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Mixed Messages: How the Free Press Has a Responsibility to We the People at the Marketplace of Ideas

by Addison O'Donnell

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Introduction

The Free Press makes possible a fair democracy. It exerts influence on our communities and our consciences, principally in the form of reporting facts through its account of events, endorsing certain viewpoints through editorials, and ultimately producing the “first rough draft of history.”¹ How the public responds to the Free Press speaks to the historic and continued expectation that many different voices should present divergent messages and allow the people to decide which message is the truth. Risks taken by the Free Press in the name of truth enable the theory of our Constitution² to endure by facilitating the unbridled flow of ideas for the public to debate.

But what happens when the public’s debate is not based upon fair and honest messages, but on ambiguity or deception? It is not that the purpose of the Free Press—to communicate a clear message and have the public verify its truth through open discourse—supplants the validity of certain opinions held by individuals in the public. Rather, it is that the flow of ideas to the public is now impeded by rogue voices that claim that the truth is not ascertainable. These voices abandon the responsibility of the Press, and, as a result, contaminate the public debate.

This Note addresses, in part, this phenomenon. In Part I, it summarizes the historical context of the Free Press from its English and Colonial American origins and how the Press played an important part in the country’s founding. Part II delves into the twentieth century jurisprudence of the Supreme Court of the United States that repeatedly recognizes the responsibility of the Free Press to the public. Part III examines the current economic and political landscape, in conjunction with how the marketplace of ideas and public debate have been hindered. And finally, Part IV posits how the public can protect the Free Press and allow truth to prevail.

I. “A History of Conflict Between the Crown and the Press”³

The heart of American democracy evolved in part from the deregulation of the press in England and the American Colonies. The concept of a Free Press in the Colonies stood against an English backdrop of warrants granted by the monarchy to those who had the means to print.⁴ The British Crown until 1694 licensed warrants that gave permission to

1. This quote is often attributed to Phillip L. Graham (1915-1963), former president and publisher of *The Washington Post*.

2. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (forwarding an alternative of speech regulation based on an analogy of the free market).

3. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978), quoting *Stanford v. Texas*, 379 U.S. 476, 482 (1965), relying on SEIBERT, FREEDOM OF THE PRESS, 1476-1776, pp. 83, 85-6, 97.

4. See generally SEIBERT, FREEDOM OF THE PRESS, 1476-1776.

publish in the hope of controlling an aggravated and inconsistent public.⁵ Modern courts have recognized this history as an important foundation to the First and Fourth Amendments, recalling that warrants and the resulting limitations on free expression derived from “a history of conflict between the Crown and the Press.”⁶

The Colonies inherited this conflict and faced a dramatic development of press freedoms due to the trial of John Peter Zenger.⁷ Zenger’s *New York Weekly Journal* published anonymous, satirical articles and scathing editorials, which criticized certain actions⁸ by the then-Governor of New York, William S. Cosby.⁹ The case was brought in 1735 by the Crown against Zenger for libel.¹⁰ Zenger knew what was at stake; he insisted on continuing publication and dissemination of his newspaper during his trial.¹¹ The jury found Zenger not guilty of authorship of the editorials,¹² and a new precedent was formed in the Colonies: the government cannot silence press criticism, and libel requires falsehood.

It is sometimes said that Zenger’s attorney, Andrew Hamilton, saved the day in court. “It is not the cause of one poor printer, nor of New York alone, which you are trying. No!” He passionately claimed to the jury, “It may in its consequence affect every free man that lives under a British government on the main of America. It is the best cause. It is the cause of liberty.”¹³

Zenger became a colonial symbol of the Free Press¹⁴ and signified how the American view of press *freedom* diverted sharply from the English one of press *permission*. In the *Weekly Journal* editorials, which accused those in power of selfish intentions, the newspaper asked the public in earnest to think critically about the government by weighing the veracity of the criticisms. If the criticisms were indeed incorrect, then it was for the public to right the wrong and exonerate the government.

5. *Id.*

6. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978), quoting *Stanford v. Texas*, 379 U.S. 476, 482 (1965), relying on SEIBERT, *FREEDOM OF THE PRESS*, 1476-1776, pp. 83, 85-6, 97.

7. See *Crown v. John Peter Zenger*, <http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-new-york-legal-eras-crown-zenger.html>.

8. The Governor was known for arguing publicly about his exorbitant salary. *Id.*

9. Governor William Cosby (1690-1736) served from 1732-1736. He died in office.

10. It is important to note that “libel” also included, at that time, information that was opposed to the government. This case is the catalyst that evolved the meaning of libel, and Courts adopted it since.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

But the government cannot use its power to silence the Press in its presentation of criticisms due to fear of the consequences of publication. That truth, again, is for the people to decide. This was an early example that laid down the theory of our Constitution: that “the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”¹⁵

A. “A Constitutional Redundancy”¹⁶

So succinctly does the First Amendment read:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,¹⁷ or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.¹⁸

Yet there is some confusion as to how to understand the text.¹⁹ Put more simply, the First Amendment can override any law²⁰ that unduly imposes upon: (1) freedom of religion;²¹ (2) freedom of speech;²² (3) freedom of the press;²³ (4) freedom of the people to assemble;²⁴ and (5)

15. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

16. Justice Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1974).

17. Note the comma between “speech” and “press.” In conjunction with the language of the whole text alongside the contextual historical role of the press, this leads the reading to mean that these two rights are separated: “freedom of speech” and “freedom of the press.” This is akin to the lively debate between the Establishment and Exercise Clauses: “respecting an establishment of religion” and “prohibiting the exercise thereof.”

18. U.S. Const. amend. I.

19. See, e.g., Christina E. Wells, *Introduction: The Difficult First Amendment*, 66 Mo. L. Rev. (2001) (noting that the complexity of the Amendment is in the jurisprudence that diverged from the absolutist phrase in the Amendment, “make no law”).

20. This does not include or extend to corporate work policies. See Jena McGregor, *The Google memo is a reminder that we generally don’t have free speech at work*, WASH. POST (Aug. 8, 2017), <https://www.washingtonpost.com/news/on-leadership/wp/2017/08/08/the-google-memo-is-a-reminder-that-we-generally-dont-have-free-speech-at-work/>.

21. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 410 (1963) (holding that the denial of unemployment insurance “imposes [a] burden on the free exercise” of religion and thereby violates the Free Exercise Clause).

22. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 283 (1964) (determining the extent of press protections in a libel action brought by a public official against critics of his conduct).

23. The phrase contains a comma and grammatically separates the two rights, discussed *infra*.

24. See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 158-59 (1969) (striking down an ordinance that prohibited parades and processions without a permit because of its unreasonable restrictions against the participants who were marching for civil rights).

freedom to petition the Government for redress.²⁵ Particularly, these freedoms are attached to the *person* who can exercise these freedoms, rather than the *function* of the freedom itself.²⁶ Therefore, the First Amendment precludes any law that unduly imposes upon: (1) the religious practitioner; (2) the speaker; (3) the press; (4) the people who are assembled; and (5) the grieving petitioner.

It would be illogical to say that the First Amendment solely protects the individual's actions,²⁷ which in and of themselves do not necessarily have freedoms,²⁸ are not immune from liability,²⁹ and are always subject to limitation.³⁰ The freedom of religion does not mean that a religious practitioner can carry out illegal acts according to his or her morality.³¹ The freedom of the people to assemble does not mean people can assemble without notice to the government.³² The freedom to petition the Government does not mean that all grievances can be redressed.³³ And principally, the freedom of speech does not mean that a speaker can threaten others through speech,³⁴ and, by the same token, the freedom of

25. See, e.g., *United States v. Cruikshank*, 92 U.S. 542, 558-59 (1875) (holding that the right to petition operates for the citizens).

26. Eugene Volokh, *Freedom for the Press as an Industry, or For the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459 (2012) (arguing that the Free Press Clause protects the Press as a technology rather than as an industry).

27. *Id.*

28. Rights are owed to *people*. "Ours is a government of the people, by the people, for the people." Abraham Lincoln, *Gettysburg Address*.

29. See, e.g., *Schenck v. United States*, 249 U.S. 47, 52-53 (1919) (Holmes, J.) (holding that speech that the First Amendment does not protect one if the speech "create[s] a clear and present danger").

30. See e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (relying on free speech precedent and reiterating that "it is well understood that the right of free speech is not absolute at all times and under all circumstances").

31. See, e.g., *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 890 (1990) (holding that the general criminal prohibition of the use of peyote did not violate the Free Exercise Clause of the First Amendment in regards to a practitioner's religiously inspired use in accordance with the practices of the Native American Church).

32. See, e.g., *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) (explaining that the regulation of the streets is a "traditional exercise of control by local government" that did not "deny or unwarrantedly abridge the right of assembly" for the sidewalk parade organized by Jehovah's Witnesses).

33. See *McDonald v. Smith*, 472 U.S. 479 (1985) (holding that the right to petition does not give absolute immunity to petitioners). See also *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (finding that "baseless litigation is not immunized by the First Amendment right to petition").

34. See e.g., *Elonis v. United States*, 135 S.Ct. 2001 (2015) (holding that the defendant's intention to issue threats or the defendant's knowing that the communications can be perceived as threats are required in a criminal true threat statute).

press does not mean the freedom to publish and disseminate falsehoods about others.³⁵

Specifically, the Free Press Clause does not mean that a person has the right to use the press, but rather, it gives the press itself a freedom. In considering English history and the Colonial American press background, it is only logical to read the clause as, “Congress shall make no law . . . abridging the freedom of [a person’s] speech, or of the press[’s speech] . . .”³⁶ In other words, the Free Press Clause gives rise to the Free Press, which has the right to speak.

Justice Potter Stewart wrote a famous eight-page law review article³⁷ that sparked and sustained the modern conversation³⁸ over what the First Amendment really means when it designates “or of the press.”³⁹ “It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They *are* guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause,” Justice Stewart writes, “If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy.”⁴⁰

Justice Stewart is onto something here. The Free Speech Clause protects a person’s speech and expression, which includes an individual’s right to publish, but there is an explicit reference to the press. The Free Press Clause protects—separate and apart from an individual’s freedom of speech—the press’s speech and expression.

Justice Stewart also recognizes the relationship that the press has in its responsibility to the people in the marketplace of ideas. “So far as the Constitution goes, the autonomous press may publish *what it knows*, and may seek *to learn what it can*,”⁴¹ he remarks. “The press is free to do battle against secrecy and deception in government.”⁴² In considering the function of the Free Press, Justice Stewart also recognizes that embedded in the First Amendment is the adversarial role of the press against the government in

35. See e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52 (1974) (holding that a private individual can recover damages for defamatory statements that were actually false and negligently made by the speaker).

36. U.S. Constitution, Amendment I.

37. Justice Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 631 (1974).

38. See, e.g., Keith Bybee, *Justice Stewart Meets the Press*, excerpt from JUDGING FREE SPEECH: FIRST AMENDMENT JURISPRUDENCE OF U.S. SUPREME COURT JUSTICES, Helen J. Knowles and Steven B. Lichtman, eds., Palgrave MacMillan (featuring and analyzing Justice Potter Stewart and his distinctive views of the press by drawing upon the plain language of the U.S. Constitution, the political events of his day, and his own personal experience with the press).

39. U.S. Const. amend. I.

40. See Justice Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633 (1974) (emphasis in original).

41. Justice Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1974).

42. See *id.* (emphasis added to highlight the press’s obligation to act responsibly).

relation to the marketplace—the contest—that will ultimately reveal the truth. “The Constitution, in other words, establishes the contest, not its resolution.”⁴³

B. The Press as an Industry

The Constitution and, specifically, the Bill of Rights, enumerated specific rights granted to specific types of persons. Consider voter eligibility,⁴⁴ a well-regulated Militia,⁴⁵ and the President.⁴⁶ Over time, these rights have expanded⁴⁷ and evolved.⁴⁸ Similarly, the Supreme Court has progressively recognized that the Free Press is one such group and that it includes “newspapers, books, and magazines, [and] also humble leaflets and circulars.”⁴⁹ “[T]he Free Press Clause extends protection to an institution,”⁵⁰ Justice Stewart famously recognizes. “The publishing business is, in short, the only organized private business that is given explicit constitutional protection.”⁵¹

Because of the investment required to publish,⁵² the press as an industry has been historically a recognizable group. The Stationers’ Guild in England first gained this distinction from the Crown’s warrants,⁵³ and it evolved in the colonies with Zenger and the *Weekly Journal*.⁵⁴ Even Justice Stewart cites that “the organized press” refers to an industry “of the daily newspapers and established media.”⁵⁵

43. *Id.*

44. *See generally* U.S. Const. art. I, § 4.

45. *See* U.S. Const. amend. II.

46. *See* U.S. Const. art. II.

47. *See, e.g.,* U.S. Constitution, Amendment XV (expanding voter eligibility to African-American males); *see also* U.S. Constitution, Amendment XIX (expanding voter eligibility to women); *see also* U.S. Const. amend. XXVI (expanding voter eligibility to those between the ages of 18 and 21).

