speech—that is, speech that is false and defamatory—enjoyed no legal protection under the First Amendment to the U.S. Constitution.¹⁰ Common law libel, derived from English common law,¹¹ permitted each state to decide for itself what the burden of proof would be. However, in 1931, the high court dipped its toe into the murky waters of defamation law, striking down a state statute that

⁴ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

⁵ *McKee v. Cosby*, 139 S. Ct. 675 (2019) (Thomas, J., concurring).

⁶ *See, e.g., Larson v. Gannett Co.*, 940 N.W.2d 120, 125 (Minn. 2020), *reh’g denied* (Mar. 30, 2020) (concluding that “the fair and accurate reporting privilege protects news reports about statements on a matter of public concern made by law enforcement officers at an official press conference and in an official press release”).

⁷ *See, e.g., 25 P.R. Laws Ann.* 3654(a), (f) (2020); Katherine Jacobsen, *Amid COVID-19, the Prognosis For Press Freedom is Dim. Here Are 10 Symptoms to Track*, COMMITTEE TO PROTECT JOURNALISTS, <https://cpj.org/reports/2020/06/covid-19-here-are-10-press-freedom-symptoms-to-track/> [<https://perma.cc/A2X8-3CMZ>].

⁸ *See infra* Part III.

⁹ *See* Shibani Mahtani, *Singapore Introduced Tough Laws Against Fake News. Coronavirus Has Put Them to The Test.*, WASH. POST (Mar. 16, 2020), https://www.washingtonpost.com/world/asia_pacific/exploiting-fake-news-laws-singapore-targets-tech-firms-over-coronavirus-falsehoods/2020/03/16/a49d6aa0-5f8f-11ea-ac50-18701e14e06d_story.html [<https://perma.cc/YAV6-PW9G>] (including examples in Thailand, Nigeria, Indonesia, and other countries, as well as Singapore).

¹⁰ *See, e.g., Near v. Minnesota*, 283 U.S. 697, 715 (1931) (“But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the 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.”).

¹¹ This inheritance included the concept of seditious libel, which, during the colonial period, criminalized criticism of the Crown or its officials. A notable example was the trial of New York printer John Peter Zenger, which resulted in an early example of jury nullification, when the jurors acquitted Zenger of charges of sedition for publishing statements that criticized the colonial governor. *See generally* RICHARD KLUGER, *INDELIBLE INK: THE TRIALS OF JOHN PETER ZENGER AND THE BIRTH OF AMERICA’S FREE PRESS* (2016).

permitted “a malicious, scandalous and defamatory newspaper, magazine or other periodical” to be enjoined from publication.¹² The majority found that allowing government to censor allegations of official misconduct in advance of publication would undermine the central purposes of the First Amendment—specifically, public oversight and government accountability.¹³

And, indeed, it was a lawsuit predicated on accusations of official misconduct that led to the watershed case of *New York Times v. Sullivan* in 1964, at the height of the Civil Rights movement. Following publication of a full-page fundraising advertorial in *The New York Times*, headlined “*Heed Their Rising Voices*,” which decried what was characterized as a “wave of terror” against African Americans and others who engaged in nonviolent protests in the American South, Montgomery, Alabama Commissioner L.B. Sullivan sued the newspaper, as well as several signatories to the advertorial, for libel.¹⁴ Although Sullivan was not named in the publication, he claimed that a paragraph describing actions of law enforcement at a historically black college campus, including that officers had surrounded the campus and padlocked the dining hall “in an attempt to starve [the students] into submission,” could be imputed to him because his duties as commissioner included supervision of the police.¹⁵ Sullivan proved, *inter alia*, that the incident described in the advertorial had not occurred, and that there were other factual errors in the narrative as well.¹⁶ The trial judge concluded that the false statements constituted libel per se under state law, as “tend[ing] to injure a person . . . in his reputation” or to “bring [him] into public contempt” so as to “injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust”¹⁷ The jury returned a verdict of \$500,000 and the Alabama Supreme Court affirmed.¹⁸

Before the Supreme Court of the United States, the *Times*’s counsel argued that the Alabama libel law was equivalent to the Sedition Act of 1798—a statute championed by the Federalists that punished criticism of government officials, and, according to First Amendment scholar Geoffrey Stone, was “perhaps the most grievous assault on free speech in the history of the United States.”¹⁹ Between 1798 and 1801,

¹² *Near*, 283 U.S. at 701–702 (quoting Mason’s Minn. Stat., §§ 10123-1 to 10123-3 (1927)).

¹³ *See id.* at 721.

¹⁴ *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256–57 (1964).

¹⁵ *Id.* at 258.

¹⁶ *See id.* at 258–59.

¹⁷ *Id.* at 267.

¹⁸ *N.Y. Times Co. v. Sullivan*, 144 So. 2d 25 (Ala. 1962), *rev’d*, 376 U.S. 254 (1964).

¹⁹ GEOFFREY STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 19 (2004).

approximately 25 Republican editors and writers were arrested, and 10 were ultimately tried and convicted under the statute.²⁰ Popular opinion was outraged, with John Quincy Adams observing that the Sedition Act had “operated like oil upon the flames.”²¹ After the Republicans prevailed in the contentious election of 1800, the statute was allowed to expire, and consequently was never tested in the Supreme Court.²²

Herbert Wechsler, a Columbia law professor who represented the *Times*, invoked the Sedition Act when he contended that misstatements of fact about public officials could not be the basis for a libel judgment because that would deter legitimate commentary by citizens and the press.²³ And in his opinion for the Court, Justice William Brennan agreed:

Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which “steer far wider of the unlawful zone.” The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments. The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.²⁴

The ruling in *New York Times v. Sullivan* changed the shape of libel law. It was “an occasion for dancing in the streets,” a sentiment attributed to First Amendment scholar Alexander Meiklejohn.²⁵ No longer could government officials successfully sue for defamatory statements made in the course of good faith criticism by simply claiming that the statements were false. Although the Court declined, in the same

²⁰ See *id.* at 63.

²¹ *Id.* at 71.

²² See *id.* (“The Sedition Act expired on March 3, 1801, the final day of Adams’s term of office.”); see also *Sullivan*, 376 U.S. at 276.

²³ See ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT* 52 (2007).

²⁴ *Sullivan*, 376 U.S. at 279–80 (citation omitted).

²⁵ Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 221 n.125 (internal quotation marks omitted) (quoting Alexander Meiklejohn).

term, to declare unconstitutional all criminal libel laws,²⁶ it nevertheless held that truth must always be a defense in complaints brought by public officials.²⁷

In succeeding years, the progeny of *New York Times v. Sullivan* expanded the actual malice standard to include public figures,²⁸ though leaving to the states to establish whatever fault standard they chose in cases brought by private figure plaintiffs, “so long as they do not impose liability without fault.”²⁹ And the Court declared that “[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”³⁰ As a consequence of these rulings, public officials faced an almost insurmountable barrier to successful libel litigation.

But things changed in the late 1980s. Punitive damages awards against the news media escalated, causing alarm among news organizations.³¹ Even if successful in gaining reversal on appeal, they were likely to expend enormous sums in legal fees in the course of defending themselves. This situation, coupled with the findings of a 1987 study concluding that most libel plaintiffs sue to vindicate their reputations, rather than for the money,³² prompted prominent scholars, judges, and free press advocates to argue for new approaches to libel law that would focus on truth or falsity, not fault.

In a 1988 *Harvard Law Review* article, Judge Pierre N. Leval, then of the Southern District of New York, advocated for creation of what he called the “no-money, no-fault” libel suit.³³ Under Leval’s system, plaintiffs could sue to obtain a declaratory judgment of falsity.³⁴ The fault requirements of *Sullivan* and its progeny would not apply, because, Leval claimed, “the sole purpose” of the *Sullivan* standard was to protect the press from crippling monetary awards.³⁵ He also argued that these “no-money, no-fault” trials would be simpler, more efficient, less expensive, and would protect the media from inquiries into their news-

²⁶ See *Garrison v. Louisiana*, 379 U.S. 64 (1964).

²⁷ See *id.* at 73.

²⁸ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

²⁹ *Id.* at 347.

³⁰ *Id.* at 339–40.

³¹ See generally Charles Rothfeld, *The Surprising Case Against Punitive Damages in Libel Suits Against Public Figures*, 19 YALE L. & POLY REV. 165 (2000) (discussing the trend of substantial libel damages verdicts against media defendants).

³² Randall P. Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CALIF. L. REV. 789, 792 (1986)

³³ See Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in Its Proper Place*, 101 HARV. L. REV. 1287 (1988).

³⁴ See *id.* at 1288.

