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## FAKE NEWS: POTENTIAL SOLUTIONS TO THE ONLINE EPIDEMIC\*

On December 4, 2016, police arrested Edgar Maddison Welch for assault with a dangerous weapon at Comet Ping Pong pizzeria in Washington, D.C.<sup>1</sup> At some point before that day, Welch came across a story, transmitted online through 4chan, Reddit, and Twitter, along with other websites,<sup>2</sup> stating that Hillary and Bill Clinton used Comet Ping Pong as a “front for a pedophile sex ring; the back room was supposedly used for kidnapping and trafficking children.”<sup>3</sup> Welch accepted this story as true and decided he had to put a stop to it.<sup>4</sup> He grabbed his assault rifle and drove 360 miles from his home in Salisbury, North Carolina to Comet Ping Pong in Washington, D.C.,<sup>5</sup> operated by the Clinton’s “co-conspirators,” to end the supposed scheme himself.<sup>6</sup> He entered the store with family patrons present, walked up to the counter, and pointed his assault rifle directly at the cashier’s face.<sup>7</sup> No one was injured, and Welch was apprehended and arrested by Washington police outside the restaurant soon after the incident.<sup>8</sup>

This “Pizzagate” conspiracy started when James Alefantis, Comet Ping Pong’s owner, was mentioned in an email sent from Hillary Clinton’s campaign manager because he was considering organizing a fundraiser for Clinton’s presidential campaign.<sup>9</sup>

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1. Kevin Bohn, Daniel Allman & Greg Clary, *Gun-Brandishing Man Sought to Investigate Fake News Story Site, Police Say*, CNN (Dec. 5, 2016, 2:48 PM), <http://www.cnn.com/2016/12/04/politics/gun-incident-fake-news/> [https://perma.cc/4ECZ-PDE8].

2. See Brian Stelter, *Fake News, Real Violence: ‘Pizzagate’ and the Consequences of an Internet Echo Chamber*, CNN (Dec. 6, 2016, 9:30 AM), <http://money.cnn.com/2016/12/05/media/fake-news-real-violence-pizzagate/> [https://perma.cc/UFM9-5J7C].

3. Kate Samuelson, *What to Know About Pizzagate, the Fake News Story with Real Consequences*, TIME (Dec. 5, 2016), <http://time.com/4590255/pizzagate-fake-news-what-to-know/> [https://perma.cc/P6XX-7S74].

4. See Bohn et al., *supra* note 1 (reporting that Welch told police officers he went to the pizza parlor to “self-investigate”).

5. Driving Directions from Salisbury, N.C., to Washington, D.C., GOOGLE MAPS, <http://maps.google.com> [https://perma.cc/CJ86-GBGA] (follow “Directions” hyperlink; then search starting point field for “Salisbury, NC,” and search destination field for “Washington, DC”).

6. Bohn, et al., *supra* note 1.

7. *Id.*

8. *Id.*

9. Samuelson, *supra* note 3.

Members of the anonymous message board 4chan combed through posts on Alefantis's social media accounts and developed a pedophile sex-ring conspiracy theory that spread to other social media sites, including Twitter, Facebook, and a Reddit thread called "Pizzagate" with thousands of subscribers.<sup>10</sup> Even before Welch's extreme reaction to the fake news story, the business encountered frequent protests outside the restaurant, as well as harassment of Alefantis and his staff on their respective social media sites.<sup>11</sup>

While the story of Welch's planned assault on a pizzeria is extraordinary, it is not uncommon for people to believe fake stories as true.<sup>12</sup> During the 2016 presidential race, "stories" with no basis in fact erupted around the world: "Pope Francis Shocks World, Endorses Donald Trump for President";<sup>13</sup> "RuPaul Claims Trump Touched Him Inappropriately in the 90s";<sup>14</sup> "WikiLeaks Confirms Hillary Sold Weapons to ISIS . . . Then Drops Another Bombshell."<sup>15</sup> These stories are more than simply narratives containing factual errors. They are just a few examples of completely fabricated stories

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10. *Id.*

11. *Id.*

12. It is unclear exactly how Welch first came across this story; however, it is notable that he followed Alex Jones and Infowars on Facebook, and Jones posted frequently about this story. Tim Mack, 'Pizzagate' Gunman Liked Alex Jones, DAILY BEAST (Dec. 4, 2016, 10:16 AM), <https://www.thedailybeast.com/pizzagate-gunman-liked-alex-jones> [<https://perma.cc/AZ5A-VU8Y>]. The Infowars articles on the conspiracy theory fit the "fake news" definition presented in this Recent Development. *See infra* Part I. It is impossible to know whether Welch would have learned of and believed the Pizzagate story notwithstanding Jones and Infowars' presentation of it as truthful, but the notice-and-takedown remedy proposed in this Recent Development would have permitted Alefantis to force Infowars and other websites to remove the stories from their sites, or else face litigation. *See infra* Part IV.

13. *Pope Francis Shocks World, Endorses Donald Trump for President, Releases Statement*, WTOE5 NEWS, <https://web.archive.org/web/20161115024211/http://wtoe5news.com/us-election/pope-francis-shocks-world-endorses-donald-trump-for-president-releases-statement/> [<http://perma.cc/9PYA-ZQ7Q>]; Hannah Ritchie, *Read All About It: The Biggest Fake News Stories of 2016*, CNBC.COM (Dec. 30, 2016, 2:04 AM), <http://www.cnbc.com/2016/12/30/read-all-about-it-the-biggest-fake-news-stories-of-2016.html> [<http://perma.cc/EQ7R-G5KC>].

14. *Rupaul Claims Trump Touched Him Inappropriately in the 1990s*, NEW WORLD ORDER MEDIA, <http://worldnewsdailyreport.com/rupaul-claims-trump-touched-him-inappropriately-in-the-1990s/> [<http://perma.cc/8AXG-2YTK>] (last visited Sept. 26, 2017). This website is explicitly a satire site; nonetheless, it was one of the top 20 performing election stories on Facebook in the final three months leading up to the 2016 election. Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook*, BUZZFEED (Nov. 16, 2016, 4:15 PM), [https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm\\_term=.cim087pOB#.xl9npN4Yw](https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm_term=.cim087pOB#.xl9npN4Yw) [<http://perma.cc/7K8H-9VLW>].

15. Silverman, *supra* note 14.

that were shared and disseminated rampantly in 2016.<sup>16</sup> Regardless of the target of fake news stories or the reasons for their contrivance, fake news stories clearly resonated with the public during the 2016 election.<sup>17</sup> According to a BuzzFeed report, false election-related stories had greater Facebook engagement than election stories generated by mainstream media outlets, such as *The Washington Post* and *The New York Times*.<sup>18</sup>

Beyond the contention that fake news may have had some impact on the 2016 presidential election and that rampant misinformation is bad for society in general, fake news has a much more concrete and justiciable harm: reputational damage caused by the publication of a demonstrably false claim. For example, the “Pizzagate” story hurt the reputation of Comet Ping Pong, its owner, and staff, and the story inspired someone to bring a gun to a restaurant. At the same time, the story likely damaged Hillary Clinton’s reputation,<sup>19</sup> both as an individual and as a presidential candidate, by suggesting that she was complicit in the kidnapping, imprisonment, and torture of children.<sup>20</sup> While technology CEOs disagree as to whether the individual companies can or should regulate fake news stories,<sup>21</sup> the legal system has the tools necessary

16. See *id.* (listing other 2016 election fake news stories, including allegations that Hillary Clinton’s emails were “worse than anyone could have imagined,” or that she was “already disqualified from holding any federal office”).

17. *Fake News Expert on Why False Stories Spread and Why People Believe Them*, NAT’L PUB. RADIO (Dec. 14, 2016, 12:31 PM), <http://www.npr.org/2016/12/14/505547295/fake-news-expert-on-how-false-stories-spread-and-why-people-believe-them> [<https://perma.cc/E2MQ-AKN5>] [hereinafter *Fake News Expert*].

