

FAKE NEWS FROM A LEGAL PERSPECTIVE: THE UNITED STATES AND SOUTH KOREA COMPARED

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I. INTRODUCTION

“Fake news” has emerged as a pressing concern since the 2016 U.S. presidential election. As media columnist Jim Rutenberg of *The New York Times* noted in November of 2016, “[t]he internet-borne forces that are eating away at print advertising are enabling a host of faux-journalistic players to pollute the democracy with dangerously fake news items.”¹ Similarly, *The Washington Post* media columnist Margaret Sullivan, a former *New York*

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1. Jim Rutenberg, *Media’s Next Challenge: Overcoming the Threat of Fake News*, N.Y. TIMES, Nov. 6, 2016, at B1, https://www.nytimes.com/2016/11/07/business/media/medias-next-challenge-overcoming-the-threat-of-fake-news.html?_r=0.

Times public editor, wrote one month later that “the era of fake news causing real trouble” has arrived in the United States.²

Publishing fake news has been around as a legal issue for many years.³ As early as the late 18th century, fake news was already addressed by the United States Congress. When Congress passed the Alien and Sedition Act in 1798, one of its objectives was to punish “malicious” falsehoods about the government as a crime.⁴

Fake news and its counterpart – “real news” – is not limited to the United States. The impact of fake news is global. Freedom House reports that fake news was spread in 30 of the 65 countries examined between June 2016 and May 2017.⁵ South Korea is no exception in confronting fake news as a sociopolitical and legal issue. Koreans dealt with fake news during a presidential impeachment in early 2017⁶ and a snap presidential election in May 2017.⁷ Fake news has been often abused to calumniate political opponents in Korea.

In the United States, where freedom of speech and the press is the rule, not the exception, however, “[t]he real question is not whether fake news is

2. Margaret Sullivan, *Sick of the News? This is No Time to Tune Out*, WASH. POST (Dec. 8, 2016), https://www.washingtonpost.com/lifestyle/style/sick-of-the-news-this-is-no-time-to-tune-out/2016/12/08/97ff1e70-bd61-11e6-91ee-1adddfe36cbe_story.html?utm_term=.44e3a68d4882.

3. See Steven Seidenberg, *Fake News Has Long Held a Role in American History*, A.B.A.J. (July, 2017), http://www.abajournal.com/magazine/article/history_fake_news/ (noting American fake journalism of the 19th century, which was for entertainment, not objective information).

4. Alien and Sedition Act of 1798, ch. 75, 1 Stat. 596 (criminalizing writing or publishing “any false, scandalous and malicious writing or writings against the government of the United States,” including Congress or the President “with intent to defame” the government; or to bring them “into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States”), *cited with disapproval in* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); see Eugene Volokh, *Fake News and the Law, From 1798 to Now*, WASH. POST (Dec. 9, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/09/fake-news-and-the-law-from-1798-to-now/?utm_term=.26a0422650ef.

5. FREEDOM HOUSE, FREEDOM ON THE NET 2017, at 1 (2017), https://freedomhouse.org/sites/default/files/FOTN_2017_Full_Report.pdf; Keith Wagstaff, *The Even Uglier Truth About ‘Fake News,’* MASHABLE (Nov. 14, 2017), <https://mashable.com/2017/11/14/fake-news-freedom-house-report/#MnlgPw6TSZqO>.

6. See Seung Lee, *How South Korea’s Fake News Hijacked a Democratic Crisis*, GIZMODO (Mar. 10, 2017, 10:32 AM), <https://gizmodo.com/how-south-korea-s-fake-news-hijacked-a-democratic-crisi-1793146533>.

7. Choe Sang-Hun, *South Korea Elects Moon Jae-in, Who Backs Talks With North, as President*, N.Y. TIMES, May 9, 2017, at A1, <https://www.nytimes.com/2017/05/09/world/asia/south-korea-election-president-moon-jae-in.html>.

protected, but under what circumstances would fake news *not* be protected.”⁸ But in other countries, which are less speech-friendly, disseminating fake news is rarely not discussed as a part of free speech. In Ireland, for example, a new law proposed would criminalize spreading fake news on social media.⁹ In Germany, a social media law came into force in October of 2017 that requires social media sites to remove fake news promptly.¹⁰ The German law gives social media networks twenty-four hours to take actions on fake news after they have been alerted.¹¹

From a comparative perspective, South Korea and the United States deserve careful attention, given that American law has exerted a considerable impact on Korea’s democratic process as a rule-of-law-nation over the years.¹² Fake news and freedom of expression is a timely topic for comparatists, since it illustrates how society approaches evolving free speech issues like fake news. This Article first examines the definitional framework of fake news in the United States and Korea. Second, it analyzes where fake news is placed as a legal issue in the United States and Korea. And finally, the contrast of the United States with Korea is analyzed by looking at how fake news is framed as a new or not so new issue in free speech jurisprudence.

II. “FAKE NEWS” AS A DEFINITIONAL QUESTION

What is fake news? This is quite a challenging question to legal and non-legal scholars because there is no universally agreed-upon definition. It is often understood as fabricated news stories. But its definition is less than useful, since the term is being loosely bandied about.

8. Daniel Faltesek, *Should Publishing Fake News Be a Crime?*, OZY (Aug. 9, 2017), <https://www.ozy.com/opinion/should-publishing-fake-news-be-a-crime/80180>.

9. Online Advertising and Social Media (Transparency) Bill (Act. No. 150/2017) (Ir.); Max Jaeger, *Spreading Fake News on Social Media Could Become a Crime in This Country*, N.Y. POST (Dec. 5, 2017, 10:03 AM), <https://nypost.com/2017/12/05/spreading-fake-news-on-social-media-could-become-a-crime-in-this-country/>; *New Laws Propose Five Years in Prison for Spreading Fake News*, IRISH NEWS (Dec. 5, 2017, 1:00 PM), <http://www.irishnews.com/news/2017/12/05/news/new-laws-propose-five-years-in-prison-for-spreading-fake-news-1202749/>.