48. *See* *District of Columbia v. Heller*, 554 U.S. 570 (2008) (controversially expanding the Second Amendment from a well-regulated Militia to include an individual’s right to bear arms). *See also* *United States v. Nixon*, 418 U.S. 683, 686 (1974) (requiring the President of the United States to adhere to a subpoena).

49. *See* *Mills v. State of Alabama*, 384 U.S. 214, 218-19 (1966), citing *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938) (recognizing that the Constitution specifically selected the press, which includes the aforementioned items, to play an important role in the discussion of public affairs).

50. Justice Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633 (1974).

51. *Id.*

52. This refers to the savings in cost by an increased level of newsgathering and dissemination: *e.g.*, by having the capital to own a newspaper company, the facilities to print daily news, the journalists to hire, and the local contacts to aid in the newsgathering.

53. *See generally* SEIBERT, FREEDOM OF THE PRESS, 1476-1776, discussed *supra*.

54. *See* *Crown v. John Peter Zenger*, discussed *supra*.

55. Justice Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 631 (1974).

Some have argued that the press has not yet been recognized to its fullest potential, and that the Free Press Clause does not have the judicial recognition that it deserves.⁵⁶ States have attempted to fill in the gaps by statutorily defining the press.⁵⁷ One definition of the press is that it is what it claims to be.⁵⁸ Another definition is to describe the press with reference to what the press does in its newsgathering process.⁵⁹ Justice Stewart also suggested that “[t]he press could be [recognized as having] the status of a public utility.”⁶⁰

The fullest definition of the press can be found in the Freedom of Information Act.⁶¹ “A ‘representative of the news media’ means any person or entity that (1) gathers information of (2) potential interest to a segment of the public, (3) uses its editorial skills to turn the raw materials into a distinct work, and (4) distributes that work to an audience.”⁶² It is important to note that, aligning with the same historic representations of the purpose of the press, the Freedom of Information Act defines the press as a conduit of the “public to information.”⁶³

One thing is undeniable in looking at the historic role of the press as an industry: the press, in being necessarily and inherently adversarial, empowers the people. By enabling the people to critically think about their political and social surroundings, the press does what those in power fear most—it opens the door to change. Ignoring the press’s role as an adversary, and indeed as an industry, diminishes the Free Press’s role

56. See, e.g., Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025 (2011) (proposing a recognition of press responsibility).

57. See, e.g., “The individual is ‘earning his or her principal livelihood’ from newsgathering” Del. Code Ann. Title 10, § 4320 (1999). See also “A member of the press is a ‘person engaged in, connected with, or employed by (1) any newspaper of general circulation or (2) any press association or any radio or television station, or (3) any magazine of general circulation.’” 42 Pa. Cons. Stat. Ann. § 5492 (West 2000) (numbers added for better understanding).

58. See, e.g., R.I. Gen. Laws § 9-19.1-1 (1997). “A ‘newspaper’ and ‘periodical’ to mean (1) only publications issued at regular intervals and (2) with paid circulation and (3) *explicitly stating that the definition applies* to those gathering or presenting news (4) *for any accredited newspaper.*” *Id.* (numbers added for better understanding and emphasis added). This definition escapes logic and risks legitimacy of the press.

59. See, e.g., Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist’s Privilege in an Infinite Universe of Publication*, 39 Hous. L. Rev. 137, 137 (2003) (positing that the definition should center on “the process through which information that is useful to self-governance is gathered and provided to the public”).

60. Justice Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1974).

61. 5 U.S.C. § 552 (2006).

62. See Freedom of Information Act, 5 U.S.C. § 552 (2006).

63. See S. Rept. No. 1219, 88th Cong., 2d Sess., [https://nsarchive2.gwu.edu/nsa/foialeg/history/S.%20Rep.%20No.%2088-1219%20\(1966%20Source%20Book\).pdf](https://nsarchive2.gwu.edu/nsa/foialeg/history/S.%20Rep.%20No.%2088-1219%20(1966%20Source%20Book).pdf).

entirely.⁶⁴ The press's adversarial role strengthens the press as an industry because of the public's continued perception of the press as unique⁶⁵ and because of support in the form of subscriptions.⁶⁶

C. "A Contraction of Territorial Limits"⁶⁷

The press historically was tailored to the locality that it served. In reporting the local happenings, the press does what a gathering would do: it dispenses a message and moderates discussion to and from the community. This method of substitution—a proxy for getting a multitude of people who are geographically disparate into the same room—is also the principal theory behind the election of representatives in government.⁶⁸

It was no surprise that James Madison, architect of the Constitution, embraced a Free Press as a tool for the people in the newly formed democracy. An avid antifederalist who foresaw a tyrannical few ruling over many,⁶⁹ Madison urged for the adoption of the First Amendment to ensure that the American public could live in a country different from England, one that did not even suppose an alternative fate for Zenger and his press. This was also in part inspired by the rise of citizen journalism in the colonies post-Zenger with pamphlets that shaped the Revolution.⁷⁰ In the *National Gazette*,⁷¹ James Madison writes an essay that details his desire for a Free Press in the democracy:

"Whatever facilitates a general intercourse of sentiments, as good roads, domestic commerce, a free press, and particularly *a circulation of newspapers through the entire body of the people, and Representatives going from, and returning among every part of them*, is equivalent to a contraction of territorial limits, and is favorable to liberty, where these⁷² may be too extensive."⁷³

64. See Ronnell Andersen Jones and Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L.J. 1301 (2018) (arguing that the press is weakened when it is degraded and framed as an enemy of the government).

65. It rings true of the conventional wisdom, "[f]acts do not cease to exist because they are ignored." Aldous Huxley, author of *Brave New World* (1894-1963).

66. Discussed in Part III, *infra*.

67. THE COMPLETE MADISON 294 (S. Padover 1st ed., 1953) (emphasis in original) (reprinting essay in *National Gazette*, Dec. 19, 1791).

68. See generally U.S. Const., art. I.

69. See generally THE FEDERALIST PAPERS No. 10 (recognizing the fears of those "who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community").

70. See, e.g., THOMAS PAINE, COMMON SENSE (1775-76).

71. This newspaper, lauded by antifederalists, served Philadelphia, Pennsylvania.

72. This refers to territorial limits.

73. THE COMPLETE MADISON 294 (S. Padover 1st ed., 1953) (emphasis in original) (reprinting essay in *National Gazette*, Dec. 19, 1791).

Madison describes this phenomenon—that newspapers, their circulation, and the traveling representatives contracted the vast geography of the colonies and gathered the many members of the public into one “room” in order to “facilitate a general intercourse of sentiments,” or discuss the truth of the ideas at hand. The same effect occurs when good roads facilitate easy travel from place to place and when the local economy is strong: travel informs discussion as to the activities of people in other places, and commerce ensures that choice is the root of liberty. So too does the Free Press ensure both of those goals.

II. Modern Meaning of Press Responsibility

History informs us but does not control us. Its understanding is based on information that can be unreliable and unavailable. History is often limited to what was written down, found, and considered relevant; the perception of history is very narrow. Meaning, then, is attached based not on how the words were used at the time they were written, but how the *reader* understands how the words were used at the time they were written. Temporal circumstances prevent true understanding.

Yet history is an important backdrop in understanding the law today. To prevent anachronistic and confusing inconsistencies, the law is read in the only way it *can* be read: as twenty-first century Americans.⁷⁴ “Such is the character of human language,” wrote the Court in 1819, “that no word conveys to the mind, in all situations, one single definite idea . . .”⁷⁵

Press responsibility is often defined today by its limits. Most cases ask what exactly the press is allowed to do. Unquestionably, the impact of the press on public debate during the twentieth century reached its apex with the resignation of President Richard M. Nixon⁷⁶ and the Watergate Scandal.⁷⁷ The best place to start a discussion of modern press responsibility is not with jurisprudence, but, with an event and the regulations that followed it, which impacted the entire country because of the press’s actions: Orson Welles’s famous radio broadcast of “The War of the Worlds.”⁷⁸

74. This is a paraphrase of Justice Brennan’s speech given at Georgetown University on October 12, 1985.

75. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414 (1819) (Marshall, C.J.).

76. August 9, 1974.

77. See *The Watergate Story*, WASH. POST, <http://www.washingtonpost.com/wp-srv/politics/special/watergate/timeline.html>.

78. *The War of the Worlds* (Columbia Broadcasting Station October 30, 1938).

Framed as a news report without any commercial interruptions,⁷⁹ Welles described to listeners in the New York metropolitan radio market⁸⁰ an alien sighting in Grover's Mills, New Jersey.⁸¹ He then portrayed a full-on alien invasion.⁸² There were listeners who did not know about the fiction and took the story as true news reporting, and the result caused mass hysteria,⁸³ property damage,⁸⁴ and countrywide outrage.⁸⁵ CBS News head Paul White⁸⁶ recalled that the telephone switchboards in the news bureau were overloaded and could not take any more telephone calls.⁸⁷ He famously remarked, "And there bedlam reigned."⁸⁸

On October 31, 1938, the day after the broadcast, it still was not widely understood that the story was fictional.⁸⁹ There was a countrywide outcry to CBS and other news outlets to clarify what had happened.⁹⁰ Suffice it to say, the Federal Communications Commission conducted an extensive investigation of CBS's broadcast, so as to ensure that mass panic would not recur.⁹¹ This investigation led to the Commission's rule on "hoaxes":

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

79. See Christopher Sterling, "War of the Worlds ("The Mercury Theatre on the Air," 1938)," Library of Congress, <https://www.loc.gov/programs/static/national-recording-preservation-board/documents/TheWaroftheWorlds.pdf>.

80. See *Radio Listeners in Panic, Taking War Drama as Fact*, N.Y. TIMES, <http://www.war-of-the-worlds.org/Radio/Newspapers/Oct31/NYT.html>.

81. See Peter Genovese, *Mars Attacks! 75 years ago, 'War of the Worlds' broadcast put nation in a panic*, NJ.COM (Oct. 30, 2013), http://www.nj.com/entertainment/index.ssf/2013/10/mars_attacks_75th_anniversary_of_orson_wells_infamous_war_of_the_worldsbroadcast.html. Even in Grover's Mills did the citizens panic: some started shooting at a water tower suspecting that it was an alien spaceship. See *1938 Martian Landing Site Monument*, <https://www.roadsideamerica.com/story/2749>. Nevertheless, it is a lasting source of local pride for the citizens of West Windsor Township. *Id.*

82. See *Radio Listeners in Panic, Taking War Drama as Fact*, N.Y. TIMES, <http://www.war-of-the-worlds.org/Radio/Newspapers/Oct31/NYT.html>.

83. See Graeme McMillan, *Real-Life Casualties from "War of the Worlds,"* (Mar. 31, 2008), <https://io9.gizmodo.com/373869/real-life-casualties-from-war-of-the-worlds>.

84. See, e.g., *War of the Worlds broadcast causes chaos in 1938*, DAILY NEWS <http://www.nydailynews.com/news/national/war-worlds-broadcast-caos-1938-article-1.2406951>.

85. *Id.*

86. (1902-1955).

87. PAUL W. WHITE, *NEWS ON THE AIR*. (New York: Harcourt, Brace and Company 1947).

88. *Id.*

89. See, e.g., *War of the Worlds broadcast causes chaos in 1938*, DAILY NEWS, <http://www.nydailynews.com/news/national/war-worlds-broadcast-caos-1938-article-1.2406951>.

90. See *Radio Listeners in Panic, Taking War Drama as Fact*, N.Y. TIMES, <http://www.war-of-the-worlds.org/Radio/Newspapers/Oct31/NYT.html>.

91. See David Oxenford, *Orson Welles' War of the Worlds 75 Years Later – What Would the FCC Do Now?*, BROADCAST LAW BLOG (Oct. 31, 2013), <https://www.broadcastlawblog.com/2013/10/articles/orson-welles-war-of-the-worlds-75-years-later-what-would-the-fcc-do-now/>.

knows this information is false; (b) It is foreseeable [sic] that broadcast of the information will cause substantial public harm, and (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.”⁹²

This produced the result that the Commission wanted: the broadcasters could not transmit and treat a broadcast as news when it is, in truth, fictitious and, therefore, dangerous to the public.⁹³ This reliance by the public on the news stemmed from America’s historic reliance on the press;⁹⁴ due to the general advancement of modern technology, the use of radio as a means to transmit information, and the increasing density of Americans in cities across the wide expanse of the country, the role of the press has only increased.⁹⁵

The Commission understood that the people trusted the news, and the confusion that it caused afterwards evinced that trust.⁹⁶ No doubt broadcasting responsibility is identical to overall press responsibility; after all, the broadcast industry is recognized as a subset of the Free Press.⁹⁷ It is under this perspective that the twentieth century jurisprudence of press responsibility should be understood.