18. Silverman, *supra* note 14.

19. For more information on why Clinton and potential plaintiffs like her are unlikely to pursue recovery under traditional defamation law from websites, see *infra* notes 78–80 and accompanying text.

20. See Joshua Gillin, *How Pizzagate Went from Fake News to a Real Problem for a D.C. Business*, POLITIFACT (Dec. 5, 2016, 5:23 PM), <http://www.politifact.com/truth-o-meter/article/2016/dec/05/how-pizzagate-went-fake-news-real-problem-dc-busin/> [<http://perma.cc/MB8S-VQ8S>].

21. Compare Lucinda Shen, *Apple CEO Tim Cook Says ‘Fake News’ Must Be Tackled*, FORTUNE (Feb. 10, 2017) <http://fortune.com/2017/02/10/fake-news-apple-facebook-tim-cook-google/> [<https://perma.cc/3SQ8-R8V8>] (“We have to give the consumer tools, to help with this. And we’ve got to filter out part of it before it ever gets there without losing the great openness of the internet . . . This is one of today’s chief problems. It is not something that has a simple solution.”) and Michael Lietdtke, *Google Also Gets Fooled by Fake Election News*, ASSOCIATED PRESS (Nov. 15, 2016), <https://apnews.com/e5d5c46f2ffb4ffa6c39821cf1959c8> [<http://perma.cc/W4JF-HQQP>] (“[Google] is taking steps to punish sites that manufacture falsehoods . . . [I]t will prevent its lucrative digital ads from appearing on sites that ‘misrepresent, misstate, or conceal information.’”) with Mark Zuckerberg, FACEBOOK (NOV. 12, 2016), <https://www.facebook.com/zuck/posts/10103253901916271> [<http://perma.cc/8G7W-AHLX>]

to provide relief for individuals while adequately deterring the creation and dissemination of fake news in the future.

In every state in the United States, slander, libel, or defamation laws protect individuals' reputations from destruction by false statements.<sup>22</sup> Why then, do the subjects of fake news stories who suffer reputational and—in some cases—actual harm, not sue under state defamation law?<sup>23</sup> After all, using the “Pizzagate” story as an example, it was published with no concern for the accuracy of the statements made within it, and it substantially harmed the restaurant, its owner, and the Clintons. Yet neither the Clintons, the store, nor the owner ever brought suit against the authors of the story or the websites through which it was disseminated.

Despite the desire to protect the reputations of private citizens, much of the case law regarding defamation demonstrates courts' hesitancy in making it easier for plaintiffs to recover in defamation lawsuits.<sup>24</sup> While it may at first seem to be unproblematic to attack

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(telling Facebook users that he does not believe fake news stories affected the 2016 presidential election results, and that the company would cautiously explore ways to flag false news stories).

22. See, e.g., *Andrews v. Elliot*, 109 N.C. App. 271, 274, 426 S.E.2d 430, 432 (1993) (classifying “statements which are susceptible of but one meaning . . . and that tend to ‘disgrace and degrade the party or hold him up to public hatred, contempt, or ridicule’” as defamatory *per se* (quoting *Flake v. Greensboro News Co.*, 212 N.C. 780, 786, 195 S.E. 55, 60 (1938))); *Murray v. Holnam, Inc.*, 542 S.E.2d 743, 748 (S.C. Ct. App. 2001) (holding that “[t]he elements of defamation include: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication”); *Sullivan v. Baptist Mem'l Hosp.*, 995 S.W.2d 569, 571 (Tenn. 1999) (holding that to prevail on a defamation claim, “the plaintiff must establish that: (1) a party published a statement; (2) with knowledge that the statement is false and defaming to the other; or (3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement”).

23. In an interview with NPR, Derigan Silver, a professor of media, First Amendment and Internet law at the University of Denver, discussed the reasons why it is not particularly feasible to bring defamation claims in response to fake news articles. *What Legal Recourse do Victims of Fake News Stories Have?*, NAT'L PUB. RADIO (Dec. 7, 2016, 7:04 PM), <http://www.npr.org/2016/12/07/504723649/what-legal-recourse-do-victims-of-fake-news-stories-have> [<http://perma.cc/FUU6-R959>]. Primarily, recovering monetary damages is unlikely to cure the reputational harm, and recovering those damages may come at great financial cost that a plaintiff may not be able to bear. See *id.* Additionally, it is often difficult, if not impossible, to find the party who could be held legally liable for the creation of the content in order to initiate an action. See *id.*

24. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 300 (1964) (Goldberg, J., concurring) (demonstrating the Court's concern over the “chilling effect . . . on First Amendment freedoms” that strict libel laws create); see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 772 (1985) (White, J., concurring) (“[T]he *New*

purveyors of fake news articles containing defamatory content, it is important to recognize that strengthening defamation law may place increased restrictions on publications, thereby impacting the freedom of speech guarantee within the First Amendment.<sup>25</sup> Expanding laws regulating online defamation is likely to have a “chilling effect” on freedom of speech. Chilling free speech has been a constant concern for courts in libel and defamation cases.<sup>26</sup>

This Recent Development discusses why more lawsuits have not been filed over fake news stories and lays out potential alternatives to how courts handle defamation caused by fake news. The lack of litigation is not only due to the difficulty and cost of finding those responsible for creating the defamatory content in fake news articles, but also to the existing legal framework not sufficiently deterring the creation of that type of content. In an effort to temper the rampant spread of misinformation that is becoming increasingly pervasive on the internet,<sup>27</sup> it may be necessary to hold third parties (websites that disseminate this misinformation) liable by allowing recovery for individuals in the instances in which the fake news stories are also defamatory. Courts should use the “notice and takedown” provision of the Digital Millennium Copyright Act of 1998 (“DMCA”)<sup>28</sup> as a model for imposing liability on websites that aid in the spread of fake news that contains defamatory content.<sup>29</sup> Fake news, as defined by

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*York Times* standard was formulated to protect the press from the chilling danger of numerous large damages awards.”).

25. See U.S. CONST. amend. I.

26. See *supra* note 24; see also *Grzelak v. Calumet Publ'g. Co.*, 543 F.2d 579, 582 (7th Cir. 1975) (reasoning that the burden of proving the requisite intent standard for liability “is placed upon plaintiffs” in order to “minimize the ‘chilling effect’ that libel suits invariably have on the exercise of First Amendment rights”) (quoting *Time, Inc. v. McLaney*, 406 F.2d 565, 566 (5th Cir. 1969)); *Cardillo v. Doubleday & Co.*, 366 F. Supp. 92, 94–95 (S.D.N.Y. 1973) (“Frivolous libel suits should be dismissed summarily to avoid the ‘chilling effect’ on free speech . . .”) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965)). See generally Anna Vamialis, *Online Defamation: Confronting Anonymity*, 21 INT’L J.L. & INFO. TECH. 31 (2012) (discussing the conflict between defamation law and freedom of speech on the internet, especially when considering anonymous speech).

27. See Sapna Maheshwari, *How Fake News Goes Viral: A Case Study*, N.Y. TIMES (Nov. 20, 2016), <http://www.nytimes.com/2016/11/20/business/media/how-fake-news-spreads.html> [<https://perma.cc/TY2Q-FJAJ>].

28. 17 U.S.C. § 512(c)(1)(C) (2012).