10. *Netzwerkdurchsetzungsgesetz [NetzDG] [Network Enforcement Act]*, § 3, ¶ 2 (Ger.).

11. *Id.* § 3, ¶ 2; *Germany Starts Enforcing Hate Speech Law*, BBC NEWS (Jan. 1, 2018), <http://www.bbc.com/news/technology-42510868>.

12. See Kyu Ho Youm, *Free Speech Jurisprudence in South Korea: Legal Transplants from the United States*, in *THE GLOBAL IMPLICATIONS OF KOREAN LAW*, 135, 137-55 (2014).

A. *The United States*

Narrowly defined, fake news refers to “a made-up story with an intention to deceive, often geared toward getting clicks.”¹³ *The Washington Post’s* Margaret Sullivan focuses on fake news within the context of “deliberately constructed lies” designed to “mislead the public” in the form of news.¹⁴

In American law, a definition of fake news cannot be overly encompassing because that would overreach the definition into speech that is protected by the First Amendment. In U.S. law, false information is protected not because falsity is valuable enough but because truthful information can be suppressed. Hence, the First Amendment allows “breathing space.” This explains, in part, why fake news should be narrowly defined.

According to journalism researchers at the University of Florida, fake news should be limited to “articles that suggest, by both their appearance and content, the conveyance of real news, but also knowingly include at least one material factual assertion that is empirically verifiable as false and that is not otherwise protected by the fair report privilege.”¹⁵ This proposed definition of fake news reflects how fake news is countered in the United States with the aim of safeguarding Americans’ settled free speech values. That is, the First Amendment principles of American constitutional democracy are adaptable to the fake news challenge inherent in the Internet-based media world.¹⁶

B. *South Korea*

Defining fake news is a work in progress in Korea. Academic and non-academic commentators and lawmakers in Korea have struggled with the definitional question about fake news this past year. In February 2017, a

13. Sabrina Tavernise, *As Fake News Spreads Lies, More Readers Shrug at the Truth*, N.Y. TIMES, Dec. 6, 2016, at A1, <https://www.nytimes.com/2016/12/06/us/fake-news-partisan-republican-democrat.html>.

14. Margaret Sullivan, *It’s Time to Retire the Tainted Term “Fake News,”* WASH. POST (Jan. 8, 2017), https://www.washingtonpost.com/lifestyle/style/its-time-to-retire-the-tainted-term-fake-news/2017/01/06/a5a7516c-d375-11e6-945a-76f69a399dd5_story.html?utm_term=.b9c1877e9c00.

15. Clay Calvert et al., *Fake News and the First Amendment: Reconciling a Disconnect Between Theory and Doctrine*, 86 UNIV. CIN. L. REV. 99, 103 (2018) (citations omitted); David O. Klein & Joshua R. Wueller, *Fake News: A Legal Perspective*, 20 J. INTERNET L. 1, 6 (2017) (defining “fake news” as “the online publication of intentionally or knowingly false statements of fact”).

16. Michael Chertoff, *Fake News and the First Amendment*, HARV. L. REV. BLOG (Nov. 10, 2017), <https://blog.harvardlawreview.org/156-2/>.

Korean communication professor stressed a need to distinguish fake news from parodies, rumors, satire and other protected expressions online.¹⁷ He considered fake news “deceptive information for commercial or political purpose.”¹⁸ Meanwhile, media law scholar Ahran Park at the Korea Press Foundation has limited fake news to “information in a news format published with a knowledge of its falsity, regardless of whether its author is a traditional journalist.”¹⁹ Park reasoned that the definition of fake news cannot hinge on the status of its publisher, for it is difficult to determine who should or should not be a qualified journalist in the digital age.²⁰

At a fake news forum organized by the Korea Journalist Association in Seoul, Professor Jaejin Lee, a leading communication law scholar in Korea, offered his own definition of fake news: “false or deceptive information in a news format, including an advertorial.”²¹ To other fake news researchers, fake news is “1) deceptive information disseminated for commercial or political purpose; 2) fraudulent information packaged in a news format to deceive others; and 3) information disguised as being factually verified.”²² Likewise, law professor Chang-guen Hwang considers fake news as “false information formatted as news designed to mislead news consumers.”²³

Introducing a bill on fake news in May 2017, seventeen Korean lawmakers stated: “We define fake news as the intentionally fraudulent act of deceiving others via the Internet for commercial or political purposes with information that is packaged as factually verifiable news, although no journalistic function of informational and factual checking was involved.”²⁴

To understand the fake news issues in Korea, the Korea Press Foundation conducted a survey in March 2017 and collected 1,000-plus

17. Yongsuk Hwang, *Is Fake News a Satire or a Deceit?* (Korean) (paper presented at the conference of the Korean Society for Journalism & Communication Studies & Korea Press Foundation, Feb. 14, 2017) (on file with authors).

18. Yongsuk Hwang & Osung Kwon, *A Study on the Conceptualization and Regulation Measures on Fake News: Focused on Self-Regulation of Internet Service Providers*, 16 PRESS & L. 53-101 (2017).

19. Ahran Park, *Fake News: Legal Issues and Regulations* (Korean) (paper presented at the conference of the Korean Society for Journalism & Communication Studies & Korea Press Foundation, Feb. 14, 2017) (on file with authors).

20. *Id.*

21. Jaejin Lee, *Fake News and Journalism in the Age of Post-Truth* (Korean) (paper presented at the forum of the Korea Journalist Association, Feb. 24, 2017) (on file with authors).

22. Hwang & Kwon, *supra* note 18.

23. Chang-guen Hwang, *Legal Solution to Fake News*, PRESS ARBITRATION Q. (Korean) 26-37 (2017).

24. Bill in Partial Amendment of the Act on Promotion of Information and Communications Network Utilization and Information, etc., Bill No. 7095, May 30, 2017, presented by National Assemblyman Ho-young Ahn on behalf of seventeen National Assemblymen.

responses.²⁵ In the survey, fake news was presented in a traditional news format and in a social messenger format to two groups: Group A viewed the fake news in a traditional news format and Group B in a social messenger format. Nearly 24% of Group A stated that they trusted the fake content, while more than 11% of Group B indicated their trust in fake news. So, more people tend to trust fake news in a traditional news format with the news title, byline, and publication date. Fake news in news format has more impact on media users than private online rumors via SNS or social messenger, so far as the news format gives more trust to people.