³⁵ *Id.* at 1302.

gathering practices.³⁶ They would provide plaintiffs with a far greater chance of vindicating their reputations, which is really what most of them want, he wrote.³⁷

Also in 1988, the Libel Reform Project at Northwestern University issued the *Annenberg Proposal*.³⁸ Under the Annenberg model, a libel “victim” would have to request a retraction or opportunity to reply within 30 days of publication.³⁹ If the defendant complied, any further legal action would be barred.⁴⁰ If not, either the plaintiff or the defendant could compel any libel suit to be converted into a “no-fault, no-damages” declaratory judgment proceeding, where the only issue would be truth or falsity.⁴¹ A traditional suit for actual damages would remain an option, but only if the defendant agreed to it.⁴²

Neither of these proposals was adopted at the state level. However, in 1993, the Uniform Law Commission promulgated the Uniform Correction or Clarification of Defamation Act (“UCCDA”), making a correction or clarification request a prerequisite to a libel suit.⁴³ Under the UCCDA, if, after a correction or clarification was published, the case still went to trial, a prevailing plaintiff could recover only economic losses, not punitive damages.⁴⁴ As of 2018, only North Dakota, Texas, and Washington had adopted the UCCDA.⁴⁵

The common link between these initiatives was the goal of shifting the focus of libel litigation from fault to “truth.” But one problem with them is that they presume that truth is something that can be concretely determined through an adversarial proceeding. Of course, First Amendment theory, notably the “marketplace of ideas,”⁴⁶ presumes

³⁶ *Id.* at 1287–1288, 1295.

³⁷ *Id.* at 1293.

³⁸ NW. UNIV., THE ANNENBERG WASHINGTON PROGRAM PROPOSAL FOR THE REFORM OF LIBEL LAW (1988). For further discussion of the proposal, see Rodney A. Smolla & Michael J. Gaertner, *The Annenberg Libel Reform Proposal: The Case for Enactment*, 31 WM. & MARY L. REV. 25 (1989).

³⁹ See Smolla & Gaertner, *supra* note 38, at 32–33.

⁴⁰ *Id.* at 33.

⁴¹ *Id.*

⁴² *Id.* at 34.

⁴³ See *Correction or Clarification of Defamation Act*, UNIFORM LAW COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=6ba5d1ed-8924-48aa-81e9-1ed0f7a9f47d> [<https://perma.cc/234A-6RG3>].

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ Generally attributed to John Stuart Mills’s 1859 essay, *On Liberty*, the “marketplace of ideas” has been invoked by the U.S. Supreme Court. See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, Jr., J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”).

“that the test of the truth or acceptance of ideas depends on their competition with one another and not on the opinion of a censor, whether one provided by the government or by some other authority.”⁴⁷ It is therefore troublesome when a governmental or quasi-governmental entity is tasked with determining what is “the truth.”

III. TRUTH VERSUS “FAKE NEWS”

Which brings us, inevitably, to the question: if determining “truth” is the goal, what is the value of so-called “fake news”? Politicians and their supporters frequently accuse those in the mainstream media of peddling “fake news,” a term President Donald Trump claimed he invented.⁴⁸ In fact, he didn’t. Perhaps the most notorious use of the equivalent term, “Lügenpresse” or “lying press,” was invoked by the Nazis in the 1930s and revived by far-right anti-immigration activists in Germany in 2014 and by Trump supporters during the 2016 campaign to undermine public confidence in the mainstream media.⁴⁹ But other groups across the political spectrum have used the term as well. As one example, the left-leaning Center for Democracy & Technology’s PR Watch has been “reporting on spin and disinformation since 1993”⁵⁰ with its various campaigns to “stop fake news.”⁵¹

Although Trump did not invent the term, he has been one of the most prolific users of it. During his candidacy and since his election, he has applied the label of fake news to virtually any media—the “failing” *New York Times*, NBC, ABC, CBS, CNN, among others—he disagrees with.⁵² This view is shared by many of his supporters, and, in fact, by others as well. A poll conducted by Monmouth University reported that three out of four Americans believe that the media routinely

⁴⁷ David Schulz, *Marketplace of Ideas*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/999/marketplace-of-ideas> [<https://perma.cc/J2WG-HR5X>] (updated by David L. Hudson 2017).

⁴⁸ Chris Cillizza, *Donald Trump Just Claimed He Invented ‘Fake News’*, CNN (Oct. 26, 2017), <https://www.cnn.com/2017/10/08/politics/trump-huckabee-fake/index.html> [<https://perma.cc/3ZDD-RBJQ>].

⁴⁹ Rick Noack, *The Ugly History of ‘Lügenpresse,’ a Nazi Slur Shouted at a Trump Rally*, WASH. POST (Oct. 24, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/10/24/the-ugly-history-of-luegenpresse-a-nazi-slug-shouted-at-a-trump-rally/> [<https://perma.cc/DHU6-7NGY>].

⁵⁰ See *Profile on PR Watch*, INDEP. AUSTRALIA, <https://independentaustralia.net/profile-on/pr-watch,530> [<https://perma.cc/5CJ4-FHJQ>].

⁵¹ Diane Farsetta, *Fake TV News: Widespread and Undisclosed*, PR WATCH (Mar. 16, 2006), <https://www.prwatch.org/fakenews/execsummary> [<https://perma.cc/W8YZ-PPKP>]; *No Fake News!*, PR WATCH, <https://www.prwatch.org/nofakenews> [<https://perma.cc/U49Y-TLZY>].

⁵² See, e.g., Brett Samuels, *Trump ramps up rhetoric on media, calls press ‘the enemy of the people,’* HILL (Apr. 5, 2019), <https://thehill.com/homenews/administration/437610-trump-calls-press-the-enemy-of-the-people> [<https://perma.cc/M57C-JA9U>].

reports fake news.⁵³ The phrase has become so ubiquitous that *Washington Post* columnist Margaret Sullivan has argued that it should be discarded because its original meaning—“fraudulent or misinformation meant to deceive”—has been distorted beyond recognition.⁵⁴

Yet, the fake news label persists. Trump’s inaugural “Fake News Awards,” published on the Republican National Committee’s website in January 2018, included several cases where news outlets had corrected themselves and apologized—actions that would not fit the traditional definition of fake news.⁵⁵ In April 2018, more than 170 television stations owned by conservative-leaning Sinclair Broadcast Group were ordered to use local anchors to produce a scripted “must-run” commentary decrying fake news.⁵⁶ Responding to criticism from others in the industry that the segment *itself* was fake news intended to deceive viewers, Trump tweeted that “The Fake News Networks, those that knowingly have a sick and biased AGENDA, are worried about the competition and quality of Sinclair Broadcast.”⁵⁷

Yet despite Trump’s incendiary tweets calling “the FAKE NEWS media . . . the enemy of the American People,”⁵⁸ his actual power to take action to curtail their activities has, to date, been limited to largely unsuccessful attempts to exclude credentialed reporters from press briefings and “gaggles.”⁵⁹ But as Joel Simon of the Committee to Protect

⁵³ MONMOUTH UNIVERSITY POLL, NATIONAL: ‘FAKE NEWS’ THREAT TO MEDIA; EDITORIAL DECISIONS, OUTSIDE ACTORS AT FAULT (2018), https://www.monmouth.edu/polling-institute/documents/monmouthpoll_us_040218.pdf [<https://perma.cc/4BQE-A95B>].

⁵⁴ Abby Adcock, “*Fake News*” Has Lost its Meaning and Punch, *Post’s Margaret Sullivan Says*, NEWS LAB, <https://newslab.org/fake-news-has-lost-its-meaning-and-punch-posts-margaret-sullivan-says/> [<https://perma.cc/K8HX-ZV7E>].

⁵⁵ Team GOP, *The Highly-Anticipated 2017 Fake News Awards*, GOP (Jan. 17, 2018), <https://gop.com/the-highly-anticipated-2017-fake-news-awards/> [<https://perma.cc/M8CC-KBXX>].

⁵⁶ See David Folkenflik, *Sinclair Broadcast Group Forces Nearly 200 Station Anchors to Read Same Script*, NPR (Apr. 2, 2018), <https://www.npr.org/2018/04/02/598916366/sinclair-broadcast-group-forces-nearly-200-station-anchors-to-read-same-script> [<https://perma.cc/6CHN-U264>].

⁵⁷ Donald Trump (@realDonaldTrump), TWITTER (Apr. 3, 2018, 5:34 AM), <https://twitter.com/realDonaldTrump/status/981117684489379840> [<https://perma.cc/A93X-89BM>]; see also Chris Morris, *Trump Calls Out CNN, NBC, ABC, and CBS in Wake of Sinclair’s ‘Fake News’ Promos*, FORTUNE (Apr. 3, 2018), <https://fortune.com/2018/04/03/trump-tweets-sinclair-fake-news/> [<https://perma.cc/N7AC-Y662>]; Paul Farhi, *As Sinclair’s Sound-Alike Anchors Draw Criticism for ‘Fake News’ Promos, Trump Praises Broadcaster*, WASH. POST (Apr. 2, 2018), https://www.washingtonpost.com/lifestyle/style/as-sinclairs-sound-alike-broadcaster/2018/04/02/a1be67e8-367a-11e8-9c0a-85d477d9a226_story.html?arc404=true [<https://perma.cc/HR7H-NSSM>].

⁵⁸ Donald Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 3:48 PM), <https://twitter.com/realDonaldTrump/status/832708293516632065> [<https://perma.cc/2NLB-ESW2>]; see also William P. Davis, *‘Enemy of the People’: Trump Breaks Out This Phrase During Moments of Peak Criticism*, N.Y. TIMES (July 19, 2018), <https://www.nytimes.com/2018/07/19/business/media/trump-media-enemy-of-the-people.html> [<https://perma.cc/3498-TWR7>].

