

# FAKE NEWS AND THE COVID-19 PANDEMIC

Russell L. Weaver\*

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## I. INTRODUCTION

“Fake News,” or disinformation, has existed since the beginning of time.<sup>1</sup> Octavian spread false allegations against Mark Anthony, leading to Anthony being denounced as a traitor in ancient Rome;<sup>2</sup> George

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\* Professor of Law & Distinguished University Scholar, University of Louisville, Louis D. Brandeis School of Law.

<sup>1</sup> See, e.g., Anthony L. Fargo, *A Federal Shield Law that Works: Protecting Sources, Fighting Fake News, and Confronting Modern Challenges to Effective Journalism*, 8 J. INT’L MEDIA & ENT. L. 35, 59 (2018) (referencing “anti-Semetic tales in the twelfth century to Nazi propaganda before and during World War II”) (footnote omitted); Thomas Rid, *Can Russia Use the Coronavirus to Sow Discord Among Americans?*, N.Y. TIMES (Mar. 16, 2020),

<https://www.nytimes.com/2020/03/16/opinion/russian-interference-coronavirus.html>; and RUSSELL L. WEAVER, FROM GUTENBERG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY AND THE IMPLICATIONS FOR DEMOCRACY 141–42 (Carolina Acad. Press, 2nd ed., 2019).

<sup>2</sup> See Karl Manheim & Lyric Kaplan, *Artificial Intelligence: Risks to Privacy and Democracy*, 21 YALE J.L. & TECH. 106, 144 (2019) (“Fake news in ancient Rome may have sealed the fate of Mark Antony and Cleopatra.”); Carol A. Watson, *Information Literacy in a Fake/False News World: An Overview of the Characteristics of Fake News and its Historical Development*, 46 INT’L J. LEGAL

Washington was alleged to have been a British loyalist and traitor during the American Revolution;<sup>3</sup> the Nazis and the Japanese disseminated propaganda and disinformation to U.S. troops during World War II;<sup>4</sup> and the U.S. government fed disinformation to anti-war protestors during the Vietnam War.<sup>5</sup>

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INFO. 93, 94 (2018).

[I]n ancient Rome the rivalry between Mark Antony and Octavian (Julius Caesar's adopted son) escalated due to false news. In order to damage Antony's reputation, Octavian deployed devious propaganda tactics to spread fake news about him. Octavian distributed coins with slogans describing Antony as a drunk and a puppet of Cleopatra's. Octavian even purported to have a copy of Antony's official will, although historians still debate its veracity. He inflamed the emotions of politicians with anti-Cleopatra prejudices by reading the will aloud in the Senate and claiming Antony wanted to be buried with the Egyptian pharaohs. The Senate was outraged, proclaiming Antony a traitor and declaring war on Cleopatra. The public shaming was so humiliating, Antony killed himself after his defeat in the battle of Actium.

Watson, *supra*.

<sup>3</sup> See Watson, *supra* note 2, at 95.

In the 1700s even America's founding father, George Washington was the victim of fake news. Someone published pamphlets that included letters supposedly written by Washington to his family and describing that he was miserable during the revolutionary war and lamenting that the revolutionary war was a mistake. The fake news was very convincing, purportedly an excellent forgery of his writing style. Even George Washington admitted he was impressed with how well the letters mimicked his writing. Unfortunately, the letters were influential in persuading some members of the public that Washington was a British loyalist. The letters haunted him throughout his presidency and tarnished his reputation. Side note, the letters were probably written by John Randolph of Virginia.

*Id.*

<sup>4</sup> See Henry Mark Holzer, *Why Not Call It Treason?: From Korea to Afghanistan*, 29 S.U. L. REV. 181, 210–12 (2002).

<sup>5</sup> See Stephen Dycus, *The Role of Military Intelligence in Homeland Security*, 64 LA. L. REV. 779, 784 (2004) (“In the late 1960s, the Pentagon compiled personal information on more than 100,000 politically active Americans in an effort to quell civil rights and anti-Vietnam War demonstrations and to discredit protestors. The Army used 1,500 plainclothes agents to watch demonstrations, infiltrate organizations, and spread disinformation.”) (footnotes omitted).

Fake news has become a serious problem today because of the rapid evolution of speech technologies.<sup>6</sup> For centuries, ordinary people had limited capacity to communicate their ideas.<sup>7</sup> While the printing press has existed since the fifteenth century, and was later followed by even more powerful speech technologies, all of those technologies have historically been controlled by “gatekeepers” – essentially, rich or powerful individuals (e.g., the owners of the technologies or editors or producers of media outlets).<sup>8</sup> Ordinary people could try to convince the owners or gatekeepers of technology to air their ideas; but, if the gatekeepers refused, people had few communication options at their disposal.<sup>9</sup> They could give speeches, but could thereby reach only a limited number of people.<sup>10</sup> They could also produce written documents, but they faced substantial distribution problems.<sup>11</sup> Today, the internet has transformed communication by giving everyone the ability to mass communicate.<sup>12</sup> Of course, this increased capacity is a double-edged sword.<sup>13</sup> Just as the internet has made it easier for people to engage in politics, and political debate, and to disseminate their ideas widely, it has also made it easier for them to disseminate disinformation,<sup>14</sup> and to easily transmit disinformation across international borders and indeed around the world.<sup>15</sup>

The COVID-19 pandemic has set off a massive wave of disinformation.<sup>16</sup> As one commentator noted, we have never “faced a pandemic at a time when humans are as connected and have as much access to information as they do now.”<sup>17</sup> Indeed, the World Health Organization has warned of an “infodemic” as the purveyors of

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<sup>6</sup> See WEAVER, *supra* note 1, at 142–43.

<sup>7</sup> See *id.* at 39–65, 142.

<sup>8</sup> See *id.* at 32–38, 39–65.

<sup>9</sup> See *id.* at 47–65.

<sup>10</sup> See *id.* at 3–5.

<sup>11</sup> *Id.* at 35–36 (“Even individuals who could afford to pay for printing were confronted by substantial distribution costs that were beyond the means of average individuals.”) (footnote omitted).

<sup>12</sup> See *id.* at 67–114.

<sup>13</sup> See *id.* at 67–114, 139–170.

<sup>14</sup> See *id.* at 67–114.

<sup>15</sup> *Id.* at 158.

<sup>16</sup> See Sebastian Herrera, *Misinformation About Epidemic Flourishes Online*, WALL ST. J., Mar. 4, 2020, at A6.

<sup>17</sup> See Max Fisher, *The Infectious Danger of Conspiracy Theories*, N.Y. TIMES, Apr. 9, 2020, at A10.

disinformation take advantage of the fact that people are scared.<sup>18</sup> Individuals have circulated claims that the virus is a “hoax,”<sup>19</sup> that exaggerate the fatality rate of the coronavirus,<sup>20</sup> that downplay the danger of the virus,<sup>21</sup> that suggest blacks are immune to the virus,<sup>22</sup> and that suggest cell phone towers facilitate the spread of the virus,<sup>23</sup> as do 5G cellular networks.<sup>24</sup> Disinformation has been circulated regarding remedies for the virus,<sup>25</sup> with some alleging that diluted bleach can cure the virus,<sup>26</sup> as can bananas.<sup>27</sup> There have also been claims that the virus is treatable, but that governments are hiding the truth regarding effective treatments.<sup>28</sup> The internet has also led to conspiracy theories regarding the origins of the virus,<sup>29</sup> including

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

<sup>19</sup> See Jason Breslow, *Why Misinformation and Distrust are Making COVID-19 More Dangerous for Black America*, NPR (Apr. 10, 2020, 5:24 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/10/832039813/why-misinformation-and-distrust-is-making-covid-19-more-dangerous-for-black-amer>; Fisher, *supra* note 17.

