

LEGAL RESPONSIBILITY FOR FALSE NEWS

Tommaso Tani*

In 2016 and 2017, the debate about *false news* reached its peak, leading several authors to a new specific legal categorization that explored a new limitation on freedom of speech. This article starts with an analysis of different frameworks (from the U.S. and Europe) that can be applied to design such limitations as well as their philosophical origins. Then, it demonstrates that if a proper definition is set, there is no room for the law to step in prescribing responsibility for false news; hence, digital intermediaries as well are exempted from any obligation to monitor, remove, or flag false information.

TABLE OF CONTENTS

I. INTRODUCTION: AIM, SCOPE AND METHODOLOGY.....	230
II. TRUTH AND FALSITY IN FREEDOM OF EXPRESSION.....	233
A. Philosophy and Freedom of Expression.....	233
1. From Plato to Rousseau: The Argument from Democracy.....	233
2. Protagoras, Milton and Mill: The Argument from Truth.....	235
B. Different Points of View: The U.S. vs. Europe.....	237
1. The U.S.: First Amendment and Absolute Freedom of Expression.....	237
2. The European Approach to Freedom of Speech and Falsity.....	241

* Privacy and Media Consultant and Researcher, Law and Digital Technologies graduate, eLaw, Center for Law and Digital Technologies, Leiden, The Netherlands. The author would like to thank Professors Jan Oster and Wouter Hins for the helpful comments and reviews; Alan Sears for the invaluable support and suggestions; and finally, the staff of the *International Journalism Festival* for the constant and precious contributions. This article is based on the Advanced LL.M. Thesis the author submitted in fulfillment of the requirements of the Master of Laws: Advanced Studies Programme in Law and Digital Technology degree, Leiden Law School (Leiden University).

III. FALSITY AND FALSE NEWS.....	247
A. Three Key Points to Define False News	247
B. Falsity, Truthfulness and Proof	248
C. Scope of the Definition of False News.....	249
D. Insincerity: the Point of View of the Speaker	252
IV. LEGALLY IDENTIFIABLE HARM.....	253
A. Harm to Others as Criterion for Liability.....	253
1. Public Interest as a Not Suitable Approach	253
2. Harm to Others as Measure of Responsibility.....	255
B. Not False News.....	260
1. Defamation	260
2. Hate Speech	262
3. Genocide Denial Laws.....	265
V. LIABILITY OF INTERMEDIARIES	268
A. Digital Intermediaries’ Liability in the EU Framework.....	268
B. Digital Intermediaries’ Liability for False News	271
VI. CONCLUSION.....	273

I. INTRODUCTION: AIM, SCOPE AND METHODOLOGY

In the final months of 2016 during the midst of the U.S. Presidential campaign and elections, an important debate came out about “false/fake news,” “relative facts,” and “post-truth.” Those words ended up being named “word of the year” by Oxford Dictionaries.¹ The discussion was so strong that in several countries—Italy among them—there have been proposals to create specific laws, as well as a European authority (or a network of authorities), that could fight false news.² In 2015, the European Union established the East StratCom Task Force, a team with the precise goal to debunk and check information campaigns conducted by Russia.³ In 2017, the Russian Foreign Ministry launched a website with the intent to flag what they consider “false news.”⁴ Germany’s Justice Minister even proposed fines as

¹ Alison Flood, ‘Post-truth’ Named Word of the Year by Oxford Dictionaries, *GUARDIAN* (Nov. 15, 2016), <https://web.archive.org/web/20170714093147/https://www.theguardian.com/books/2016/nov/15/post-truth-named-word-of-the-year-by-oxford-dictionaries>.

² James Politi, *Italy Antitrust Chief Urges EU to Help Beat Fake News*, *FINANCIAL TIMES* (Dec. 29, 2016), <https://www.ft.com/content/e7280576-cddc-11e6-864f-20dcb35cede2>.

³ *Questions and Answers About the East StratCom Task Force*, EUROPEAN UNION EXTERNAL ACTION (Nov. 26, 2015), <https://eeas.europa.eu/headquarters/headquarters-homepage/2116/questions-and-answers-about-the-east->

⁴ The Ministry of Foreign Affairs of the Russian Federation, *Published Materials that Contain False Information About Russia*,

high as 50 million euros for social networks that do not remove defamatory and false news.⁵ This issue gained particular relevance and concern throughout the media because of the new digital ecosystem in which news circulates today. The Digital News Report 2017 by the Reuters Institute for the Study of Journalism reported that over the half of U.S. citizens asked say they use social media as a source of news each week.⁶ Facebook is by far the most important network for news but, inconsistently, a survey from BuzzFeed News and Ipsos Public Affairs found that 54% of the people who use Facebook as a news source trust news on the platform “only a little” or “not at all.”⁷

What is missing in the current debate is a proper legal analysis of what false news is: is this a new category of speech, or is it something that always existed? Are the existing laws on limitation of speech already adequately dealing with false news or should legislators step in to write new rules? Finally, is false news harmful? These questions are the starting point of my analysis and require looking back to the foundation of freedom of speech in order to be appropriately answered.