⁵⁹ See Sabrina Siddiqui, *Trump Press Ban: BBC, CNN and Guardian Denied Access to Briefing*, GUARDIAN (Feb. 25, 2017), <https://www.theguardian.com/us-news/2017/feb/24/media-blocked-white-house-briefing-sean-spicer> [<https://perma.cc/W6EM-FVNG>]; see also David Bauder, *White House Excludes CNN From Trump Session, With No Protest*, AP NEWS (Feb. 4, 2020),

Journalists observed, Trump's words provide authoritarian leaders in countries with less robust protections than the First Amendment such as Kenya, Venezuela, Somalia, Thailand, and the Philippines the ammunition to suppress opposition media, even as they spread fake video clips and stories of their own through paid commentators and bots.⁶⁰

This legislation to curtail fake news is proliferating, often citing national security concerns or the need to stamp out misinformation about COVID-19 as justification. The Poynter Institute documents the adoption of these statutes around the world,⁶¹ including in Singapore⁶² and Albania.⁶³ By contrast, although Malaysia enacted the Anti-Fake News Act in April 2018, which provided that anyone convicted of creating or circulating fake news online or on social media could face imprisonment for up to six years or fines in excess of \$120,000, the statute was repealed in October 2019 on the grounds that it stifled dissent.⁶⁴ The Committee to Protect Journalists also reported that between 2012 and 2019, 65 journalists around the world have been imprisoned on false-news charges; as of the end of 2019, 30 of them were still in jail.⁶⁵

Even mature democracies struggle with the issue of fake news. On January 1, 2018, Germany announced that it would begin to enforce a law, known as NetzDG,⁶⁶ requiring social media sites to remove hate speech and fake news within 24 hours or face fines of up to €50 million.⁶⁷ In March 2018, the European Commission's High Level Group on fake

<https://apnews.com/2e437582d7fe86d1058ce6363938be3a> [<https://perma.cc/Z3F7-D64E>].

⁶⁰ See Joel Simon, *Trump is Damaging Press Freedom in the U.S. and Abroad*, N.Y. TIMES (Feb. 25, 2017), <https://www.nytimes.com/2017/02/25/opinion/trump-is-damaging-press-freedom-in-the-us-and-abroad.html> [<https://perma.cc/ZW78-LBF3>].

⁶¹ See Daniel Funke & Daniela Flamini, *A Guide to Anti-Misinformation Actions Around the World*, POYNTER, <https://www.poynter.org/ifen/anti-misinformation-actions/> [<https://perma.cc/X6GL-F6KH>].

⁶² See Mahtani, *supra* note 9.

⁶³ See Armand Mero, *In Quake-Rattled Albania, Journalists Detained on Fake News Charges After Falsely Warning of Aftershocks*, VOA NEWS (Sept. 23, 2019), <https://www.voanews.com/europe/quake-rattled-albania-journalists-detained-fake-news-charges-after-falsely-warning> [<https://perma.cc/W8JM-A6M4>]; see also Llazar Semini, *Albanian Lawmakers Pass Fake News Laws Over Media Protests*, AP NEWS (Dec. 18, 2019), <https://apnews.com/dd6a3063803a116f4ff109a90fca250a> [<https://perma.cc/4PDJ-GQHB>].

⁶⁴ See Reuters Staff, *Malaysia Parliament Scraps Law Penalizing Fake News*, REUTERS (Oct. 9, 2019), <https://www.reuters.com/article/us-malaysia-politics-fakenews/malaysia-parliament-scraps-law-penalizing-fake-news-idUSKBN1WO1H6> [<https://perma.cc/7CKZ-Q3CQ>].

⁶⁵ Miriam Berger, *There's a Worrying Rise in Journalists Being Arrested for 'Fake News' Around the World*, WASH. POST (Dec. 12, 2019), <https://www.washingtonpost.com/world/2019/12/12/theres-worrying-rise-journalists-being-arrested-fake-news-around-world/> [<https://perma.cc/2E5A-BDUF>].

⁶⁶ *Netzdurchsetzungsgesetz [NetzDG][The Network Enforcement Act]*, Sept. 1, 2017, FED. LAW GAZETTE I at 3352 (Ger.).

⁶⁷ HEIDI TWOREK & PADDY LEERSSEN, TRANSATLANTIC WORKING GRP., AN ANALYSIS OF GERMANY'S NETZDG LAW (2019), https://www.ivir.nl/publicaties/download/NetzDG_Tworek_Leerssen_April_2019.pdf [<https://perma.cc/S84P-784R>].

news and online disinformation issued a report concluding that although disinformation may not necessarily be illegal, it nevertheless is harmful to democratic values.⁶⁸ Although ostensibly eschewing “any form of censorship, either public or private,” it advocates greater self-regulation in the short term, with a long-range goal of developing a Code of Practices to encourage transparency, media literacy, diversity, the development of tools to “tackle” disinformation, and further research to monitor and assess the sources and impact of fake news.⁶⁹ On the other hand, also in March 2018, the Dutch Parliament voted to repudiate EUvsDisinfo.eu, a European Union website created by the East StratCom Task Force⁷⁰ in 2015 to report disinformation and fake news allegedly spread by Russian actors.⁷¹ Its Dutch opponents characterize it as a state publication that “passes judgments whether a publication in the free media contains the correct views or not. If your publication ends up in its database, you’re officially labeled by the EU as a publisher of disinformation and fake news.”⁷²

Meanwhile in Puerto Rico, the ACLU filed suit to challenge a pair of Puerto Rican laws, passed in 2017 and 2020, which make it a felony to raise “a false alarm in relation to” a catastrophe, or to “[t]ransmit or allow [another person] to transmit . . . through any social network or mass media, false information with the intention of creating confusion, panic, or collective public hysteria, regarding any proclamation or executive order decreeing a state of emergency or disaster or curfew.”⁷³ Punishment could include imprisonment or a fine of up to \$5,000, or both.⁷⁴

The case arose after Governor Wanda Vázquez-Garced declared a state of emergency and issued a series of executive orders aimed at controlling the spread of COVID-19 in March 2020.⁷⁵ They included

⁶⁸ See EUROPEAN COMM’N, A MULTI-DIMENSIONAL APPROACH TO DISINFORMATION 5 (2018), <https://op.europa.eu/en/publication-detail/-/publication/6ef4df8b-4cea-11e8-be1d-01aa75ed71a1> [<https://perma.cc/59J3-NSJL>]; see also EUROPEAN COMM’N, FINAL REPORT OF THE HIGH LEVEL EXPERT GROUP ON FAKE NEWS AND ONLINE DISINFORMATION (2018), <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation> [<https://perma.cc/UJJ4-DRYZ>].

⁶⁹ See EUROPEAN COMM’N, FINAL REPORT OF THE HIGH LEVEL EXPERT GROUP ON FAKE NEWS AND ONLINE DISINFORMATION, *supra* note 68.

⁷⁰ See generally *Questions and Answers about the East StratCom Task Force*, EUROPEAN UNION EXTERNAL ACTION, https://eeas.europa.eu/headquarters/headquarters-homepage/2116/questions-and-answers-about-east-stratcom-task-force_en [<https://perma.cc/LT39-P7TP>].

⁷¹ See Andrew Rettman, *Dutch MPs in Plan to Shut EU Website on Russian Propaganda*, EUOBSERVER (Mar. 16, 2018), <https://euobserver.com/foreign/141350> [<https://perma.cc/4BZC-A5VQ>].

⁷² Arjen Nijeboer, *Why the EU must close EUvsDisinfo*, EU OBSERVER (Mar. 28, 2018), <https://euobserver.com/opinion/141458> [<https://perma.cc/P8M4-9JPF>].

⁷³ Complaint at 1–2, *Rodríguez-Cotto v. Vázquez-Garced*, No. 3:20-cv-01235 (D.P.R. May 20, 2020).

⁷⁴ *Id.* at 6.

⁷⁵ *Id.*

imposition of an island-wide curfew and a variety of business restrictions.⁷⁶ According to the complaint, a minister, Pastor José Luis Rivera Santiago, was charged with disseminating false information via WhatsApp about an executive order that would close all businesses.⁷⁷ The government claimed that his speech resulted in a rush on the island's supermarkets.⁷⁸ Eventually Governor Vázquez-Garced did order the closure of businesses, which in turn resulted in another run on supermarkets.⁷⁹ At that point, the Court of San Juan ruled that the government had failed to establish probable cause to prosecute Rivera Santiago.⁸⁰

Nevertheless, the ACLU decided to challenge the statutes. The named plaintiffs are two Puerto Rican journalists, Sandra Rodríguez and Rafelli González. Both have a history of tangling with the government. Rodríguez, a syndicated radio host, and blogger, and a former president of the Oversea Press Club, challenged Puerto Rico's criminal defamation law prior to its repeal,⁸¹ and her reporting and commentary helped trigger protests that led to the resignation of the former Governor, Ricardo Rosselló.⁸² González, an independent journalist, has reported on undercounting of the island's COVID-19 fatality rate.⁸³ He received thousands of threatening messages via social media and, according to the complaint, his house was broken into "under mysterious circumstances."⁸⁴ Both plaintiffs claim the statutes are so vague that their sources are discouraged from speaking to them, and that they themselves fear prosecution, even if they have multiple sources, citing the chilling effect of the prosecution of Pastor Rivera Santiago.⁸⁵

Accordingly, the ACLU complaint alleges that the statutes violate the First Amendment as overbroad, specifically by making it a crime to share false information, but not requiring the government to demonstrate that the speaker acted with actual malice.⁸⁶ Moreover, the language in the statutes does not clearly define what types of speech are

⁷⁶ *Id.*

⁷⁷ *Id.* at 7.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See *Mangual v. Rotger-Sabat*, 317 F.3d 45 (1st Cir. 2003). The statute was struck down in 2003. *Id.* at 69.