<sup>20</sup> See Fisher, *supra* note 17; Herrera, *supra* note 16.

<sup>21</sup> See Fisher, *supra* note 17.

<sup>22</sup> See Breslow, *supra* note 19.

<sup>23</sup> See Adam Satariano & Davey Alba, *Burning Cell Towers, Out of Baseless Fear They Spread the Virus*, N.Y. TIMES, Apr. 11, 2020, at 1.

The attacks were fueled by the same cause, government officials said: an internet conspiracy theory that links the spread of the coronavirus to an ultrafast wireless technology known as 5G. Under the false idea, which has gained momentum in Facebook groups, . . . radio waves sent by 5G technology are causing small changes to people's bodies that make them succumb to the virus.

*Id.*

<sup>24</sup> See Fisher, *supra* note 17.

<sup>25</sup> See Emma Bowman, *Facebook Steps Up Efforts to Combat the Spread of Coronavirus Information*, NPR (Mar. 26, 2020, 9:55 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/26/822245048/facebook-steps-up-efforts-to-combat-the-spread-of-coronavirus-misinformation>; Kazim Rizvi & Ayush Tripathi, *Fighting Misinformation During the Ongoing Pandemic*, CIOL (Apr. 8, 2020), <https://www.ciol.com/fighting-misinformation-ongoing-pandemic/>; Fisher, *supra* note 17.

<sup>26</sup> See Fisher, *supra* note 17.

<sup>27</sup> See *id.*

<sup>28</sup> See *id.*

<sup>29</sup> See Bowman, *supra* note 25; Herrera, *supra* note 16 (stating sources have claimed

claims that the coronavirus is a “foreign bioweapon,”<sup>30</sup> that it was engineered and released by the United States,<sup>31</sup> particularly the Central Intelligence Agency<sup>32</sup> or by the U.S. Army,<sup>33</sup> perhaps as a plot to reengineer the population<sup>34</sup> or as a bioweapon directed at China.<sup>35</sup> There have also been claims that the virus was released by a pharmaceutical company hoping to profit from the pandemic,<sup>36</sup> by China,<sup>37</sup> by Jews,<sup>38</sup> by Turkey<sup>39</sup> or by Iran.<sup>40</sup>

This article examines societal responses and remedies for fake news related to the coronavirus pandemic.

## II. FAKE NEWS: THE IMPLICATIONS FOR DEMOCRATIC SOCIETIES

Disinformation is problematic. In democratic systems, freedom of expression is accorded a preferred position because it constitutes an essential building block of the governmental system. In the Middle Ages, European governments were monarchical, often premised upon the Divine Right of Kings.<sup>41</sup> Under the theory of Divine Right, the king was viewed as God’s representative on earth, and his actions were

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that the coronavirus is a “bioengineered weapon system”).

<sup>30</sup> See Fisher, *supra* note 17.

<sup>31</sup> See *id.*; Melissa Healy, *How Misinformation Overpowers Truth*, L.A. TIMES, Feb. 9, 2020, at B3.

<sup>32</sup> See Herrera, *supra* note 16.

<sup>33</sup> See Fisher, *supra* note 17.

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> See Healy, *supra* note 31.

<sup>37</sup> See Fisher, *supra* note 17; Souad Mekhennet, *Far-Right and Radical Islamist Groups are Exploiting Coronavirus Turmoil*, WASH. POST (Apr. 10, 2020, 2:08 PM), [https://www.washingtonpost.com/national-security/far-right-wing-and-radical-islamist-groups-are-exploiting-coronavirus-turmoil/2020/04/10/0ae0494e-79c7-11ea-9bee-c5bf9d2e3288\\_story.html](https://www.washingtonpost.com/national-security/far-right-wing-and-radical-islamist-groups-are-exploiting-coronavirus-turmoil/2020/04/10/0ae0494e-79c7-11ea-9bee-c5bf9d2e3288_story.html).

<sup>38</sup> See Mekhennet, *supra* note 37.

<sup>39</sup> See Nabih Bulos, *Coronavirus Becomes a Weapon of Disinformation in Middle East Battle for Influence*, L.A. TIMES (Apr. 8, 2020, 3:11 PM), <https://www.latimes.com/world-nation/story/2020-04-08/coronavirus-becomes-new-front-in-middle-east-battle-for-influence>.

<sup>40</sup> *Id.*

<sup>41</sup> See *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 602 (1837) (“The policy of the common law, which gave the crown so many exclusive privileges, and extraordinary claims, different from those of the subject, was founded in a good measure, if not altogether, upon the divine right of kings . . .”).

portrayed as carrying out God's will, and therefore criticism of government was regarded as inappropriate.<sup>42</sup> After all, why would society allow ordinary people to criticize what God (through the king) has done? England even went so far as to prohibit criticism of the king through the Star Chamber's 1606 decision in *de Libellis Famosis*.<sup>43</sup> That decision created the crime of seditious libel,<sup>44</sup> making it an offense to criticize the government or governmental officials (and, at one point, the clergy as well).<sup>45</sup> The crime was justified by the notion that criticism of the government "inculcated a disrespect for public authority."<sup>46</sup> Truth was not a defense, and indeed, truthful criticisms were punished more severely than false criticisms.<sup>47</sup>

A dramatic shift in societal attitudes came about in the eighteenth century as societies began to move from monarchy to democracy. An early indication of this shift was reflected in the U.S. Declaration of Independence's implicit rejection of Divine Right and its explicit adoption of democratic principles: the power to govern derives from the "consent of the governed."<sup>48</sup> As societies shifted from monarchy to democracy, societies began to regard free speech as an essential right. As the Court reiterated in *Connick v. Myers*,<sup>49</sup> "[speech] concerning public affairs is more than self-expression; it is the essence of self-government."<sup>50</sup> Indeed, former U.S. Supreme Court nominee Robert

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<sup>42</sup> *Divine Right*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003).

<sup>43</sup> *De Libellis Famosis* (1606) 77 Eng. Rep. 250, 251; 5 Co. Rep. 125 a, 125 b.

<sup>44</sup> See Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 909 (1963).

<sup>45</sup> Indeed, in *De Libellis Famosis*, 77 Eng. Rep. at 251, the defendants had ridiculed high clergy.

<sup>46</sup> William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 103 (1984). See also Matt J. O'Laughlin, *Exigent Circumstances: Circumscribing the Exclusionary Rule in Response to 9/11*, UMKC L. REV. 707, 720–21 (2002) (referring to the seditious libel prosecution of John Wilkes during the reign of George III (1760–64)).

<sup>47</sup> See Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 184 n.290 (1998); see also William R. Glendon, *The Trial of John Peter Zenger*, 68 N.Y. STATE BAR J. 48, 48 (1996).

<sup>48</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see also *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 820 (2015); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

<sup>49</sup> 461 U.S. 138 (1983).