But where is the line drawn regarding a press outlet’s unencumbered freedom to speak? Does it take a tumultuous event for the government to react? So long as the government does not interfere with the press’s ability to maintain the public debate, the government should stand as a watchman

92. See 47 C.F.R. § 17.1217, “Broadcast Hoaxes.” A note following the rule reads: “For purposes of this rule, ‘public harm’ must begin immediately, and cause direct and actual damage to property or to the health or safety of the general public, or diversion of law enforcement or other public health and safety authorities from their duties. The public harm will be deemed foreseeable if the licensee could expect with a significant degree of certainty that public harm would occur. A ‘crime’ is any act or omission that makes the offender subject to criminal punishment by law. A ‘catastrophe’ is a disaster or imminent disaster involving violent or sudden event [sic] affecting the public.” *Id.* This limits the rule as to the public’s reaction to the news in respect to the time of the broadcast.

93. *Cf. Schenck v. United States*, 249 U.S. 47, 52-53 (1919) (articulating a “clear and present danger” test as a standard for losing First Amendment protections on speech).

94. Discussed in Part I, *supra*.

95. James Madison would have posited that this truly was “a contraction of territorial limits.” See *THE COMPLETE MADISON* 294 (S. Padover 1st ed., 1953) (emphasis in original) (reprinting essay in *National Gazette*, Dec. 19, 1791).

96. See Justin Levine, *A History and Analysis of the Federal Communications Commission’s Response to Radio Broadcast Hoaxes*, *FEDERAL COMMUNICATIONS LAW JOURNAL*, Vol. 52: Iss. 2, Article 3 (2000).

97. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) (stating that “moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.”)

ensuring that press responsibility will endure. As stated by the Court, “A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.”⁹⁸

A. “The Press Serves and was Designed to Serve as a Powerful Antidote”⁹⁹

As the first “great press case”¹⁰⁰ of the modern era, *Near v. Minnesota*¹⁰¹ paved the way for ensuring that editorials can be published without blanket restrictions¹⁰² on content. Yet the press did not get off scot-free; the Court recognized that states may impose legislative limits on the press and that the Free Press is not an absolute right.¹⁰³

The question as to the standard of libel was refined by *New York Times v. Sullivan*¹⁰⁴ and its progeny¹⁰⁵ with the requirement of “actual malice.” But what is important to see is that even after the line was crossed from sensationalism to “bedlam,”¹⁰⁶ as in the “The War of the Worlds” broadcast, editorializing by using *ad hominem* attacks was still protected under the First Amendment.¹⁰⁷ In a competition between the Free Press and the government, must the Free Press, to the extent that it offers criticism and reporting editorializing and reporting on the courts, the election process, or the criminal defendant awaiting trial, do so *responsibly*?

*Pennkamp v. Florida*¹⁰⁸ answers the question as to whether the press can use its voice to place the courts in the spotlight of public debate. There, the *Miami Herald* was held in contempt of court and held “responsible” for publishing two editorials that criticized a trial court as being too favorable to certain defendants.¹⁰⁹ The assertion was that the newspaper did not fully explain both sides and that “these omissions were a wanton withholding of the full truth.”¹¹⁰ To determine whether the press would be punished for its

98. *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

99. *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).

100. This quote is attributed to legal columnist and scholar Anthony Lewis (1927-2013).

101. 283 U.S. 697, 706-07 (1931).

102. Here, a statute that prohibited the publication of “malicious, slanderous, and defamatory” statements. *Id.*

103. *Id.* at 708.

104. 376 U.S. 254, 256 (1964).

105. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 134 (1967) (extending the “actual malice” standard to public figures); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (rejecting the “actual malice” standard of a private person if negligence is present); *Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967) (implementing the “actual malice” standard to a false light cause of action); *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (using the “actual malice” standard to an intentional infliction of emotional distress cause of action).

106. PAUL W. WHITE, *NEWS ON THE AIR* (New York: Harcourt, Brace and Company 1947).

107. See *Near v. Minnesota*, 283 U.S. 697, 707 (1931).

108. 328 U.S. 331, 355-56 (1946).

109. *Id.* at 333-34. The basis for the original court order is unclear.

110. *Id.* at 341.

publication, the court “weigh[ed] the right of free speech¹¹¹ . . . against the danger of coercion and intimidation of courts.”¹¹²

“Free discussion of the problems in society is a cardinal principle of Americanism—a principle which all are zealous to preserve,”¹¹³ the Court underscores. “Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.”¹¹⁴ Free discussion, according to the Court’s line of reasoning, comports with monitoring the administration of justice by featuring it in the public debate. Free discussion of whether the court was fair enables the public to better discuss the role that the court plays in the community.

Yet, the Florida court found that a scathing newspaper article could tamper with the fair administration of justice.¹¹⁵ Ultimately, this position favors the public policy of the marketplace of ideas because criticism, much like the accusatorial legal system, reveals the truth. The statute was ruled unconstitutional.¹¹⁶ The government was up to bat; strike one for the government.

*Mills v. Alabama*¹¹⁷ raises the question of whether a state can punish a newspaper that takes a position regarding a ballot issue on Election Day.¹¹⁸ In order to prevent “electioneering,” the State of Alabama penalized the *Birmingham Herald* for endorsing a mayor-council form of government, which was a ballot issue for that election.¹¹⁹ The Court writes in an admonishing tone, “Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”¹²⁰

But the Court does not stop there. The specific facts gave the Court an opportunity to reaffirm the role of the press: “[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials, and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they

111. The Free Press has been recognized as a right separate from Free Speech. *See* *Near v. Minnesota*, 283 U.S. 697, 707 (1931). *See* also *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 556 (1976).

112. 328 U.S. at 335. The Court here, however, used *speech* as the right in which to measure. 328 U.S. 331, 346.

113. *Id.* at 346.

114. *Id.* at 347.

115. *Id.* at 343.

116. *Id.* at 349-50.

117. 384 U.S. 214, 218-19 (1966).

118. *Id.* at 215-17.

119. *Id.*

120. *Id.* at 218.

were selected to serve.”¹²¹ Here, the Court breathes life into the very purpose of the press and into the Free Press Clause—a remedy for the virus of abusive power.

When the press presents cogent arguments for a position, the public makes better-informed decisions about government. Because the press is an expert in public affairs by virtue of its regular reporting, the press develops an immune system for a public weary of the choices at hand. “Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.”¹²² Strike two.

Finally, *Sheppard v. Maxwell*¹²³ details a carnival-like atmosphere that surrounded a small-town murder trial.¹²⁴ There were several facts that strongly implicated prominent Dr. Sheppard for the murder of his wife,¹²⁵ but the local police did not make an arrest.¹²⁶ It was implied that his many local contacts were insulating him from prosecution, and the press detailed this theory.¹²⁷ It took the neighboring municipality of Cleveland to urge for the arrest of the doctor as a suspect for the murder; even then, the press and the media closely followed these events and the sensational trial.¹²⁸ There is no doubt that the press’s goal was to sell more newspapers, but by challenging the courts and police, the press ensured the fair administration of justice.

“A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field,”¹²⁹ the Court explains. The Court then recognizes that the press had editorialized and reported successfully for “several centuries.”¹³⁰ “The Court is, therefore, unwilling to place any direct limitations on the freedom traditionally exercised by the news media for ‘(w)hat [sic] transpires in the courtroom.’”^{131, 132}

121. *Id.* at 219.

122. *Id.*

123. 384 U.S. 333, 335 (1966).

124. *Id.* at 335-50.

125. *Id.* at 336-38.

126. *Id.* at 338.

127. *Id.* at 340-41.

128. *Id.*

129. *Id.* at 350.

130. *Id.*

131. *Craig v. Harney*, 331 U.S. 367, 374 (1947).

132. 384 U.S. at 350.

In reiterating the approval for editorializing about the administration of justice from *Pennekamp*,¹³³ the Court identifies that “[t]he press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to the extensive public scrutiny and criticism.”¹³⁴ The responsibility of the press to protect the people by exposing injustices strengthens the marketplace of ideas by allowing the truth, as it would have done in *Zenger*,¹³⁵ to criticize or exonerate the government. While the Court has “consistently required that the press have a free hand, even though [the Court has] sometimes deplored its sensationalism,”¹³⁶ it also recognizes that the press has a legitimate expectation of a “hands-off” government so that it can investigate and disseminate its message for the people. Strike three, and the government is out!

The Free Press’s editorial territory reaches to any part of the government process to ignite public debate. The Court articulated the test clearly in *Pennekamp*:¹³⁷ the Court weighs the press’s editorial power against unfairness. If the burden is not met to show that the press’s publication created a grave injustice, then the press’s right to criticize, endorse, and investigate lives on.

B. “Most of Us . . . Would be Unable to Vote Intelligently”¹³⁸

The 1970s was a tumultuous time, and the Free Press provided the raw materials for controversy. The press’s adversarial role was lauded for the investigative reporting of Bob Woodward and Carl Bernstein during the Watergate Scandal.¹³⁹ Even before that, the Pentagon Papers¹⁴⁰ were published by the *New York Times* and the *Washington Post*; accordingly, the Court decided tersely that the press was allowed to print the documents,¹⁴¹ which incriminated presidents John F. Kennedy and Lyndon B. Johnson for fabricating pretexts for American involvement in Vietnam.¹⁴²

133. 328 U.S. at 355-56.

134. 384 U.S. at 362-63.

135. See *Crown v. John Peter Zenger*, <http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-new-york-legal-eras-crown-zenger.html>.

136. 384 U.S. at 350.

137. 328 U.S. at 355-56.

138. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975).

139. See *The Watergate Story*, WASH. POST, <http://www.washingtonpost.com/wp-srv/politics/special/watergate/timeline.html>.

140. *New York Times v. United States*, 403 U.S. 713, 714 (1971).

141. The per curiam opinion was only three paragraphs. *Id.*

142. See Neil Sheehan, *Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement*, N.Y. TIMES, (June 13, 1971), <https://timesmachine.nytimes.com/timesmachine/1971/06/13/170503942.pdf>.

The Supreme Court during this time was truly a tale of two cities: Justice Potter Stewart, who respected the press's power,¹⁴³ and Chief Justice Warren Burger, who had a complicated relationship with the press.¹⁴⁴ Appointed by President Richard M. Nixon,¹⁴⁵ Chief Justice Burger openly disliked the media,¹⁴⁶ excluding it at his public speeches, and, at one time, knocking a television camera from the hands of a reporter who followed him into an elevator.¹⁴⁷ But for Justice Potter Stewart, the media was a powerful tool. He secretly helped famed Watergate journalist Bob Woodward as a primary source and secret instigator for *The Brethren: Inside the Supreme Court*,¹⁴⁸ "almost hop[ing] that he could bring Warren Burger down by launching this inquiry into how [Burger] ran the Court."¹⁴⁹

A reader would not necessarily see Chief Justice Burger's bias against the press in his opinions. In *Miami Herald Pub. Co. v. Tornillo*,¹⁵⁰ the *Miami Herald* is yet again¹⁵¹ thrust into the spotlight. The newspaper refused to give a political candidate "equal space" to respond to editorials that attacked his character.¹⁵² A Florida statute required newspapers to give candidates a "right to reply."¹⁵³ This "equal space" rule, which permitted the candidate to place his or her reply anywhere in the paper, jarred the Court: "Compelling editors or publishers to publish that which 'reason' tells them should not be published"¹⁵⁴ is what is at issue in this case."¹⁵⁵ The Court simplifies the heart of the matter here: "The Florida statute exacts a penalty on the basis of the content of a newspaper"¹⁵⁶ and "fails to clear the barriers of the First Amendment because of its intrusion into the function of editors."¹⁵⁷ In other words, the Court objected to the fact that

143. See Justice Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 631 (1974).

144. See generally Michael J. Wahoske, *Chief Justice Burger and Freedom of the Press*, 45 OKLA. L. REV. 121 (1992).

145. He was appointed on June 23, 1969, and served until September 26, 1986.

146. See RonNell Andersen, *U.S. Supreme Court Justices and Press Access*, 2012 BYU L. REV. 1791.

147. See Linda Greenhouse, *Warren E. Burger is Dead at 87; Was Chief Justice for 17 Years*, N.Y. TIMES, (June 26, 1995), <https://www.nytimes.com/1995/06/26/obituaries/warren-e-burger-is-dead-at-87-was-chief-justice-for-17-years.html>.

148. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT*, 1979.

149. *Id.*

150. 418 U.S. 241, 244 (1974).

151. See *Pennekamp v. Florida*, 328 U.S. 331, 333 (1946).

152. 418 U.S. 241, 244 (1974).

153. *Id.* at 244-45.

154. The Court does not cite this quote. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

155. *Id.* at 256.

156. *Id.*

157. *Id.* at 258.

the press did not have full discretion as to what it could print and where it could print it in its newspaper.¹⁵⁸

“A responsible press is an undoubtedly desirable goal, but press responsibility¹⁵⁹ [for giving equal space to different candidates] is not mandated by the Constitution and like many other virtues it cannot be legislated [in this way].”¹⁶⁰ The Court here understands that if the State required a right to reply, then the press becomes a megaphone of the government.¹⁶¹ The message, then, will fool the public in the debate into thinking that the message comes from an organic place, when it is, in actuality, tainted.

Balanced editorializing does not fulfill press responsibility because it strips the press’s opinion away from the press, and the people need the press’s opinion in order to properly understand what to believe. Presenting both sides of a story does not necessarily lead to the truth. When the press presents a story in order to exploit a lack of “balanced” presentation of both sides, the press then misrepresents its own position, abdicates its responsibility, and deserves to lose its protection under the First Amendment.