29. Numerous legal scholars, law students, and even federal judges have proposed that the notice-and-takedown scheme of the Digital Millennium Copyright Act (“DCMA”) be used as a model by which to alter § 230 of the Communications Decency Act; however, it continues to be a useful model for the explicit purposes of protecting individual rights that are harmed by fake news containing defamatory content. See, e.g., *Batzel v. Smith*, 333 F.3d 1018, 1032 n.19 (9th Cir. 2003) (proposing the notice-and-takedown provision of the DMCA as a possible solution to the problems created by the broad immunity provided in § 230); Michael L. Rustad & Thomas H. Koenig, *Rebooting*

this Recent Development, provides none of the societal benefits often provided by traditional news outlets,<sup>30</sup> and that is why fake news in particular needs to be quelled.

Analysis proceeds in four parts. Part I defines fake news as referenced in this Recent Development. Part II briefly examines the background of defamation law in the United States, including *N.Y. Times Co. v. Sullivan*,<sup>31</sup> and section 509 of the Communications Decency Act of 1996, codified as 47 U.S.C. § 230 (“§ 230”).<sup>32</sup> Part III analyzes the balance struck between the First Amendment rights that courts have historically tended to favor in the context of defamation lawsuits and three different potential forms of liability for websites that allow fake news stories to remain on their forums. This first form of liability for online publishers is the current one that is regulated by § 230. The second potential liability standard is publisher liability, in which websites would be liable for anything that they put or allow to be put on their site. The third system is distributor liability, which would allow for websites to avoid liability for disseminating fake news stories if they receive notice of the stories’ defamatory nature and remove them from the site within a designated time frame. Finally, Part IV argues that the third option, distributor liability, strikes the right balance between freedom of speech and the protection of an individual’s right to recover for unlawful harm to her reputation.

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*Cybertort Law*, 80 WASH. L. REV. 335, 343 (2005) (proposing “that Congress scale back § 230’s absolute immunity for ISPs by reformulating online intermediary law to harmonize elements from the common law of distributor liability, the Digital Millennium Copyright Act’s (DMCA) notice-and-takedown procedure, and the European Union’s E-Commerce Directive.”); Julie Hsia, Note, *Twitter Trouble: The Communications Decency Act in Inaction*, 2017 COLUM. BUS. L. REV. 399, 441 (2017) (recommending that the “notice and takedown” provision of the DMCA be used in the United States to combat unlawful material published on Twitter); Colleen M. Koch, Comment, *To Catch a Catfish: A Statutory Solution for Victims of Online Impersonation*, 88 U. COLO. L. REV. 233, 238–39 (2017) (suggesting amending § 230 to allow social networking sites to be found liable for harmful online impersonation, or “catfishing,” by using a similar “notice and takedown” provision to the one in the DMCA); Cecilia Ziniti, Note, *The Optimal Liability System for Online Service Providers: How Zeran v. America Online Got it Right and Web 2.0 Proves It*, 23 BERKELEY TECH. L.J. 583, 603 (2008) (“A formal notice-based system [akin to that in the DMCA] . . . would give injured parties a mechanism to request removal of offending content and service providers an incentive to take that content down—an incentive they argue that § 230 fails to provide.”).

30. See *infra* text accompanying notes 58–62.

31. 376 U.S. 254 (1964).

32. 47 U.S.C. § 230 (2012).

## I. FAKE NEWS DEFINED

The term “fake news” has recently been commandeered by a number of public figures and media outlets to convey displeasure over what is reported within a news report;<sup>33</sup> however, it is important to make key definitional distinctions before proposing how the legal community should make adjustments to that phenomenon. For the purposes of this Recent Development, “fake news” covers only inaccurate articles published online “in the guise of a genuine news story” that are created without any concern as to their truth or falsity.<sup>34</sup>

Publications in traditional media formats are not subject to any of the protections afforded to online publications; the statutory immunities that exist for online publishers of information make it harder for individuals whose reputations are illegally harmed to recover damages from those information publishers.<sup>35</sup> The thrust of the solution that would allow plaintiffs to recover from online publishers, thereby curtailing fake news, centers around changing § 230, which provides immunity for websites against tort claims as long as the domain owner does not contribute to or edit the allegedly tortious content appearing on the site.<sup>36</sup> The focus on fake news stories published on the internet stems in part from the fact that many online sources that distribute fake news stories do not set or enforce the strict internal standards to which many paper publications hold their employees.<sup>37</sup> These different standards that print and online

33. See Stephen Collinson, *An Amazing Moment in History: Trump's Press Conference*, CNN (Feb. 16, 2017, 5:13 PM), <http://www.cnn.com/2017/02/16/politics/donald-trump-press-conference-amazing-day-in-history/index.html> [<https://perma.cc/C3JJ-FKHF>] (reporting on President Trump's press conference in which he called reports about his alleged personal connections with Russia “fake news”); see also Alana Abramson, *White House Blasts 'Fake News,' Won't Answer Questions on Jared Kushner*, TIME (May, 30, 2017), <http://time.com/4798343/sean-spicer-fake-news-jared-kushner/> [<http://perma.cc/Y6R3-G6GM>] (relaying then-Press Secretary Sean Spicer's description of President Trump's frustration with certain negative stories, which he called “fake news”); Callum Borchers, *'Fake News' Has Now Lost All Meaning*, WASH. POST (Feb. 9, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/02/09/fake-news-has-now-lost-all-meaning/?utm\\_term=.c91dadf936](https://www.washingtonpost.com/news/the-fix/wp/2017/02/09/fake-news-has-now-lost-all-meaning/?utm_term=.c91dadf936) [<https://perma.cc/58Y8-ANKD>] (“[C]onservatives—led by President Trump—have hijacked the term [“fake news”] and sought to redefine it as, basically, any reporting they don't like.”).

34. See Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POL'Y 57, 66 (2017).

35. See *infra* Section III.A.

36. See 47 U.S.C. § 230.

37. Many online sources, particularly ones that disseminate fake news stories, do not have internal guidelines by which their employees or reporters must abide. *But cf.* N.Y. TIMES, ETHICAL JOURNALISM: A HANDBOOK OF VALUES AND PRACTICES FOR THE

publications are held to be important for reinforcing societal norms outside the legal system.

Additionally, fake news stories are sometimes written or produced by anonymous authors.<sup>38</sup> While anonymous speech encourages people to express opinions that they would ordinarily have kept to themselves,<sup>39</sup> it should not prohibit those harmed by a reckless misstatement, or worse by intentionally false stories, from receiving a remedy for harm to their reputation. As the Fourth Circuit has asserted, “[§] 230 was enacted, in part, to maintain the robust nature of internet communication and, accordingly, to keep government interference in the medium to a minimum.”<sup>40</sup> While this was and remains a worthy goal, § 230 has expanded beyond the purpose for which it was created—robust speech—and has devolved into an overprotective mechanism for those who break the law on the internet.<sup>41</sup>

This Recent Development does not seek to propose remedies for defamatory publications by traditional news outlets like newspapers, magazines, television, or radio stations. In addition to these news outlets not being granted statutory immunity to defamation like their online-only counterparts,<sup>42</sup> they also have notable internal

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NEWS AND EDITORIAL DEPARTMENTS 7 (Sept. 2004), [www.nytco.com/wp-content/uploads/NYT\\_Ethical\\_Journalism\\_0904-1.pdf](http://www.nytco.com/wp-content/uploads/NYT_Ethical_Journalism_0904-1.pdf) [<https://perma.cc/DMM4-N4T9>] (“The Times treats its readers as fairly and openly as possible. In print and online, we tell our readers the complete, unvarnished truth as best we can learn it. It is our policy to correct our errors, large and small, as soon as we become aware of them.”); *The Washington Post Standards and Ethics*, ASNE <http://asne.org/content.asp?contentid=335> [<https://perma.cc/SC74-MCTH>] (“The newspaper shall tell ALL the truth so far as it can learn it, concerning the important affairs of America and the world.”). Part of the reason for the rise in fake news is the immense number of sources that distribute or claim to distribute legitimate news. See *Gaughan*, *supra* note 34, at 65–66. The decline in the need for the traditional “gatekeepers” of national news has increased the acceptability of other sources, sometimes to the detriment of truth. See *id.*