⁸² Complaint, *supra* note 73, at 4.

⁸³ *Id.* at 10.

⁸⁴ *Id.*

⁸⁵ *Id.* at 8–9, 12; see also Dánica Coto, *ACLU Files Lawsuit Against Puerto Rico's 'Fake News' Laws*, WASH. POST (May 20, 2020) https://www.washingtonpost.com/world/the_americas/aclu-files-lawsuit-against-puerto-ricos-fake-news-laws/2020/05/20/cad15392-9b00-11ea-ad79-eef7cd734641_story.html [<https://perma.cc/SWG6-Z8FE>].

⁸⁶ Complaint, *supra* note 73, at 13.

criminalized. “Without a well-defined standard of criminal responsibility, law enforcement officers and factfinders are given nearly unfettered discretion to apply their own standards,” the complaint alleges.⁸⁷

These examples illustrate how problematic it can be when governmental entities become arbiters of what is true and what is fake. As the Dutch critics of EUvsDisinfo.eu argued, governments should be loath to interfere in freedom of the press because “it makes it impossible for the truth to emerge in the public debate.”⁸⁸

IV. THREATS TO THE FAIR REPORT PRIVILEGE

It is indisputable that the public must have accurate data about what its government is up to in order to engage in informed debate and for democracy to function properly. Curiously, however, in recent years, the long-standing common privilege—the “fair report” privilege,⁸⁹ which protects news organizations from libel suits when they accurately report pronouncements and actions of government—has been under fire.

For example, in February 2020, the Minnesota Supreme Court ruled in *Larson v. Gannett Co.*⁹⁰ that the fair report privilege protects fair and accurate reporting of information about matters of public concern derived from official law enforcement press conferences and press releases, therefore holding that several statements published by television station KARE 11 and the *St. Cloud Times* were not actionable.⁹¹ However, the Court also ordered a new trial, finding that the jury lacked sufficient information to adequately determine whether the privilege could be defeated in relation to five particular statements published about the incident.⁹²

The case arose following a 2012 fatal shooting of police officer Tom Decker behind a bar in Cold Spring, Minnesota.⁹³ Decker was in the process of performing a welfare check on the plaintiff, Ryan Larson, who lived above the bar and was reportedly suicidal.⁹⁴ Police arrested Larson soon after the shooting, and the following day, senior local and state law enforcement officials held a press conference and issued a press

⁸⁷ *Id.* at 14.

⁸⁸ Nijeboer, *supra* note 72.

⁸⁹ See generally *Larson v. Gannett Co.*, 940 N.W.2d 120 (Minn. 2020), *reh'g denied* (Mar. 30, 2020).

⁹⁰ 940 N.W.2d 120 (Minn. 2020).

⁹¹ See *id.* at 126.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See *Larson v. Gannett Co., Inc.*, 915 N.W.2d 485, 488 (Minn. Ct. App. 2018), *aff'd in part and rev'd in part*, 940 N.W.2d at 120, 127–28 (Minn. 2020).

release about the incident.⁹⁵ The press release said that a SWAT team had arrested Larson “[w]ithin an hour” of the shooting and that he “was booked into the Stearns County Jail on murder charges.”⁹⁶

Based on the law enforcement press conference and press release, numerous news organizations, including KARE 11 and the *St. Cloud Times*, reported on the fatal shooting, investigation, and arrest of Larson.⁹⁷ However, days after his arrest, Larson was freed because authorities lacked sufficient evidence to prosecute him, and he was formally eliminated as a suspect in August 2013.⁹⁸ Investigators had identified a different man, Eric Thomes, as a lead suspect in January 2013, but Thomes committed suicide when agents sought to question him.⁹⁹ Nonetheless, after the ordeal, Larson reportedly quit his job, dropped out of school and moved away so he could avoid further “embarrassment and humiliation,” according to the Minneapolis *Star Tribune*.¹⁰⁰

On May 28, 2015, Larson sued KARE 11 and the *St. Cloud Times*, alleging they published 11 defamatory statements about his arrest.¹⁰¹ Five of the statements were attributed to law enforcement, three statements referenced accusations against Larson, and three additional statements discussed his criminal history or community members’ opinions about the case.¹⁰² In April 2014, Larson sued KSTP-TV and WCCO’s TV and radio stations, each of which settled.¹⁰³

The district court granted partial summary judgment in favor of KARE 11 and the *St. Cloud Times*, ruling in May 2016 that “to the extent the news conference and news release only communicated the fact of Mr. Larson’s arrest or of the charge of crime made by the officer in making or returning his arrest, these sources are entitled to the [fair report] privilege.”¹⁰⁴

However, the court amended the ruling during trial in November 2016 to find that the fair report privilege did not cover the five

⁹⁵ *Larson*, 940 N.W.2d at 126–27.

⁹⁶ *Id.* at 127 (internal quotation marks omitted).

⁹⁷ *Id.* at 127–29.

⁹⁸ *Id.* at 129.

⁹⁹ See Rochelle Olson, *Minnesota Supreme Court Orders New Defamation Trial for Cold Spring Man Arrested, Cleared in Police Officer’s Killing*, STAR TRIB. (Feb. 26, 2020), <https://www.startribune.com/supreme-court-orders-new-trial-for-cold-spring-man-who-lost-defamation-law-suit/568218802/> [<https://perma.cc/6U7A-FTGG>].

¹⁰⁰ *See id.*

¹⁰¹ *See Larson v. Gannett Co.*, 940 N.W.2d 120 (Minn. 2020), *reh’g denied* (Mar. 30, 2020).

¹⁰² *See id.*

¹⁰³ Brandon Stahl, *Man Cleared in Cold Spring Killing Loses Defamation Case, Jurors Decide in Lawsuit*, STAR TRIB. (Nov. 21, 2016), <https://www.startribune.com/man-cleared-in-cold-spring-killing-loses-defamation-case/402284915/> [<https://perma.cc/RWQ5-U7KP>].

¹⁰⁴ *Larson v. Gannett Co.*, No. 27-CV-15-9371, 2016 WL 7163036, at *5 (Minn. Dist. Ct. May 19, 2016).

statements attributed to law enforcement and that the three statements referencing accusations against Larson were not substantially accurate.¹⁰⁵ Only claims based on the last three statements at issue, which discussed Larson's criminal history and community members' opinions about the case, were dismissed because the court found they were incapable of a defamatory meaning.¹⁰⁶

A jury then found that that the eight remaining statements were defamatory, but that the news organizations were immunized from liability because the statements were not false.¹⁰⁷ Larson moved for a new trial following the jury verdict, asserting that the jury did not properly apply the law. The district court granted Larson a new trial for all 11 statements, finding that the statements exceeded "the mere fact of arrest or charge" and were false and defamatory as a matter of law.¹⁰⁸

On May 7, 2018, a three-judge panel of the Minnesota Court of Appeals reversed the district court, holding that the fair report privilege covers "fair and accurate reports of statements by law enforcement during an official press conference and in an official news release."¹⁰⁹ The panel held that the district court erroneously concluded that the fair report privilege did not apply, writing that Minnesota "has recognized the fair-report privilege for over a century."¹¹⁰ Most recently, in 2000, the Minnesota Supreme Court held in *Moreno v. Crookston Times Printing Co.*¹¹¹ that the privilege applies to an "accurate and complete report or a fair abridgement of events that are part of the regular business of a city council meeting."¹¹² The Court held that the privilege was premised on two principles: a fair and accurate report of a city council meeting would "simply relay information to the reader that she would have seen or heard herself were she present at the meeting,"¹¹³ and second, that there is an "obvious public interest in having public affairs made known to all."¹¹⁴ The Court therefore concluded that the news media should be able to cover meetings when they are open to the public and

¹⁰⁵ *Larson v. Gannett Co.*, 915 N.W.2d 485, 490 (Minn. Ct. App. 2018), *review granted* (July 17, 2018), *aff'd in part, rev'd in part*, 940 N.W.2d 120 (Minn. 2020), *reh'g denied* (Mar. 30, 2020), *cert. denied sub nom. Gannett Co. v. Larson*, No. 20-252, 2020 WL 6037250 (U.S. Oct. 13, 2020).

¹⁰⁶ *Id.*

¹⁰⁷ *Larson v. Gannett Co. Inc.*, No. 27-CV-15-9371, 2016 WL 9709979, at *1 (Minn. Dist. Ct. Dec. 05, 2016).

¹⁰⁸ *Larson v. Gannett Co.*, No. 27-CV-15-9371, 2017 WL 4220968, *1, 2 (Minn. Dist. Ct. June 13, 2017).

¹⁰⁹ *Larson v. Gannett Co.*, 915 N.W.2d 485, 491 (Minn. Ct. App. 2018).

¹¹⁰ *Id.* at 492.

¹¹¹ *See Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 333 (Minn. 2000).