The Florida legislature misunderstood press responsibility as press impartiality. It is not the responsibility of the press to afford each political candidate equal footing. The press can and does have the expertise and power to prefer one over the other based on the merits of his or her candidacy. It is the responsibility of the disregarded candidate to find an alternative means of dissemination¹⁶² to defend his or her character against an editorial or opinion. If there is no alternative for the disregarded

158. “The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.” *Id.*

159. It is important to recognize that Chief Justice Burger here does not refer to *general* press responsibility, but to the specific “right to reply” press responsibility imputed upon by the Florida legislature.

160. 418 U.S. 241, 256 (1974).

161. This statute seems like a form of the famous broadcasting “fairness doctrine,” which does not *prohibit* the broadcaster from expressing its views. It simply means that if a broadcaster wants to express its own views, it must make sure that the paramount right of the public is met: to hear a diverse number of views. The “fairness doctrine” means that there must be an opportunity for other views. *See generally* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (White, J.) (stating that “the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount”). The “fairness doctrine” was finally eliminated in 2011. *See* Brooks Boliek, “FCC finally kills off fairness doctrine,” POLITICO, (Aug. 22, 2011), <https://www.politico.com/story/2011/08/fcc-finally-kills-off-fairness-doctrine-061851>.

162. Perhaps a competing newspaper may believe with honesty in the truthfulness of a candidate, as mandated by the modern precedent of press responsibility.

candidate, then, according to *Tornillo*,¹⁶³ the character flaw of that candidate may very well be true.

About one month after *Tornillo*,¹⁶⁴ President Richard M. Nixon resigned. The writing was on the wall after the editorial judgment was freed from government control,¹⁶⁵ the *Washington Post* reported relentlessly,¹⁶⁶ and the boundaries of the presidential privilege were drawn in *United States v. Nixon*.¹⁶⁷ The Free Press and its responsibility were here to stay.

*Cox Broadcasting Corp. v. Cohn*¹⁶⁸ deals with a television news station that used the name of a victim of rape, obtained from judicial records that were open to inspection.¹⁶⁹ The victim's father brought the Georgia invasion of privacy cause of action against the reporter and the company, which raised the question whether the First Amendment protected the station.¹⁷⁰

"[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government," the Court declares, "he [or she] relies necessarily upon the press to bring him [or her] in convenient form the facts of those operations."¹⁷¹ Once again, the Court reaffirms the purpose of the press and how it affects the marketplace of ideas.

Then, the Court reaffirms what was at issue in *Pennekamp*¹⁷² and in *Sheppard*.¹⁷³ "With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."^{174, 175} Yet again, the Court insists that the First Amendment and the administration of justice do not conflict with each other.¹⁷⁶

Ultimately, the First Amendment protected the news station and the invasion of privacy statute was struck down.¹⁷⁷ The Court also articulates the *standard* of press responsibility. "Great responsibility is accordingly

163. 418 U.S. at 256.

164. *Id.*

165. *Id.*

166. See *The Watergate Story*, WASH. POST, <http://www.washingtonpost.com/wp-srv/politics/special/watergate/timeline.html>.

167. 418 U.S. 683, 715-16 (1974).

168. 420 U.S. 469, 491-92 (1975) (White, J.).

169. *Id.* at 471-72.

170. *Id.* at 475.

171. *Id.* at 491.

172. 328 U.S. 331, 346-47 (1946).

173. 384 U.S. 333, 350 (1966).

174. See *id.*

175. 420 U.S. at 492.

176. This is probably because the Court cannot realistically choose between the two.

177. *Id.* at 496-97.

placed upon the news media to report *fully and accurately* the proceedings of government, and official records and documents open to the public are the basic data of government operations.”¹⁷⁸ The Court here acknowledges that the public understands that the Free Press will report public affairs thoroughly and honestly.

The Court then prophesizes the worst outcome of a corrupted marketplace of ideas: “Without the [full and accurate] information provided by the press[,] most of us and many of our representatives would be unable to vote intelligently or to register an opinion on the administration of government generally.”¹⁷⁹ *Cohn*¹⁸⁰ marks a watershed; the Court is now conscious of the political realities of the press and how the press can affect the democratic process of elections.

*Nebraska Press Ass’n v. Stuart*¹⁸¹ combines two concerns: ensuring a check on unfair administration of justice¹⁸² and restricting government in newsrooms.¹⁸³ A murder trial in Nebraska garnered unruly national media attention, and a state court restricted the news media from publishing accounts of confessions of the criminal defendant.¹⁸⁴ Press skeptic Chief Justice Burger writes again for the Court and formally recognizes the Free Press Clause at the outset of his analysis.¹⁸⁵ The Court then articulates action that can be taken by the Free Press in fulfilling its responsibility:

The extraordinary protections afforded by the First Amendment carry *with them something in the nature of a fiduciary duty* to exercise the protected rights responsibly[,] a duty widely acknowledged but not always observed by editors and publishers. It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors.¹⁸⁶

Ultimately, the Court struck down the Nebraska court’s restriction on publication.¹⁸⁷ “We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues

178. *Id.* at 491-92 (emphasis added).

179. *Id.* at 492.

180. *Id.*

181. 427 U.S. 539, 559-60 (1976).

182. 384 U.S. 333, 350 (1966).

183. 418 U.S. 241, 256 (1974).

184. 427 U.S. at 559-60.

185. “The First Amendment provides that ‘Congress shall make no law . . . abridging the freedom . . . of the press[.]’” *Id.* at 556.

186. *Id.* (emphasis added).

187. *Id.*

intact.”¹⁸⁸ Similar to the test that was measured in *Pennekamp*,¹⁸⁹ the Court remains concerned to keep the marketplace of ideas free from fraud and informative about government affairs and the administration of justice.

Did Chief Justice Burger shift his position based on an observation of the Nixonian political realities? It seems that the Court in *Tornillo*,¹⁹⁰ authored by Chief Justice Burger, applies broad language to restrain excessive limits on press freedom.¹⁹¹ Here, however, the Court concedes that “[t]he extraordinary protections afforded by the First Amendment carry with them *something in the nature of a fiduciary duty* to exercise the protected rights *responsibly*[.]”¹⁹² It gives pause to think that the insular Court appears to have been influenced by current political events in its rulings defining the responsibility of the press.

The influence of the press, therefore, grows with the political conflict. The Court cannot ignore the reality of the influence of the press on national life. Understanding the Free Press Clause requires recognition between the press and the times.

C. “A Historic, Dual Responsibility in our Society”¹⁹³

There is one final case in which the Court’s majority¹⁹⁴ had directly recognized press responsibility. *FCC v. League of Women Voters of California*¹⁹⁵ is the culmination of the twentieth century jurisprudence regarding evolving communications technology, growing press responsibility through the political conflict, and the long-standing history of the Free Press from the days of the founding.

Congress passed the Public Broadcasting Act of 1967¹⁹⁶ to “support and promote the development of noncommercial, educational broadcasting stations”¹⁹⁷ through the Corporation for Public Broadcasting.¹⁹⁸ In order to further the goal of neutrality, Congress also forbade editorializing under the Corporation and its affiliates.¹⁹⁹ A nonprofit corporation, Pacifica Foundation, and the League of Women Voters of California, in the capacity

188. *Id.*

189. 328 U.S. 331, 349 (1946).

190. 418 U.S. 241, 256 (1974).

191. 418 U.S. 241, 256 (1974).

192. 427 U.S. 539, 559-60 (1976) (emphasis added).

193. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 382 (1984) (Brennan, J.).

194. *But see Citizens United v. FEC*, 558 U.S. 310, 391 (2010) (Scalia, J., concurring).

195. *FCC*, 468 U.S. at 382.

196. 47 U.S.C. § 390.

197. *FCC*, 468 U.S. at 366.

198. *See generally*, *About the Corporation for Public Broadcasting*, <https://www.cpb.org/aboutcpb>.

199. *FCC*, 468 U.S. at 366-67.

here as a listener,²⁰⁰ brought an action against the Federal Communications Commission claiming that the restriction was unconstitutional.²⁰¹ In a ruling reminiscent of the aim of the balanced, “equal space” presentation in the newspaper in *Tornillo*,²⁰² the Court summarizes, in about fifty words, press responsibility in the United States:

“As we have recognized in *Mills v. Alabama*,²⁰³ the special place of the editorial in our First Amendment jurisprudence simply reflects the fact that the press, of which the broadcasting industry is indisputably a part,²⁰⁴ carries out a historic, dual responsibility in our society of reporting information and of bringing critical judgment to bear on public affairs.”²⁰⁵

In other words, press responsibility is defined by its two historic roles in reporting full and accurate information²⁰⁶ and bringing its honest message forward *without* any aim of equalized reporting.²⁰⁷ The Court’s ruling cut directly against the statute in question which prohibited editorializing; the prohibition was seen as a fundamental example of a “significant abridgment of speech.”²⁰⁸ Congress misunderstood press responsibility as press abstinence.

The absence of an editorial does not necessarily mean the presence of neutrality. “The editorial has traditionally played precisely this role by informing and arousing the public, and by criticizing and cajoling those who hold government office to help launch new solutions to the problems of the time.”²⁰⁹ The Court refers to the long history of the press’s sprawling reach as to what is appropriate for publication, and this speaks to the heart of the marketplace of ideas.

The Court also articulates the standard of how the marketplace of ideas should be conducted: “Preserving the free expression of editorial opinion, therefore, is part and parcel of ‘a profound national commitment . . . that debate on public issues should be uninhibited, robust,

200. It is important to note that the League of Women Voters’s mission is to “encourage[] the informed and active participation of citizens in government, work[] to increase understanding of major public policy issues, and influence[] public policy through education and advocacy.” See *Mission Statement and Core Values*, <https://www.lwvge.org/lwv-mission-core-values/>. The nonpartisan organization is often known for its role in organizing local and state candidate debates.

201. *FCC*, 468 U.S. at 366-67.

202. 418 U.S. at 256.

203. 384 U.S. 214 (1966).

204. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

205. *FCC*, 468 U.S. at 382.

206. See *Cohn*, 420 U.S. at 491-92.

207. See *Tornillo*, 418 U.S. at 256.

208. *FCC*, 468 U.S. at 398-99.

209. *Id.* at 382.

and wide-open”^{210, 211} Firmly stated in the opinion is the affirmation of the Framers’ desire in drafting the Bill of Rights to promote “the discovery and spread of political truth.”²¹² Most importantly, because the press has changed with the times in a technological sense, so too does the interpretation of the Free Press Clause and press responsibility.

After the ruling, the *New York Times* recognized the significance of the press responsibility language and published an article summarizing the opinion of the Supreme Court with the front-page headline, “High Court Lifts an Editorial Ban on Broadcasters.”²¹³ There, the same language that defines the press’s historic, dual responsibility was published.²¹⁴ The *Times* implicitly follows the responsibility that is given to them by the Free Press Clause and the Court by presenting a clear message of what was most important in the opinion to the public.

Suffice it to say, public debate should be uninhibited. If the editorial or the reporting does not convey the full message, it would inhibit public debate. The press can speak so long as the public *knows* that the views are part of the press’s editorial. If the press’s message is unclear and confusing, thereby making the marketplace of ideas inhibited and frail, public debate will be contaminated, and the public will vote unintelligently.²¹⁵

“T[he] threat [of the State blaming the press for the effects of its message] can operate as effectively a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government.”^{216, 217} The Court writes one year earlier, echoing the wisdom from *Grosjean*:²¹⁸ “[A]n untrammelled press [is] a vital source of public information,”²¹⁹ and an informed public is the essence of working democracy.²²⁰

210. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

211. To an extent, the standard of “uninhibited, robust, and wide-open” address the same thing. This Note focuses on “uninhibited.”

212. *FCC*, 468 at 383 (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

213. See Linda Greenhouse, *High Court Lifts an Editorial ban on Broadcasters*, N.Y. TIMES (July 3, 1984), <https://www.nytimes.com/1984/07/03/us/high-court-lifts-an-editorial-ban-on-broadcasters.html>.

214. *Id.*

215. See *Cohn*, 420 U.S. at 492.

216. See generally Justice Stewart, *Or of the Press*, 26 Hastings L.J. 631, 634 (1975).

217. *Minneapolis Star and Tribute Co. v. Minnesota Com’r of Revenue*, 460 U.S. 575, 585 (1983) (O’Connor, J.).

218. 297 U.S. at 250.

219. *Id.*

220. *Minneapolis Star and Tribute Co.*, 460 U.S. at 585 (quoting *Grosjean v. American Press Co.*, 297 U.S. 233 (1936)).

So, if the press is restrained and publishes dishonest or no information, then the public is misinformed. It follows that if the public is misinformed, there is no working democracy.