38. See Vamialis, *supra* note 26, at 32.

39. *Id.*

40. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

41. For examples of further legal debate concerning the overprotective nature of § 230, see *supra* note 29.

42. See, e.g., *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 147 (1967) (“Newspapers, magazines, and broadcasting companies . . . inflict damage in the course of performing a service highly useful to the public . . . and injured persons should not be relegated to remedies which make collection of their claims difficult or impossible unless strong policy considerations demand.”) (quoting *Buckley v. N.Y. Post Corp.*, 373 F.2d 175, 182 (2d Cir. 1967)); *id.* at 150 (“The publisher of a newspaper has no special immunity from the application of general laws.”) (quoting *Associated Press v. Nat’l Labor Relations Bd.*, 301 U.S. 103, 132–33 (1937)); *Associated Press, Raleigh News & Observer Loses Libel Lawsuit from SBI Agent*, TIMES-NEWS (Oct. 19, 2016, 2:12 PM), <http://www.thetimesnews.com/news/20161019/raleigh-news--observer-loses-libel-lawsuit-from-sbi-agent> [<https://perma.cc>

mechanisms to avoid publishing falsehoods.<sup>43</sup> These traditional outlets are also liable for defamation committed by their employees under the doctrine of *respondeat superior*.<sup>44</sup>

Additionally, editorial sections of traditional media outlets like newspapers do not try to deceive readers into believing contentions within them are factual, but rather are “traditional forum[s] for debate, where intemperate and highly biased opinions are frequently presented and . . . often times should not be taken at face value.”<sup>45</sup> This notion of personal opinion not being subject to defamation claims has extended to personal social media accounts. For example, one federal court deemed a tweet incapable of defamatory meaning because the discussion on Twitter was filled with exaggerations, and the tweet in question was clearly a personal opinion.<sup>46</sup> In another case, a state court in New York dismissed a defamation claim against President Donald Trump and members of his campaign staff because the plaintiff could not show that the allegedly defamatory statements made via social media posts, during his campaign, rose to anything more than personal opinion.<sup>47</sup> Thus, social media posts from the personal accounts of named private individuals are akin to newspaper editorial sections—not likely to be considered capable of defamatory meaning—and are not considered fake news within this Recent Development. The key distinction between personal opinion or editorial pages on websites and fake news is that in context, the former is generally not perceived as a genuine news story.

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/ZT5W-728Y] (reporting on a jury finding a North Carolina newspaper liable for libel after publishing statements from firearms experts questioning a SBI agent’s ballistics analysis, as well as their suspicions that she helped falsify evidence to help prosecutors win a murder conviction in 2006).

43. See, e.g., N.Y. TIMES, *supra* note 37, at 7. (“The Times treats its readers as fairly and openly as possible. In print and online, we tell our readers the complete, unvarnished truth as best we can learn it. It is our policy to correct our errors, large and small, as soon as we become aware of them.”).

44. See RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. LAW INST. 2006) (“An employer is subject to liability for torts committed by employees while acting within the scope of their employment.”).

45. Keohane v. Stewart, 882 P.2d 1293, 1301 (Colo. 1994).

46. See Feld v. Conway, 16 F. Supp. 3d 1, 4 (D. Mass. 2014) (holding the tweet “Mara Feld . . . is fucking crazy,” when viewed in the context of the entire Twitter feed, could not reasonably be anything other than opinion and was therefore constitutionally privileged).

47. Jacobus v. Trump, 51 N.Y.S. 3d 330, 339–40 (N.Y. Sup. Ct. 2017) (explaining that New York courts are less likely to find defamation in statements made on social media than on other platforms because those online forums welcome a broad array of emotional and imprecise communication).

Finally, historically, pieces or remarks that are clearly opinion,<sup>48</sup> parody,<sup>49</sup> or hyperbole<sup>50</sup> are constitutionally privileged and cannot be subject to a truth or falsity investigation by the courts; therefore, these categories of articles are not the subject of discussion in this Recent Development. The affirmative defense that fake news is parody or hyperbole may be raised in a defamation case concerning fake news, but the Supreme Court has established limits on what it will accept as defenses to defamation law.<sup>51</sup>

While determining the intent of the makers of fake news is not critical to this Recent Development, it is interesting to note that for the most part, the writers of the most relevant fake news stories are not politically or ideologically motivated, but rather, are financially motivated.<sup>52</sup> For example, an investigation by Craig Silverman, who reported extensively on fake news for BuzzFeed, discovered that young people in rural Macedonia would investigate topics doing well on Facebook (usually extreme right-wing material), republish the story with a new sensationalized headline on their websites, and share it on Facebook.<sup>53</sup> Every click from Facebook to the false news story generated a significant amount of advertising revenue for the websites, and the Macedonian teens received more ad revenue for U.S.-based Facebook users than users from any other country.<sup>54</sup> Even though the fake news articles were politically charged, the writers often did not share those radical views.<sup>55</sup> For those writers, fake news articles were simply a way to make money.<sup>56</sup> This particular type of speech can cause significant reputational harm to individuals, and

48. *Keohane*, 882 P.2d at 1293.

49. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 46–47 (1988) (holding that a parody of Jerry Falwell was not actionable because parodies are protected speech).

50. *Greenbelt Coop. Publ'g Ass'n. v. Bresler*, 398 U.S. 6, 13 (1970) (holding that although the defendant newspaper quoted a third party declaring the plaintiff's actions were “blackmail” during a contentious public meeting, it was clearly not imputing that the plaintiff committed the crime of blackmail; therefore, the statement was a hyperbole and the newspaper article quoting the statement was not actionable under defamation law).

51. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990) (recognizing that “[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation” in a case where a gym teacher was accused of “perjury” in a newspaper article and reversing dismissal of the claim) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)).

52. *Fake News Expert*, *supra* note 17 (discussing some of the fake news stories on the 2016 presidential election).

53. Craig Silverman & Lawrence Alexander, *How Teens in the Balkans Are Duping Trump Supporters with Fake News*, BUZZFEED NEWS (Nov. 3, 2016, 7:02 PM), [https://www.buzzfeed.com/craigsilverman/how-macedonia-became-a-global-hub-for-pro-trump-misinfo?utm\\_term=.nd4JvPje9#.mwNLPgEOJ](https://www.buzzfeed.com/craigsilverman/how-macedonia-became-a-global-hub-for-pro-trump-misinfo?utm_term=.nd4JvPje9#.mwNLPgEOJ) [<https://perma.cc/JBU6-UF98>].

54. *Id.*

55. *Id.*

56. *Id.*

there should be little to no interest in protecting it because it is not in line with any of the important values that United States courts seek to protect under the First Amendment.<sup>57</sup>

Therefore, this Recent Development will focus solely on stories posted on the internet, not including personally constructed social media posts. A claim from a prospective defendant that the piece was opinion, and thus not subject to the same level of scrutiny as publications in other areas, is not problematic because courts will be able to deal with those claims as they would in any other defamation claim. To reiterate, the term “fake news” within this Recent Development refers to inaccurate stories published online “in the guise of a genuine news story” without regard for their truth or falsity.<sup>58</sup>

## II. THE CURRENT STATE OF DEFAMATION LAW AND ITS APPLICATION ON THE INTERNET

### A. Defamation Law

The seminal case in American defamation doctrine is *N.Y. Times Co. v. Sullivan*.<sup>59</sup> The Court concluded that in the interest of promoting free speech and avoiding a chilling effect on the expansive libel law creates, some false speech should be protected.<sup>60</sup> The *Sullivan* court held that defamation requires a showing of “actual malice” in cases where the allegedly defamatory content concerns a public official’s official conduct.<sup>61</sup> The Court decided to add a fault element requiring the plaintiff prove the defendant either knew that the claim was false or made the statement with reckless disregard for its accuracy.<sup>62</sup> This standard, the Court believed, would promote “[d]ebate on public issues [that is] uninhibited, robust, and wide open, and that it well may include vehement, caustic, and sometimes

57. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (asserting certain categories of speech, including libelous statements, “are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality”); see also *infra* Section II.A (explaining the Court’s rationale in the seminal defamation case, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), when it held the interests of a free press outweighed the individual interests of a person’s reputation).