First, in Section II, two main approaches to freedom of expression will be briefly illustrated, one from the U.S. and one from Europe, starting with the background philosophical doctrines that strongly influenced them: Plato, Protagoras, Rousseau, Milton and Mill. Second, in Section III, the fundamental definition of false news will be deduced: it is only via a perfect understanding of its scope that it is possible to further assess the role that the law should have. Thus, three key aspects of the false news issue will be analyzed: (i) falsity, truthfulness and proof; (ii) insincerity—the point of view of the speaker; and (iii) the scope of the definition of false news. The last section will outline a scenario in which the remaining areas between

<https://web.archive.org/web/20170617155119/http://www.mid.ru/en/nedostovernie-publikacii>.
(last visited May 17, 2020).

⁵ Anthony Faiola & Stephanie Kirchner, *How do You Stop Fake News? In Germany, with a Law*, WASH. POST (Apr. 5, 2017), https://web.archive.org/web/20170617155351/https://www.washingtonpost.com/world/europe/how-do-you-stop-fake-news-in-germany-with-a-law/2017/04/05/e6834ad6-1a08-11e7-bcc2-7d1a0973e7b2_story.html.

⁶ Nic Newman et al., *Reuters Institute Digital News Report 2017*, REUTERS INST. FOR THE STUDY OF JOURNALISM (2017), https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital%20News%20Report%202017%20web_0.pdf.

⁷ IPSOS Public Affairs, *IPSOS Public Affairs: BuzzFeed Facebook News* (Mar. 28, 2017), <https://assets.documentcloud.org/documents/3559451/Ipsos-Buzzfeed-News-Facebook-News-Survey-Topline.pdf>.

irrelevant information can define false news and false criminalized speech, where the law is not yet present—and where it should not be.

In Section IV, a *legally identifiable harm* will be introduced as a trigger for liability in spreading false news, similar to that found in defamation or hate speech cases. Indeed, it will be shown how the European approach and the public interest are not the correct ways to assess the lawfulness of false news. Conversely, it seems to be more appropriate to measure responsibility based on the harm inflicted to third parties. The main differences between false news and other criminalization of freedom of speech, namely defamation, hate speech, and genocide denial, will be briefly illustrated.

Finally, in Section V, an outline of the European approach to the liability of digital intermediaries will be given and will explain why such responsibility cannot be prescribed for the sharing of false news. At the end of my analysis, once it is assessed how false news (according to my definition) is something not yet taken into account by current regulations, it will finally be possible to answer the main question: to what extent should the law prescribe responsibility for false news, and subsequently, what is the role of digital intermediaries?

To answer this final question properly, I will refer, for the first part, to literature about freedom of expression, and I will explore the main philosophical doctrines, including some of the best comparative studies that have been made between the U.S. and European doctrines. In this section, pertinent case law will also be described; first, from the Supreme Court of the United States, with general cases about the relationship between falsity and the First Amendment, and then with one specific example of responsibility for false news. Then, the European Court of Human Rights will be used as a benchmark for the European approach: cases will be analyzed that clearly illustrate how, according to the European Convention on Human Rights, more limitations of freedom of speech are allowed. Lastly, a case specifically dealing with spreading false news will be discussed. In the third and fourth sections, academic articles on freedom of speech and its limitations, a few recently published articles about false news, and existing laws on defamation, hate speech and genocide denial will primarily be discussed. In the last section, the European approach will always be referenced within the frameworks of the laws of the European Union and the European Convention on Human Rights. Finally, in Section V, European legislation, with several cases from both the Court of Justice of the European Union and the European Court of Human Rights, will be pulled together to paint a fuller picture on digital intermediaries' liability for third-party content.

II. TRUTH AND FALSITY IN FREEDOM OF EXPRESSION

A. *Philosophy and Freedom of Expression*

1. From Plato to Rousseau: The Argument from Democracy

Answering the question of whether a potential responsibility for spreading false news exists first requires one to understand what can be defined as a falsity and to what extent this definition exists.

As it might reasonably seem, this problem is particularly hard to discern and has yet to be solved. One thing that immediately appears clear is how truth is deeply linked with freedom of expression. This begs the following question: is everyone free to say whatever he or she thinks, no matter if it is true or false?