<sup>50</sup> *Id.* at 145 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (White, J., concurring) ("Core

Bork once argued that the “entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies.”<sup>51</sup> Bork believed that protections for political speech were so essential to the democratic process that they “could and should be inferred even if there were no first amendment.”<sup>52</sup> Other commentators agree that free expression is a critical component of a democratic system of government.<sup>53</sup>

“Fake news” or disinformation is problematic in democratic systems because it has the potential to mislead the public and undermine the quality of public debate. Disinformation is particularly problematic during a pandemic. As noted, during the current pandemic, individuals have used various social media networks (e.g., Facebook, Google and Twitter) to distribute “half-truths and outright falsehoods about the deadly outbreak,”<sup>54</sup> which has resulted in a

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political speech occupies the highest, most protected position.”); *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”); *see also* RUSSELL L. WEAVER & CATHERINE HANCOCK, *THE FIRST AMENDMENT: CASES, PROBLEMS & MATERIALS* (6th ed. 2020).

<sup>51</sup> Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 23 (1971).

<sup>52</sup> *Id.* However, Bork would have limited free speech protections to speech that is “explicitly political”: “Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic.” *Id.* at 20.

<sup>53</sup> *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. REV.* 964, 1028 (1978) (“Either all people have a right to participate in the individual and social processes of self-determination or a ‘better’ individual and collective expression of humanity results from this social process because of the increased opportunity of each to freely participate.”); Emerson, *supra* note 44, at 883. (“The crucial point . . . is not that freedom of expression is politically useful, but that it is indispensable to the operation of a democratic form of government.”); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 *SUP. CT. REV.* 245, 255 (“The First Amendment does not protect a ‘freedom to speak.’ It protects the freedom of these activities of thought and communication by which we ‘govern.’”).

<sup>54</sup> Tony Romm, *Facebook, Google and Twitter Scramble to Stop Misinformation About Coronavirus*, *WASH. POST* (Jan. 27, 2020, 5:52 PM), <https://www.washingtonpost.com/technology/2020/01/27/facebook-google-twitter-scramble-stop-misinformation-about-coronavirus/>.

pandemic of misinformation.<sup>55</sup> Disinformation is being spread by foreigners, as well as by U.S. citizens themselves.<sup>56</sup> Facebook, which has nearly two billion users worldwide,<sup>57</sup> is a major source of disinformation.<sup>58</sup> Indeed, “[e]very time major political events dominated the news cycle, Facebook was overrun by hoaxers and conspiracy theorists, who used the platform to sow discord, spin falsehoods and stir up tribal anger.”<sup>59</sup>

India’s government has flatly declared that, even though it is “taking proactive steps to deal with this pandemic, fake news ‘is the single most unimaginable hindrance’ in addressing the situation.”<sup>60</sup> India’s situation is hardly unique. A British study concluded that nearly fifty percent of the British population has been confronted with disinformation regarding the pandemic, and that forty percent are unsure regarding the truth or falsity of the information that they are receiving.<sup>61</sup> As with political information, social media is playing a prominent role. In the British study, forty-nine percent of the British public indicated that they were receiving information about the pandemic from social media, and only forty-three percent indicated that they were receiving their information from newspapers.<sup>62</sup>

As with other attempts to spread disinformation, many claims related to the pandemic have “elements of truth,” which make them

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<sup>55</sup> See Farhad Manjoo, *How Twitter is Being Gamed to Feed Misinformation*, N.Y. TIMES (May 31, 2017), <https://www.nytimes.com/2017/05/31/technology/how-twitter-is-being-gamed-to-feed-misinformation.html> (“But the biggest problem with Twitter’s place in the news is its role in the production and dissemination of propaganda and misinformation.”). This article offers the example of a conspiracy theory suggesting that the murder of a staffer at the Democratic National Committee was linked to the leak of Clinton campaign emails. *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See Joel Timmer, *Fighting Falsity: Fake News, Facebook and the First Amendment*, 35 CARDOZO ARTS & ENT. L.J. 669, 672 (2017).

<sup>58</sup> See Kevin Roose, *Facebook Thwarted Chaos on Election Day. It’s Hardly Clear That Will Last*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/business/facebook-midterms-misinformation.html>.

<sup>59</sup> *Id.* “Misinformation is a worrisome consequence of any emerging epidemic . . . .” Healy, *supra* note 31 (quoting Dartmouth College political scientist Brendan Nyhan).

<sup>60</sup> Rizvi & Tripathi, *supra* note 25.

<sup>61</sup> See *Half of Us Hit by Fake News on Pandemic*, DAILY MIRROR, Apr. 9, 2020, at 10.

<sup>62</sup> See *id.* at 11.

“just plausible enough to be credible.”<sup>63</sup> For example, some rumors link the virus to “unfounded yet well-established beliefs,” such as claims “linking vaccines to autism and genetically modified foods to health risks.”<sup>64</sup> Those claims have been linked almost daily to claims about the coronavirus.<sup>65</sup>

Disinformation regarding the pandemic has created various societal problems. For example, disinformation has decreased public trust in official and governmental sources of information,<sup>66</sup> including official medical sources,<sup>67</sup> and has encouraged the public to believe that they must find the truth on their own.<sup>68</sup> Some believe that the “wave of coronavirus conspiracies” has the “potential to be just as dangerous for societies as the outbreak itself.”<sup>69</sup>

### III. POSSIBLE SOLUTIONS

Lots of suggestions have been offered for dealing with disinformation related to the pandemic. However, it is not clear that any of the suggested remedies are adequate to deal with the problem, especially in the United States.

#### A. Criminal Prosecutions

In some countries, individuals can be arrested and prosecuted for disseminating fake news related to the pandemic.<sup>70</sup> In South Africa, for example, two teenagers were criminally prosecuted for a video that

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<sup>63</sup> See Healy, *supra* note 31.

<sup>64</sup> *See id.*

<sup>65</sup> *See id.*

<sup>66</sup> See Fisher, *supra* note 17.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Daniel Jolley & Pia Lamberty, *Coronavirus is a Breeding Ground for Conspiracy Theories—Here’s Why That’s a Serious Problem*, THE CONVERSATION (Feb. 28, 2020, 5:55 AM), <https://theconversation.com/coronavirus-is-a-breeding-ground-for-conspiracy-theories-heres-why-thats-a-serious-problem-132489>.

<sup>70</sup> See Sakhiseni Nxumalo, *Nine Arrested for Spreading ‘Fake News,’ IOL: THE MERCURY* (Apr. 8, 2020), <https://www.iol.co.za/mercury/news/nine-arrested-for-spreading-fake-news-46432117> (“In a bid to clamp down on ‘fake news’, the police have arrested nine people throughout the country for spreading false information about the Covid-19 pandemic.”).

went viral on social media.<sup>71</sup> The teenagers were dressed in police uniforms in order to make their statements seem more authentic and more official.<sup>72</sup> In addition, the City of Newark, New Jersey, has threatened to prosecute individuals who disseminate disinformation during the pandemic, especially through social media networks, because of the potential to cause “unnecessary public alarm.”<sup>73</sup> Newark expressed concern that those who circulate disinformation “can set off a domino effect that can result in injury to residents and visitors and affect schools, houses of worship, businesses and entire neighborhoods.”<sup>74</sup>

In the United States, there are limited situations in which criminal prosecutions for dissemination of false information will be permissible. For example, because fraudulent commercial speech is not constitutionally protected,<sup>75</sup> individuals who try to sell fake cures for the COVID-19 virus could potentially be prosecuted for fraud. However, it would be extremely difficult to prosecute individuals who disseminate conspiracy theories regarding the origin of the virus. The U.S. position might be regarded as counterintuitive. In the panoply of free speech values, one might assume that false speech would not be accorded much value. After all, if speech receives special protection because of its role in the democratic process,<sup>76</sup> false speech should arguably receive less protection because of its potential to distort and mislead the democratic process.