58. See Gaughan, *supra* note 34, at 66.

59. 376 U.S. 254 (1964).

60. *Id.* at 298–99 (Goldberg, J., concurring).

61. *Id.* at 280 (majority opinion).

62. *Id.*; see also *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 666, 667 (1996) (holding that ill will or profit motive is not enough, by itself, to meet the actual malice standard).

unpleasantly sharp attacks on government and public officials.”<sup>63</sup> After this decision, defamation of public officials required several elements: (1) a false statement; (2) capable of defamatory meaning; (3) of and concerning the plaintiff; (4) to a third-party; (5) made with actual malice; (6) and that the statement was not privileged in any way.<sup>64</sup>

*Sullivan* is most relevant when the plaintiff in a defamation claim is a public figure;<sup>65</sup> however, the fault standard varies depending on the type of plaintiff and the type of damages the plaintiff is seeking.<sup>66</sup> Later Supreme Court cases identify the fault standards for different types of plaintiffs and define who falls under the various plaintiff distinctions.<sup>67</sup>

First, a public official is someone who is “among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs.”<sup>68</sup> Second, a plaintiff may be classified as a public figure, and subclassified as either a general or limited purpose public figure. A general purpose public figure is one who is generally known and famous enough to garner attention from the public.<sup>69</sup> Limited purpose public figures are those who have “thrust themselves to the forefront of a particular public controvers[y] in order to influence the resolution of the issue[] involved. [They] invite attention and

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63. *Sullivan*, 376 U.S. at 270.

64. *See id.* at 256–84.

65. *Harte-Hanks Commc'ns, Inc.*, 491 U.S. at 666 (stating “there is no question that public figure libel cases are controlled by the *New York Times* standard” of actual malice).

66. *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (holding that private citizens seeking to recover actual damages for reputational damage, even if the article subject matter is of public concern, do not have to prove actual malice).

67. *See, e.g.*, *Time, Inc. v. Firestone*, 424 U.S. 448, 466 (1976) (holding a private citizen embroiled in a highly-publicized divorce was not a “public figure,” and she could prevail on a libel claim without proving the defendant publication acted in actual malice); *Long v. Cooper*, 848 F.2d 1202, 1204–06 (11th Cir. 1988) (holding that a corporation and its president were not limited purpose public figures because neither injected themselves into or publicly addressed the newsworthy controversy over which the defamatory statements were made).

68. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

69. *See Time, Inc.*, 424 U.S. at 486 (Marshall, J., dissenting).

comment.”<sup>70</sup> Finally, a private figure is anyone who does not fall into one of the above three categories.<sup>71</sup>

The table below shows how the required minimum fault standards vary between class of plaintiff and within classes of plaintiffs depending on whether the comment is on a matter of public or private concern and what type of damages the plaintiff is seeking.

**Figure 1**<sup>72</sup>

| <b>Type of Plaintiff</b>  | <b>Actual Damages<br/>Fault Requirement</b>     | <b>Punitive Damages<br/>Fault Requirement</b> |
|---|---|---|
| <b>Public Official/Public<br/>Figure and Public<br/>Concern</b> | Actual Malice                                   | Actual Malice                                 |
| <b>Private Figure and<br/>Public Concern</b>                    | At least Negligence                             | Actual Malice                                 |
| <b>Private Figure and<br/>Private Concern</b>                   | Negligence<br>(potentially strict<br>liability) | Does not require<br>Actual Malice             |

Where actual malice is not required, states are free to implement whatever fault standard they deem appropriate. However, when a publication issues a false statement about a public figure in a matter of public concern, in order for the subject to recover damages, the false statement must have been made with actual malice.<sup>73</sup> Similarly, for a private figure to recover punitive damages when the false statement was made regarding her involvement in a matter of public concern, she must also prove actual malice.<sup>74</sup>

70. *Gertz*, 418 U.S. at 345; *see also* *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980) (“[A] person has become a public figure for limited purposes if he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants.”).

71. *See Gertz*, 418 U.S. at 344–45 (describing the various reasons for providing greater protections to private plaintiffs in defamation actions, and distinguishing those private plaintiffs by describing what constitutes a public figure).

72. *See supra* notes 59–71 and accompanying text. Special thanks to Professor Mary-Rose Papandrea for providing the figure in her Media Law class.

73. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989).

74. *See Gertz*, 418 U.S. at 367.

Recovery for a prospective plaintiff thus hinges on the category of plaintiff in which a court places the person, as well as the subject of the story and the type of damages a plaintiff is seeking. However, it is unlikely that fake news stories that receive substantial amounts of attention would focus on plaintiffs who fall outside of the public official or public figure category, and even less likely that the story would not be a matter of public concern. With the current state of defamation law now enunciated, this Recent Development moves to defamation law's application to the internet.

*B. Intermediary Liability for Traditional News Outlets under Common Law.*

Traditionally, media outlets could be held to three different standards of liability depending on the type of outlet and how it disseminated information. The first is publisher liability, the scenario put forth in *N.Y. Times Co. v. Sullivan*, in which the news outlet may be held liable for anything it prints, regardless of whether or not the news outlet or its staff actually created the content.<sup>75</sup> The second is distributor liability, which applies to “one who only delivers or transmits defamatory matter published by a third person . . . if, he knows or has reason to know of its defamatory character.”<sup>76</sup> “Generally, a distributor, such as a newsstand, bookstore, or library, has no duty to examine, for defamatory content, the various publications being offered.”<sup>77</sup> The last traditional form of liability is conduit liability, where parties are subject to liability for transmitting defamatory material if they “participate” in production of the material.<sup>78</sup>

*C. Section 230 Immunity for Websites.*

Thanks to the existence of § 230, websites that disseminate information are held to a different standard than their traditional print media counterparts.<sup>79</sup> This statute grants websites immunity to defamation claims by stating that “[n]o provider or user of an interactive computer service shall be treated as the publisher or

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75. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 262 (1964) (concerning an allegedly libelous advertisement written and paid for by a civil rights organization, but published in *The New York Times*).

76. RESTATEMENT (SECOND) OF TORTS § 581(1) (AM. LAW INST. 1977).

77. William E. Buelow III, *Re-Establishing Distributor Liability on the Internet: Recognizing the Applicability of Traditional Defamation Law to Section 230 of the Communications Decency Act of 1996*, 116 W. VA. L. REV. 313, 321 (2013).

78. See *In re Med. Lab. Mgmt. Consultants*, 931 F. Supp. 1487, 1492 (D. Ariz. 1996).

79. 47 U.S.C. § 230 (2012).

speaker of any information provided by another information content provider.”<sup>80</sup> As long as the interactive computer service is not the information content provider or “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service,” it cannot be held liable for defamation.<sup>81</sup>

Practically, this means that as long as a website does not create the content that it displays, then it is not liable for whatever information is provided on that website. For example, in *Zeran v. American Online, Inc.*,<sup>82</sup> Zeran sued American Online, Inc. (“AOL”) for failing to remove hoax advertisements posted by an anonymous third party on an AOL bulletin board.<sup>83</sup> The advertisement featured shirts with inappropriate slogans about the Oklahoma City bombing and included Zeran’s phone number for inquiries.<sup>84</sup> As a result, Zeran received angry calls and death threats.<sup>85</sup> Zeran notified AOL, but AOL did not remove it from the website.<sup>86</sup> Even though AOL received notice of the harmful material, the computer service provider was immune from liability because a third party and not AOL created the defamatory material.<sup>87</sup>

In enacting the Communications Decency Act, Congress decided that it was in the best interest of the country to offer a forum “for true diversity of political discourse, [and] unique opportunities for cultural development”<sup>88</sup> by “promot[ing] the continued development of the Internet.”<sup>89</sup> *Zeran* demonstrates that Congress created a tremendous barrier to recovery for defamation when it passed § 230. Despite the admirable intentions of Congress, it is unlikely that anyone anticipated the breadth and impact that the internet would have twenty years later. The statute, as it stands, does not provide adequate protections for defamed individuals and protects far more false, and oftentimes, illegal speech than necessary to ensure a robust freedom of speech.