To give more strength to the link between truth and freedom of expression, it is significant to introduce the idea of *parrhesia* (παρρησία) as it was known in ancient Greece; Plato in particular referenced this idea. In modern English, it translates as “boldness” or, more pertinently, as “freedom of speech,”⁸ but the original idea contains much more than what is in our modern conception of this human right. Indeed, the correlation between the freedom for everyone to express their thoughts is intrinsically related to the expression of the truth for Plato. Further, we are able to trace *parrhesia* back to the central idea that freedom of expression should not be considered as an absolute right, but rather it should be recognized only to the extent to which it is useful and utilized towards what is best for democracy and society. The idea of *parrhesia*, in its positive meaning, represents the will of the one who wants to speak the truth. Indeed, “*parrhesiazesthai*,” in the Greek verbal form, means “to tell the truth.” Leaving aside the internal reasoning of the speaker about how he is convinced of the truthfulness of his opinions, *parrhesia* can be defined as the verbal activity in which the speaker chooses to speak frankly and clearly and it, together with *isegoria* (the equal right of speech) and *isonomia* (the equal participation of all citizens in the exercise of power) represented one of the pillars of the Athens’ democracy.⁹

But Plato’s—and his disciples’—thoughts become interesting when, especially after the fourth century B.C., *parrhesia* began to also be mentioned with a pejorative meaning; it was used “as a characterization of the bad democratic constitution where everyone has the right to address himself to

⁸ *Parrhesia*, MERRIAM-WEBSTER ENGLISH DICTIONARY (2020 online edition).

⁹ Michel Foucault, *Discourse and Truth: The Problematization of Parrhesia* (1999) <http://www.naturalthinker.net/trl/texts/Foucault,Michel/Foucault%20-%20Discourse%20and%20truth.pdf>.

his fellow citizens and to tell them anything—even the most stupid or dangerous things for the city.”¹⁰ At a certain point, *parrhesia* revealed hazards for the democracy: if every opinion has the same value as the others, it is now more difficult to access the truth, if not sometimes impossible. Moreover, an additional problem arose; the difficulty of differentiating falsehood from truth. What we should take from this part of Plato’s philosophy, and that later on will form part of the communitarianism doctrine, is the underlying idea that absolute freedom of speech could be harmful to the peaceful existence of citizens and democracy; indeed, general freedom within a society cannot be intended as absolute freedom. On the contrary, an individual might enjoy freedom but still be subject to bonds imposed by social order.¹¹ Jean-Jacques Rousseau indicated that in a democracy such freedom and duties might coexist; “a subject is . . . free insofar as his individual will is in harmony with the ‘collective’ (or ‘general’) will expressed in the social order.”¹² Freedom of expression for the French philosopher is seen as a contribution to the common good, as part of the duties of a citizen that, contributing to the *volonté générale*, will also seek his own liberty.¹³ This is the core of the rationale for freedom of expression defined as the *argument from democracy*.

Consequently, not all ideas are equal and not all ideas deserve the same protection: there are people who can speak the truth, the *parrhesiastes*—who, not surprisingly, are philosophers. Hence, it is possible to understand where the idea that some speeches are more valuable than others has its basis. If Plato’s principle was used to answer the main research question of this article, there would be a certain margin of appreciation in which it is possible to condemn a piece of news because it is false. This is *per se* harmful for society and democracy, without any need to investigate further to find a real and quantifiable harm to someone or something. “Even if [it] does not cause harm. . . it has to be limited because it is incompatible with democracy itself;” the argument from democracy indeed aims to create a better environment for citizens to exercise their rights and their abilities.¹⁴

Rousseau’s contribution is contained in his book, *The Social Contract*, where he theorized a new collective dimension of human rights—among which is freedom of expression—which are seen as tools “serving to carry

¹⁰ *Id.*

¹¹ HANS Kelsen, GENERAL THEORY OF LAW AND STATE 285 (1945).

¹² *Id.*

¹³ JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT: ON PRINCIPLES OF POLITICAL RIGHT (G. D. H. Cole Trans., 1762).

¹⁴ David van Mill & Edward Zalta, *Freedom of Speech*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter 2016).

out popular sovereignty and to contribute to the common good.”¹⁵ The human individual is deprived of importance in order to empower the new entity of citizen. The public discussion hence gains value—and more protection—when it is oriented to enhance the overall experience of the community, when, as it would be defined in current times, it is of *public interest*. This principle will come to be of pivotal importance in the European doctrine of freedom of expression: public interest is one of the lenses through which speech is judged as sufficiently valuable for protection. This criterion has a crucial role when assessing the legitimacy of any form of expression—if it is not possible to find a proper public interest under which, for example, news, can be protected, it is likely for others’ rights to prevail.¹⁶

From this perspective, it is possible to impose a limitation—if intended *ex-ante*—or a responsibility—*ex-post*—on a subject who spreads false news: a falsehood is of no interest to the community, but rather it can be harmful to the common good. Hence, not surprisingly, legislators and courts that adopt this approach will be less inclined to grant the protection of freedom of expression to such content, leaving room for criminalization and sanctions.