On the concept of fake news, 80% of the respondents agreed that fake news means “fake contents in a news format,” while slightly more than 40% of the respondents agreed that fake news includes “exaggerated or distorted news by the traditional news media.”

Furthermore, three quarters of the respondents noted that they received fake news through the Internet. Almost 40% of the respondents said they accessed fake news via social messengers such as Kakao Talk. By contrast, fake news came to more than 27% of the respondents via social platforms such as Facebook and Twitter.

III. LAWS AND REGULATIONS OF FAKE NEWS

At the moment, there is no such thing as direct or special law governing fake news in the United States or in Korea. Fake news is too new a legal issue to evolve into a full-fledged subject that demands legislative or judicial attention. American legal commentators noted in April 2017: “[M]ore lawmakers, regulators, courts, and private citizens will explore legal and regulatory solutions that balance the societal importance of truth-seeking with the constitutional right to speak freely (and, at times, to lie).”²⁶

A. *The United States*

Under the First Amendment, the protection or non-protection of fake news as speech can be analyzed doctrinally (e.g., strict scrutiny and under-inclusiveness—fake news not censored) and theoretically (e.g., marketplace of ideas and democratic self-governance—fake news censored).²⁷ But from

25. Sewook Oh & Ahran Park, *Survey of Fake News*, 3(3) MEDIA ISSUE (Mar. 29, 2017), <http://www.kpf.or.kr/site/kpf/research/selectMediaPdsView.do?seq=574068> (S. Kor.).

26. Klein & Wueller, *supra* note 15, at 12.

27. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press[.]”). See generally Calvert et al., *supra* note 15.

the structural-rights perspective,²⁸ the dissonance between the fake news doctrinal and theoretical framework is more apparent than real. As the authors of a recent study on fake news under the First Amendment observed:

Simply put, permitting the government to tell society what is and is not true is treacherous, for it vests officials temporarily in charge of the country with the power to twist narratives to serve their own purposes. That is disturbingly akin to the function of the Ministry of Truth in George Orwell's *Nineteen Eighty-Four*. Its 'purpose was to dictate and protect the government's version of reality.'²⁹

In a similar vein, Professor Richard Hasen of the University of California-Irvine has argued that the First Amendment doctrine should not be “fundamentally rework[ed]” because it prevents government from censoring speech “in an ostensible effort to battle ‘fake news.’”³⁰ He added: “We do not want the cure to be worse than the disease.”³¹

Outlawing fake news outright is undoubtedly questionable in the United States because it would create a chilling effect on real news. This does not necessarily mean that no legal system is in place against fake news in the United States. Defamation litigation is a key legal recourse against fake news. Indeed, “no legal claim is invoked more frequently against fake news publishers.”³²

False, harmful publications concerning public officials and public figures are actionable only if the publications were published with “actual malice” – that is, with knowledge of falsity or with reckless disregard for the

28. Structural rights are “constitutional provisions that structure the government’s interaction with its citizens and limit the power of government in order to prevent governmental overreaching and ensure over the long term the preservation of popular consent to the exercise of political power.” Steven G. Gey, *The Procedural Annihilation of Structural Rights*, 61 HASTINGS L.J. 1, 4 (2009) (cited in Calvert et al., *supra* note 15).

29. Calvert et al., *supra* note 15, at 137 (quoting Flemming Rose & Jacob Mchangama, *Shutting Down Fake News Could Move Us Closer to a Modern-Day ‘1984,’* WASH. POST, Feb. 10, 2017, at A17) (citing Steven G. Gey, *The Procedural Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U.L. REV. 1, 22 (2008); GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (Alfred A. Knopf ed., 1992) (1949)).

30. Richard L. Hasen, *Cheap Speech and What It has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 202 (2017).

31. *Id.*

32. Klein & Wueller, *supra* note 15, at 6; see also *What Legal Recourse do Victims of Fake News Stories Have?*, NPR (Dec. 7, 2016, 7:04 PM), <https://www.npr.org/2016/12/07/504723649/what-legal-recourse-do-victims-of-fake-news-stories-have> (quoting media law professor Derigan Silver at the University of Denver: “Fake news sites are clearly a situation where they’re engaging in a defamatory statement, a false statement about another that damages that person’s reputation. In that situation, that is certainly actionable.”).

truth.³³ When a private individual sues a fake news publisher, comparatively, the plaintiff is only required to establish negligence.³⁴ If fake news is at issue in a defamation claim, it is limited to intentional or knowingly false statement. Under the so-called republication rule, “one who republishes a defamatory statement ‘adopts’ it as his own, and is liable in equal measure to the original defamer.”³⁵ So, fake news liability may extend to anyone who repeats the fake news.

In February of 2017, the *Daily Sentinel*, a newspaper in Grand Junction, Colorado, threatened to sue Ray Scott, a Colorado state lawmaker, for defamation over Scott’s Twitter claim that one of the newspaper’s columns on an access to information bill was “a fake news story.”³⁶ The newspaper decided not to pursue the lawsuit because Scott would have had the Colorado taxpayers pay for his defense and he would have used legislative immunity to shield him against liability.³⁷ One of the reasons for the Colorado newspaper’s initial plan to file a legal action over Scott’s “fake news” allegation, however, was that the paper wanted a *judicial* definition of fake news.³⁸

Criminal libel is more or less passé in American law. But it is still on the books in more than a dozen states, and the U.S. Supreme Court has not

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

34. *Gertz v. Robert Welch, Inc.*, 418 U.S. 325, 350 (1974); *Gertz*, 418 U.S. at 353-54 (Burger, J., dissenting).

35. *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1298 (D.C. Cir. 1988).