The real place of false speech in the free speech hierarchy is much murkier. There are certain categories of false speech that are not constitutionally protected (e.g., perjury in judicial proceedings and making false statements to the government). In addition, those who

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Justine Coleman, *Newark Warns of Criminal Prosecution for ‘False Reporting of Coronavirus,’* THE HILL (Mar. 11, 2020, 11:41 AM), <https://thehill.com/policy/healthcare/public-global-health/487006-newark-nj-warns-of-criminal-prosecution-for-false>.

<sup>74</sup> Newark Department of Public Safety, *Public Safety Director Ambrose Warns Against False Reporting of Coronavirus in Newark via Social Media*, NEXTDOOR (Mar. 10, 2020), <https://nextdoor.com/agency-post/nj/newark/newark-police-department/public-safety-director-ambrose-warns-against-false-reporting-of-coronavirus-in-newark-via-social-media-139923492/>.

<sup>75</sup> See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553 (2001) (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976)).

<sup>76</sup> See *WEAVER & HANCOK*, *supra* note 50, at 3–16.

engage in fraud (e.g., offering to sell bogus remedies for the coronavirus or offering fake testing to determine whether someone has contracted the virus) can be criminally prosecuted.<sup>77</sup>

However, there are many instances in which false speech is constitutionally protected. For example, in *United States v. Alvarez*,<sup>78</sup> federal prosecutors charged Alvarez under the Stolen Valor Act for falsely claiming that he had won the Congressional Medal of Honor. In *Alvarez*, the Court flatly rejected the contention that false speech is not entitled to constitutional protection, overturning Alvarez's conviction.<sup>79</sup> The Court held that the government does not have the power to "compile a list of subjects about which false statements are punishable,"<sup>80</sup> a power that the Court referred to as a "broad censorial power" that is "unprecedented in this Court's cases or in our constitutional tradition."<sup>81</sup> The Court expressed concern that governmental power to punish false speech might impose "a chill the First Amendment cannot permit if free speech, thought and discourse are to remain a foundation of our freedom."<sup>82</sup>

The U.S. Supreme Court's landmark decision in *New York Times Co. v. Sullivan*<sup>83</sup> further illustrates the idea that false speech may be constitutionally protected. *Sullivan* involved a defamation action by a public official (Sullivan) against the *New York Times* for an advertisement relating to the civil rights movement of the 1960s.<sup>84</sup> In overturning the judgment, the Court emphasized that free speech requires "breathing space,"<sup>85</sup> and therefore mere factual error does not

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<sup>77</sup> See Matt Zapposky, *Justice Department Brings First Fraud Case Stemming from Coronavirus Crisis*, WASH. POST (Mar. 22, 2020, 2:27 PM), [https://www.washingtonpost.com/national-security/coronavirus-vaccine-fraud-case-justice-department/2020/03/22/3ac4014e-6c72-11ea-b148-e4ce3fbd85b5\\_story.html](https://www.washingtonpost.com/national-security/coronavirus-vaccine-fraud-case-justice-department/2020/03/22/3ac4014e-6c72-11ea-b148-e4ce3fbd85b5_story.html).

<sup>78</sup> 567 U.S. 709, 713 (2012).

<sup>79</sup> *Id.* at 718. The Court agreed that certain types of false speech could be criminally prosecuted such as perjury or filing a false claim with the U.S. government. *Id.* at 720–22.

<sup>80</sup> *Id.* at 723.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* "[E]ven where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood." *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964).

<sup>83</sup> 376 U.S. 254 (1964).

<sup>84</sup> *Id.* at 256.

<sup>85</sup> *Id.* at 271–72 (citing *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

deprive defamatory speech of constitutional protection.<sup>86</sup> As a result, in order to recover, a public official is required to not only prove that the defendant's allegation was false, but also must show that the defendant made the statement with "actual malice."<sup>87</sup> In other words, a plaintiff must prove either that the defendant "knew" that the statement was false, or acted in "reckless disregard" for whether it was true or false.<sup>88</sup> Mere negligence, or a failure of the newspaper to check the advertisement against its own files, is an insufficient basis for liability.<sup>89</sup> Moreover, the Court limited the amount of damages that could be recovered and provided for independent appellate review of defamation judgments.<sup>90</sup> In subsequent decisions, the Court extended the actual malice standard to defamation actions brought by public figures.<sup>91</sup> In other words, the mere fact that a statement is false does not provide an adequate basis for imposing defamation liability.<sup>92</sup>

Absent the possibility for a criminal prosecution or a successful defamation action, it is difficult to control fake news. For one thing, there is no clear method for determining "truth" in our governmental system. Some courts and commentators rely on the "marketplace of ideas" justification for providing special protection for free expression.<sup>93</sup> In its strict sense, this theory suggests that all ideas should be allowed into the marketplace of ideas, and thereby allowed to compete against each other, in the hope that the best ideas will

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<sup>86</sup> *Sullivan*, 567 U.S. at 273.

<sup>87</sup> *Id.* at 279–80.

<sup>88</sup> *Id.* at 280.

<sup>89</sup> *Id.* at 287.

<sup>90</sup> *Id.* at 284–85.

<sup>91</sup> See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967); *Associated Press v. Walker*, 393 S.W.2d 671 (Tex. Civ. App. 1965), *rev'd sub nom. Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

<sup>92</sup> Although the Court has imposed lower liability standards on defamation actions brought by private individuals, the Court still imposed significant restrictions on the ability of private individuals to recover. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348–50 (1974). Only when a private individual is involved in a matter of "purely private concern" would the Court permit a defamation plaintiff to recover presumed and/or punitive damages. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985).

<sup>93</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."). See also Emerson, *supra* note 44, at 881–82 (arguing freedom of expression helps lead society to the "attainment of truth" because it is the best process for advancing knowledge and discovering truth).

ultimately prevail.<sup>94</sup> This theory, which can be traced back to John Stuart Mill<sup>95</sup> and John Milton,<sup>96</sup> was incorporated into U.S. jurisprudence by Justice Oliver Wendell Holmes.<sup>97</sup> The difficulty is that, in the U.S. system, there are few mechanisms for declaring truth, or knowing whether the “best ideas” have prevailed (absent success in a defamation action). Unlike some other countries (e.g., France) which have declared that certain facts cannot be denied on pain of criminal sanctions (e.g., the French Gayssot law permits the imposition of criminal sanctions on those who deny the Holocaust<sup>98</sup>), the United States does not allow the government to declare certain ideas to be “true” and to prohibit the expression of contrary opinions. Moreover, there is no “Truth Commission” that is empowered to decide and declare which ideas or facts are true, and which are false, and to impose criminal penalties on those who disagree. Even if the United States did have such a commission, it is not clear that the American people would be willing to accept governmental declarations of truth as accurate. In the United States, many are skeptical of government and governmental pronouncements.

Further, many would be troubled by the idea of giving the government the power to declare “truth.” If it were given that power, there is a significant risk that its declarations might be skewed by political considerations. Since the Obama Administration believed in the concept of climate change,<sup>99</sup> one might guess that an Obama Truth Commission would have declared the validity of climate change theory, and perhaps prosecuted those who denied the existence of

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<sup>94</sup> See Baker, *supra* note 53, at 964–65, 974–78, 1028.