2. Protagoras, Milton and Mill: The Argument from Truth

During the golden age of Athens’ democracy, another philosophical doctrine was developed, that may be contrasted with Plato’s writings—and specifically with his idea of freedom of speech. It was presented by a group of individuals collectively called the *Sophists*, whose most notable exponent was Protagoras.¹⁷ This group of philosophers shifted the focus from the object, or what was said, to the subject, or who was speaking, and hence the human being. With his famous sentence “man is the measure of all things,” Protagoras introduced a strong relativism which put man at the center of everything, including values, opinions and judgments. According to his philosophy, “there was no such thing as objectively right or wrong conduct, simply conduct that was ‘profitable’ or ‘useful’ (*khresimos*) and that which was not.”¹⁸ Projecting this paradigm to the false news problem, we can deduce that no argument is intrinsically more valuable than another. Everyone has the possibility to express himself or herself and to convince the

¹⁵ JAN OSTER, 7 MEDIA FREEDOM AS A FUNDAMENTAL RIGHT, CAMBRIDGE U. PRESS 15, 16 (2015).

¹⁶ For example, the European Court of Human Rights has been open to prior restraints on publications “in cases which demonstrate no pressing need for immediate publication and in which there is no obvious contribution to a debate of general public interest.” See *Mosley v. United Kingdom*, 2011 Eur. Ct H.R. 117; OSTER, *supra* note 15, at 140.

¹⁷ JOHN M. DILLON & TANIA GERGEL, GREEK SOPHISTS (2003).

¹⁸ *Id.*

audience of the truthfulness of his or her statement. It was not a coincidence that the Sophists' school has always been related to the strong role and development of rhetoric and the art of discourse, in which the focus was shifted from the value of the argument to the way in which it was expressed.

Objectivity—truth and falsity—was considered impossible to recognize to the point that its existence was doubted: the best argument would prevail after public discussion. This Sophist approach represents the sprouting of the *marketplace of ideas* theory that Milton first expressed in his *Areopagitica*: “Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.”¹⁹ What the English poet believed is that truth is most likely to emerge in a “free and open encounter,”²⁰ hence no restriction must be imposed on freedom of expression. Milton wrote this in response to a licensing act promoted by the government in 1643 which could be used to impose prior restraint on authors whose views the government disliked.²¹ He opposed the bill, arguing that it is not for the government to express judgment on books' content—on ideas—but truth and falsehood should “grapple” to the point when the truth, or ‘the most convincing idea’ will prevail.²²

If Milton introduced the concept of the marketplace of ideas, the English philosopher John Stuart Mill was the one who really had embraced it and became the leading light of freedom of expression as an absolute right that cannot be limited. His point of view was radical to the extent that in his opinion “there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered.”²³ Again, no censorship or limitation can be applied to speech: everything has the right to be told; everyone has the right to speak. In his book *On Liberty*, Mill give examples of how, even if only one person had a dissenting opinion from the rest of the humankind, nobody could stop or prevent him from expressing himself.²⁴ Going back to the central theme of false news, and elaborating on this idea of the English philosopher, no one can be held responsible for spreading falsehood; only through a public discussion that pushes an idea to its logical limit is it possible to reach the full dignity of the human being without sacrificing “the entire moral courage of the human mind.”²⁵

¹⁹ JOHN MILTON, *AREOPAGITICA* 73 (1644).

²⁰ *Id.* at 58.

²¹ Clay Jenkinson, *From Milton to Media: Information Flow in a Free Society*, 58 *MEDIA & VALUES* 3-6 (1992).

²² OSTER, *supra* note 15, at 16.

²³ JOHN S. MILL, *ON LIBERTY* 32 (1869).

²⁴ *Id.* at 33.

²⁵ *Id.* at 60.

Naturally, Mill was well aware that on occasion it may be necessary to control and—in extreme cases—limit the freedom of expression. When people form a community, some rules must be put in place. Thus, he suggested one straightforward and effective principle, known as the *harm principle*. According to this principle, limitations on free speech may exist only when they are intended to prevent other people from being harmed. As he wrote in *On Liberty*, “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others . . . Over himself, over his own body and mind, the individual is sovereign.”²⁶ This need for control stems from the necessary relationship between two or more persons, but only when someone’s ideas can create damage to another’s personal sphere. If no harm is traceable, no limitations can be imposed. This approach will strongly influence the U.S. freedom of expression doctrine, in which it is unlikely to find rulings against someone’s speech unless it is strongly correlated with someone else’s significant harm. In the following sections, this article will analyze why the *harm principle*—where harm is intended to mean a legally identifiable harm—should be taken into account as the main rule when evaluating an individual’s potential responsibility for spreading false news. If harm is not correlated, no action must be taken.²⁷

B. Different Points of View: The U.S. vs. Europe

1. The U.S.: First Amendment and Absolute Freedom of Expression

(i) Doctrine and Constitution

The United States’ approach to freedom of expression has been strongly affected by the ideas of English philosophers John Milton and John Stuart Mill. The First Amendment of the Constitution protects freedom of speech:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.²⁸

This provision of the Constitution imposes a negative obligation on the State to not “abridge” freedom of speech; this is a *de facto* prohibition of any kind of interference with the private right to freely express ideas by any means, such as “criminal prosecution or conviction, civil judgment for money

²⁶ *Id.* at 22.