¹¹² *See id.* at 333.

¹¹³ *Id.* at 331.

¹¹⁴ *Id.* (citing Restatement (Second) of Torts § 611) (internal quotation marks omitted).

are related to matters of public interest without fear that doing so might subject them to litigation.¹¹⁵

In its February 2020 opinion in the *Larson* case, the Minnesota Supreme Court affirmed the Court of Appeals in part, reversed in part, and remanded the case back to the district court for a new trial.¹¹⁶ Justice Margaret Chutich, writing for the majority, concluded that the privilege applied to seven statements the media published based on the press conference and press release, that the jury instructions and a special verdict form failed to sufficiently inform the jury of the factors that should be used to assess whether the privilege can be defeated, and that although four of the statements were not covered by the privilege, they were not actionable.¹¹⁷

Chutich began her analysis by explaining the majority's reasoning as to why the privilege should apply to the media statements based on the press conference and press release. *Larson* had disputed that *Moreno* supported extending the privilege to law enforcement press conferences and press releases.¹¹⁸ However, Chutich found that "principles recognized in *Moreno* and the values underlying the First Amendment warrant applying the fair and accurate reporting privilege" to the facts of the case.¹¹⁹ Chutich wrote that the Court was taking an "incremental approach" in expanding the privilege, holding only that it protects "news reports that accurately and fairly summarize statements about a matter of public concern made by law enforcement officers during an official press conference and in an official news release."¹²⁰

First, Chutich found that the press conference and press releases were public.¹²¹ *Larson* had argued that the press conference was not public because only invited journalists were allowed to attend, and the public was not provided with advance notice.¹²² However, the majority rejected this argument, concluding that such a view is "far too narrow" for when proceedings can be deemed public.¹²³ "The clear purpose of the press conference was to convey information to the community, and the community was able to view the press conference live on television or through the subsequent media coverage," Chutich wrote.¹²⁴ She further held that the press must be provided with "some leeway in its depiction

¹¹⁵ See *id.* at 333.

¹¹⁶ *Larson v. Gannett Co.*, 940 N.W.2d 120 (Minn. 2020), *reh'g denied* (Mar. 30, 2020).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 132.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 133.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 133–34.

and reporting of public events.”¹²⁵ Chutich wrote, “[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations.”¹²⁶

Second, Chutich concluded that the press conference and press release were a matter of public concern. “The citizens of Cold Spring and surrounding communities had a great need to be informed about matters affecting their safety and their ability to go about their daily activities without fear,” she wrote.¹²⁷ “And under some circumstances, such as when a suspected criminal remains at large, it is important for the public to be so informed and for the government to be able to caution the public and solicit pertinent information.”¹²⁸ Furthermore, Chutich ruled that reporting such information advances the “key values of transparency and accountability,” namely facilitating communication between officials and the public, but also allowing the public to evaluate the officials’ actions.¹²⁹

Third, Chutich found that reporting about the press conference and press release were covered by the privilege as an official action or proceeding because they were organized by senior officials of law enforcement agencies.¹³⁰

The majority also rejected Larson’s argument that extending the privilege to police press conferences and press releases would prejudice juries. Although Chutich recognized that there can be a tension between press freedom and fair trials, she said that because of the strong public interest in fair and accurate reporting about matters of public interest derived from public proceedings, it would not be appropriate to extend ethical rules prohibiting lawyers from making public statements to non-lawyer public officials.¹³¹ The majority also said changes to *voir dire* or moving the venue could also be used to find an unbiased jury.¹³²

Finally, Chutich explained that a report is fair and accurate when it “simply relay[s] information to the reader that she would have seen or heard herself were she present” at the official proceeding.¹³³ However, Chutich added that because the district court erroneously held

¹²⁵ *Id.* at 134.

¹²⁶ *Id.* (citing *Cox Broad. Corp. v. Cohn* 420 U.S. 469, 491–92 (1975)).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 135.

¹³¹ *Id.* at 138.

¹³² *Id.*

¹³³ *Id.* at 139 (citing *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 331 (Minn. 2000)) (internal quotation marks omitted).

that the privilege did not apply, the district court did not tell the jury how to assess whether the privilege has been defeated.¹³⁴ Therefore, the district court's jury instructions were not adequate because they focused only on whether the statements were substantially accurate and did not assess fairness.¹³⁵ A report may be unfair if it omits or misplaces information or adds context that changes the meaning of the statements in a material way, she wrote.¹³⁶

Thus, the majority ordered a new trial to decide whether the privilege can apply to five statements at issue.¹³⁷ KARE 11 published four statements: "Police say that man—identified as 34-year-old Ryan Larson—ambushed officer Decker and shot him twice—killing him"; "Investigators say 34-year-old Ryan Larson ambushed the officer, shooting him twice. Larson is in custody"; "He [Officer Decker] was the good guy last night going to check on someone who needed help. That someone was 34-year-old Ryan Larson who investigators say opened fire on Officer Tom Decker for no reason anyone can fathom"; and "Investigators believe he fired two shots into Cold Spring Police Officer Tom Decker, causing his death."¹³⁸ The *St. Cloud Times* published the fifth statement: "Police say Larson is responsible for the shooting death of Cold Spring-Richmond Police Officer Tom Decker."¹³⁹

Regarding the remaining statements, Chutich concluded that two—"Ryan Larson, the man accused of killing Officer Decker, could be charged as early as Monday," and "Man faces murder charge"—were fair and accurate as a matter of law.¹⁴⁰ Chutich held that four additional statements were not actionable because they were not capable of a defamatory meaning, were opinion, or were true.¹⁴¹

In an opinion concurring in part and dissenting in part, Justice G. Barry Anderson, joined by Chief Justice Lorie S. Gildea, agreed with the majority's conclusion that four media statements were not actionable.¹⁴² However, he disagreed with the rest of the majority's decision, writing that the Court "tip[p]ed [the] balance too far . . . in favor of the press, effectively immunizing the press from liability for falsely accusing a private citizen of murder."¹⁴³

¹³⁴ *Id.* at 141–42.

¹³⁵ *Id.* at 142.

¹³⁶ *Id.*

¹³⁷ *Id.* at 144.

¹³⁸ *Id.* at 127–28, 129.

¹³⁹ *Id.* at 129.

¹⁴⁰ *Id.* at 145.

¹⁴¹ *Id.* at 147.

¹⁴² *Id.* at 148 n.1 (Anderson, J. concurring in part, dissenting in part).

¹⁴³ *Id.* at 148.

Anderson first argued that the majority's holding made the fair and accurate report privilege "expansive and limitless," and that the privilege should not apply to a law enforcement press conference and press release.¹⁴⁴ He observed that the Minnesota Constitution entitles residents to a specific remedy for reputational harm.¹⁴⁵ Furthermore, Anderson concluded that expanding the privilege "is neither consistent with the history of defamation law nor wise under our existing jurisprudence."¹⁴⁶ He questioned why the press conference and press release would be considered "official" for purposes of the privilege.¹⁴⁷

Anderson criticized the majority's holding that reporting about the press conference and press release were covered by the privilege as "an official action or proceeding" because the conference and release were organized by senior officials of law enforcement agencies.¹⁴⁸ However, he argued that "[u]nder that logic, the media has immunity to report on any press conference held by any government employee and the scope of the fair and accurate reporting privilege is effectively limitless,"¹⁴⁹ adding that "[b]ecause of the court's broad rule, any government official or employee will be able to call a press conference or disseminate a press release that defames private individuals and the press, with impunity, will be able to widely circulate that defamation."¹⁵⁰ Such immunity, he wrote, contradicts the Court's own precedent and the Restatement (Second) of Torts.¹⁵¹

Moreover, Anderson questioned the majority's invocation of the First Amendment. Its "values and principles," he wrote, "have little to do with the facts here."¹⁵² He found that the case was not about government misconduct or defamation of a government employee, but instead concern[ed] "a private citizen who was falsely accused by certain media representatives of shooting and killing a police officer."¹⁵³ Although acknowledging that the murder of a police officer and the expenditure of public money to investigate such a crime are of public concern, he concluded that the identity of someone who is solely the target of a police investigation "cannot be said to be of sufficient public concern to

¹⁴⁴ *Id.* at 149.

¹⁴⁵ *Id.* ("Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character . . .") (citing MINN. CONST. Art. 1, § 8).

¹⁴⁶ *Id.* at 150.

¹⁴⁷ *Id.* at 151 n.4.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 151.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* (citing Restatement (Second) of Torts § 611 (1977)).

¹⁵² *Id.* at 153.