<sup>95</sup> See generally JOHN STUART MILL, *ON LIBERTY* (Cambridge Univ. Press 2011) (1859).

<sup>96</sup> See generally 2 JOHN MILTON, *Areopagitica*, in *COMPLETE PROSE WORKS OF JOHN MILTON* 166 (E. Sirluck ed. 1959).

<sup>97</sup> *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”).

<sup>98</sup> See Russell L. Weaver et al., *Holocaust Denial and Governmentally Declared “Truth”*: *French and American Perspectives*, 41 *TEX. TECH. L. REV.* 495, 497 (2009).

<sup>99</sup> See *President Obama on Climate & Energy: A Historic Commitment to Protecting the Environment and Addressing the Impacts of Climate Change*, WHITE HOUSE: PRESIDENT BARACK OBAMA, [https://obamawhitehouse.archives.gov/sites/obamawhitehouse.archives.gov/files/achievements/theRecord\\_climate\\_0.pdf](https://obamawhitehouse.archives.gov/sites/obamawhitehouse.archives.gov/files/achievements/theRecord_climate_0.pdf) (last visited Apr. 15, 2021).

climate change. By contrast, since the Trump Administration rejected the idea of climate change,<sup>100</sup> there was a very real risk that it would have prosecuted those who affirmed the existence of climate change.

The same problems arise with regard to statements about the pandemic. Should government be able to prohibit individuals from asserting that the U.S. government was the cause of the pandemic? Can government make it criminal for individuals to state that the pandemic is worse than the government is admitting? I was in Japan when the pandemic first broke out, and Japanese citizens repeatedly told me that the Japanese government was concealing information regarding the scope and severity of the pandemic. At the time, Japan was scheduled to host the 2020 Olympics, and many believed that the government was covering up the scope of the crisis to prevent a postponement of the Olympics. If Japan had a criminal law prohibiting the circulation of disinformation, could Japanese citizens have been prosecuted for alleging that Japan was circulating disinformation? In fact, there is considerable evidence suggesting that governments have been systematically understating the number of COVID-19 infections. After all, most governments have limited capacity to test their citizens for the infection, and therefore many believe that official statistics significantly understate the number of infections.<sup>101</sup>

The ability to criminally prosecute individuals for false statements is further undercut by the Court's holding in *Garrison v. Louisiana*,<sup>102</sup> which abolished criminal libel in the United States. *Garrison* involved

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<sup>100</sup> See Juliet Eilperin et al., *Trump Rolled Back More Than 125 Environmental Safeguards. Here's How.*, WASH. POST (Oct. 30, 2020), <https://www.washingtonpost.com/graphics/2020/climate-environment/trump-climate-environment-protections/>.

<sup>101</sup> See Sara Chodosh, *Why So Many of the COVID-19 Graphs You See Are Misleading*, POPULAR SCIENCE: HEALTH (Mar. 24, 2020), <https://www.popsoci.com/story/health/misleading-covid-coronavirus-graphs-charts/>.

And that brings up another major issue with looking at pure case counts: You're only ever looking at confirmed cases. Most places aren't testing a huge number of people right now, which means there are certainly many more folks infected than the stats suggest. And because of the massive variation in testing rates, it's close to impossible to compare case counts between countries (or sometimes even within one) because our ability to detect mild cases is so low in some areas.

*Id.*

<sup>102</sup> 379 U.S. 64 (1964).

a Louisiana district attorney who made disparaging comments regarding judicial conduct at a press conference, and who was convicted of criminal defamation.<sup>103</sup> In reversing the conviction, the Court emphasized that, even if an allegedly defamatory statement is false, the Court expressed reluctance to impose criminal liability.<sup>104</sup> At the very least, the prosecution must show that defendant knew that the statement was false or acted in reckless disregard for truth or falsity.<sup>105</sup>

### *B. Injunctions Against False Pandemic Speech*

It will also be difficult to obtain injunctive relief against the dissemination of false information related to the pandemic. In general, injunctions against speech are regarded as prior restraints, and therefore are presumptively unconstitutional.<sup>106</sup> For example, in *Near v. Minnesota*,<sup>107</sup> a newspaper alleged that gangsters and racketeers were engaged in illegal activities in Minneapolis, and that public officials were not “energetically” attempting to control the situation.<sup>108</sup> Relying on a Minnesota statute that allowed the government to enjoin a “malicious, scandalous and defamatory newspaper,” city officials sought to enjoin the newspaper from publishing further information about the topic.<sup>109</sup> The trial court concluded that the allegations in question were “chiefly devoted to malicious, scandalous and defamatory articles,” held that the newspaper was a public nuisance, and enjoined the newspaper “from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law.”<sup>110</sup> The trial court further enjoined the newspaper “from further conducting said nuisance under the name and title of said The Saturday Press or any other name or

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<sup>103</sup> *Id.* at 64–65.

<sup>104</sup> *Id.* at 70–72.

<sup>105</sup> *Id.* at 73 (“Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood.”).

<sup>106</sup> *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963).

<sup>107</sup> 283 U.S. 697 (1931).

<sup>108</sup> *Id.* at 704.

<sup>109</sup> *Id.* at 701–03.

<sup>110</sup> *Id.* at 706

title.”<sup>111</sup> The U.S. Supreme Court vacated the injunction, concluding that prior restraints on speech are generally prohibited,<sup>112</sup> and as a result, viewed the Minnesota injunction as a prior restraint.<sup>113</sup> Moreover, the Court struck down the statute even though it gave newspapers the chance to defend themselves by establishing the truth of their allegations.<sup>114</sup> Publishers cannot be forced to defend themselves prior to publication.<sup>115</sup> In any event, the Court made clear that its decision to overturn the injunction was undertaken without regard to whether the newspaper’s allegations were true or false.<sup>116</sup>

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 716 (“The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship.”).

<sup>113</sup> *Id.* at 718–19 (“Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals.”).

<sup>114</sup> *Id.* at 721–23 (“The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends.”).

<sup>115</sup> If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the Legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details), and required to produce proof of the truth of his publication, or of what he intended to publish and of his motives, or stand enjoined. If this can be done, the Legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship. The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected. The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this court has said, on proof of truth.

*Id.* (citing *Patterson v. Colorado*, 205 U.S. 454, 462 (1907)).

<sup>116</sup> For these reasons we hold the statute, so far as it authorized the proceedings in this action under clause (b) of section 1, to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. We should add that this decision rests upon the operation and effect of the statute, without regard to the question of the truth of the

The Court has even been reluctant to enjoin the publication of information that implicates national security interests. In *New York Times Co. v. United States*,<sup>117</sup> a case that is also referred to as the “Pentagon Papers” case, classified documents were stolen from the U.S. Department of Defense and turned over to newspapers for publication. The government intervened, seeking to prevent the publication. In overturning an injunction issued by a lower court, the Court emphasized that “any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity,”<sup>118</sup> and suggested that the government must carry a “heavy burden of justification” to sustain such a restraint.<sup>119</sup> Although the case produced a plethora of concurrences and dissents,<sup>120</sup> a per curiam decision lifted the injunction.<sup>121</sup>

The one situation in which it might be possible to obtain injunctive relief is against fraudulent commercial speech related to the pandemic. While commercial speech is protected under the First Amendment,<sup>122</sup> receiving an intermediate level of scrutiny,<sup>123</sup> fraudulent or illegal speech is unprotected.<sup>124</sup> As a result, if an individual sought to sell a

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charges contained in the particular periodical. The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication.