²⁷ *Cf. supra*, Section IV.

²⁸ See U.S. CONST., ART. I, § 1.

damages, or censorship.”²⁹ Even though a pure absolutist position of this right is difficult to sustain, it is possible to affirm that the U.S.—and the Supreme Court—have historically been less inclined to limit and apply restrictions to freedom of speech than other countries. Indeed, the definition of the “marketplace of ideas” argument for truth, formulated by Justice Holmes in his famous dissenting judgment in the *Abrams* case,³⁰ has also exercised a significant influence on U.S. free speech jurisprudence:³¹ “The best test of truth is the power of thought to get itself accepted in the competition of the market.”³² This doctrine, originally introduced by John Milton, states that if the public discussion is left without any governmental interference, it “will lead to the discovery of truth” and, eventually, to a benefit for the common good.³³ This approach evidently requires a certain amount of faith in the whole of society to discern the truth from falsehood through the means of public debate or, like Greenawalt perfectly summarized, a confident “optimism that people have some ability over time to sort out true ideas from false ones.”³⁴

It appears that definitions of truth and falsehood, even in their own existence, play a crucial role in the U.S. framework surrounding freedom of speech. On one hand, we have already seen that the “marketplace of ideas” theory affirms that truth will be discovered by means of public discussion, so an institution must not assess it. Thus, the state should adopt an agnostic position toward truth and falsehood. The Supreme Court of the United States effectively affirmed this position by stating that, under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend on its influence “not on the conscience of judges and juries, but on the competition of other ideas.”³⁵ On the other hand, the very goal of public discussion—namely, the discovery and predominance of the truth—implies the existence of an objective truth that must eventually be reached. However, this existence has been highly challenged by academics. Ingber wrote, “[T]oday’s truth, consequently, may become tomorrow’s superstition,” thus arguing that the marketplace will lead not to the

²⁹ DOUGLAS M. FRALEIGH & JOSEPH S. TRUMAN, *FREEDOM OF EXPRESSION IN THE MARKETPLACE OF IDEAS* 3 (2010).

³⁰ *Abrams v. United States*, 250 U.S. 616 (1919).

³¹ ERIC BARENDT, *FREEDOM OF SPEECH* 48 (2ded. 2007).

³² See *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

³³ Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3-4 (1984). In point of fact, U.S. jurisprudence has reduced the distance between the two doctrines on the marketplace of ideas and the argument from democracy, introducing an “aggregate benefits on society” given by freedom of speech as well as an instrumental meaning for this right.

³⁴ Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 131 (1989).

³⁵ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

affirmation of what is ultimately true or best, but rather to the dominating cultural group's sense of what is true or best.³⁶ Conversely, Greenawalt replied to this concern asserting that the "truth-discovery argument can survive a substantial dose of skepticism about objective truth."³⁷ According to Greenawalt, rather than affirming the objective truth, the goal of free public discussion is to get *close enough* to the truth. For example, those who think the Holocaust occurred are indeed closer to the truth than those who deny its existence.

(ii) *Case Law*

The Supreme Court of United States has largely ruled in favor of expression on matters related to the First Amendment and has generally been against limitations of the right, allowing only narrow and well-defined exceptions to the protection of freedom of speech. The Court made one of its most important statements in *New York Times Co. v. Sullivan*, where it affirmed the principle that the First Amendment does not "recognize an exception for any test of truth."³⁸ Even if small exceptions are allowed—as is permitted in cases that concern defamation, fraud, and incitement—the central theme of case law is that speech cannot be scrutinized under the guise of seeking the truth.

The Supreme Court has expressed its opinion on the possibility of excluding false statements—including false news reports—from the protection of the First Amendment. Previously, the Supreme Court had thoroughly defined constitutional provisions as not intending to protect the objective truth, but rather guaranteeing that anyone could be "his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us."³⁹ The Court then fully applied the principle theorized by Mill that no punishment or limitation can be sustained against a false statement if no demonstrable harm is done to third parties. The government is excluded from giving any kind of judgment on the truthfulness of certain speech. The American Civil Liberties Union precisely summarized this prohibition of truth's assessment in its brief in support of the respondent in *United States v. Alvarez*,⁴⁰ explaining that "investing the government with the general power to declare speech to be constitutionally valueless on the

³⁶ Ingber, *supra* note 33, at 25, 27.