36. Bente Birkeland, *When a Politician Says “Fake News” and a Newspaper Threatens to Sue Back*, NPR (Feb. 17, 2017, 12:36 PM), <https://www.npr.org/2017/02/17/515760101/when-a-politician-says-fake-news-and-a-newspaper-threatens-to-sue-back>. Media law scholar Eric Robinson at the University of South Carolina speculated about “commercial disparagement” as another possible cause of action for the Colorado newspaper. Eric P. Robinson, *Fake News Is a Real Dilemma for the Law*, BLOG L. ONLINE (Feb. 15, 2017), <https://bloglawonline.blogspot.com/2017/02/fake-news-is-real-dilemma-for-law.html>. “Trade libel” or “injurious falsehood,” which subsumes “commercial disparagement,” comprises “the knowing publication of false matter derogatory to the plaintiff’s business of a kind calculated to prevent others from dealing with the business or otherwise interfering with its relations with others, to its detriment.” ROBERT D. SACK, *SACK ON DEFAMATION* § 13:1.3 (5th ed. 2017) (first citing *Waste Distillation Tech., Inc. v. Blasland & Bouck Eng’rs*, 523 N.Y.S.2d 875, 877 (N.Y. 1988); then citing *State ex rel. BP Prods. N. Am., Inc. v. Ross*, 163 S.W.3d 922, 928 (Mo. 2005); and then citing *Rehak Creative Servs. Inc. v. Witt*, 404 S.W.3d 716, 728 (Tex. App. 2013)).

37. Paul Fletcher, *Colorado Newspaper Publisher Backs Off Defamation Lawsuit for “Fake News” Tweet*, FORBES (Apr. 29, 2017, 3:39 PM), <https://www.forbes.com/sites/paulfletcher/2017/04/29/colorado-newspaper-publisher-backs-off-defamation-lawsuit-for-fake-news-tweet/#79aed4c358ea>.

38. *Id.*

repudiated criminal libel as such.³⁹ Criminal libel law, however, is rarely used against the mainstream media, while the alternative media and the Internet publishers are likely to be targeted for criminal libel sanctions. In this connection, lesser fake news publishers can be investigated for criminal libel.⁴⁰

Fake news can result in a false light lawsuit in states where it is recognized as a tort when “one gives publicity to a matter concerning another that places the subject in a false light that is highly offensive to a reasonable person.”⁴¹ This should come as no surprise, given that a false light claim is often brought together with a defamation claim – they are related yet distinguishable from each other.⁴²

False light through fake news as a legal claim can be no longer ignored as blithely as it was in the pre-Internet era. In her comprehensive study of privacy as a newly enhanced right in American law, Professor Amy Gajda at Tulane Law School asserted: “[P]ublishing is different today [and] courts must bolster privacy and other related causes of action in response.”⁴³

Intentional infliction of emotional distress (IIED) is similar to defamation as a “regularly” invoked tort against fake news publishers under state law.⁴⁴ It’s called an “end-run” approach for those who feel injured by the media in avoiding the wide legal berth allowed to professional communicators.⁴⁵ IIED arises when one’s publication of fake news results in “intentionally or recklessly causing another person severe emotional distress through one’s extreme or outrageous acts.”⁴⁶

The leading First Amendment case on IIED was precipitated by a dispute between Larry Flynt, publisher of *Hustler Magazine*, and the Reverend Jerry

39. Kyu Ho Youm, *Defamation*, in COMMUNICATION AND THE LAW 83, 86-87 (W. Wat Hopkins ed., 2018) (citing Eric P. Robinson, *Another One Bites the Dust: Minnesota’s Criminal Libel Law Struck Down*, BLOG L. ONLINE (May 28, 2015), <https://bloglawonline.blogspot.com/2015/05/another-one-bites-dust-minnesotas.html>).

40. Klein & Wueller, *supra* note 15, at 9.

41. Lincoln D. Bandlow & Rom Bar-Nissim, *United States*, in INTERNATIONAL LIBEL AND PRIVACY HANDBOOK § 6.01, § 6.01[15][d] (Charles J. Glasser, Jr. ed., 2016) (citing RESTATEMENT (SECOND) OF TORTS § 652E (1977)).

42. RODNEY A. SMOLLA, LAW OF DEFAMATION § 10:10 (2d ed. 2017).

43. AMY GAJDA, THE FIRST AMENDMENT BUBBLE 53 (2015) (noting that many American courts have followed the Ohio Supreme Court’s reasoning in *Welling v. Weinfeld*, 866 N.E.2d 1051, 1058-59 (Ohio 2007), explicitly recognizing false light as a legal possibility for the innocent to protect against Internet-facilitated harm).

44. Klein & Wueller, *supra* note 15, at 7.

45. Sigman Splichal & Samuel A. Terilli, Jr., *Privacy Rights in an Open and Changing Society*, in COMMUNICATION AND THE LAW 287, 305 (W. Wat Hopkins ed., 2018).

46. *Intentional Infliction of Emotional Distress*, Black’s Law Dictionary 932 (10th ed. 2014).

Falwell, a prominent TV evangelist in the 1980s. In one of the “first-time” interviews that the magazine ran as a take-off of Campari Liqueur’s advertising, *Hustler Magazine* portrayed Falwell as having his first-time sexual experience with his mother in an outhouse. Falwell won \$200,000 on the IIED claim, and the U.S. Fourth Circuit Court of Appeals upheld the judgment.⁴⁷ The U.S. Supreme Court reversed, however. The Supreme Court instead held that allowing public figures like Falwell to collect damages without proving actual malice would unconstitutionally chill social and political debates. Also, the outrageousness requirement was subjective and “would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.”⁴⁸

Few IIED claims are successful against *satirical* fake news publishers, although “particularly extreme fake news publications remain susceptible to IIED claims, especially when involving private individuals.”⁴⁹

Fake news publishers can be subject to administrative rules and regulations, including the standards of the Federal Trade Commission (FTC) for unfair and deceptive trade practice. The FTC finds an act or practice to be deceptive where “[1] a representation, omission, or practice misleads or is likely to mislead the consumer; [2] a consumer’s interpretation of the representation, omission, or practice is considered reasonable under the circumstances; and [3] the misleading representation, omission, or practice is material.”⁵⁰

Broadcasting fake news is prohibited by the Federal Communications Commission (FCC). The FCC rule on “broadcast hoaxes” provides:

No licensee or permittee of any broadcast station shall broadcast false information concerning a crime or a catastrophe if:

- (a) The licensee knows this information is false;
- (b) It is foreseeable that broadcast of the information will cause substantial public harm, and

47. *Falwell v. Flynt*, 797 F.2d 1270, 1272 (4th Cir. 1986), *rev’d*, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

48. *Hustler Magazine v. Falwell*, 485 U.S. 46, 55-56 (1988).