*Id.* at 722–23

<sup>117</sup> *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>118</sup> *Id.* at 714 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

<sup>119</sup> *Id.* (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

<sup>120</sup> *Id.* at 714–21 (Black, J., concurring); *id.* at 721–24 (Douglas, J., concurring); *id.* at 724–27 (Brennan, J., concurring); *id.* at 727–30 (Stewart, J., concurring); *id.* at 730–40 (White, J., concurring); *id.* at 740–48 (Marshall, J., concurring); *id.* at 748–52 (Burger, C.J., dissenting); *id.* at 752–60 (Harlan, J., dissenting); *id.* at 760–63 (Blackmun, J., dissenting).

<sup>121</sup> *Id.* at 714.

<sup>122</sup> *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976).

<sup>123</sup> *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

<sup>124</sup> *See id.* at 574 (Blackmun, J., concurring); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Hum. Rels.*, 413 U.S. 376, 388 (1973) (“Discrimination in employment is not only commercial activity, it is *illegal* commercial activity . . . We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes.”).

completely bogus remedy for the coronavirus, not only might the government prosecute the individual, but it might be able to prohibit advertisements for the bogus product as well.

Thus, it seems unlikely that the government can easily obtain an injunction against false speech related to the pandemic except in limited circumstances.

### *C. Responsive Speech*

One possible remedy for disinformation is for the government to provide the people with accurate information. India, for example, is fighting disinformation by trying to circulate accurate information.<sup>125</sup> In the United States, not only the federal government, but also many governors, are holding daily press conferences to update the public regarding the course of the pandemic. The federal briefing includes two of the nation's leading experts, Dr. Anthony Fauci and Dr. Deborah Birk.<sup>126</sup>

But it is not clear whether these attempts to provide truthful and accurate information regarding the pandemic have been successful. For one thing, it is difficult to know how many people are listening to these updates. For example, in Louisville, most media outlets do not live stream updates from the national coronavirus task force.<sup>127</sup> Instead, they filter the task force and report only what they wish.<sup>128</sup> Even when responsive speech occurs, there is no assurance that it will be effective. Those who are skeptical of government may choose not to believe what they hear.<sup>129</sup>

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<sup>125</sup> See Rizvi & Tripathi, *supra* note 25 (“The Central government in its status report to the Supreme Court has said that they would create a portal for answering every query of the citizens by creating a separate unit headed by a joint secretary-level officer along with eminent doctors from reputed institutes.”).

<sup>126</sup> Yelena Dzhanova, *Watch Live: Coronavirus Task Force Holds Briefing as Latest Relief Package Passes House*, CNBC (Apr. 23, 2020, 6:41 AM), <https://www.cnn.com/2020/04/23/watch-live-coronavirus-task-force-holds-briefing.html>.

<sup>127</sup> See generally David Bauder, *To Air or Not Air Trump Briefings? Pressure on at Networks*, ABC NEWS (Apr. 17, 2020, 1:02 PM), <https://abcnews.go.com/Entertainment/wireStory/air-air-trump-briefings-pressure-networks-70210701>.

<sup>128</sup> See *id.*

<sup>129</sup> See Healy, *supra* note 31.

#### D. *Actions by Social Media Companies*

Social media platforms have undertaken their own efforts to combat disinformation, including deactivating the accounts of those who spread disinformation, directing users from fake news to sites with more reliable information, and trying to provide accurate information.<sup>130</sup> In additions, nations are working with social media companies to counteract disinformation.<sup>131</sup>

The problem for social media companies is that there is so much disinformation that companies like Facebook are simply overwhelmed by the total volume of information.<sup>132</sup> Facebook receives more than 6.5 million reports a week alleging fake or improper accounts,<sup>133</sup> and Facebook's moderators are sometimes forced to make decisions

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<sup>130</sup> Herrera, *supra* note 16.

Social media platforms are also taking initiatives in order to prevent the spread of misinformation. Facebook has deployed artificial intelligence to deactivate the accounts spreading fake news along with the introduction of pop-ups which direct[] the users to the resources of WHO from where reliable information could be obtained. Other such initiatives have been taken by WhatsApp wherein they have started a coronavirus information hub to provide reliable information with regard to the pandemic.

Rizvi & Tripathi, *supra* note 25.

<sup>131</sup> Apart from this, the central government in collaboration with What's App has started a service of chatbots named "MyGov Corona News Desk" which aims to prevent the spread of misinformation by providing reliable information about the pandemic. A similar initiative has also been started by the government on Telegram as well. The MyGov website of the government of India specifically provides a section on myth busters that presents facts while simultaneously destroying the misinformation attached to it.

Rizvi & Tripathi, *supra* note 25.

<sup>132</sup> See generally Alex Hern & Olivia Solon, *Facebook Closed 583m Fake Accounts in First Three Months of 2018*, THE GUARDIAN (May 15, 2018, 10:00 AM), <https://www.theguardian.com/technology/2018/may/15/facebook-closed-583m-fake-accounts-in-first-three-months-of-2018>.

<sup>133</sup> Nick Hopkins, *Revealed: Facebook's Internal Rulebook on Sex, Terrorism and Violence*, THE GUARDIAN (May 21, 2017, 1:00 PM), <https://www.theguardian.com/news/2017/may/21/revealed-facebook-internal-rulebook-sex-terrorism-violence>.

regarding the permissibility of content in as little as ten seconds.<sup>134</sup> There is so much disinformation on social media networks that it is difficult for the platforms to keep up. At one point, Facebook hired a team of twenty-five news curators who were charged with examining “trending” new stories, and who were given the power to suppress them.<sup>135</sup> This team was supposed to be skilled in “the art of determining source credibility, ascertaining truth and applying news content.”<sup>136</sup> However, Facebook summarily dismissed the team when its existence became public knowledge, and allegations were made that it “routinely suppressed news stories of interest to conservative readers.”<sup>137</sup> Since dissolving the team, Facebook has used algorithms to ferret out fake content.<sup>138</sup> The nature of those algorithms is not publicly known.<sup>139</sup>

In Germany, Facebook employs hundreds of content moderators who have the power to delete content from Facebook pages.<sup>140</sup> The deletion can be based either on a violation of German law or a violation of Facebook’s “community standards.”<sup>141</sup> As a result, the regulators routinely take down “hate speech,” “terrorist propaganda,” Nazi symbols, and pictures of child abuse.<sup>142</sup> Of course, such repression is consistent with Germany’s free speech attitude which allows for the prohibition of *Mein Kampf*, swastikas, speech that involves incitement to hatred, and defamatory speech.<sup>143</sup> Facebook is reinforced by the Network Enforcement Law, enacted in 2017, which defines twenty-one different types of content that are declared to be illegal and that network platforms are required to remove from their sites.<sup>144</sup>

One thing is clear, a large amount of content has been excluded

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<sup>134</sup> *Id.*

<sup>135</sup> See NATHAN BOMEY, *Prologue* to AFTER THE FACT: THE EROSION OF TRUTH AND THE INEVITABLE RISE OF DONALD TRUMP 9 (2018).

<sup>136</sup> *Id.*

<sup>137</sup> Hopkins, *supra* note 133.