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80. § 230(c)(1).

81. § 230(f)(3). Websites cannot escape liability for publishing material that violates federal criminal law, communications privacy law, and intellectual property law. § 230(e)(1), (2), (4).

82. 129 F.3d 327 (4th Cir. 1997).

83. *Id.* at 328.

84. *Id.* at 329.

85. *Id.*

86. *Id.* at 329, 331.

87. *Id.* at 328–29.

88. 47 U.S.C. § 230(a)(3) (2012).

89. § 230(b)(1).

### III. STRIKING THE RIGHT BALANCE: DIFFERENT FORMS OF LIABILITY FOR WEBSITES AND FREEDOM OF SPEECH

In reviewing who may be liable for defamation for fake news published on the internet, it is important to note why targeting websites may be the most effective method in both obtaining remedies for the person harmed as well as deterring the dissemination of fake news. While attempting to hold the author of fake news liable is always a viable remedy,<sup>90</sup> it is not necessarily practical. First, many authors of fake news publications are anonymous,<sup>91</sup> and second, even if one could discover the author's identity, fake news is sometimes developed in other countries by those without sufficient resources to provide an adequate remedy.<sup>92</sup> And therein lies part of the issue. Since it is not financially reasonable to file a claim against an individual who is neither in an American court's jurisdiction nor likely to be able to provide any financial compensation in a lawsuit, why waste the time and money suing? Holding websites rather than individual users accountable would better enable financial recovery and would also place an onus on websites to be more cognizant of how people are using their platform.

Below, the three different types of intermediary liability are analyzed in the context of their application to websites and fake news. The first type is the one currently in place under § 230, which promotes a robust free flow of information and is very protective of the freedom of speech. The second type of liability, publishers liability, would treat websites like traditional media outlets. This system strikes a balance that favors protecting individual liberties over the freedom of speech. Finally, this Recent Development introduces distributor liability, which maintains immunity for websites who do not have knowledge nor should have had knowledge about defamatory material on the site, and this Recent Development explains the Digital Millennium Copyright Act's notice and takedown provision.<sup>93</sup>

#### *A. Liability for Websites Under § 230.*

As previously discussed, if a website did not create the content of a fake news story, it is not subject to liability as an author or

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90. See § 230(e)(3).

91. See *supra* text accompanying notes 38–39.

92. See *supra* text accompanying notes 53–56 (explaining the influx of fakes news stories on the U.S. presidential election generated by teens in a poor, rural town in Macedonia).

93. See 17 U.S.C. § 512 (2012).

publisher.<sup>94</sup> As such, it is unlikely that continuing to treat fake news in this way will provide adequate recourse for plaintiffs or effectively deter potential fake news authors. However, it is possible that courts could get creative with what actually constitutes an “information content provider”<sup>95</sup> and hold that websites are not so liberally granted § 230 immunity. *Fair Housing Council of San Fernando Valley v. Roomates.com, LLC*<sup>96</sup> provides an example of the type of protections that courts have the power to implement while keeping § 230 in place.

In that case, Roomates.com was sued for violations of the Fair Housing Act (“FHA”)<sup>97</sup> because the website allowed users to describe their ideal roommate in comment boxes, and also required users answer questions about the user’s roommate preferences through drop-down menus.<sup>98</sup> Specifically, users were required to disclose their own and their preferences for their roommate’s sex, sexual orientation, and whether they would bring children.<sup>99</sup> The district court held § 230 granted Roomates.com immunity from all claims, but the Ninth Circuit disagreed.<sup>100</sup> The Ninth Circuit remanded the case to the district court to determine if Roomates.com was liable for violation of the FHA for promoting discrimination in housing situations.<sup>101</sup> While the comments section retained immunity under § 230,<sup>102</sup> the court found that by requiring users to disclose preferences via the drop-down menus, the website utilized a “discriminatory filtering process” and “designed its search and email systems to limit the listings available to subscribers based on sex, sexual orientation, and presence of children.”<sup>103</sup> Section 230 was previously understood to shield websites from potential liability under laws implicating publishers or content creators, so long as the website did not create the content.<sup>104</sup> The FHA claims against Roomates.com were not defamation claims but would presumably fall under the § 230 umbrella because the allegedly discriminatory roommate and housing preferences were generated by third-party

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94. *See supra* Section II.C.

95. 47 U.S.C. § 230(c)(1).

96. 521 F.3d 1157 (9th Cir. 2008).

97. 42 U.S.C. § 3601 (2012) (prohibiting housing intermediaries from discriminatory practices against housing applicants based on, among other things, sex and familial status).

98. *Roomates.com*, 521 F.3d at 1161–62.

99. *Id.* at 1169.

100. *Id.* at 1175.

101. *Id.*

102. *Id.*

103. *Id.* at 1169.

104. *Id.* at 1173–74.

users.<sup>105</sup> The dissent voiced concern with the majority's determination, stating it seems arbitrary in light of the statute and is likely to chill free speech by forcing websites to become "Net Nannies" that filter a substantial amount of content.<sup>106</sup>

The Communications Decency Act, despite the contentions of the dissent in *Roommates.com*, still provides ample protection for websites with user-generated content published on the site; however, the majority opinion left the door cracked a bit for expansion as to what the term "information content provider" includes. There are cases in which courts have refused to dispose of § 230 immunity in defamation cases because they did not find that the websites created the content.<sup>107</sup> However, it is possible that courts could become more plaintiff-friendly in deciding the fact-specific question of what constitutes an information content provider.<sup>108</sup>

While there is still potential for defamation liability for fake news under the current system of website liability, the current liability scheme ultimately provides the vast and encompassing protection of the freedom of speech contemplated by Justice Brennan in *N.Y. Times Co. v. Sullivan* and by Congress in its enactment of § 230. Simply providing a space for users to post links and comments on a social media website or in the comment section on a website is unlikely to ever be an exception to § 230, as was seen in *Roommates.com*, and that is one key method by which fake news is spread.<sup>109</sup> The individual rights of those harmed by the spread of fake news via intermediary websites are strongly outweighed by protections that Congress gave websites with § 230. However, moving forward, is this type of speech worth protecting? The *Sullivan* Court wanted to grant more leeway for false speech in order to avoid stifling

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105. *Id.* at 1163.

106. *See id.* at 1187–88 (McKeown, J., dissenting).

107. *See, e.g., Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 417 (6th Cir. 2014) (holding that the website, [www.TheDirty.com](http://www.TheDirty.com), allowed unlawful material to be posted on the website, but protected its § 230 immunity because the publisher did not "materially contribute to the tortious content"); *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com*, 591 F.3d 250, 260 (4th Cir. 2009) (holding that the plaintiff failed to show that *ConsumerAffairs.com* was an information content provider for any of the allegedly libelous posts on a consumer review website concerning plaintiff's car dealership).

108. *See, e.g., FTC v. Accusearch Inc.*, 570 F.3d 1187, 1201 (10th Cir. 2009) (holding that a website lost § 230 immunity because it "solicited requests for confidential information [that it did not create] protected by law, paid researchers to find it, knew that the researchers were likely to use improper methods, and charged customers who wished the information to be disclosed").