III. The Urgent Need for Free Press Protection

How can the public keep the Free Press from being untrammelled? The press can be restrained in two different ways: (1) the government can censor the press's message;²²¹ or (2) the press can censor itself, known as a "chilling" effect.²²² While overt government censorship causes alarm,²²³ it is self-censorship that should be the most disquieting because of the press's clandestine decision to opt out of publishing the truth due to fear from its consequences²²⁴ or due to a desire to appease the government.²²⁵ Ultimately, it is the press's judgment to publish a story,²²⁶ but what if the press is coerced into restraining its publication by its corporate owner,²²⁷ the government,²²⁸ or, possibly, a foreign entity?²²⁹

It is in all of the democratic actors'—the public's, the government's, and the press's—best interest to put protections in place in order to keep

221. See *Tornillo*, 418 U.S. at 256.

222. See *U.S. v. Alvarez*, 567 U.S. 709, 723 (2012) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

223. See, e.g., *Smith v. California*, 361 U.S. 147, 153 (1959) (overruling a city ordinance that made the possessor of an obscene book criminally liable).

224. See *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (holding that taking a mandatory loyalty oath as a condition of employment was unconstitutional because "[s]uch unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers" (emphasis added)).

225. See Donald J. Trump (@realDonaldTrump), Twitter (Apr. 2, 2018, 6:28 AM) https://twitter.com/realDonaldTrump/status/980799183425802240?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.nytimes.com%2F2018%2F04%2F02%2Fbusiness%2Fmedia%2Fsinclair-news-anchors-script.html ("So funny to watch Fake News Networks, among the most dishonest groups of people I have ever dealt with, criticize Sinclair Broadcasting for being biased. Sinclair is far superior to CNN and even more Fake NBC, which is a total joke"). See also Jacey Fortin & Jonah Engel Bromwich, *Sinclair Made Dozen of Local News Anchors Recite the Same Script*, N.Y. TIMES (Apr. 26, 2018), <https://www.nytimes.com/2018/04/02/business/media/sinclair-news-anchors-script.html>.

226. See *Tornillo*, 418 U.S. at 256.

227. See, e.g., Jacey Fortin & Jonah Engel Bromwich, *Sinclair Made Dozen of Local News Anchors Recite the Same Script*, N.Y. TIMES (Apr. 26, 2018), <https://www.nytimes.com/2018/04/02/business/media/sinclair-news-anchors-script.html> (detailing the corporate owner's political preferences).

228. See, e.g., *New York Times v. United States*, 403 U.S. 713, 714 (1971) (holding that the government did not meet the heavy burden for its restraint in imposing an injunction on the *New York Times* for its publication of the Pentagon Papers).

229. See *Russian media law poses threat to free press: U.S. State Department*, REUTERS (Nov. 28, 2017), <https://www.reuters.com/article/us-usa-russia-journalists/russian-media-law-poses-threat-to-free-press-u-s-state-department-idUSKBN1DS32I>.

the press untrammelled and unfettered, because the press's downfall will undermine democracy itself. In order to understand in what ways the press may be influenced, the Court has looked,²³⁰ and must look, to the political and economic realities of the time. The current realities stemming from the election of 2016 have evinced a sharp deviation from press responsibility and a rise of what has often been called, "fake news."²³¹

A. The Rise of the Internet and the Fall of Print Media

It is unsurprising that the Internet is "the town square for the global village of tomorrow."²³² What is surprising is what has followed from the widespread growth of the Internet: factions of people use it as a platform to communicate with each other. A Madisonian "intercourse of sentiments"²³³ indeed, social media is, theoretically, the room where the open discussion of current events takes place.

"As of August 2017, two-thirds (67%) of Americans report that they get at least some of their news on social media – with two-in-ten doing so often."²³⁴ Twitter, YouTube, and Snapchat, which all feature news in some capacity, grow in users every year.²³⁵ "Not only have Americans grown somewhat in their use of social media for news overall, but now they are more likely than ever to get news from multiple social media sites."²³⁶

Because of the Internet's rise, traditional print media's economic viability has been diminished. "The newspaper industry as a whole, however, faced ongoing challenges in 2016 . . . [T]otal weekday circulation for U.S. daily newspapers—both print and digital—fell 8% in 2016, marking the 28th consecutive year."²³⁷ While newspapers have online

230. See, e.g., *Nebraska Press Ass'n*, 427 U.S. at 559-60.

231. Fake news is not a recent expression. For example, in Nazi Germany, the term was "Lügenpresse," or "lying press." See Rick Noack, *The ugly history of 'Lügenpresse,' a Nazi slur shouted at a Trump rally*, WASH. POST (Oct. 24, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/10/24/the-ugly-history-of-luegenpresse-a-nazi-slur-shouted-at-a-trump-rally/?utm_term=.c47986120f02.

232. This quote is attributed to Bill Gates, founder of Microsoft, Inc. See Axelle Tessandier, *Citizens of the Internet*, HUFFINGTON POST (Jan. 1, 2014 10:32 PM EST) https://www.huffingtonpost.com/axelle-tessandier/citizens-of-the-internet_b_4495550.html.

233. THE COMPLETE MADISON 294 (S. Padover 1st ed., 1953) (reprinting essay in *National Gazette*, Dec. 19, 1791), discussed in Part I, *supra*.

234. See Elisa Shearer & Jeffery Gottfried, *News Use Across Social Media Platforms 2017*, PEW RESEARCH CENTER (Sept. 7, 2017), <http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/>.

235. *Id.*

236. *Id.*

237. See Michael Barthel, *Despite subscription surges for largest U.S. newspapers, circulation and revenue fall for industry overall*, PEW RESEARCH CENTER (June 1, 2017) <http://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry/>.

subscription services,²³⁸ it is still important to note that “[t]otal weekday circulation for U.S. daily newspapers fell to 35 million [in 2016], while Sunday circulation declined to 38 million—the lowest levels since 1945.”²³⁹

Because social media’s prime modern attribute is an “intercourse of sentiments,”²⁴⁰ does social media, then, have a responsibility to the public, like the Free Press?²⁴¹ At a technology forum held at the Massachusetts Institute of Technology, President Barack Obama called social media a “hugely powerful potential force for good,”²⁴² and, in a rare, “off-the-record”²⁴³ interview, spoke candidly with the audience.²⁴⁴

“What’s also true is that our social media platforms are just a tool,” President Obama warned. “ISIS can use that tool. Neo-Nazis can use that tool. I do think the large platforms—Google and Facebook being the most obvious, Twitter and others as well, are part of that ecosystem—have to have a conversation about their business model *that recognizes they are a public good*”²⁴⁵ as well as a commercial enterprise. They’re not just an invisible platform[;] they’re shaping our culture in powerful ways.”²⁴⁶ President Obama’s comments suggest that perhaps social media is at the nexus of people and the marketplace of ideas as a digital newsstand for the Free Press.

Because of the Internet’s ubiquity and social media’s sorting tendency, the public can be exploited by being fooled into believing that a story is true, when the story is, in fact, fraudulent. Print media, on the other hand, keeps the public debate robust, wide-open, and uninhibited by virtue of its physical tangibility: the public reads the tactile newspaper and is not fooled by rogue members of the press, untruthful reporting, or segments of the population who espouse fringe beliefs. It is also worth mentioning that the financial stakes were different for print media before the Internet; a newspaper could not publish false stories because it could not afford to publish them and lose customers and credibility. But now, the Internet

238. *Id.*

239. *Id.*

240. THE COMPLETE MADISON 294 (S. Padover 1st ed., 1953) (reprinting essay in *National Gazette*, Dec. 19, 1791), discussed in Part I, *supra*.

241. See Robby Soave, *5 Things Barack Obama Said in His Weirdly Off-the-Record MIT Speech*, REASON: HIT & RUN (Feb. 26, 2018 6:11 PM) <https://reason.com/blog/2018/02/26/barack-obama-mit-sloan-sports>.

242. *Id.*

243. It turns out that the interview was not truly off-the-record. See *id.*

244. *Id.*

245. In this context, it is important to note that President Obama did not necessarily refer to social media as a “public good” in economic terms. See *id.*

246. *Id.* (emphasis added).

allows free publication by any and all, and the computer screen further distances the public from open debate, thereby inhibiting it.²⁴⁷

There is some hope. An uptick in subscribers resulted from the election of 2016, when the Free Press²⁴⁸ was constantly in the crosshairs, especially from then-candidate Donald J. Trump.²⁴⁹ There is a faction of the public that wants reliable, factual, and sometimes unpleasant truth in order to promote public debate. But economic support can only go so far; the prevalence of the quasi-free Internet and biased news under the misrepresentative label as “fair and balanced” is alive now more than ever.²⁵⁰ Without recognition of press responsibility, the economic downfall of the Free Press may lead to the downfall of the Republic.

B. The Election of 2016

The backroom details of the election of 2016 are still, astoundingly, being uncovered.²⁵¹ What is known about the election at present is that there is significant reason to believe that Russian operatives on behalf of Russian President Vladimir Putin aided and colluded with then-candidate Donald J. Trump’s campaign for the Presidency.²⁵² Never has there been a more contentious election²⁵³ and administration²⁵⁴ in the modern era; the

247. See Claire Cain Miller, *How Social Media Silences Debate*, N.Y. TIMES (Aug. 26, 2014), <https://www.nytimes.com/2014/08/27/upshot/how-social-media-silences-debate.html>.

248. This specifically included the New York Times and the Washington Post.

249. See *The New York Times Company Reports 2017 First-Quarter Results*, N.Y. TIMES (May 3, 2017), <http://investors.nytc.com/investors/investor-news/investor-news-details/2017/The-New-York-Times-Company-Reports-2017-First-Quarter-Results/default.aspx>.

250. See Jack Shafer, Tucker Doherty, *The Media Bubble is Worse Than You Think*, POLITICO (May/June 2017), <https://www.politico.com/magazine/story/2017/04/25/media-bubble-real-journalism-jobs-east-coast-215048>.

251. See *Russian Hacking and Influence in the U.S. Election*, N.Y. TIMES, <https://www.nytimes.com/news-event/russian-election-hacking>. See also Philip Rucker, *Trump’s Russia ‘hoax’ turns out to be real*, WASH. POST (Feb. 2017), https://www.washingtonpost.com/politics/trumps-russia-hoax-turns-out-to-be-real/2018/02/16/be3d174a-1346-11e8-9065-e55346f6de81_story.html?utm_term=.6548a9e1a682. See Darren Samuelsohn, Sarah Frostenson & Jeremy C. F. Lin, *The 285 people connected to Russian probes*, POLITICO (Jan. 21, 2018 5:00 PM), <https://www.politico.com/interactives/2018/trump-russia-investigation-ties/#methodology>. See Darren Samuelsohn, Sarah Frostenson, Jeremy C. F. Lin, *The 285 people connected to Russian probes*, POLITICO, <https://www.politico.com/interactives/2018/trump-russia-investigation-ties/#methodology>.

252. See Indictment, *United States v. Internet Research Agency, LLC, et al.*, Case 1:18-cr-00032-DLF (D.D.C. Feb. 16, 2018), <https://www.justice.gov/file/1035477/download>. See also Philip Bump, *Timeline: How Russians trolls allegedly tried to throw the 2016 election to Trump*, WASH. POST (Feb. 16), https://www.washingtonpost.com/news/politics/wp/2018/02/16/timeline-how-russian-trolls-allegedly-tried-to-throw-the-2016-election-to-trump/?utm_term=.ba44e163eb3b.

253. See, e.g., William Wan, Tanya Sichynsky & Sandhya Somashekhar, *After Trump’s election: ‘There are two Americas now.’*, WASH. POST (Nov. 21, 2016), <https://www.washington>

frequency of protests resulting from the 2016 victory and subsequent actions of President Donald J. Trump are more prevalent now than at any other time in American history.²⁵⁵

The organized media and political experts seriously underestimated the likelihood that Republican candidate Donald J. Trump would succeed.²⁵⁶ The press regularly reported on his unusual and inexplicable speeches at rallies, which encouraged sexists,²⁵⁷ empowered racists,²⁵⁸ ridiculed those with disabilities,²⁵⁹ fortified anti-immigration stances and xenophobia,²⁶⁰ condoned violence,²⁶¹ and sermonized general incoherence.²⁶² These gatherings centered on his charged speeches from a

post.com/national/after-trumps-election-there-are-two-americas-now/2016/11/21/12fa26c8-acec-11e6-8b45-f8e493f06fcd_story.html?utm_term=.a91c038dfaf3.

254. See, e.g., Chuck Todd, Mark Murray & Carrie Dean, *Tracing the Trump White House's year of permanent scandal*, NBC NEWS (Feb. 9, 2018, 6:00 AM PST), <https://www.nbcnews.com/politics/first-read/tracing-trump-white-house-s-year-permanent-scandal-n846246>.

255. See Mary Jordan & Scott Clement, *Rallying Nation: In reaction to Trump, millions of Americans are joining protests and getting political*, WASH. POST (Apr. 6, 2018), https://www.washingtonpost.com/news/national/wp/2018/04/06/feature/in-reaction-to-trump-millions-of-americans-are-joining-protests-and-getting-political/?utm_term=.c370302631a0. See also *One in five adults have attended a political protest, rally or speech*, WASH. POST (Apr. 21, 2018), https://www.washingtonpost.com/page/2010-2019/WashingtonPost/2018/04/06/National-Politics/Politics/release_516.xml.