49. Klein & Wueller, *supra* note 15, at 8.

50. U.S. BD. OF GOVERNORS OF THE FED. RESERVE SYS., CONSUMER COMPLIANCE HANDBOOK, FEDERAL TRADE COMMISSION ACT SECTION 5: UNFAIR OR DECEPTIVE ACTS OR PRACTICES § IV, at 1 (2017), <https://www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf>; *see* Federal Trade Commission Act of 1914, 15 U.S.C. § 45(4)(A) (2012) (“For purposes of subsection (a), the term “unfair or deceptive acts or practices” includes such acts or practices involving foreign commerce that (i) cause or are likely to cause reasonably foreseeable injury within the United States; or (ii) involve material conduct occurring within the United States.”).

(c) Broadcast of the information does in fact directly cause substantial public harm.

Any programming accompanied by a disclaimer will be presumed not to pose foreseeable harm if the disclaimer clearly characterizes the program as a fiction and is presented in a way that is reasonable under the circumstances.⁵¹

The FCC rule has been applied “sparingly” against broadcasters.⁵²

B. South Korea

Defamatory fake news can be punished under Korean law. Unlike in the United States, reputation is constitutionally protected in Korea against the abuse of free speech,⁵³ and defamation is both a crime and a civil wrong.⁵⁴ The Criminal Act punishes defamation, regardless of whether it is true or false:

(1) A person who defames another by publicly alleging facts shall be punished by imprisonment or imprisonment without prison labor for not more than two years or by a fine not exceeding five million won.

(2) A person who defames another by publicly alleging false facts shall be punished by imprisonment for not more than five years, suspension of qualifications for not more than ten years, or a fine not exceeding ten million won.⁵⁵

When fake news publishers distribute *false* and defamatory stories, the originator of fake news shall be punished under Article 307(2) of the Criminal Act.⁵⁶ If fake news is published by means of newspaper, magazine, radio, or other publication “with intent to defame another,” Article 309 shall provide for an aggravated punishment of defamatory fake news. According

51. FCC Broadcast Radio Services, 47 C.F.R. § 73.1217 (2017).

52. Volokh, *supra* note 4.

53. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 21(4) (S. Kor.). Article 21(4) of the Constitution states: “Neither speech nor the press may violate the honor or rights of other persons Should speech or the press violate the honor or rights of other persons, claims may be made for the damage resulting therefrom.”

54. *See generally* Kyu Ho Youm et al., *Korea*, in MEDIA, ADVERTISING, & ENTERTAINMENT LAW THROUGHOUT THE WORLD § 21:1, § 21:11 (2018 ed. 2018) (first citing Hyeongbeop [Criminal Act], Act No. 293, Sept. 18, 1953, *amended by* Act No. 14415, Dec. 20, 2016, art. 307-10, 312 (S. Kor.); then citing Minbeob [Civil Act], Act No. 471, Feb. 22, 1958, *amended by* Act No. 14965, Oct. 31, 2017, art. 751, 765 (S. Kor.); and then citing Gwahakgisulgibonbeop [Framework Act on Science and Technology], Act No. 3848, May 12, 1986, *amended by* Act No. 14839, July 26, 2017, art. 70 (S. Kor.)).

55. Criminal Act, Act No. 14415, art. 307 (S. Kor.).

56. *Id.* art. 309(2).

to a recent study of Korean criminal and insult law, criminal defamation law is “still being vigorously enforced” in Korea.⁵⁷

Defamation is a tort under the Civil Act. If fake news defames an individual’s reputation, the reputational victim may use: (1) Article 751, which authorizes monetary compensation for libelous injury;⁵⁸ or (2) Article 764, which allows the court to order the defendant to take “measures appropriate” to restore the plaintiff’s reputation, either in lieu of or together with compensation for damages.⁵⁹

Fake news attracted public attention during the national elections in Korea, when it swirled around major presidential candidates. The Public Official Election Act⁶⁰ can cover fake news relating to political candidates. Article 250 states that any person who publishes false information about a candidate and his/her family will be punished by imprisonment with prison labor or by fine.⁶¹ So, if fake news is disseminated about political candidates and their family members, its publisher will be subject to penalty under the Public Official Election Act.

In November 2017, a person who posted false information to Facebook and other social media sites was indicted under the Public Official Election Act. The Cheongju District Court ruled that the defendant violated the election law by posting false and defamatory statements to badmouth the presidential candidate Moon Jae-in.⁶² Although it made no specific mention of the postings at issue as fake news, the court stated that the defendant made no effort to verify the online rumors about Moon Jae-in before posting, although other Facebook users pointed out the falsity of his online postings. The defendant was ordered to pay 5 million *Won* (U.S. \$5,000) in fines.

When fake news harms public interest, such as national security or social safety, by spreading false rumors, there does not exist a special law on point. In the past, the Framework Act on Telecommunications could be applicable. Article 47(1) provides: “Any person who exercises false communication via electronic device for the purpose of ruining public interest will be punished by prison term up to 5 years or by penalty by 50 million *Won* (U.S. \$50,000).”

57. Criminal Act, Act No. 14415, art. 309(1) (S. Kor.); Kyung Sin Park & Jong-Sung You, *Criminal Prosecutions for Defamation and Insult in South Korea with a Leflarian Study in Election Contexts*, 12 U. PA. ASIAN L. REV. 463, 465 (2017).

58. Civil Act, Act No. 14965, art. 751 (S. Kor.).

59. *Id.* art. 764.