109. *See Maheshwari, supra* note 27.

public discussion,<sup>110</sup> but fake news is entirely false speech used to obliterate public discussion and potentially destroy individuals' reputations.

*B. Publishers Liability for Websites*

While § 230 provides too much protection for websites, publishers liability goes too far in the other direction in protecting individual rights at the expense of free speech. Traditionally, without the protections granted by § 230, a publisher could be held liable for anything published within its platform, regardless of whether or not the publisher created the content.<sup>111</sup> *N.Y. Times Co. v. Sullivan* provides an illustrative example of publishers liability. The New York Times was sued for defamation for content appearing in an “editorial advertisement,” despite the fact that the newspaper staff did not create any of the content within the advertisement.<sup>112</sup> There was no debate that the newspaper *could* be held liable for defamation as the intermediary as a matter of law, but only whether they *should* be held liable based on the facts.

Should this type of liability be extended to the internet and replace § 230, it would most certainly over-correct for the holes currently in existence. Hyperbolic and opinionated comments would still not impute liability on the website, as editorial sections do not convey liability in newspapers;<sup>113</sup> however, it is unlikely that websites would be willing to risk liability by providing open forums for third-party visitors. Under this system of liability, websites would be so fearful of litigation that it would not be fiscally responsible to maintain the same kind of free flow of information imagined by Congress when it passed § 230.<sup>114</sup> In fact, the concerns of Judge McKeown in his dissent in *Roommates.com* would become very real

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110. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

111. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at \*4–5 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act of 1996, Pub. L. 104–104, § 509(c)(1), 110 Stat. 56, 137–39 *as recognized in* *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 952 N.E.2d 1011, 1015 (N.Y. 2011) (dismissing a motion for summary judgment by a computer network provider in a libel lawsuit because the provider was a “publisher” of third-party statements on its bulletin board). In both *Zeran* and *Roommates.com*, the courts stated that Congress sought to prevent the result in *Stratton Oakmont* when it enacted § 230. See *Roommates.com*, 521 F.3d at 1163; *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

112. *Sullivan*, 376 U.S. at 255.

113. See *supra* text accompanying note 45.

114. See 47 U.S.C. § 230(a)(4) (2012) (“The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.”).

under the context of a publisher liability system for websites: “the burden of filtering content would be unfathomable,”<sup>115</sup> websites would “have no choice but to severely limit its use,” and “[s]heer economics would dictate that vast quantities of valuable information be eliminated from websites.”<sup>116</sup> Clearly, this scheme would present too much of the “chilling effect” that Justice Goldberg was concerned about in *Sullivan*.<sup>117</sup> Publishers liability is much more reasonable for traditional media publications because there is only so much space in a newspaper or magazine. The publisher can control what goes in and monitor it closely. However, interactive computer services that encourage open and robust discussion would either have to monitor potentially vast numbers of posts and contributions, or drastically limit availability of open forums. The former is unworkable as a matter of practicality for websites, and the latter flies in the face of exactly what the Constitution and judicial and legislative precedent have encouraged. While holding purveyors of fake news liable is important, it cannot and should not be done to this extent at the expense of the First Amendment.

*C. Distributor Liability and the “Notice and Takedown” Provision of the Digital Millennium Copyright Act*

Under common law, distributor liability may be incurred by a person who transfers the material from the author to the consumer.<sup>118</sup> These transfers could encompass “selling, renting, giving or otherwise transferring or circulating a book, paper, magazine, document or phonograph record containing defamation published by a third person.”<sup>119</sup> This is knowledge-based liability, so if a distributor knows or should have known about defamatory material in the publication they are disseminating, then they have the same potential liability as the publisher.<sup>120</sup> This system is the one that strikes the best balance between individual rights and freedom of speech while still being able to combat fake news.

If websites are considered by law to be distributors of information when they are simply the medium through which people

115. *Roommates.com*, 521 F.3d at 1188 (McKweon, J., dissenting).

116. *Id.* (quoting Brief for News Organizations as Amici Curiae in Support of *Roommates.com* at 22, *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2010) (Nos. 04-56916, 04-57173)).

117. 376 U.S. at 300 (Goldberg, J., concurring).

118. Buelow, *supra* note 76, at 320–21.

119. RESTATEMENT (SECOND) OF TORTS § 581 cmt. b (AM. LAW INST. 1977).

120. *Id.* § 581(1).

communicate, then fake news might be effectively combated while still preserving a rich communal debate. However, if websites had to investigate everything written on the site, it is unlikely they would meet the knowledge requirement of distributor liability, and would be able to surreptitiously claim sheer volume as a reason that they did not spot and remove defamatory material. The DMCA provides an analogous law from which one could build a system that is fair to the websites, the subjects of defamatory fake news, and to the nation's interest in having a robust freedom of speech right.

The rise of the internet has presented new problems to copyright law, just as it has for defamation law. In order to establish copyright infringement, "two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original."<sup>121</sup> Congress enacted the DMCA in 1998 "in an effort to adapt U.S. copyright law to the challenges posed by digital technologies and the online environment."<sup>122</sup>

The prescient point of the DMCA is the notice and takedown provision.<sup>123</sup> In order for a website to avoid liability for copyright infringement, a service provider must demonstrate "good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing."<sup>124</sup> If the website is notified of potential copyright infringement, it will not be held liable if it takes the allegedly infringing work down.<sup>125</sup>

#### IV. THE MERITS OF USING THE DIGITAL MILLENNIUM COPYRIGHT ACT AS A GUIDEPOST IN COMBATING FAKE NEWS ONLINE

The above described formula combining traditional distributor liability and the "notice and takedown" scheme of the DMCA should be applied to websites and fake news.<sup>126</sup> As long as websites keep a

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121. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991). For additional information on what may be registered as a copyright and the procedures for registering a copyright, see generally *Copyright Basics*, U.S. COPYRIGHT OFF. (2012), <https://www.copyright.gov/circs/circ01.pdf#page=7> [<https://perma.cc/6HV9-E25E>].

122. DAVID KOHLER ET AL., *MEDIA AND THE LAW* 621 (2d ed. 2014).

123. 17 U.S.C. § 512 (2012).

124. § 512(g)(1).

125. *See id.*

126. This suggestion is not novel, and the DMCA provides a useful model by which scholars have suggested revising § 230. *See* Vanessa S. Browne-Barbour, *Losing Their License to Libel: Revisiting § 230 Immunity*, 30 BERKELEY TECH. L.J. 1505, 1559 (2015) (suggesting revising § 230 to model the notice-and-takedown provisions of the DMCA to allow for more recoveries from Internet intermediaries and third-party users in

record of their alerts and monitor exceedingly suspicious articles that are not linked to a verifiable source, then they should only be liable for defamatory publications on their sites if they should have known or did know about the material. Not only does this system allow for recovery by harmed individuals, but it also puts the onus on the public to report fake news to the individuals about which it is posted. While this “notice and takedown” plan will certainly curb some public discourse, it would not be as dramatic of a change as implementing publisher liability, and it would give substantially more protection to individuals who have been defamed. Additionally, the discourse sought to be curtailed by this suggestion is completely false and is intended to misinform and mislead the public. This system also allows for a temporary takedown to review the material to ensure that it is in fact real news.