256. See, e.g., Michael Barbaro, *How Did the Media – How Did We – Get This Wrong?*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/11/09/podcasts/election-analysis-run-up.html>. See also Kenneth P. Vogel & Alex Isenstadt, *How did everyone get it so wrong?*, POLITICO (Nov. 9, 2016 12:15 AM EST), <https://www.politico.com/story/2016/11/how-did-everyone-get-2016-wrong-presidential-election-231036>. See also Andrew Mercer, Claudia Deane, Kyley McGeeney, *Why 2016 election polls missed their mark*, PEW RESEARCH CENTER (Nov. 9, 2016), <http://www.pewresearch.org/fact-tank/2016/11/09/why-2016-election-polls-missed-their-mark/>.

257. See, e.g., Claire Landsbaum, *The Most Misogynistic Gear Spotted at Trump Rallies*, THE CUT (Oct. 12, 2016), <https://www.thecut.com/2016/10/the-most-misogynistic-things-people-wore-to-trump-rallies.html>.

258. See, e.g., Clark Mindock, *White Nationalists claim Donald Trump encouraged racist violence and elevated their cause*, INDEPENDENT (May 1, 2017 16:15), <https://www.independent.co.uk/news/world/americas/us-politics/trump-racism-violence-white-nationalists-say-president-encourage-elevated-cause-a7711801.html>.

259. See, e.g., Irin Carmon, *Donald Trump's Worst Offense? Mocking Disabled Reporter, Poll Finds*, NBC NEWS (Aug. 11, 2016, 3:24 AM ET), <https://www.nbcnews.com/politics/2016-election/trump-s-worst-offense-mocking-disabled-reporter-poll-finds-n627736>.

260. See, e.g., Jenna Johnson, *'Build that wall' has taken on a life of its own at Donald Trump's rallies – but he's still serious*, WASH. POST (Feb. 12, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/02/12/build-that-wall-has-taken-on-a-life-of-its-own-at-donald-trumps-rallies-but-hes-still-serious/?utm_term=.66e1e0fac4ff.

261. See, e.g., Ben Jacobs, *Trump campaign dogged by violent incidents at rallies*, GUARDIAN (Mar. 11, 2016, 12:28 EST), <https://www.theguardian.com/us-news/2016/mar/11/donald-trump-campaign-claims-violence-rallies>.

262. See, e.g., Rich Lowry, *The Phenomenal Incoherence of Donald Trump*, POLITICO (Aug. 12, 2015), <https://www.politico.com/magazine/story/2015/08/the-phenomenal-incoherence-of-donald-trump-121309>.

pulpit in the center of large amphitheaters and stadiums, which garnered significant, free international publicity for his campaign.²⁶³ In what was widely seen as an attempt to achieve “equal” reporting,²⁶⁴ the Free Press prominently featured Democratic candidate Hillary Rodham Clinton’s use of emails on a private server during her tenure as Secretary of State.

Although Secretary Clinton won the popular vote,²⁶⁵ she lost by way of the Electoral College,²⁶⁶ the second time in twenty years that this phenomenon occurred in a presidential election.²⁶⁷ Before it was revealed that there were other forces at play, pundits originally credited the disillusioned working-class who rejected multiculturalism and globalization.²⁶⁸ “In Mr. Trump, a thrice-married Manhattanite who lives in a marble-wrapped three-story penthouse apartment on Fifth Avenue, they found an improbable champion.”²⁶⁹

What was recently revealed was that echo chambers were constructed by a firm tied to the Trump campaign to inhibit the playing field, cause confusion among the populace, and tilt the election toward Donald J. Trump.²⁷⁰ Cambridge Analytica claimed that it could implement “psychographics” derived from Facebook data to ensure that social media members are kept in one room, and one room only.²⁷¹ The debate would be stifled, and the members in different rooms would view distinctly charged advertisements and “fake news” that played to the individual reader’s emotions and fears.²⁷² In turn, this would result, they claimed, in a victory for Donald J. Trump.²⁷³ It seems to have worked.²⁷⁴

263. See Nicholas Confessore & Karen Yourish, *\$2 Billion Worth of Free Media for Donald Trump*, N.Y. TIMES (Mar. 15, 2016), <https://www.nytimes.com/2016/03/16/upshot/measuring-donald-trumps-mammoth-advantage-in-free-media.html>.

264. See *Tornillo*, 418 U.S. at 256.

265. See *Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES (Aug. 9, 2017, 9:00 AM ET), <https://www.nytimes.com/elections/results/president>.

266. *Id.*

267. See *Bush v. Gore*, 531 U.S. 98, 100 (2000).

268. See, e.g., Patrick Healy & Jonathan Martin, *Trump Triumphs*, N.Y. TIMES (Nov. 9, 2016), <http://www.nytimes.com/images/2016/11/09/nytfpage/scan.pdf>.

269. *Id.*

270. See Hannes Grassegger & Mikael Krogerus, *The Data That Turned the World Upside Down*, MOTHERBOARD (Jan. 28, 2017, 6:15 AM), https://motherboard.vice.com/en_us/article/mg9vvn/how-our-likes-helped-trump-win.

271. *Id.*

272. *Id.*

273. *Id.*

274. See Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html>.

Additionally, bots²⁷⁵ and humans who believed them²⁷⁶ shared news on their personal pages from purported news sites.²⁷⁷ This was done so that only one individual with a specific political belief receives one tailor-made message to feed into that belief from similar speakers.²⁷⁸ “[W]henever you’re trying to socially engineer [the segments of the public] and convince them that the information is true, it’s much more simple because you see somebody and they look exactly like you, even down to the pictures . . . It’s a circular system.”²⁷⁹

These bots tend to perpetuate contentious stances on divisive issues and spread, in essence, propaganda.²⁸⁰ “Sometimes the propaganda outlets themselves will put out false or manipulated stories. Other times, the president will go with a conspiracy . . . Every time a conspiracy is floated from the [Trump] administration, it provides every outlet around the world, in fact, an opportunity to amplify that conspiracy and to add more manipulated truths or falsehoods onto it.”²⁸¹

As opposed to satire, parody, or editorial opinion, “fake news” is misleading, fictitious, or fraudulent information reported as news to a wide audience.²⁸² “Top fake election news stories generated more total

275. See All Things Considered, *How Russian Twitter Bots Pumped Out Fake News During the 2016 Election*, NPR (Apr. 3, 2017, 4:53 PM ET), <https://www.npr.org/sections/alltechconsidered/2017/04/03/522503844/how-russian-twitter-bots-pumped-out-fake-news-during-the-2016-election>.

276. See Sinan Aral, *How Lies Spread Online*, N.Y. TIMES (Mar. 8, 2018), <https://www.nytimes.com/2018/03/08/opinion/sunday/truth-lies-spread-online.html>.

277. See *How Russian Twitter Bots Pumped Out Fake News During the 2016 Election*, NPR (Apr. 3, 2017, 4:53 PM ET), <https://www.npr.org/sections/alltechconsidered/2017/04/03/522503844/how-russian-twitter-bots-pumped-out-fake-news-during-the-2016-election>.

278. See generally *The Echo Chamber Effect*, N.Y. TIMES (Apr. 22, 2011, 3:56 PM), <https://www.nytimes.com/roomfordebate/2011/04/21/barack-obama-and-the-psychology-of-the-birther-myth/the-echo-chamber-effect>. See also Amanda Erickson, *Russian-linked accounts are tweeting their support of embattled Fox News host Laura Ingraham*, WASH. POST (Apr. 2, 2018), https://www.washingtonpost.com/news/worldviews/wp/2018/04/02/russian-bots-are-tweeting-their-support-of-embattled-fox-news-host-laura-ingraham/?utm_term=.b921e39cfa0c.

279. See All Things Considered, *How Russian Twitter Bots Pumped Out Fake News During the 2016 Election*, NPR (Apr. 3, 2017, 4:53 PM ET), <https://www.npr.org/sections/alltechconsidered/2017/04/03/522503844/how-russian-twitter-bots-pumped-out-fake-news-during-the-2016-election>.

280. See Amanda Erickson, *Russian-linked accounts are tweeting their support of embattled Fox News host Laura Ingraham*, WASH. POST (Apr. 2, 2018), https://www.washingtonpost.com/news/worldviews/wp/2018/04/02/russian-bots-are-tweeting-their-support-of-embattled-fox-news-host-laura-ingraham/?utm_term=.b921e39cfa0c.

281. Former FBI agent and cybersecurity expert Clint Watts said. See All Things Considered, *How Russian Twitter Bots Pumped Out Fake News During the 2016 Election*, NPR (Apr. 3, 2017, 4:53 PM ET), <https://www.npr.org/sections/alltechconsidered/2017/04/03/522503844/how-russian-twitter-bots-pumped-out-fake-news-during-the-2016-election>.

282. See David O. Klein & Joshua R. Wueller, *Fake News: A Legal Perspective*, 20 No. 10 J. INTERNET L. 1 (2017).

engagement[, which refers to clicks and shares,] on Facebook than top [genuine] election stories from 19 major news outlets combined.”²⁸³ At first, it was widely believed that how the public debated the election was due to reporting bias toward a certain political belief.²⁸⁴ But it was not entirely the fault of the media; the playing field was swarming with fake news, perpetuated by rogue voices with a partisan purpose in making certain stories go viral.²⁸⁵ An independent study has determined that these viral fake news stories had a “substantial impact” on the election of 2016.²⁸⁶

It follows logically that there was widespread public confusion as to what was true or false. Because of the data-driven and artificially-created echo chambers, only certain isolated members of the public were exposed to a wide-open and robust marketplace of ideas. The marketplace of ideas, however, was severely inhibited, voters were uninformed,²⁸⁷ and the great diversity of America was exploited. If the marketplace of ideas was indeed manipulated by foreign firms or a candidate, does this mean that the public was cheated of a fair election?

C. The Inhibited Marketplace of Ideas

“The further society drifts from the truth, the more it will hate those who speak it.”²⁸⁸ Truth is not balanced; that is what makes it the truth. But how can the public combat false information? “The remedy for speech that is false is speech that is true.”²⁸⁹ Ultimately, the First Amendment’s purpose is “to preserve an uninhibited marketplace of ideas in which truth

283. See Craig Silverman, This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook, BUZZFEED NEWS (Nov. 16, 2016, 5:15 PM ET), https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm_term=.rtR19EDrg#.fabDEr59w.

284. See, e.g., Thomas E. Patterson, *News Coverage of the 2016 General Election: How the Press Failed Voters*, SHORENSTEIN CENTER (Dec. 7, 2016, 5:00 AM), <https://shorenstein.center.org/news-coverage-2016-general-election/>.

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

286. See Aaron Blake, *A new study suggests fake news might have won Donald Trump the 2016 election*, WASH. POST, https://www.washingtonpost.com/news/the-fix/wp/2018/04/03/a-new-study-suggests-fake-news-might-have-won-donald-trump-the-2016-election/?utm_term=.f417ea56f92e. See also *Fake News May Have Contributed to Trump’s 2016 Victory*, Ohio State University, <https://www.documentcloud.org/documents/4429952-Fake-News-May-Have-Contributed-to-Trump-s-2016.html>.

287. See *Cohn*, 420 U.S. at 492.

288. This quote is attributed to George Orwell (1903 – 1950).

289. *U.S. v. Alvarez*, 567 U.S. 709, 727 (2012) (reaffirming the best measure of First Amendment protections to the marketplace of ideas).

will ultimately prevail.”²⁹⁰ The fears expressed in *Tornillo*²⁹¹ and *Mills*²⁹² have surfaced: the government shows a clear preference for a certain newsroom, and the public is torn between patriotism and logic.

The Free Press is not designed to campaign for readership by embedding certain fixed points of view rooted in falsehood. A major contention in the modern era is the distinction between reporting and editorializing, a line blurred by a press that abuses its responsibility in order to grab the public’s attention. In distorting the presentation of facts into a flashy and pointed display intended to deceive, the protections afforded to the Free Press no longer serve the needs of the people, thereby threatening the democracy.

In the name of the country’s safety, does the Free Press have a responsibility to *not* bring stories to the forefront? The model of unbiased journalism has traditionally been to present two sides of a story, so as to show its due diligence.²⁹³ But the due diligence is still met if the press can prove itself worthy in the marketplace of ideas, which usually happens when the press conducts an investigation into the facts behind the story.²⁹⁴ Considering “political center” news reporting, the press gives at least some weight to both sides of a political argument for the sake of its political nature and not for its viability.²⁹⁵ Evoking this “false equivalency” of mixed, diametrically opposed messages undermines press responsibility.²⁹⁶

It is noticeable that some press outlets seem to exploit the public’s need to be better informed. Because of local and national geographical gaps, novelty in the stories published, or a lack in the variety of accurate information, irresponsible news outlets intend to fool the public into believing that their editorializing *is* reporting. This confusion can cause the public to develop trust in an untrustworthy source, and then perceive competing voices’ *reporting* as *editorializing*. This is not to say that any press outlet has been blameless. After all, it is not *accuracy* that is the goal in the adversarial system. It is *truth*.