¹⁵³ *Id.*

warrant the application of the immunity the media seeks here.”¹⁵⁴ As such, he would find that eight of the media statements were false and would remand back to the district court to determine the negligence of KARE 11 and the *St. Cloud Times*, as well as damages.¹⁵⁵

This case is illustrative of another thorny aspect of the “truth” problem: is information “true,” simply because the government reports it? Is it “reckless” for the press to report without independently verifying what is said? The answer may be different, depending upon whether the question is considered from a legal or ethical perspective. As reporter Bob Collins wrote in a 2014 post on his blog *NewsCut*, a Minnesota Public Radio (MPR) hosted opinion blog, “There was never any real evidence against Larson, but that didn’t stop reporters from racing to show his mug shot and name him as a suspect only on the strength of what police said.”¹⁵⁶ He added, “We just reported what the cops said’ is a solid First Amendment defense in cases like this. But cases like this should remind all of us that we should be better and more careful. Our job isn’t to be stenographers. It’s to get the story right.”¹⁵⁷

V. ACTUAL MALICE REDUX

An explosion of public figure libel cases has roiled the press in recent months, providing an opportunity for courts to reexamine the actual malice standard. Litigants have included Sarah Palin,¹⁵⁸ Joe Arpaio,¹⁵⁹ Harvard law professor and former presidential candidate Lawrence Lessig,¹⁶⁰ and many others—all public figures who would be required to prove knowledge of falsity or reckless disregard of the truth on the part of the publisher. Not least among these is President Donald Trump, whose reelection campaign has sued, among others, *The New*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 155–56.

¹⁵⁶ Bob Collins, *Ryan Larson Case Shows Damage of Reporting ‘Just the Facts’*, MPR NEWS (Apr. 29, 2014), <https://blogs.mprnews.org/newscut/2014/04/ryan-larson-case-of-reporting-just-the-facts/> [<https://perma.cc/T82Z-E4G6>].

¹⁵⁷ *Id.*

¹⁵⁸ See *Palin v. N.Y. Times Co.*, 940 F.3d 804 (2d Cir. 2019).

¹⁵⁹ See *Arpaio v. Zucker*, 414 F. Supp. 3d 84 (D.D.C. 2019); see also Jessica Campisi, *Judge Tosses Out Joe Arpaio’s \$300M Defamation Lawsuit Against CNN, Other Media Outlets*, HILL (Nov. 1, 2019), <https://thehill.com/regulation/court-battles/468562-federal-judge-tosses-joe-arpaio-300m-defamation-lawsuit-against-cnn> [<https://perma.cc/AN6C-5DMQ>].

¹⁶⁰ See *Lessig v. N.Y. Times Co.*, No. 1:20-cv-10060-NMG, 2020 WL 203334 (D. Mass. Jan. 13, 2020). On April 13, 2020, Reuters reported that Lessig had withdrawn his lawsuit. See Jonathan Stempel, *Harvard Professor Withdraws NY Times Defamation Lawsuit Over Jeffrey Epstein Story*, REUTERS (Apr. 13, 2020), <https://www.reuters.com/article/people-jeffrey-epstein-new-york-times-la/harvard-professor-withdraws-ny-times-defamation-lawsuit-over-jeffrey-epstein-story-idUSL2N2C10ZN> [<https://perma.cc/3BYG-K4YK>].

York Times.¹⁶¹ As media attorney Theodore Boutrous observed, “The lawsuit is a transparent misuse of the judicial branch as a political and fundraising stunt. The lawsuit also plainly aims to chill freedom of speech and freedom of the press when it comes to Trump.”¹⁶²

But even before his election, Trump had complained that libel law is stacked against the rich and powerful. As he told the *Washington Post* editorial board in March 2016, “I want to make it more fair from the side where I am, because things are said about me that are so egregious and wrong, and right now according to the libel laws I can do almost nothing about it.”¹⁶³ And it appears he may have an ally in Associate Justice Clarence Thomas. In a concurring opinion filed in *McKee v. Cosby*¹⁶⁴ in February 2019, Thomas called for the Court to revisit the actual malice standard.¹⁶⁵

In December 2014, petitioner Kathrine McKee accused actor and comedian Bill Cosby of sexually assaulting her in the 1970s, one of many #MeToo cases that surfaced during that time.¹⁶⁶ She alleged that Cosby’s attorney responded by writing and leaking a letter that deliberately distorted her personal background in order to “damage her reputation for truthfulness and honesty, and further to embarrass, harass, humiliate, intimidate, and shame [her].”¹⁶⁷

On October 18, 2017, the U.S. Court of Appeals for the First Circuit upheld the district court’s decision to grant Cosby’s motion to dismiss, finding that McKee was a public figure and could not prove actual malice.¹⁶⁸ On February 19, 2019, the Supreme Court denied *certiorari* in the case.¹⁶⁹

In his concurring opinion, Thomas wrote that although he agreed with the Court’s decision to deny *certiorari* in the case, he also called for the high court, in an appropriate case, to reconsider the actual

¹⁶¹ See *Donald J. Trump For President, Inc. v. N.Y. Times Co.*, No. 152099/2020, 2020 WL 962293 (N.Y. Sup. Feb. 26, 2020).

¹⁶² Theodore J. Boutrous Jr., *Why Trump’s Frivolous Libel Lawsuit Against the New York Times is Dangerous*, WASH. POST (Feb. 29, 2020), <https://www.washingtonpost.com/opinions/2020/02/29/why-trumps-frivolous-libel-lawsuit-against-new-york-times-is-dangerous/> [https://perma.cc/E5FH-D46].

¹⁶³ Post Opinions Staff, *A Transcript of Donald Trump’s Meeting with The Washington Post Editorial Board*, WASH. POST (Mar. 21, 2016), <https://www.washingtonpost.com/blogs/post-partisan/wp/2016/03/21/a-transcript-of-donald-trumps-meeting-with-the-washington-post-editorial-board/> [https://perma.cc/M7VZ-43SM].

¹⁶⁴ 139 S. Ct. 675 (2019).

¹⁶⁵ See *McKee v. Cosby*, 139 S. Ct. 675 (2019) (Thomas, J., concurring).

¹⁶⁶ See *id.* at 675.

¹⁶⁷ *Id.* (internal quotation marks omitted).

¹⁶⁸ See *McKee v. Cosby*, 874 F.3d 54 (1st Cir. 2017).

¹⁶⁹ See *McKee*, 139 S. Ct. 675. (Thomas, J., concurring).

malice standard.¹⁷⁰ He contended that *Sullivan* and subsequent decisions extending the standard were “policy-driven decisions masquerading as constitutional law.”¹⁷¹

He continued, “[t]he states are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm,” adding that “[t]here appears to be little historical evidence suggesting that the *New York Times* actual-malice rule flows from the original understanding of the First or Fourteenth Amendment.”¹⁷²

Part of Thomas’s disquiet seems to be based on concerns about recourse for individuals who are not obviously classified as public figures but are thrust into the public eye as a result of their involvement in matters of public concern.¹⁷³ The #MeToo complainants, like those in *McKee*, are one such group. But perhaps the poster child for this dilemma is Nicholas Sandmann, a Covington Catholic High School student who became the subject of a viral video involving an alleged confrontation with a Native American activist Nathan Phillips.¹⁷⁴

The litigation stemmed from reporting about an incident on January 18, 2019, when numerous news organizations and social media accounts circulated photos and videos of a confrontation between Sandmann and Phillips during two separate rallies taking place at the National Mall in Washington, D.C.¹⁷⁵ Sandmann had traveled to Washington, D.C. from a suburb of Cincinnati to participate in a march on the National Mall opposing abortion.¹⁷⁶ As the students were waiting for a bus to pick them up at the Lincoln Memorial, they were approached by Phillips and other participants of the Indigenous Peoples March.¹⁷⁷ Many of the students, including Sandmann, were wearing “Make America Great Again” hats.¹⁷⁸ Early reporting about the incident

¹⁷⁰ *Id.* at 676.

¹⁷¹ *Id.*

¹⁷² *Id.* at 682.

¹⁷³ *See id.* at 675–76.

¹⁷⁴ *See* Cameron Knight, *Nick Sandmann and CovCath: It’s a Year Later. Where Do Things Stand, and What Have We Learned?*, CINCINNATI ENQUIRER (Jan. 23, 2020), <https://www.cincinnati.com/story/news/crime/crime-and-courts/2020/01/23/nick-sandmann-and-covcath-its-year-later-where-things-stand-now/4465864002/> [<https://perma.cc/HAM4-R7PN>].

¹⁷⁵ *See* Sarah Brookbank, *Analysis: Breaking Down the Full Video with Covington Catholic Students*, USA TODAY (Jan. 22, 2019), <https://www.usatoday.com/story/news/nation/2019/01/22/covington-catholic-analyzing-video-incident-indigenous-peoples-march/2644511002/> [<https://perma.cc/MYU8-RTSW>].

¹⁷⁶ *See id.*

¹⁷⁷ *See* Michael E. Miller, *Viral Standoff Between a Tribal Elder and a High Schooler Is More Complicated Than It First Seemed*, WASH. POST (Jan. 20, 2019), https://www.washingtonpost.com/local/social-issues/picture-of-the-conflict-on-the-mall-comes-into-clearer-focus/2019/01/20/c078f092-1ceb-11e9-9145-3f74070bbdb9_story.html [<https://perma.cc/EB3Q-D7H>].