While the “notice and takedown” provision of the DMCA provides a model by which Congress can modify § 230 to increase liability for websites that maintain fake news articles on their forums, the model is not a precise fit. The DMCA has certain foundational elements that make claims of its violation both less likely to be abused and easier to identify. First, claims of a violation of the DMCA are made by parties “under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.”<sup>127</sup> The statute limits those who are properly able to bring the suit and stamps them with the responsibility to honestly report a violation.<sup>128</sup> Additionally, in notifying the website, the complainant must identify “the copyrighted work claimed to have been infringed”<sup>129</sup> and “information reasonably sufficient to permit the service provider to locate the material.”<sup>130</sup>

It may, admittedly, be difficult to develop a statute that limits reporting of potentially defamatory fake news articles to a

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defamation claims); Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 622–23 (2001) (using the notice-and-takedown provision of the DMCA to provide an example that illustrates how Congress had previously required online intermediaries to protect “victims’ injuries at the hands of third parties”); Stephanie Blumstein, Note, *The New Immunity in Cyberspace: The Expanded Reach of The Communications Decency Act to the Libelous “Re-Poster,”* 9 B.U. J. SCI. & TECH L. 407, 431 (2003) (contending that statutory revisions to § 230 should model the notice-and-takedown provisions of the DMCA).

127. 17 U.S.C. § 512(c)(3)(A)(vi).

128. § 512(c)(3)(A)(v) (asserting that a complainant must provide “[a] statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law”).

129. § 512(c)(3)(A)(ii).

130. § 512(c)(3)(A)(iii).

manageable level like the DMCA does. First, if only the person who is allegedly suffering reputational harm could file these reports, how would that person go about proving to the website that they are the subject of the story to a degree that would justify the website using time and resources to investigate the allegedly defamatory material? Unlike with copyright registration, people might not be comfortable providing other personal governmental registration information to websites in order to prove their identities; for example, it is unlikely an individual would send their social security information to a website in order to prove her identity. Next, website owners who are alerted of potential copyright violations are provided with the work that is copyrighted to allow for an efficient investigation.<sup>131</sup> This is not possible for website owners who are alerted to stories that are allegedly entirely fabricated. The reporting party would essentially be tasked with proving a negative, thus imputing substantially more investigative responsibility upon the domain owner to determine whether a story has a total absence of truth.

The issues presented do pose problems, but not unworkable ones. It is logical that only copyright owners or those authorized to act for them are able to report infringement as they are invested with an intellectual property interest in the copyright. The simplest, most straightforward way to translate this to the fake news context would be to require individuals to provide the website with a signed affidavit asserting that their reputation is being harmed by a fake news article. Ideally, this, and the threat of both civil litigation and perjury charges would deter those who may seek to abuse the system. As previously discussed, this Recent Development proposes imputing distributor liability upon these websites: they may be held liable if they “knew or should have known” about the defamatory material.<sup>132</sup> This allows for more flexibility for websites to manage how they investigate reports of fake news. Perhaps having a regulated system for investigation could be a condition that would alleviate most of that liability.<sup>133</sup>

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131. Chris Sprigman & Mark Lemley, Opinion, *Why Notice-and-Takedown is a Bit of Copyright Law Worth Saving*, L.A. TIMES (Jun. 21, 2016, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-sprigman-lemley-notice-and-takedown-dmca-20160621-snap-story.html> [<http://perma.cc/38TZ-WYBU>].

132. See *supra* Section III.C; see also RESTATEMENT (SECOND) OF TORTS § 581(1) (AM. LAW INST. 1977).

133. This potential solution is analogous to another realm of legal action: derivative claims. See *Rahbari v. Oros*, 732 F. Supp. 2d 367, 382 (2d Cir. 2010). For a board of directors to be liable for breach of fiduciary duties under the lack of oversight theory, a plaintiff must show “(a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from

The proposition of altering § 230 is intended to cure the issues created by fake news, not on the margins, but on the extremes. Another alternative to accomplish this goal may be to allow websites to avoid liability if they were negligent in allowing a fake news story to remain on the forum, but hold sites liable if the domain owner allowed a story to remain with actual malice.<sup>134</sup> This standard would mean that as long as websites did not avoid investigating reports with reckless disregard, they would not be held liable for any defamatory content.<sup>135</sup> It would mean AOL would likely not be immune from liability for leaving the defamatory post about Zeran on its bulletin board after Zeran notified the company that he was being harassed,<sup>136</sup> but Roommates.com would possibly not be in violation of the Fair Housing Act when it negligently required users to indicate their roommate preferences in a drop-down menu.<sup>137</sup> In the context of attempting to eliminate purely false stories, this may mean doing a brief search of sources cited or a quick search for any reputable support for the story. With this system—or a system like it—in place, reports made based on unhappiness with a story rather than concern with its truthfulness could be dealt with quickly, as most stories with adequate support could be efficiently supported. Also, not every report would require investigation, because once a story is “cleared,” any further investigation would be unnecessary, thus helping with the potential volume of complaints.

With the possibility of liability for websites, domain owners are less likely to be concerned with providing a forum for speech and more likely to be concerned with protecting their wallets; however, under a DMCA-like system, they can lean on the public to inform them of defamatory material. Additionally, it can also help with the notion that once it is on the internet, it cannot be removed. Under this system, if someone publishes a fake news story on Facebook and it is reported and taken down, but the story is posted on Reddit before it could be removed, Reddit would be under obligation to take it down once they got notice as well. Memory of the fake news would remain, but it would not permeate headlines on sites that people trust, and if they did, then the legal system would present an avenue

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being informed of risks or problems requiring their attention.” *Id.* (quoting *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006)). In other words, if a board has an oversight system in place, it is very difficult for an action against the board to survive the motion to dismiss phase under the lack of oversight theory.

134. *See supra* Part II.

135. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

136. *See supra* notes 82–89 and accompanying text.

137. *See supra* notes 96–106 and accompanying text.

through which someone could recover for any reputational harm. The political news cycle in particular moves quickly, and it is likely that while a story is being investigated by a domain owner it is also being shared in multitudes over any number of social media outlets. However, if the story is ultimately removed and the links are disconnected, the only place to find the text would probably be on private individuals' profiles. Those who rely on individual posts as the basis for their beliefs are unlikely to be persuaded by any action taken by websites or the legal system.<sup>138</sup> While potential damage from fake news is likely to remain, this system is proposed in order to minimize that damage to the greatest extent possible. The system is by no means perfect, but it does strike a reasonable and workable balance between protecting the reputational rights of individuals and protecting the national interest in having a robust freedom of speech.

#### CONCLUSION

The spread of fake news on the internet poses substantial threats to the reputations of parties without any meaningful recourse to recover from those responsible for the dissemination of defamatory content. While these individual harms are grave and are made especially difficult to bear because the motive for creation is either for profit or with the intent to defame, the legal system cannot rush to create avenues for recovery at the expense of a robust protection of free speech. There is no simple answer to how defamation law should evolve to deter the creation of fake news and provide recovery for those harmed by it, all the while protecting freedom of speech. However, the pervasiveness of fake news and the threat of its corrosiveness on both discourse and relationships require serious thought be given to revising § 230 of the DMCA.<sup>139</sup> By implementing a notice and takedown requirement similar to that in the DMCA, websites will have the opportunity to remove defamatory posts without fear of liability, and individuals will be able to receive financial restitution from those websites in the event that they do not remove fake news. Welch entered Comet Pizza with the intent to harm someone, but had the "Pizzagate" story been removed from

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138. See *Fake News Expert*, *supra* note 17 ("[W]hen we're confronted with information that contradicts what we think and what we feel, the reaction isn't to kind of sit back and consider it. The reaction is often to double down on our existing beliefs.").

139. Buelow, *supra* note 77, at 356 ("[T]here is nothing so inherently unique to this medium that justifies a wholesale discounting of traditional defamation law . . . . [T]he consequences of defamatory statements posted to Cyberspace frequently have consequences in the real world.").

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Reddit, Infowars or any of the other sites by which it was disseminated sooner, he may never have been there. It is worth discussing amending § 230 not only because it can provide actual relief to those harmed, but also because reform may negate rash and outlandish actions by those who seek to do others harm based on completely false publications.

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