290. See *McCullen v. Coakley*, 134 S.Ct. 2518 (2014). See also *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)).

291. See *Tornillo*, 418 U.S. at 258.

292. See *Mills*, 384 U.S. at 219.

293. See David Robert Grimes, *Impartial journalism is laudable. But false balance is dangerous*, GUARDIAN (Nov. 6, 2018), <https://www.theguardian.com/science/blog/2016/nov/08/impartial-journalism-is-laudable-but-false-balance-is-dangerous>.

294. See *Cohn*, 420 U.S. at 492.

295. See *We Have No Idea Who’s Right: Criticizing “he said, she said” journalism at NPR*, PRESSTHINK (Sept. 15, 2011), New York University <http://pressthink.org/2011/09/we-have-no-idea-whos-right-criticizing-he-said-she-said-journalism-at-npr/>.

296. See *Tornillo*, 418 U.S. at 256. See also Robert S. Eshelman, *The Danger of Fair and Balanced*, COLUMBIA JOURNALISM REVIEW, https://archives.cjr.org/essay/the_danger_of_fair_and_balance.php.

The marketplace of ideas operates with two different actors: speakers and hearers. Different speakers broadcast divergent messages for the hearers who decide what is best. When the speaker knows that the message is not factual or correct and yet announces it in the name of impartiality,²⁹⁷ it sends a confusing message to the hearer. The speaker misunderstands its responsibility and the marketplace of ideas. The speaker should not deliver conflicting versions of reality in order to uphold its responsibility to the public; the hearer should hear different voices, and debate with other hearers as to the validity of the speaker's message. So, in terms of the Free Press, the public does not need conflicting viewpoints from each speaker. In that case, the press confuses *hearer* with *speaker*.

But when the speaker *knows* that its material will deceive hearers and yet publicizes it, the speaker perverts the uninhibited marketplace of ideas and therefore abdicates its responsibility. The hearers will judge varying inaccurate information on a tilted playing field because the speaker intentionally misinforms its listeners in order to achieve a returning audience and a certain political result. In this scenario, the press maliciously swaps *hearer* with *speaker*.

The Free Press brings forward material in whose accuracy it has faith. For example, libel laws illustrate that the public has a check on the press if it abuses its freedom and knowingly publishes untruths about a person.²⁹⁸ The public expects truthful reporting of information from the press based on the press's conviction in the accuracy in its own reporting. This does not necessarily mean that every story must be accurate,²⁹⁹ but truthful.³⁰⁰

For editorials, the public historically recognizes them as opinion. Likewise, the public understands that parodies and satires are comedic and not necessarily true to facts. But, as evinced from the election of 2016, the public does not know whether factual information is opinion, satire, or

297. See, e.g., *BBC Trust review of impartiality and accuracy of the BBC coverage of science*, BBC TRUST, INDEPENDENT ASSESSMENT (July 2011), http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/our_work/science_impartiality/science_impartiality.pdf.

298. See generally *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964). "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker. Cf. *Speiser v. Randall*, 357 U.S. 513, 525-526 (1958). The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415, 445 (1963). As Madison said, "Some degree of abuse is inseparable from the proper use of every thing, and in no instance is this more true than in that of the press." *Id.*

299. See, e.g., *Tim Jones, Dewey Defeats Truman*, CHICAGO TRIBUNE (Dec. 19, 2007), <http://www.chicagotribune.com/news/nationworld/politics/chi-chicagoday-deweydefeats-story-story.html>.

300. See Ben Cosgrove, *Behind the Picture: 'Dewey Defeats Truman' and the Politics of Memory*, TIME (May 4, 2014), <http://time.com/3879744/dewey-defeats-truman-the-story-behind-a-classic-political-photo/>.

parody because of the confusion that was created in debate. This points to the conclusion that the marketplace of ideas was, and currently is, inhibited.

Therefore, if a press outlet is untruthful—if it presents biased information designed to deceive the public—that press outlet should not receive the protections afforded by the First Amendment. It follows that states ought to recognize this problem and afford legitimate Free Press protections and, penalize those who pedal editorializing as fact.

A great fear is that involving the courts with free speech or free press may permit the government to use this restriction in unethical, unforeseeable ways.³⁰¹ This argument ignores one hundred years of precedent addressing free speech concerns.³⁰² The concerns for “breathing space”³⁰³ regarding First Amendment protections are misplaced when that space contains toxic and stifling air.

The press must be unmistakably clear in the way it presents messages, so as to not confuse or pervert the marketplace of ideas and allow truth to come forth. It is ultimately for the people, not the press, to decide what is the truth.³⁰⁴ What happens, then, if the press continues to abuse or confuse its role? Do individual members of the public³⁰⁵ or other Free Press³⁰⁶ have the power to protect press responsibility and restore the marketplace of ideas?

301. See *The Hate Debate*, WNYC STUDIOS, <https://www.npr.org/podcasts/481105292/more-perfect>.

302. Discussed in Parts I and II, *supra*.

303. See *NAACP v. Button*, 371 U.S. 415, 433 (1963). See also *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940).

304. See, e.g., *Board of Educ. v. Pico*, 457 U.S. 853, 866 (1982) (reaffirming that the “precedents have focused “not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.” *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). And we have recognized that “the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.” *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). In keeping with this principle, we have held that in a variety of contexts “the Constitution protects the right to receive information and ideas.” *Stanley v. Georgia*, 394 U.S. 557, 564, (1969); see *Kleindienst v. Mandel*, 408 U.S. 753, 762–763, (1972) (citing cases)”; *Citizens-Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981) (reaffirming that “[t]he Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas. That concept has been stated and restated almost since the Constitution was drafted.”)

305. See, e.g., *Eastwood v. National Enquirer*, 123 F.3d 1249, 1250 (9th Cir. 1997) (Kozinski, J.), discussed *infra*.

306. See, e.g., Andy Newman, *Gothamist Will Publish Again in Deal With WNYC*, N.Y. TIMES, <https://www.nytimes.com/2018/02/23/nyregion/gothamist-dnainfo-deal-wnyc-publish-again.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region®ion=top-news&WT.nav=top-news>.

IV. Work to Be Done

“The true symbol of the United States is not the bald eagle; it is the pendulum. When things swing too far in one direction, the pendulum will start to move in the opposite direction.”³⁰⁷ In order to swing the pendulum back to where it was before, a place of fair and rigorous discussion that sought truth, there is much work for the public to do. The best way to resolve these issues is through rigorous participation in government, either through the political process or through the courts. Participating in government, however, requires that the public grasp the inner-workings of the media, where the news comes from, and who produces it.

Once upon a time, media was not typically categorized into differing political positions.³⁰⁸ Part of this polarization was born out of the rise of cable television.³⁰⁹ Now, the public expects a certain political perspective based on the reputation of the news outlet.³¹⁰ What is troubling is that it is not uncommon for some segments of the public to conflate the media into one monolithic entity, and then illogically dismiss the media altogether.³¹¹ More ominously, the public has been consuming news that has gradually become more polarized, and this probably contributes to the public’s present overall distrust in the media.³¹²

Keeping the media accountable also means maintaining an understanding of who owns the outlet and how it is structured. The public must realize that divergent—not balanced—messages are crucial for the democracy to function properly. The public should also fearlessly accuse those who *own* the media for bad acts,³¹³ rather than the press institution

307. This quote is attributed to Martin D. Ginsburg (1932–2010), but popularized by Justice Ruth Bader Ginsburg.

308. See Markus Prior, *Media and Political Polarization*, PRINCETON UNIVERSITY, <https://www.princeton.edu/~mprior/Prior%20MediaPolarization.pdf>. See also Matt Levendusky, *Are Fox and MSNBC polarizing America?*, WASH. POST (Feb. 3, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/02/03/are-fox-and-msnbc-polarizing-america/?utm_term=.2935b7020115.

309. See also Matt Levendusky, *Are Fox and MSNBC polarizing America?*, WASH. POST (Feb. 3, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/02/03/are-fox-and-msnbc-polarizing-america/?utm_term=.2935b7020115.

310. *Id.*

311. See Seth Ashley, Mark Poepsel, *Media Literacy and News Credibility: Does knowledge of media ownership increase skepticism in news consumers?*, JOURNAL OF MEDIA LITERACY EDU. Vol. 2, Iss. 1 (2010).

312. See Andrew Soergel, *Why Do Americans Hate the Media?*, U.S. NEWS & WORLD REPORT (June 21, 2016), <https://www.usnews.com/news/articles/2016-06-21/why-do-americans-hate-the-media>.

313. See, e.g., Jennifer Rubin, *The final straw: Rupert Murdoch needs to go*, WASH. POST (Dec. 17, 2017), https://www.washingtonpost.com/blogs/right-turn/wp/2017/12/17/the-final-straw-rupert-murdoch-needs-to-go/?utm_term=.2ea58408215d.

itself.³¹⁴ What is most imperative is that the public, rather than the government, should hold the media accountable.³¹⁵

There is a strong public policy for solving problems accusatorially, rather than inquisitorially.³¹⁶ It is arguably the most effective way of choosing what is best and what is fair.³¹⁷ Since the undermining of press responsibility is a problem of the highest order, the concern about a flood of litigation or judicial economy should not be necessary in the analysis. It is, after all, in everyone's best interest to finally get to the bottom of what is happening, and restore the marketplace of ideas.

A. Legislate for Press Protection

The public, since the election of 2016, has been consistently urging legislators to act on certain issues.³¹⁸ State legislatures have already defined the press by its actions,³¹⁹ but the press is not generally given the same protections granted to other industries.³²⁰ In order to find a solution, the public should urge state legislators to protect local press responsibility.

Internationally, there are countries that are proactively fighting against the destabilizing threat of fake news. These legislative measures could be seen as a political attack on free speech. For example, at the urging of Prime Minister Najib Razak, Malaysia passed a fake news law that targets "any news, information, data and reports which are wholly or partly false, whether in the form of features, visuals or audio recordings or in any other form capable of suggesting words or ideas."³²¹ "When the American president made 'fake news' into a buzzword," Fadhlullah Suhaimi Abdul

314. See, e.g., *Crown v. John Peter Zenger*, <http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-new-york-legal-eras-crown-zenger.html>, discussed *supra*.

315. See Sun-Times Staff, *Homeland Security to compile database of journalists and 'media influencers'*, CHICAGO SUN-TIMES (Apr. 7, 2018), <https://chicago.suntimes.com/news/homeland-security-to-compile-database-of-journalists-and-media-influencers/>.

316. See *Miller v. Fenton*, 474 U.S. 104, 110 (1985). See also Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. (1989).

317. *Id.*

318. See, e.g., Kate Zernike, *Trump Protesters Borrow From Tea Party to Put Pressure on Lawmakers*, N.Y. TIMES (Feb. 5, 2017), <https://www.nytimes.com/2017/02/05/us/trump-protesters-tea-party.html>.

319. See Part I, *supra*.

320. See, e.g., Austan D. Goolsbee, Alan B. Freuger, *A Retrospective Look at Restructuring General Motors and Chrysler*, JOURNAL OF ECONOMIC PERSPECTIVES, 29 (2): 3-24 (overviewing the steps taken to restructure General Motors and Chrysler amid the 2008-09 recession and financial crisis).

321. See Hanna Beech, *As Malaysia Moves to Ban 'Fake News,' Worries About Who Decides Truth*, N.Y. TIMES (Apr. 2, 2018), <https://www.nytimes.com/2018/04/02/world/asia/malaysia-fake-news-law.html>.

Malek, a senior official with the Malaysian Communications and Multimedia Commission said, “the world woke up.”³²²

The Malaysian law has met with significant uneasiness; political opponents of the Prime Minister claim that the legislation is intended to stifle free expression to secure his victory in the upcoming election.³²³ The law also penalizes those who share fake news on their individual social media feeds.³²⁴ This government oversight will discourage political dissenters from sharing legitimate news that may oust a politician from office. Bearing in mind the risks, states should be cautious when protecting press responsibility, but not discouraged.

A good first step may be to address whether holding oneself out to be the Free Press affords the same responsibility that the Free Press has to the public.³²⁵ The public has a responsibility to restrain rogue voices. In agency law, the principal is responsible for the conduct of those he or she empowers.³²⁶ Similarly, the public empowers the press.

Thus, if a press outlet holds itself out to be a legitimate Free Press,³²⁷ and press responsibility is a duty owed to the public, then press responsibility is imposed on that press outlet. It follows that when a confusing or nefarious press outlet holds itself out as the Free Press and wields this responsibility, but abdicates this responsibility by publishing untruthful messages, then the First Amendment does not protect that press outlet’s freedom.

Old solutions do not always solve modern problems. Modern solutions ought to use history as a guide, but there must also be a reliance on facts, data, analysis, and expertise to fully address the problems. By this logic, the responsibility of the press was born, and, by this logic, the public and legislatures should take action to preserve the nation.