³⁷ Greenawalt, *supra* note 34, at 132.

³⁸ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

³⁹ *Thomas v. Collins*, 323 U.S. 516, 545 (1945).

⁴⁰ *United States v. Alvarez*, 567 U. S. 709 (2012).

grounds of its 'falsity' would give the government sweeping power to control and censor public debate."⁴¹

The Supreme Court has affirmed the harm principle multiple times in regard to punishment for the publication of false news, including criminal convictions and fines. The Court's opinion is based on the position that false news is still protected under the First Amendment unless they cause harm to others. The Court also clarified that this protection is not meant only to give "breathing space" to true statements, but statements *per se* in their own right. Yet again, the Constitution protects freedom of speech, regardless of the content, as long as no harm is done. In every case in which the protection of the First Amendment was reduced, the Supreme Court has always done so in response to an inflicted harm. There are very few cases, "well-defined and narrowly limited"⁴² by this jurisprudence, such as defamation ("calculated falsehood enjoyed no immunity in the case of alleged defamation of a public official concerning his official conduct"⁴³) or fraud, when the falsehood is not criminalized itself, but only if and when the statement misleads the listener.⁴⁴

In recent years, one particular case has been brought to attention for its focus on false statements, leading the Supreme Court to affirm once again, and with more clarity, the principle that falsity is still protected by the First Amendment. In June 2012, the Supreme Court ruled in *United States v. Alvarez* that an act which prohibited one to lie about military honor infringed upon speech protected by the First Amendment.⁴⁹ In his opinion,⁴⁵ Justice Kennedy reaffirmed that false statements have never been an exception to the content-based restriction to freedom of speech. There are only a few categories, such as defamation, obscenity, and fraud that fall within this restriction. In each of these classifications, the restriction is always triggered when harm is caused to someone else. Moreover, Justice Kennedy added that even in cases of fraud and defamation, "falsity alone may not suffice to bring

⁴¹ *Id.*

⁴² *United States v. Stevens*, 559 U.S. 460, 468-69 (2010).

⁴³ *Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967).

⁴⁴ *United States v. Dunnigan*, 507 U.S. 87, 94 (1993).

⁴⁹ *United States v. Alvarez*, 567 U.S. 709 (2012). The *Stolen Valor Act* makes it a crime to falsely claim receipt of military decorations or medals and provides an enhanced penalty if the Congressional Medal of Honor is involved. 18 U.S.C. §§ 704 (b), (c). The Respondent, Mr. Xavier Alvarez, pleaded guilty to a charge of falsely claiming that he had received the Medal of Honor, but reserved his right to appeal his claim that the Act is unconstitutional. The Ninth Circuit reversed, finding the Act invalid under the First Amendment. The Government of the United States appealed the decision of the Circuit Court to the Supreme Court.

⁴⁵ *Id.*

the speech outside the First Amendment.”⁴⁶ The threat of having a chilling effect on speech would be too big and “inhibit the speaker from making even true statements.”⁴⁷

Thus, the U.S. approach to false statements is extremely clear: in order to prevent any interference and abuse by the government for critical thinking, the protection of the First Amendment for freedom of expression is granted to all speech, regardless of its truthfulness, which ultimately cannot be tested. The only circumstance in which someone can be held responsible for “falsity” is when such falsity causes demonstrable harm to third parties.

2. The European Approach to Freedom of Speech and Falsity

(i) *Principles and Laws*

Europe’s approach to freedom of expression has been strongly influenced by the ancient civic republicanism theory, but that is not its sole source of influence.⁴⁸ Strong guidance is derived from the history of those countries that experienced totalitarian dictatorships in the 1920s and 1930s, including Antisemitism, persecution, and genocide.⁴⁹ This history relates to different ideologies and circumstances, and encourages European nations to allow certain restrictions on freedom of speech in order to protect the population from the recurrence of nationwide hate and racism. Many countries have adopted laws prohibiting specific kinds of speech; for example, Germany, Austria, and France, have laws against the denial of the Second World War genocides. However, the European Convention on Human Rights (ECHR) sets out the general leading framework. Article 10 of the Convention affirms the principle of freedom of expression and illustrates its potential limits:

The exercise of these freedoms, since it carries with it duties and responsibilities, *may be subject to such formalities, conditions, restrictions or penalties* as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See BARENDT, *supra* note 31, at Introduction; OSTER, *supra* note 15, at 22; S. Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. MARY BILL RTS. J. 305, 320 (1998).