¹⁷⁸ *See* Brookbank, *supra* note 175.

alleged that Sandmann was blocking Phillips as Phillips chanted and beat a drum.¹⁷⁹ However, Sandmann later disputed that characterization and said he was not trying to interfere with Phillips's movements.¹⁸⁰

On February 19, 2019, Sandmann sued *The Washington Post*, alleging that video the news organization had posted of the incident was “selectively edited” in order to show Sandmann as the aggressor and that “the *Post* actively, negligently and recklessly participated in making the [video] go viral on social media,” without investigating the validity of the video or the Twitter account.¹⁸¹ The complaint further asserted that the *Post* ignored journalistic standards when interpreting the incident.¹⁸² Media experts opined that Sandmann would face challenges in winning the case.¹⁸³

On March 12, 2019, the Sandmann family filed a similar lawsuit against CNN, making largely the same claims as the complaint against the *Post*.¹⁸⁴ The complaint asserted that CNN would have known its reporting of the incident contained false accusations against Sandmann if it had “undertaken any reasonable efforts to verify their accuracy before publication.”¹⁸⁵ The complaint also claimed that CNN sought to advance an anti-Trump agenda.¹⁸⁶ “Contrary to its ‘Facts First’ public relations ploy, CNN ignored the facts and put its anti-Trump agenda first in waging a 7-day media campaign of false, vicious attacks against Nicholas.”¹⁸⁷

The complaint claimed that Sandmann was defamed in four CNN television broadcasts and nine online articles published on the CNN website, pointing particularly to claims that Sandmann and his classmates acted with a “mob mentality,” “looked like they were going to lynch” other protestors, and were “racist.”¹⁸⁸ The lawsuit sought \$75

¹⁷⁹ See Knight, *supra* note 172.

¹⁸⁰ *Id.*

¹⁸¹ Complaint at 10, Sandmann v. WP Co. LLC, 401 F. Supp. 3d 781 (E.D. Ky. 2019) (No. 19-CV-19 WOB-CJS).

¹⁸² See *id.*

¹⁸³ Max Londberg, *Nick Sandmann of CovCath May Face Challenges in Proving Defamation, Experts Say*, CINCINNATI ENQUIRER (Feb. 11, 2019), <https://www.cincinnati.com/story/news/2019/02/11/nick-sandmann-covcath-lacks-obvious-defamation-claim-experts-say/2757343002/> [<https://perma.cc/N79V-WLXM>].

¹⁸⁴ See Complaint, Sandmann v. Cable News Network, Inc., No. 2:19-cv-00031-DLB-CJS (E.D. Ky. Mar. 12, 2019).

¹⁸⁵ *Id.* at 4.

¹⁸⁶ *Id.* at 5.

¹⁸⁷ *Id.* at 2.

¹⁸⁸ *Id.* at 3.

million in compensatory damages and \$200 million in punitive damages.¹⁸⁹

On July 26, 2019, federal District Judge William O. Bertelsman dismissed the complaint against the *Post* “in its entirety.”¹⁹⁰ He held that several of the alleged defamatory statements by the *Post* were “protected opinion” under the First Amendment.¹⁹¹ He also found that other alleged defamatory statements were not “about” or “concerning” Sandmann, or did not constitute defamation per se, meaning statements that accuse an individual of crimes or immoral acts and are presumed to be harmful.¹⁹²

However, on October 28, 2019, Bertelsman partially reinstated the suit against the *Post* and wrote that he would allow the plaintiffs to begin discovery based on three statements in the *Post*’s coverage.¹⁹³ Although Bertelsman had previously found that it was Phillips’s opinion that he was being blocked and not allowed to retreat, and that he had conveyed those beliefs to the newspaper, he ruled that this “should . . . be the subject of proof.”¹⁹⁴ Bertelsman wrote, “Suffice to say that the Court has given this matter careful review and concludes that ‘justice requires’ that discovery be had regarding these statements and their context. The Court will then consider them anew on summary judgment.”¹⁹⁵

Meanwhile, on November 21, 2019, Bertelsman similarly ruled that a separate, \$275 million libel lawsuit the Sandmann family filed against NBC Universal could move forward.¹⁹⁶ Bertelsman wrote, “[T]he court finds that the statements that plaintiff ‘blocked’ Phillips or did not allow him to retreat, if false, meet the test of being libelous per se”¹⁹⁷

¹⁸⁹ *Id.* at 6–7.

¹⁹⁰ *Sandman v. WP Co. LLC*, 401 F. Supp. 3d 781, 797 (E.D. Ky. 2019).

¹⁹¹ *Id.* at 792.

¹⁹² *Id.* at 791–93; see also Richard Leiby, *Judge Dismisses Libel Suit Against Washington Post Brought by Covington Catholic High School Student*, WASH. POST (July 26, 2019), https://www.washingtonpost.com/lifestyle/style/judge-dismisses-libel-suit-against-washington-post-brought-by-covington-catholic-high-school-student/2019/07/26/d02fd6ce-afd3-11e9-8e77-03b30bc29f64_story.html [<https://perma.cc/RVK6-6J7Z>].

¹⁹³ Paul Farhi, *Federal Judge Reinstates Libel Lawsuit Filed by Covington Catholic Teen Against Washington Post*, WASH. POST (Oct. 28, 2019), https://www.washingtonpost.com/lifestyle/style/federal-judge-reinstates-libel-lawsuit-filed-by-covington-catholic-teen-against-washington-post/2019/10/28/30155c52-f9ae-11e9-ac8c-8eced29ca6ef_story.html [<https://perma.cc/B3XC-2J>].

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See Adrian Mojica, *Judge Rules Kentucky Student’s Lawsuit Against NBCUniversal Can Proceed*, FOX17 (Nov. 25, 2019), <https://fox17.com/news/local/judge-rules-kentucky-students-lawsuit-against-nbcuniversal-can-proceed> [<https://perma.cc/8Y8S-NAR7>].

¹⁹⁷ See Valerie Richardson, *Covington Catholic teen’s \$275 million lawsuit against NBCUniversal can proceed, judge rules*, WASH. TIMES (Nov. 21, 2019), <https://www.washingtontimes.com/>

On January 7, 2020, CNN Business reported that the media outlet had reached a settlement with Sandmann, though it did not provide the details of the settlement.¹⁹⁸ However, the outlet noted that the settlement would “allow CNN to avoid a lengthy and potentially unpredictable trial.”¹⁹⁹ In July 2020, the *Washington Post* reported that the newspaper had also settled the Sandmanns’ lawsuit, quoting one of their attorneys who stated that the plaintiffs had agreed to end the litigation “because the Post was quick to publish the whole truth – through its follow-up coverage and editor’s notes.”²⁰⁰

In early March 2020, Sandmann filed lawsuits against five additional defendants in the U.S. District Court for the Eastern District of Kentucky, seeking \$450 million in total, including \$195 million from Gannett, which publishes *USA Today*, the *Cincinnati Enquirer*, and numerous other local newspapers; \$95 million from ABC News; \$65 million from *The New York Times*; \$60 million from CBS News; and \$35 million from *Rolling Stone* magazine.²⁰¹ The complaints identified multiple articles and social media posts by Gannett and ABC News as allegedly containing libelous material.

A critical question as the cases proceed will be determining whether Sandmann is a public figure and therefore obliged to prove actual malice. Opinion on this is divided, with some arguing that he is, at most, an involuntary public figure who found himself caught up in a controversy unrelated to the rally he had traveled to attend.²⁰² As the Supreme Court observed: “Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare.”²⁰³

news/2019/nov/21/nick-sandmann-covington-catholic-teen-nbcuniversal/ [https://perma.cc/58YZ-6Z4U].

¹⁹⁸ Oliver Darcy, *CNN Settles Lawsuit with Nick Sandmann Stemming from Viral Video Controversy*, CNN BUS. (Jan. 7, 2020), <https://www.cnn.com/2020/01/07/media/cnn-settles-lawsuit-viral-video/index.html> [https://perma.cc/JV2B-LRWQ].

¹⁹⁹ *Id.*

²⁰⁰ Paul Farhi, *Washington Post settles lawsuit with family of Kentucky teenager*, WASH. POST (July 24, 2020), https://www.washingtonpost.com/lifestyle/style/washington-post-settles-lawsuit-with-family-of-kentucky-teenager/2020/07/24/ae42144c-cdbd-11ea-b0e3-d55bda07d66a_story.html [https://perma.cc/GE8Y-J3RR].

²⁰¹ See *Sandmann v. N.Y. Times Co.*, No. 20-cv-23-WOB-CJS, 2020 WL 1022600 (E.D. Ky. Mar. 2, 2020); *Sandmann v. CBS News, Inc.*, No. 20-cv-24-WOB-CJS, 2020 WL 1022675 (E.D. Ky. Mar. 2, 2020); *Sandmann v. ABC News, Inc.*, No. 20-cv-25-WOB-CJS, 2020 WL 1022677 (E.D. Ky. Mar. 2, 2020); *Sandmann v. Gannett Co.*, No. 20-cv-26-WOB-CJS, 2020 WL 1022678 (E.D. Ky. Mar. 2, 2020); *Sandmann v. Rolling Stone, LLC.*, No. 20-cv-00027-WOB-CJS, 2020 WL 1022676 (E.D. Ky. Mar. 2, 2020).

²⁰² See MLRC MediaLawLetter, *Hot Topics Roundtable: Sandmann v. The Washington Post*, March 2019.

²⁰³ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 n.23 (1974).