322. *Id.*

323. See Richard C. Paddock, *Malaysian Leader, Under Corruption Cloud, Will Meet with Trump*, N.Y. TIMES (Sept. 9, 2017), <https://www.nytimes.com/2017/09/09/world/asia/malaysia-najib-razak-1mdb.html>. It is also important to note that the Prime Minister has a United States Department of Justice inquiry trailing behind him, which details a mishandling of at least \$3.5 billion. *Id.*

324. *Id.*

325. The Federal government already has a working definition of the press in the Freedom of Information Act, 15 U.S.C. § 552, discussed *supra*.

326. See Restatement (Second) of Agency § 217 C.

327. The range of press legitimacy for press outlets includes news, opinions, satire, and parody.

B. Litigate a Civil Cause of Action

The Lanham Act³²⁸ provides a cause of action to protect the public:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or *false or misleading representation* of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her [i.e., another person's] goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.³²⁹

The broad language of the Lanham Act has been used primarily in trademark infringement,³³⁰ but it is not out of the question for a plaintiff to bring a Lanham Act suit against a press outlet that relinquishes its press responsibility. Indeed, the cause of action has been used against a press outlet's misrepresentation.³³¹ In *Eastwood v. National Enquirer*,³³² Hollywood movie actor Clint Eastwood claims that the famous tabloid³³³ misrepresented the origin of an interview with him, alleging a violation of the Lanham Act.³³⁴ Ultimately, Eastwood could not prove, by clear and convincing evidence, that the tabloid published the interview *knowing* that it was false, but nevertheless prevailed by meeting the "actual malice" standard.³³⁵ The Circuit Court writes:

328. 15 U.S.C. § 1125: False Designations of Origin, False Descriptions, and Dilution Forbidden.

329. *Id.* (emphasis and brackets included for clarity).

330. *See, e.g., Matal v. Tam*, 137 S.Ct. 1744, 1751-52 (2017).

331. Alison P. Howard, *A Fistful of Lawsuits: The Press, the First Amendment, and Section 43(a) of the Lanham Act*, 88 CALIF. L. REV. 127 (2000).

332. 123 F.3d 1249, 1250-51 (9th Cir. 1997) (Kozinski, J.).

333. It is curious that the *National Enquirer* is now the target of an investigation into the role that it played in perpetuating lies during the election of 2016. *See* Jim Rutenberg, Emily Steel & Mike McIntire, *Investigators Focus on Another Trump Ally: The National Enquirer*, N.Y. TIMES (Apr. 11, 2018), <https://www.nytimes.com/2018/04/11/us/politics/trump-national-enquirer-american-media.html>.

334. *Id.*

335. "And although the concept of 'reckless disregard' 'cannot be fully encompassed in one infallible definition,' we have made clear that the defendant must have made the false publication with a 'high degree of awareness of . . . probable falsity,' or must have 'entertained serious

“[H]e could prevail if the *Enquirer* had ‘obvious reasons to doubt the veracity’ of its reporting³³⁶ but engaged in ‘purposeful avoidance of the truth.’³³⁷ Mere negligence would not be enough. ‘Even an extreme departure from accepted professional standards of journalism will not suffice to establish actual malice; nor will any other departure from reasonably prudent conduct, including the failure to investigate before publishing.’”^{338, 339}

The language from this decision lends itself well to the plague of fake news. According to the Ninth Circuit’s logic, if the press engages in avoiding the truth, akin to a scienter requirement of “recklessly” or “with knowledge of the act,” then it follows that the press can be liable under the Lanham Act.

It is intriguing that the court specifically states that “[m]ere negligence [of avoiding the truth in news reporting] would not be enough.”³⁴⁰ This speaks to the *Cohn*³⁴¹ standard of press responsibility: the Free Press must report fully and accurately. This also allows the Free Press to take the risk in publishing a story that may be mistaken, so long as a subsequent correction is published if the story proves to be untrue. The Free Press would otherwise be irresponsible if it did not actively engage in truthful factfinding. Another solution is to encourage individual states to adopt a separate cause of action that utilizes the language of the Lanham Act in order to litigate press responsibility in state courts.

There are other ways that “fake news” is being addressed internationally. One lawyer in Paris claims that defamatory news is the fault of the search engine.³⁴² Relying on European “right to be forgotten” laws,³⁴³ Dan Shefet used a legal tactic akin to *respondeat superior* against Google’s Paris office, arguing that, “[c]orporations have been raised to a level of legal untouchability hitherto only bestowed upon certain diplomatic missions and royalty.”³⁴⁴

doubts as to the truth of his publication.” ” *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 666-67 (1989).

336. *St. Amant v. Thomas*, 390 U.S. 727, 732 (1969).

337. *Harte-Hanks*, 491 U.S. at 692; *cf.* *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976) (en banc) (willful blindness tantamount to knowledge).

338. *Newton v. National Broadcasting Co.*, 930 F.2d 662, 669 (9th Cir. 1990); *see also St. Amant*, 390 U.S. at 733 (“Failure to investigate does not in itself establish bad faith”).

339. 123 F.3d at 1251.

340. *Id.*

341. 420 U.S. at 492.

342. *See* Aarti Shahani, *The Paris Lawyer Who Gives Google Nightmares*, NPR (Apr. 5, 2018), <https://www.npr.org/sections/alltechconsidered/2018/04/04/598888803/the-paris-lawyer-who-gives-google-nightmares>.

343. *Id.*

344. *Id.*

Litigation over press responsibility is as old as the Republic.³⁴⁵ The consuming public has standing to file suit,³⁴⁶ so long as there is a cause of action that enables them to do so. The judiciary, basing its rulings on principles of *stare decisis* and equity, is a particularly appropriate mechanism to give teeth to press responsibility. The question of damages is inevitable, and critics may claim that none are to be had.³⁴⁷ But the key here is aligning consumer confusion with press responsibility, an intersection that the Lanham Act seamlessly articulates.

C. Resist a Combative Executive

The solution to address press responsibility circles back to a “conflict between the Crown and the Press.”³⁴⁸ This clash continued through the twentieth and twenty-first centuries. Consider, for example, President Richard M. Nixon’s recording that borders on paranoia: “The press is the enemy. The press is the enemy. The press is the enemy.”³⁴⁹ Consider also President Donald J. Trump’s tweet, “FAKE NEWS – A TOTAL POLITICAL WITCH HUNT!”³⁵⁰ Both executives³⁵¹ preferred that the Free Press give them unwarranted praise, rather than well-deserved critique. It is a danger to the democracy when the executive assaults the legitimacy of the press, as it is the overseer of government. The public, in order to strengthen press responsibility, needs to resist these assaults.³⁵² To resist these assaults on press legitimacy is to exercise to the fullest extent the First Amendment.

345. See, e.g., *Zenger*, <http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-new-york-legal-eras-crown-zenger.html>, discussed *supra*.

346. See, e.g., *FCC*, 468 U.S. at 382.

347. But see *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1388 (2014) (stating that damages under a Lanham Act claim should be realized for either a zone of interests test or a proximate-cause analysis).

348. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978), quoting *Stanford v. Texas*, 379 U.S. 476, 482 (1965), relying on SEIBERT, FREEDOM OF THE PRESS, 1476-1776, pp. 83, 85-6, 97.

349. See *Richard Nixon Presidential Library and Museum Releases Additional 198 Hours of Tapes from Fifth Chronological Tape Release*, http://nixontapes.org/newtapes/19721214-823-1b-timecode43m17s-the_press_is_the_enemy-OVAL-Nixon-Kissinger-Haig.mp3. See also *Nixon’s the one still preoccupied with enemies*, N.Y. TIMES (Dec. 3, 2008), <https://www.nytimes.com/2008/12/03/world/americas/03iht-nixon.1.18356903.html>.

350. See Donald J. Trump, @realDonaldTrump (Jan. 10, 2017, 5:19 PM), <https://twitter.com/realdonaldtrump/status/818990655418617856?lang=en>. This was probably in response to the *BuzzFeed* publication of the famous Steele dossier. See Matt Flegenheimer, *Fusion GPS Founder Hauled From the Shadows for the Russia Election Investigation*, N.Y. TIMES (Jan. 1, 2018), <https://www.nytimes.com/2018/01/08/us/politics/fusion-gps-glenn-simpson.html>.

351. It is a Constitutional axiom that the inherited role of the English Crown is the head of the Executive branch of the state. See Part I, *supra*.

352. See generally *Resist’ Is a Battle Cry, but What Does It Mean?*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/2017/02/14/us/politics/resist-anti-trump-protest.html>.

Many voices are what makes democracy noisy, and having a noisy democracy is a benefit for all. Consider Juli Briskman, who is suing for her right to free expression after her employer, a government contractor that plays to the current administration's stances, allegedly retaliated against her by firing her.³⁵³ Consider also the massive free assemblies formed in reaction to the administration and its policies, such as the Women's March,³⁵⁴ the Science March,³⁵⁵ and March for Our Lives.³⁵⁶ Take the legal action that cites an undue discrimination against religion because of the federal government's new immigrant policy, referred to by the president as a "Muslim Ban."³⁵⁷ When the public exercises the First Amendment, then the Free Press will do its duty and report on events, comment on them, and fuel debate.

The more the public floods the marketplace of ideas with speech, assemblies, and lawsuits, the likelier that the marketplace of ideas will be repaired and truth will prevail. Embedded in the First Amendment is the root of all power stemming from the public: speaking against the government, assembling in opposition to the government, and suing the government. When the public speaks, assembles, and sues, the Free Press will follow.

It is dangerous when the public denigrates and dismisses the press as the bearer of poor news. But it is perilous when the executive does it. Therefore, the president and the governors of the individual states should neither hinder the Free Press's responsibility, nor promote any specific press outlet. If the executive has any preference towards certain news media, the legitimacy of the executive itself should be questioned.

This does not mean that the press should be neutral; it should be *truthful*. It is also important to note that if the executive attacks the Free

353. See Juli Briskman, *Why I'm Suing for my right to flip off the president*, WASH. POST (Apr. 5, 2018), https://www.washingtonpost.com/opinions/im-suing-for-my-right-to-flip-off-the-president/2018/04/05/a0abcf10-38e8-11e8-9c0a-85d477d9a226_story.html.

354. See Susan Chira, *The Women's March Became a Movement. What's Next?* N.Y. TIMES (Jan. 20, 2018), <https://www.nytimes.com/2018/01/20/us/womens-march-metoo.html>.

355. See Nicholas St. Fleur, *Scientists, Feeling Under Siege, March Against Trump Policies*, N.Y. TIMES (Apr. 22, 2017), <https://www.nytimes.com/2017/04/22/science/march-for-science.html>.

356. See Audrey Carlsen, Jugal K. Patel, *March for Our Lives: Maps of More Than 800 Protests Around the World*, N.Y. TIMES (Mar. 22, 2018), <https://www.nytimes.co/interactive/2018/03/22/us/politics/march-for-lives-demonstrations.html>.

357. See *Hawaii v. Trump*, 138 S. Ct. 2392(2018). See generally *Aziz v. Trump*, 234 F.Supp.3d 724, 726-27 (E. D. Va. 2017). See also Sam Levin, *Tears, despair and shattered hopes: the families torn apart by Trump's travel ban*, GUARDIAN (Jan. 8, 2018), https://www.theguardian.com/us-news/2018/jan/08/trump-travel-ban-families-affected-first-month?CMP=share_btn_link.

Press, then it does not necessarily diminish the press's role.³⁵⁸ Rather, it emboldens and strengthens the Free Press to inform the public of the corruption or nefarious intentions of the executive. The Free Press may chill its speech because it is frightened of retaliation for reporting negative stories or opposing the executive. Yet, the Free Press does not have a responsibility to the executive; it has a responsibility to the *public*.

It has been historically demonstrated that when an executive despises the press, he or she usually does so to prevent the revelation of questionable secrets.³⁵⁹ It follows that if an executive disparages the press, he or she may neglect his or her elected duty to "take care"³⁶⁰ of the Constitution. By having the Free Press report on what the executive does as a result of someone else's reasonable exercise of the First Amendment, the Free Press then does exactly what the modern public needs: prevent the public itself from becoming complacent, the democracy from becoming an autocracy, and the executive from becoming a tyrant.

Conclusion

The Free Press is responsible to the people by putting everyone in one room. It is given this responsibility by history and by the needs of the present, separate and apart from the goal of profit. By serving the public and providing information and insight to which the public would not otherwise have access, the Free Press protects the democracy by relaying what is happening and what it thinks about what is happening. The Free Press is undeniably free, but only so far as its message is unmistakably clear. A clear message achieves the goal of a marketplace of ideas uncontaminated and a public debate uninhibited, robust, and wide-open. Urgent action is needed to protect the press's responsibility for public debate and proper government critique. It is no longer unimaginable to envision public debate that is sterilized, news that is questionable, and democracy that is threatened: for America is now living it.

358. But see RonNell Andersen Jones and Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L.J. 1301 (2018).

359. See, e.g., *Why Was Nixon So Paranoid?*, WNYC (June 15, 2015), <https://www.wnyc.org/story/why-was-nixon-so-paranoid/>. See also Darren Samuelsohn, *White House paranoid: 'Everyone thinks they're being recorded'*, POLITICO (Dec. 4, 2018), <https://www.politico.com/story/2017/12/04/white-house-paranoid-trump-277761>.

360. See U.S. Const. art. II.