60. Gongjiksongeobeop [Public Official Election Act], Act No. 4739, Mar. 16, 1994, amended by Act No. 14839, July 26, 2017 (S. Kor.).

61. *Id.* art. 250.

62. Cheongju District Court [Dist. Ct.], 2017Ga-Hhap22, Nov. 9, 2017 (S. Kor.).

But the article was held unconstitutional due to the so-called Minerva case of the late 2000s.

A blogger with the pseudonym “Minerva” became popular after he posted a series of comments to the Korean major web-portal *Daum Agora* forum that accurately forecast sharp falls in Korea’s currency, the national stock market, and the demise of a U.S. investment bank, Lehman Brothers.⁶³ In January 2009, Minerva was arrested for violation of the Framework Act on Telecommunications,⁶⁴ which punishes “any person who has publicly made a false communication” via electronic device for the purpose of ruining public interest.⁶⁵ The Korean finance minister claimed that Minerva had spread malicious rumors about the country’s finance policy. Prosecutors argued that Minerva had hurt the Korean currency by publishing false information online. Yet, the Seoul Central District Court released Minerva in April 2009 on the grounds that he did not intend to injure the public interest.⁶⁶

In December 2010, the Korean Constitutional Court struck down Article 47(1) of the Framework Act on Telecommunications, which applied to the Minerva case.⁶⁷ The Constitutional Court held that the telecommunications law’s original purpose was to regulate cable telephone or telegram communication of using false or fake name. Furthermore, because “false information” and “public interest” were too vague, the Constitutional Court ruled that Article 47(1) of the telecommunication law violated freedom of expression and constitutional principle of clarity. As a consequence, there is no specific statute governing fake news that harms the public interest.

III. “REINVENTING THE WHEEL” IN THE FAKE NEWS WORLD?

When it comes to fake news and similar issues amidst the breathtaking communication revolutions driven by the Internet, some countries err on the

63. For more information about the Minerva story, see Mattathias Schwartz, *The Troubles of Korea’s Influential Economic Pundit*, WIRED (Oct. 19, 2009, 3:00 PM), https://www.wired.com/2009/10/mf_minerva/.

64. *Id.*; see Jeongitongsingibonbeop [Framework Act on Telecommunications], Act No. 3685, Dec. 30, 1983, *amended by* Act No. 14839, July 26, 2017 (S. Kor.).

65. Framework Act on Telecommunications, Act No. 14839, art. 47(2) (“A person who has publicly made a false communication over the telecommunications facilities and equipment for the purpose of benefiting himself or the third party or inflicting damages on the third party shall be punished by imprisonment for not more than three years or by a fine not exceeding thirty million won.”).

66. Seoul Central District Court [Dist. Ct.], 2009kodan304, Apr. 20, 2009 (S. Kor.).

67. Constitutional Court [Const. Ct.], 2009Hun-Ba88 (consol.), Dec. 28, 2010 (22-2(B) KCCR, 249) (S. Kor.).

side of experimenting with more freedom and less regulations. Others react quickly by adopting sweeping actions in the name of safeguarding individual and societal interests. Needless to say, each system ought to take into account the balancing of conflicting interests involved. But the U.S. approach to free speech versus fake news stands in sharp contrast with that of South Korea. What informs the diverging methods of the United States and Korea in tackling fake news?

A. *The United States*

No matter how its intent or purpose is analyzed, fake news is not one-dimensional. Whether it is satire, hoax, propaganda, or trolling,⁶⁸ it defies quick and simple solutions. So overreaching government-dictated anti-fake news solutions are, more often than not, cautioned against in the United States, since the so-called legislative or judicial or administrative cure may aggravate the alleged disease.⁶⁹ In their detailed analysis of fake news problems and their solutions, researchers at the University of Arizona College of Law took issue with the “monopolistic and mandatory” state solutions because they leave no room “to experiment with different mechanisms to solve a problem.”⁷⁰

The “privileged” First Amendment on freedom of expression⁷¹ is a formidable hurdle against institutionalizing new mechanisms targeting fake news, although few doubt that fake news creates little positive sociopolitical and cultural benefit for American society. In U.S. law, false statements are not necessarily without value and so unprotected.⁷²

Equally significant is that the U.S. Supreme Court is discerningly reluctant to rush in drawing the boundaries on freedom of cyberspeech. In

68. Mark Verstraete et al., *Identifying and Countering Fake News 5-7* (Ariz. Legal Studies, Discussion Paper No. 17-15, 2017) (“Trolling is presenting news or information that has biased or fake content, is motivated by an attempt to get personal humor value [and] is intended by its author to deceive the reader.”) (citations omitted).

69. FAKING NEWS, PEN AMERICA: FREEDOM TO WRITE 16 (2017), <https://pen.org/wp-content/uploads/2017/11/2017-Faking-News-11.2.pdf>.

70. Verstraete et al., *supra* note 68, at 14 (citing Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 215-16 (1996)).

71. *See generally* STEVEN H. SHIFFRIN, *WHAT’S WRONG WITH THE FIRST AMENDMENT?* (2016).

72. *United States v. Alvarez*, 132 S. Ct. 2537, 2539, 2544 (2012) (Justice Kennedy rejecting the government’s argument that “false statements have no value and hence no First Amendment protection”).

its first ever ruling on the First Amendment and access to social media, the Court held in 2017:

While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.⁷³

The Supreme Court's message is loud and clear: The traditional First Amendment doctrine will guide the Court in addressing Internet speech issues and allowing Americans a digital experiment with democratic free speech.