But regardless of his status as a public figure, Sandmann's claims for punitive damages would need to be supported by proof of actual malice. In his case, much of the allegedly libelous material he complains of may be otherwise protected, such as by the opinion or fair comment privileges. But ultimately, they constitute reporting or commentary that reflects badly on Sandmann, and that he does not like, and which he and his supporters undoubtedly consider to be "fake news."²⁰⁴

VI. WHO DECIDES: COVID-19 AND MISINFORMATION

Which brings us back to the core question of who will determine what is true, and what is false? The answer to that question becomes even more critical in the wake of the COVID-19 pandemic, where disinformation and fake news abounds. In a March 8, 2020 story, *The New York Times* reported that misinformation and conspiracy theories about the coronavirus "ha[d] spread across the world" prompting different efforts by social media and technology companies "to prevent its dissemination."²⁰⁵

Public Knowledge, a nonprofit organization promoting freedom of expression and access to information online, listed several efforts by Facebook to address false information on its platform related to the virus, including partnering with the "International Fact-Checking Network (IFCN) to support the fact-checking community by broadening the #CoronaVirusFacts Alliance, the COVID-19 related misinformation effort, with a budget of \$1 million in grants."²⁰⁶

Facebook announced on April 7, 2020 that it was investing an additional \$100 million into the "news industry," including "\$25 million in emergency grant funding for local news through the Facebook Journalism Project, and \$75 million in additional marketing spend to move money over to news organizations around the world."²⁰⁷ It also temporarily banned ads and listings for medical masks, hand sanitizer, surface disinfecting wipes, and COVID-19 testing kits.²⁰⁸

²⁰⁴ Barry Richards, *Sandmann Defeats Fake News CNN*, 1420 WBSM (Jan. 8, 2020), <https://wbsm.com/sandmann-defeats-fake-news-cnn-opinion/> [<https://perma.cc/UG35-X4XN>].

²⁰⁵ Sheera Frenkel, Davey Alba & Raymond Zhong, *Surge of Virus Misinformation Stumps Facebook and Twitter*, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2020/03/08/technology/coronavirus-misinformation-social-media.html> [<https://perma.cc/57HF-KUNT>].

²⁰⁶ Lisa Macpherson, *How Are Platforms Responding to This Pandemic?*, PUBLIC KNOWLEDGE (May 27, 2020), <https://misinfotrackingreport.com/> [<https://perma.cc/BXK8-QE7Z>].

²⁰⁷ *The Facebook Journalism Project COVID-19 Local News Relief Fund*, FACEBOOK, <https://www.facebook.com/journalismproject/programs/grants/coronavirus-local-news-relief-fund> [<https://perma.cc/R2SV-P5VC>].

²⁰⁸ Kim Lyons, *Facebook Temporarily Bans Ads for Medical Face Masks to Prevent Coronavirus Exploitation*, VERGE (Mar. 7, 2020), <https://www.theverge.com/2020/3/7/21169109/facebook-instagram-bans-ads-face-masks-coronavirus> [<https://perma.cc/B558-QBG6>].

For its part, Google also took several actions to address COVID-19 misinformation, including, like Facebook, blocking all ads “capitalizing on the coronavirus,” according to Public Knowledge. Google also pledged \$6.5 million to fund fact-checkers, news organizations, and others to improve research and reporting on the virus to help curtail the spread of misinformation related to COVID-19.²⁰⁹

Twitter also announced that it would remove tweets about the coronavirus that could cause a “direct risk to people’s health or well-being.”²¹⁰ The company claimed that it was broadening its guidance on “unverified claims that have the potential to incite people to action, could lead to the destruction or damage of critical infrastructure, or cause widespread panic/social unrest,” which were “considered a violation of our policies,” and that it would begin placing labels and warning messages on tweets containing disputed or misleading information related to COVID-19.²¹¹

However, the issue is complicated when government officials are themselves spreading misinformation.²¹² For example, although Facebook CEO Mark Zuckerberg has stated that promoting bleach as a cure for COVID-19 constituted “misinformation that has imminent risk of danger,” Facebook, as well as several other social media sites, including Twitter, declined to remove comments by President Donald Trump on April 24 suggesting that disinfectants and ultraviolet light were possible treatments for the virus.²¹³

The New York Times reported that although Facebook, Twitter, and YouTube declined to remove the statements because President Trump “did not specifically direct people to pursue the unproven treatments,” his comments nevertheless “led to a mushrooming of other posts, videos and comments about false virus cures with UV lights and disinfectants that the companies have largely left up.”²¹⁴ The *Times*

²⁰⁹ Asian News International, *COVID-19: Google Pledges USD 6.5 Million to Fight Misinformation*, BUS. STANDARD, https://www.business-standard.com/article/news-ani/covid-19-google-pledges-usd-6-5-million-to-fight-misinformation-120040201617_1.html [https://perma.cc/GTT5-ZWML] (Updated Apr. 2, 2020).

²¹⁰ Bobby Allyn, *Twitter Now Labels ‘Potentially Harmful’ Coronavirus Tweets*, NPR (May 11, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/05/11/853886052/twitter-to-label-potentially-harmful-coronavirus-tweets> [https://perma.cc/MLN7-CS69].

²¹¹ *Coronavirus: Staying Safe and Informed on Twitter*, TWITTER (Apr. 3, 2020), https://blog.twitter.com/en_us/topics/company/2020/covid-19.html [https://perma.cc/4Z95-VG9Q].

²¹² Aaron Blake, *Twitter Removes David Clarke’s Tweets as He and Other Trump Allies Sow Coronavirus Conspiracy Theories and Doubts*, WASH. POST (Mar. 16, 2020), <https://www.washingtonpost.com/politics/2020/03/16/twitter-takes-down-david-clarkes-tweets-he-other-trump-allies-seed-coronavirus-conspiracy-theories-doubt/> [https://perma.cc/NX4W-9JX3].

²¹³ Sheera Frenkel & Davey Alba, *Trump’s Disinfectant Talk Trips Up Sites’ Vows Against Misinformation*, N.Y. TIMES (Apr. 30, 2020), <https://www.nytimes.com/2020/04/30/technology/trump-coronavirus-social-media.html> [https://perma.cc/CSC8-CG7K].

²¹⁴ *Id.*

found “780 Facebook groups, 290 Facebook pages, nine Instagram accounts and thousands of tweets pushing UV light therapies that were posted after Mr. Trump’s comments and that remained on the sites Only a few of the posts have been taken down.”²¹⁵ The *Times* also found “more than 45,000 tweets discussing bleach and UV light cures for the coronavirus that stemmed from the president’s comments. Many of the posts said Mr. Trump was right about his suggested treatments.”²¹⁶ Renee DiResta, a technical research manager at the Stanford Internet Observatory, told the *Times* that most tech companies crafted policies addressing misinformation “with the expectation that there would be a competent government and reputable health authority to point to,” and therefore were unprepared to handle false information coming from the White House.²¹⁷

VII. CONCLUSION

And indeed, what are the media—or for that matter, the public—to do in the face of such false information? Ironically, the fair report privilege, for the most part, will protect the press when it repeats even patently untrue government pronouncements. Yet if they choose to critically but accurately report on controversial actions of public officials or figures, they are vulnerable to lawsuits. That vulnerability will only increase if the actual malice standard is modified or eliminated.

Writing in *The Federalist* in March 2016, Political Editor John Daniel Davidson wrote that then-candidate Trump’s musings about “open[ing] up the libel laws” “should alarm all Americans who care about freedom of speech and freedom of the press.” He continued:

Does [Trump] care about freedom of speech and freedom of the press, or understand why those things are sacrosanct in American public life? Freedom of speech is a rare thing, after all. It’s one of the big differences between the United States and a place like Cuba Cuba has no freedom of the press—or rule of law. Libel is whatever the regime says it is. Does Trump realize the slippery slope in front of him?²¹⁸

That is the slippery slope in front of all of us. Presuming that the government is operating in good faith is a prerequisite for civil society. But

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ John D. Davidson, *Donald Trump Doesn’t Understand Libel Laws*, FEDERALIST (Mar. 22, 2016), <https://thefederalist.com/2016/03/22/donald-trump-doesnt-understand-libel-laws/> [https://perma.cc/6E8R-ZQFD].

that trust must be earned and is always subject to independent verification. Allowing the government to arbitrate and determine what is true and what is false undercuts the essential teaching of *New York Times v. Sullivan*: that without the actual malice standard, “would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so.”²¹⁹

There is no question that the defense of libel suits can be very costly, and that news organizations, facing significant financial challenges of their own, may well be deterred from investigative reporting if they fear that crippling legal expenses, or even bankruptcy, may follow.²²⁰ But the true cost of libel suits, and of fake news legislation, is the loss of individual autonomy. It undermines the right of citizens to seek and find truth for themselves, without fear of retaliation or censorship. The marketplace of ideas is imperfect, but essential to facilitate that search. Eliminating it would imperil nothing less than democracy itself.

²¹⁹ N.Y. Times Co. v. United States, 376 U.S. 254, 279 (1964).

²²⁰ See, e.g., Christine Hauser, *ABC's 'Pink Slime' Report Tied to \$177 Million in Settlement Costs*, N.Y. TIMES (Aug. 10, 2017), <https://www.nytimes.com/2017/08/10/business/pink-slime-disney-abc.html> [<https://perma.cc/EE6C-GRH6>]; see also Sydney Ember, *Gawker and Hulk Hogan Reach \$31 Million Settlement*, N.Y. TIMES (Nov. 2, 2016), <https://www.nytimes.com/2016/11/03/business/media/gawker-hulk-hogan-settlement.html> [<https://perma.cc/R4WA-FPDF>].