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

<sup>139</sup> *Id.*

<sup>140</sup> Katrin Bennhold, *Germany Acts to Tame Facebook, Learning from Its Own History of Hate*, N.Y. TIMES (May 19, 2019), <https://www.nytimes.com/2018/05/19/technology/facebook-deletion-center-germany.html>.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

from social media platforms; in the first three months of 2018, Facebook closed some 583 million accounts that it characterized as “fake,” and took “moderation action” against some 1.5 billion accounts.<sup>145</sup>

Social media platforms have shown some capacity to exclude individuals or groups for reasons unrelated to the pandemic, and commentators, expressing concern that social media companies exercise too much control over speech, suggest these companies adopt transparent governing procedures.<sup>146</sup> For example, Facebook shut down online pages linked to the “Muslim Cyber Army.”<sup>147</sup> GoDaddy banned the allegedly neo-Nazi website, Daily Stormer, after it mocked a young woman (Heather Heyer) who was killed during a white nationalist rally in Charlottesville, Virginia,<sup>148</sup> claiming that the article might incite violence and therefore violated its terms of service.<sup>149</sup> GoDaddy claimed that it was not engaging in “censorship,” and that it supported a “free and open internet.”<sup>150</sup> Daily Stormer then moved its website to Google, which later banned it for violating its terms of service.<sup>151</sup>

Likewise, three internet companies (Google, Apple, and Facebook)

<sup>145</sup> Hern & Solon, *supra* note 132.

<sup>146</sup> See Bennhold, *supra* note 140.

<sup>147</sup> Max Fisher, *With Alex Jones, Facebook’s Worst Demons Abroad Begin to Come Home*, N.Y. TIMES (Aug. 8, 2018), <https://www.nytimes.com/2018/08/08/world/americas/facebook-misinformation.html?>

<sup>148</sup> Bill Chappell, *Neo-Nazi Site Daily Stormer is Banned by Google After Attempted Move from GoDaddy*, NPR (Aug. 14, 2017, 8:30 AM), <https://www.npr.org/sections/thetwo-way/2017/08/14/543360434/white-supremacist-site-is-banned-by-go-daddy-after-virginia-rally>; Christine Hauser, *GoDaddy Severs Ties with Daily Stormer After Charlottesville Article*, N.Y. TIMES (Aug. 14, 2017), <https://www.nytimes.com/2017/08/14/us/godaddy-daily-stormer-white-supremacists.html>; see also GoDaddy (@godaddy), TWITTER (Aug. 13, 2017, 8:24 PM), <https://twitter.com/GoDaddy/status/896935462622957573> (GoDaddy announced that it had “informed the Daily Stormer that they have 24 hours to move the domain to another provider, as they have violated our terms of service.”).

<sup>149</sup> Chappell, *supra* note 148.

<sup>150</sup> Hauser, *supra* note 148 (Ben Butler, the director of GoDaddy’s digital crime unit, stated, “[w]hile we detest the sentiment of such sites, we support a free and open internet . . . . [W]here a site goes beyond the mere exercise of these freedoms, however, and crosses over to promoting, encouraging, or otherwise engaging in violence against any person, we will take action . . . .”).

<sup>151</sup> Chappell, *supra* note 148.

have moved aggressively to remove content produced by Alex Jones and his Infowars site as “hate speech.”<sup>152</sup> Infowars has been described by one newspaper as a “right-wing conspiracy site,”<sup>153</sup> and another referred to Jones as someone “who became famous for his spittle-flecked rants and far-fetched conspiracies, including the idea that the Sandy Hook massacre was an elaborate hoax promoted by gun-control supporters.”<sup>154</sup> He referred to the 9/11 attacks as an “inside job,” and he helped spread the “Pizzagate” controversy (a debunked conspiracy theory alleging that Hillary Clinton was involved in running a child sexual abuse ring out of a pizza parlor).<sup>155</sup> In regard to the 9/11 attacks, Jones stated: “Now 9/11 was an inside job, but when I say inside job it means criminal elements in our government working with Saudi Arabia and others, wanting to frame Iraq for it.”<sup>156</sup> Other sites – including YouTube, Pinterest, and MailChimp – also banned Infowars.<sup>157</sup>

Leading internet companies have also banned other right-wing individuals.<sup>158</sup> For example, Twitter banned Milo Yiannopoulos,

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<sup>152</sup>Li Yuan, *This Week in Tech: Infowars and China's Great Firewall*, N.Y. TIMES (Aug. 10, 2018), <https://www.nytimes.com/2018/08/10/technology/tech-infowars-china-great-firewall.html>.

<sup>153</sup>Brian X. Chen, *The Internet Trolls Have Won. Sorry, There's Not Much You Can Do.*, N.Y. TIMES (Aug. 8, 2018), <https://www.nytimes.com/2018/08/08/technology/personaltech/internet-trolls-comments.html>.

<sup>154</sup>Kevin Roose, *Facebook Banned Infowars. Now What?*, N.Y. TIMES (Aug. 10, 2018), <https://www.nytimes.com/2018/08/10/technology/facebook-banned-infowars-now-what.html>.

<sup>155</sup>Christine Hauser, *Megyn Kelly Calls Alex Jones's Sandy Hook Denial 'Revolting,' but Still Plans to Air Interview*, N.Y. TIMES (June 12, 2017), <https://www.nytimes.com/2017/06/12/business/media/megyn-kelly-alex-jones-newtown.html>; see Eli Rosenberg, *Alex Jones Apologizes for Promoting 'Pizzagate' Hoax*, N.Y. TIMES (Mar. 25, 2017), <https://www.nytimes.com/2017/03/25/business/alex-jones-pizzagate-apology-comet-ping-pong.html>.

<sup>156</sup>Hauser, *supra* note 148.

<sup>157</sup>Roose, *supra* note 154.

<sup>158</sup>The alt-right isn't necessarily wrong when it claims, as its followers often do, that Silicon Valley is steeped in social liberalism. These are companies that emerged out of Bay Area counterculture, that sponsor annual floats in gay pride parades and hang “Black Lives Matter” signs on the walls of their offices. Silicon Valley's policy preferences aren't always liberal, but tech executives routinely side with progressives on hot-button social issues like immigration, the Paris climate accords, and

allegedly for an online harassment campaign against an actress, and it also banned Chuck Johnson, a Breitbart writer, for alleged threats against a civil rights activist.<sup>159</sup> Twitter has also banned organizations, such as the American Nazi Party and Golden Dawn.<sup>160</sup>

Perhaps because of the resilience of the internet, it is not clear that these social media platforms bans have had a dramatically adverse impact on the speech of banned individuals or organizations. Despite the fact that it was banned from certain websites, Daily Stormer has ready access to the internet.<sup>161</sup> Indeed, Daily Stormer touts the GoDaddy and Google bans for the proposition that it is the “most censored” publication.<sup>162</sup> The bans do not seem to have hurt either Alex Jones or Infowars either. Like Daily Stormer, Infowars has played up its role as a “martyr” by slapping “censored” labels on a number of its videos and initiating a “forbidden information” marketing campaign.<sup>163</sup> Jones used a different Twitter account to claim, “[t]hey’re scared of us. They’re scared of the populist movement.”<sup>164</sup> Likewise, Infowars remains readily available on the internet.<sup>165</sup> Indeed, following the bans (but before the Twitter ban) Jones saw an eight percent bump in his Twitter followers (which translated to about 70,000 followers).<sup>166</sup> Even though individuals can still access the Infowars site directly despite the bans, some believe that the social media ban will mean that Jones and Infowars will have

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President Trump’s recent decision to bar transgender people from military service. In today’s political climate, these are partisan positions, and it’s no big shock that they have drawn suspicion from the other side.