⁴⁹ BARENDT, *supra* note 31, at 319-20.

preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁵⁰

This right, as formulated in the ECHR and interpreted by the European Court on Human Rights (ECtHR), is anything but absolute. The exercise of this right is determined on a case-by-case basis through complex analysis, and limitations are allowed. The ECtHR evaluates the correct balance between the rights provided by the ECHR and determines whether one or more of those rights prevail according to precise criteria established by case law. For example, limitations on the freedom of speech are accepted in order to protect someone's right to private life, reputation, or national security. The ECtHR specifically listed two main factors that must be taken into account when judging the lawfulness of a limitation: (1) the restriction must be *prescribed by law*, and (2) must be *necessary in a democratic society*. The Court decided in *Sunday Times v. The United Kingdom*⁵¹ that in order to be "necessary," the restriction must follow a "pressing social need" in a set of particular circumstances, be proportionate to the aim pursued, and the reasons for the restriction must be relevant and sufficient.⁵²

The wording of the article makes it clear how this freedom must be exercised with "more caution" than under the United States' First Amendment by stating, "*it carries with it duties and responsibilities.*" This indicates that freedom of speech can be limited if certain criteria are not met. The Court has developed factor sets in order to assess which interest should prevail in each case. However, the factor requiring an interest to the public must always be present and is the key difference in the E.U.'s approach to freedom of expression. In the aforementioned case *Sunday Times v. The United Kingdom*, the necessity for a democratic society to limit freedom of expression is determined by taking into account "any public interest aspect of the case."⁵³ This same factor has been evaluated when freedom of expression is balanced against the right to private life. In yet another case, *Axel Springer Ag v. Germany*,⁵⁴ the Court again made a similar point, stating that these two rights "deserve equal respect" and "an initial essential criterion [to balance rights] is the contribution made by photos or articles in the press to a debate of general interest."⁵⁵

⁵⁰ Council of Eur., Eur. Conv. for the Protection of H.R. and Fundamental Freedoms, at Art. 10.

⁵¹ *Sunday Times v. UK* (1979), Application No. 6538/74.

⁵² BARENDT, *supra* note 31, at 65.

⁵³ Council of Eur., *supra* note 50, at § 65.

⁵⁴ Case of Axel Springer ag v. Germany, Eur. Ct. H.R. (2012), <http://hudoc.echr.coe.int/eng?i=001-109034>.

⁵⁵ *Id.* at § 87, 90.

European countries have always been more inclined to adopt legislation-limiting freedom of speech in order to defend particular interests and to prevent the mistakes of the past. After the Second World War, Europeans were forced to respond to the threat posed by Nazi Germany and totalitarianism.⁵⁶ This response eventually developed into a special restriction on speech, as seen in cases of Holocaust denial⁵⁷ or hate speech.⁵⁸ The ECtHR has dealt with this provision multiple times by assessing whether statements, either verbal or non-verbal, stir up or justify violence, hatred, or intolerance, and whether restrictions are justifiable and necessary under the application of Article 10 of the ECHR.⁵⁹ When dealing with laws concerning Holocaust denial and other statements relating to Nazi crimes specifically, the ECtHR and national courts have declared the statements inadmissible. In such cases, the ECtHR found interference of speech justified and necessary because “such statements [were] attacks on the Jewish community and intrinsically linked to Nazi ideology, which was antidemocratic and inimical to human rights.”⁶⁰

⁵⁶ Robert A. Khan, *Why Do Europeans Ban Hate Speech? A Debate Between Karl Loewenstein and Robert Post*, 41 HOFSTRA L. REV. 545, 557 (2013).

⁵⁷ In the European area, these countries have enacted Holocaust or Genocide denial laws: Austria (Prohibition Act 1947, as amended in 1992), Belgium (Negations Law 1995, as amended up to 2014), Czech Republic (Criminal Code, 2009), France (Penal Code of 1791, as amended up to 2016), Germany (Federal Criminal Code of 1998, as amended up to 2016), Hungary (Criminal Code of 2013), Israel (Denial of Holocaust (Prohibition) Law, 1986), Liechtenstein (Penal Code, 1987), Lithuania, Luxemburg (Penal Code, 1997), Poland (Act on the Institute of National Remembrance –Commission for the Prosecution of Crimes against the Polish Nation, 1998), Romania (Emergency ordinance 31, ratified in 2006), Slovakia (Penal Code, as amended 2001), Spain (Penal Code, 1995), Switzerland (Penal Code, amended in 1994). KANTOR CENTER FOR THE STUDY OF CONTEMPORARY EUROPEAN JEWRY (2010), <https://app.powerbi.com/view?r=eyJrIjoiNjUwYWlzMmItYzhINC00YjBiLWE4NTAtZjc2ZTgwM2JhY2Y1IiwidCI6IjE4MDAwODhjLTlINzgtNDA3MC05MDdjLTgzMDZiMTUzODdlZSIsImMiOiJl9>.