It is true that the open marketplace of ideas envisioned by the U.S. Supreme Court Justices, like Justices Oliver Wendell Holmes and Louis Brandeis in the formative period of the First Amendment, is being disrupted by "cheap speech" enabled by the Internet.⁷⁴ As a consequence, a regulatory role of the government is advocated in rectifying the fake news-skewed marketplace.⁷⁵

But Professor Richard Hasen of the University of California-Irvine strongly disagrees: "[I]n an era of demagoguery and disinformation emanating from the highest levels of government, First Amendment doctrine may serve as a bulwark against censorship and oppression that could be enacted by the government in the name of preventing 'fake news.'"⁷⁶

From a broad ideological perspective, the conservative-libertarian approach to more speech, not less, under the First Amendment⁷⁷ is making potential proponents of new fake news regulations rethink legislative actions against fake news. And whether fake news should be subject to existing or new restrictions in American law may be rather obvious a question for those familiar with free speech as a nation-defining characteristic of Americans to belabor. Professor Eugene Volokh of the UCLA Law School cogently highlights the fundamental problems with new fake news-centric governmental restrictions:

73. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017).

74. *See generally* Hasen, *supra* note 30.

75. *See* Noah Feldman, *Fake News May Not Be Protected Speech: Is Lying on Facebook Any Better Than Shouting Fire in a Crowded Theater?*, BLOOMBERG (Nov. 23, 2016, 10:22 AM), <https://www.bloomberg.com/opinion/articles/2016-11-23/fake-news-may-not-be-protected-speech>.

76. Hasen, *supra* note 30, at 216.

77. SHIFFRIN, *supra* note 71, at 166-83.

I haven't said much about the 'fake news' debate, largely because so much about it is obvious — 1) false statements are bad, but 2) various actions (especially by the government) to try to stamp out such false statements can be even worse But [libel] lawsuits and prosecutions for lies about the government are forbidden, and I think the same should apply to lies about current events, history, science and the like (at least so long as no particular person or business is targeted). It's not that the lies are constitutionally valuable as such, generally speaking; but threatening to punish them unduly deters even true statements, as well as expressions of opinion.⁷⁸

B. South Korea

The raging fake news controversy led the National Assembly to take ongoing legislative efforts to address fake news problems in 2017, apparently in response to former U.N. Secretary-General Ban Ki-mun's plea in early 2017 to the Saenuri Party to make anti-fake news laws.⁷⁹ The bills were drawn from the German Act to Improve the Enforcement of the Law in Social Networks (Netzwerkdurchsetzungsgesetz), known as the Network Enforcement Law or the NetzDG.⁸⁰ The German law provides that Internet Service Providers (ISPs) must take down fake news promptly and, if ISPs fail to take prompt actions on fake news complaints, they shall pay a fine up to €50 million (U.S. \$60 million).⁸¹

In 2017 and 2018, a total of fourteen anti-fake news bills were proposed or revised to amend the information network, public elections, and press arbitration statutes. According to the first bill on the Information Network Act, presented on April 11, 2017, fake news is "defamatory or false information in news format to deceive others."⁸² This bill mandates that ISPs pay a fine up to 30 million *Won* (U.S. \$30,000) if they fail to delete or block fake news.⁸³

78. Volokh, *supra* note 4.

79. Hak-jae Kim, *Meeting with Saenuri Lawmakers, Ban Ki-mun: "Legislate Regulation of Fake News,"* FINANCIAL NEWS (Jan. 25, 2017, 10:46 AM), <http://www.fnnews.com/news/201701251044319696> (mentioning German anti-fake news law).

80. Netzwerkdurchsetzungsgesetz [NetzDG] [Network Enforcement Act], June 30, 2017, Deutscher Bundestag: Drucksachen [BT] 536/17 (Ger.).

81. For a discussion of the German anti-fake news law, see Evelyn Douek, *Germany's Bold Gambit to Prevent Online Hate Crimes and Fake News Takes Effect*, LAWFARE (Oct. 31, 2017, 11:30 AM), <https://www.lawfareblog.com/germanys-bold-gambit-prevent-online-hate-crimes-and-fake-news-takes-effect>.

82. Bill No. 200 6708 (Apr. 11, 2017), art. 44(1) (S. Kor.).

83. *Id.* art. 76(1-6).

The second proposed amendment to the Information Network Act, which followed the first bill two weeks later, provides a slightly different definition of fake news. Emphasizing the underlying purpose and format of fake news, the bill states that fake news is “false or distorted information to obtain political or economic gain” and “information that shall be misunderstood as news.”⁸⁴ Article 44(8) of the bill requires the Korea Communications Commission (KCC) to order ISPs to designate as “under review” illegal online information, such as fake news. The bill stipulates a maximum of two years in jail and 20 million *Won* (U.S. \$20,000)⁸⁵ against fake news originators, and it imposes penalties up to 30 million *Won* (U.S. \$30,000) on ISPs that disregard the KCC order.⁸⁶

The third bill of May 30, 2017, on the Information Network Act includes a rather lengthy definition of fake news in connection with its fraudulent news format.⁸⁷ Article 2(1) reads: Fake news is “deceptive information in a news format or a deceptive action which entails no journalistic function of verification and which cheats people for political or commercial purposes.” The bill stipulates that ISPs must eliminate fake news “without delay” and punishes ISPs when failing to remove it.⁸⁸

The three other bills⁸⁹ to revise the Information Network Act also use the similar definitions of fake news and subject ISPs to punitive sanctions when they fail to delete fake news immediately.

More recently, a bill of April 2018 to revise the Information Network Act required that information and communication service providers take “necessary measures” to delete or block fake news if it is clearly deemed to fall into the banned categories of information injuring an individual’s privacy and reputation.⁹⁰

In April of 2017, ten National Assemblymen took note of fake news as “a serious issue” facing public elections in introducing a fake news bill in partial amendment of the Public Official Election Act. While mentioning the fake news phenomenon in the United States and Europe, they feared that the rapid dissemination of fake news through the Internet would undermine the

84. Bill No. 200 6804 (Apr. 25, 2017), art. 44(7) (S. Kor.).

85. *Id.* art. 73(5), 73(6).

86. *Id.* art. 76(3-5).

87. Bill No. 2007095 (May 30, 2017) (S. Kor.).

88. *Id.* art. 44(2), 76.

89. *See* Bill No. 2008194 (July 26, 2017); Bill No. 2008392 (Aug. 4, 2017); Bill No. 2008920 (Sept. 1, 2017) (S. Kor.).