Kevin Roose, *The Alt-Right Finds a New Enemy in Silicon Valley*, N.Y. TIMES (Aug. 9, 2017), <https://www.nytimes.com/2017/08/09/business/alt-right-silicon-valley-google-memo.html>.

<sup>159</sup> Kate Conger & Jack Nicas, *Twitter Bars Alex Jones and Infowars, Citing Harassing Messages*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/technology/twitter-alex-jones-infowars.html>.

<sup>160</sup> *Id.*

<sup>161</sup> DAILY STORMER, <https://dailystormer.name/> (last visited Mar. 13, 2021).

<sup>162</sup> *Id.*

<sup>163</sup> Roose, *supra* note 154.

<sup>164</sup> Conger & Nicas, *supra* note 159.

<sup>165</sup> After reading a series of articles about how Infowars had been banned, the author ran an internet search for the site on August 28, 2018 and the site readily popped up. *See generally* INFOWARS, <https://infowars.com/> (last visited Mar. 14, 2021).

<sup>166</sup> *See* Conger & Nicas, *supra* note 159.

trouble attracting new followers.<sup>167</sup>

In addition, organizations like Infowars have sometimes found ways to circumvent social media bans.<sup>168</sup> For example, when Facebook decided to ban Infowars, Infowars' private groups and messaging apps continued to proliferate on Facebook.<sup>169</sup> Using both "closed" and "secret" groups, Infowars functioned without much oversight.<sup>170</sup> There is evidence suggesting that, although Infowars' video and podcasts have been removed from various platforms, its app has become one of the most popular, sometimes on those very platforms.<sup>171</sup> Twitter responded that it would take action to prevent Jones and Infowars from circumventing its ban.<sup>172</sup>

Individuals have also been able to circumvent social media bans by starting their own apps and platforms.<sup>173</sup> In response to the threat of censorship from "liberal" social media platforms, a conservative digital universe has been developing.<sup>174</sup> For example, there are conservative apps that support the National Rifle Association (NRA) or that support particular candidates such as Donald Trump or Ted Cruz.<sup>175</sup> The Great America app contrasts enthusiastic posts about Trump with pictures of puppies against descriptions of illegal immigrants and "Fake News Friday," which encourages media bashing.<sup>176</sup> These apps provide a way for conservative candidates to interact with their bases.<sup>177</sup> Many of these platforms are not curated or

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<sup>167</sup> *See id.*

<sup>168</sup> *See* Kevin Roose, *To the Fringe, Being Barred by Facebook Isn't the End*, N.Y. TIMES, Sept. 4, 2018, at B1.

<sup>169</sup> *See id.* at B2.

<sup>170</sup> *Id.*

<sup>171</sup> *See* Yuan, *supra* note 152 ("[D]ays after Google, Facebook and Apple removed video and podcasts from Infowars from their sites, its app became one of the hottest in the United States. Among news apps on Wednesday, Infowars was No. 3 on Apple and No. 5 on Google, above all mainstream news organizations.").

<sup>172</sup> Conger & Nicas, *supra* note 159; Twitter Safety (@TwitterSafety), TWITTER (Sep. 6, 2018, 1:47 PM), <https://twitter.com/TwitterSafety/status/1037804430006005760>.

<sup>173</sup> *See* Natasha Singer & Nicholas Confessore, *Let's Talk Politics. No Liberals Allowed. Conservative Apps Build Networks Unhindered by Social Media Giants*, N.Y. TIMES, Oct. 22, 2018, at B1.

<sup>174</sup> *See id.* at B1, B3.

<sup>175</sup> *Id.* at B1.

<sup>176</sup> *Id.* at B3.

<sup>177</sup> *Id.*

controlled in the same way as traditional social media platforms,<sup>178</sup> and provide users with seemingly-authentic, pre-scripted conservative messages that they can post on Facebook or Twitter.<sup>179</sup> Although the Democrats also have their own apps, many of these apps are focused on encouraging individuals to volunteer in political campaigns.<sup>180</sup> Although anyone can gain access to the conservative apps, app controllers have the ability to ban individuals who post messages challenging conservative viewpoints.<sup>181</sup>

#### IV. CONCLUSION

A pandemic provides a particularly fertile environment for disinformation to flourish.<sup>182</sup> In the current pandemic, allegations have been made that the virus is a “hoax,”<sup>183</sup> that exaggerate the fatality rate of the virus,<sup>184</sup> downplay its danger,<sup>185</sup> and suggest that blacks are immune to the virus.<sup>186</sup> Disinformation has also circulated regarding remedies for the virus,<sup>187</sup> whether governments are hiding information regarding effective treatments for the virus,<sup>188</sup> and the source of the virus.<sup>189</sup>

There are few remedies for this flood of disinformation. Although some countries have the ability to prosecute individuals for disseminating disinformation, or to seek injunctive relief against such dissemination, those options are generally not available in the United

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<sup>178</sup> *Id.* at B1.

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

<sup>180</sup> *Id.* at B3.

<sup>181</sup> *Id.*

<sup>182</sup> *See id.*; Fisher, *supra* note 17, at A10.

<sup>183</sup> Morning Edition, *Misinformation, Distrust May Contribute to Black Americans' COVID-19 Deaths*, NPR, at 01:02 (Apr. 10, 2020), [https://www.npr.org/2020/04/10/831480462/misinformation-distrust-may-contribute-to-black-americans-covid-19-deaths?utm\\_medium=RSS&station=KXJZ\\_FM](https://www.npr.org/2020/04/10/831480462/misinformation-distrust-may-contribute-to-black-americans-covid-19-deaths?utm_medium=RSS&station=KXJZ_FM).

<sup>184</sup> *See* Fisher, *supra* note 17, at A10; Herrera, *supra* note 16.

<sup>185</sup> *See* Fisher, *supra* note 17.

<sup>186</sup> *Misinformation, Distrust May Contribute to Black Americans' COVID-19 Deaths*, *supra* note 183, at 01:09.

<sup>187</sup> *See* Bowman, *supra* note 25; Fisher, *supra* note 17.

<sup>188</sup> *See* Fisher, *supra* note 17.

<sup>189</sup> *See* Bowman, *supra* note 25; Bulos, *supra* note 39; Fisher, *supra* note 17; Healy, *supra* note 31; Herrera, *supra* note 16 (one source claimed that the coronavirus is a “bioengineered weapon system”); Mekhennet, *supra* note 37.

States unless the speech involves fraud or illegality. In some instances, social media companies have tried to counteract disinformation by providing accurate information, banning the accounts of those who disseminate false information, or deleting posts. Of course, the ability of social media companies to effectively respond is limited because of the sheer volume of disinformation. In addition, some fear that social media companies will not be fair and unbiased arbiters of information and will instead promote their own political biases. Moreover, even if the disseminators of disinformation are barred from certain social media sites, the internet is such a flexible device that they can usually find other ways to disseminate their message.

One potential solution to disinformation is for governments to respond with truthful information, thereby educating the public. Of course, governmental persuasion efforts are based on the assumption that the public is actually listening to government-provided information and willing to believe it. However, many are skeptical of the government, and there is a risk that individuals will regard governmental attempts to correct disinformation with skepticism. So, despite the plague of disinformation, it is not clear that there are meaningful remedies in free societies.

In the final analysis, perhaps the only effective remedy for disinformation is to hope that the public will read all sources of information carefully and with discretion.