90. Bill No. 20013251 (Apr. 25, 2018), art. 44 (S. Kor.). False or distorted facts would be subject to deletion or blocking especially if they are mistaken for “news reporting” under the Press Arbitration Act.

fairness of public elections in Korea. The proposed revision of the Public Official Election Act contains a new clause on prohibition on fake news during the national elections.⁹¹ Article 82(8) of the bill states that no one is allowed to distribute fake news through the information networks, and fake news victims may request the Election Management Commission to mark the complained-of online information as “fake news.” If the Election Commission finds that the challenged information is fake news, the Election Commission must request ISPs or Internet Operators to identify “fake news” on the content. If the ISPs do not comply with deletion requests, they will be penalized with fine up to 30 million *Won* (U.S. \$30,000).⁹²

A fake news bill to amend the Press Arbitration Act⁹³ will impose heavier liability on the traditional news media for fake news.⁹⁴ Article 33 states: “(1) The Press Arbitration Commission may ask the Minister of Culture, Sports, and Tourism to order correction to the news media company that publishes false facts intentionally or recklessly; (2) When the PAC request is proper, the Minister of Culture, Sports, and Tourism shall order the correction to the news company.”⁹⁵ If the news organization ignores the Minister’s correction order, it shall be subject to a fine up to 50 million *Won* (U.S. \$50,000).⁹⁶

Another fake news revision of the Press Arbitration Act was introduced by fourteen lawmakers in May, 2018. It proposes inserting a new paragraph into Article 4 of the Act that would state: “The press shall make efforts to prevent false or distorted facts from being deliberately distributed for political or economic gains.”⁹⁷

In the spring of 2018, more than forty Korean lawmakers approached fake news as a legal issue separately from the Information Network Act, the Press Arbitration Act, and the Public Official Election Act. Nearly thirty of the National Assemblymen argued that their “Bill on Prevention of Fake Information Distribution” is urgently needed to “comprehensively and systematically prevent the distribution of fake information.”⁹⁸ They further

91. Bill No. 2006807 (Apr. 25, 2017) (S. Kor.).

92. *Id.* art. 262(2).

93. Eollonjungjae Mit Pihaeguje Deunge Gwanhan Beomnyul [Act on Press Arbitration and Remedies, Etc. for Damages Caused by Press Reports], Act No. 7370, Jan. 27, 2005, *amended by* Act No. 10587, Apr. 14, 2011 (S. Kor.).

94. Bill No. 2006906 (Apr. 25, 2017) (S. Kor.).

95. *Id.* art. 33.

96. *Id.* art. 34.

97. Bill No. 20013494 (May 9, 2018), art. 4(4) (S. Kor.).

98. Bill No. 20012927 (Apr. 5, 2018) (S. Kor.).

claimed that their 22-article bill, the most detailed of its kind, was intended to clearly define fake information and to offer the IC service providers with the procedures to delete such information.⁹⁹

One month later, fifteen lawmakers expressed their intent to create a government agency in charge of anti-fake news under the supervision of the Prime Minister. The bill, titled “Commission on Fake News,” provides for the structure of the commission and its responsibilities and the definition of fake news,¹⁰⁰ which seems to be drawn from the bills on the Press Arbitration Act and the Information Network Act.

The fake news-oriented efforts for certain National Assemblymen to revise the Network Information Act, the Public Official Election Act, and the Press Arbitration Act or to enact new fake news statutes might have derived from good motives and for justifiable ends: Fake news should be eliminated as soon as possible. But some might be wondering, what has led to a raft of similar anti-fake news bills during the period of thirteen months?

On closer examination, few of the bills at the National Assembly demonstrate the legislative attention of the kind that is required when freedom of speech and the press is at stake. This is probably due to those lawmakers’ overly enthusiastic desire to address the unending controversies over fake news as a sociopolitical and legal hot issue in Korea (and abroad).

Consider the definitional problems with fake news, as evinced by the bills in varying degrees. The bills are conceptually vague and excessively encompassing in barring fake news as a matter of law in Korea. The applicational scope of fake news as a crime is not clearly drawn. Fake news, as defined by the bills’ proponents at the National Assembly, would cover a wide range of legitimate *real news* publications and statements.

Moreover, it is not difficult to imagine the chilling effect of the anti-fake news law, if enacted, on freedom of online speech. ISPs might choose to delete or prohibit the allegedly false online information. This will be more a reality than a hypothesis when ISPs are facing what to do when challenged to eliminate online expression or face sanctions. The proposed fake news amendment of the Press Arbitration Act permits the government to issue a correction order to a news media organization. The government’s correction order would constitute a direct illegal interference with the editorial right of the news media because no independent judicial review of the correction requirement is part of the process.

99. *Id.*

100. Bill No. 20013495 (May 9, 2018) (S. Kor.).

IV. SUMMARY AND CONCLUSIONS

Fake news is not easy to define. What constitutes fake news? What motivates it? What is its real or imagined impact? These and related fake news questions continue to challenge media professionals, lawmakers, scholars, law practitioners, free speech advocates, and others globally. At the moment, there is no shared definition of fake news, yet fake news ought to include intentionally fraudulent information that is presented as news whether politically or non-politically.

Although there is no legislative effort, whether at a federal or state level, fake news as a free speech issue has been a cause of concern in the United States. No matter how fake news has been defined, it should be compatible with the First Amendment if it is regulated to protect the social and individual legitimate interests such as reputation, privacy, and truthful advertising. But, just because some information is considered “fake news” does not mean it is presumed to fall outside the protection of the First Amendment. For falsity is not necessarily fatal under the exceptionally speech-protective American law.

In Korea, where freedom of speech is not in a preferred position as it is in the United States, several laws on the books in Korea can be invoked against fake news with some qualification. Defamation and public election laws are a case in point. But a number of Korean lawmakers have introduced several anti-fake news bills that are less than sensitive to their short- and long-term repercussions for freedom of expression online and off. They should have been better informed about what underlies the fake news phenomenon in Korean society and what is the actual or perceived impact of their legislative attempts on free speech. For freedom of speech and the press is not something expendable that allows politicians to use for their political posturing.