⁵⁸ On hate speech, the Council of the European Union issued a Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, which contains a definition of hate speech that every EU Member State shall make punishable. This definition, other than “public incitement to violence or hatred directed against a group of persons or a member of such a group defined on the basis of race, color, descent, religion or belief, or national or ethnic origin,” contains a specific reference to genocide denial: “publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes . . . when the conduct is carried out in a manner likely to incite violence or hatred against such a group or a member of such a group.”

⁵⁹ Case of *Perinçek v. Switzerland*, Eur. Ct. H.R. at 88, § 204 (2015), <http://hudoc.echr.coe.int/eng?i=001-158235>.

⁶⁰ *Id.* at § 209; *see also* *X. v. the Federal Republic of Ger.* 29 Eur. Comm’n H.R. Dec. & Rep. 194 (1982), <http://hudoc.echr.coe.int/eng?i=001-74463>; *Ochensberger v. Austria*, Eur. Comm’n H.R. Dec. & Rep. (1994), <http://hudoc.echr.coe.int/eng?i=001-1921>; *Walendy v. Germany*, 80-A Eur. Comm’n H.R. Dec. & Rep. 94 (1995), <http://hudoc.echr.coe.int/eng?i=001-86587>; *Remer v. Ger.*, 82-A Eur. Comm’n H.R. Dec. & Rep. 117 (1995), <http://hudoc.echr.coe.int/eng?i=001-2294>;

(ii) *Case Law*

The previous section introduced the most relevant case law produced by the ECtHR regarding potential limitations to the freedom of speech. Even if the geographical scope of the ECHR goes beyond what is traditionally referred to as Europe, the Court represents the best expression of European values and doctrine. Moreover, the ECtHR would eventually override any analysis conducted by a single country's laws. This can be considered, at least in regard to freedom of speech and other rights, the ultimate decision made at the "continental" level. As this article has already illustrated, the Court is generally inclined to justify limitations on speech when deciding cases regarding hate speech and genocide denial. The Court's decision is made on a case-by-case basis, and numerous factors must be properly taken into account. Most noteworthy are the two core factors that require restrictions of speech to be prescribed by law and necessary in a democratic society.

The first case that must be mentioned is *Perinçek v. Switzerland*. This case contains several notable considerations by the ECtHR that are worth discussing. The case "concerned the criminal conviction of a Turkish politician for publicly expressing the view that the mass deportations and massacres suffered by the Armenians in the Ottoman Empire in 1915 and the following years had not amounted to genocide."⁶¹ This historical event constitutes a peculiarity for two main reasons: first, legislation did not typically contain any explicit restriction against genocide denials (see Section IV.B.3 below), and second, genocide on its face, rather than its historical existence, is the issue that courts generally object to.⁶² The Court noted that it is not their duty to determine "if the massacres and mass deportations suffered by the Armenian people at the hands of the Ottoman Empire from 1915 onwards could be characterized as genocide within the meaning of that term under international law,"⁶³ underlining the difference of authority between international courts. The Court concluded Mr. Perinçek's statements were not an incitement of hatred, violence or intolerance. However,

Honsik v. Austria, 83-A Eur. Comm'n H.R. Dec. & Rep. 77 (1995), <http://hudoc.echr.coe.int/eng?i=001-2362>; National demokratische Partei Deutschlands Bezirksverband München-Oberbayern v. Ger., 84-A Eur. Comm'n H.R. Dec. & Rep. 149 (1995), <http://hudoc.echr.coe.int/eng?i=001-2502>; Marais v. Fr., 86-B Eur. Comm'n H.R. Dec. & Rep. 184 (1996), <http://hudoc.echr.coe.int/eng?i=001-88275>; D.I. v. Germany., Eur. Comm'n H.R. Dec. & Rep. (1996), <http://hudoc.echr.coe.int/eng?i=001-3218>; Nachtmann v. Austria, Eur. Comm'n H.R. Dec. & Rep. (1998), <http://hudoc.echr.coe.int/eng?i=001-4399>.

⁶¹ Press release issued by the Registrar of the Court, Eur. Ct. Hum. Rts., *The Court Delivers its Grand Chamber judgment in the Case of Perinçek v. Switzerland*, Eur. Ct. H.R. 325 (Oct. 15, 2015).

⁶² *Id.* at § 6.

⁶³ *Id.*

concerning the matter of public interest, the margin of appreciation granted to national courts is narrowed greatly.⁶⁴ The judges pointed out another crucial difference between this case and others concerning situations of Holocaust denial. In other instances, the deniers' statements were seen as *per se* "attacks on the Jewish community and intrinsically linked to Nazi ideology, which was antidemocratic and inimical to human right . . . , as inciting to racial hatred, [Antisemitism] and xenophobia."⁶⁵ Mr Perinçek's utterances, however, "could not be seen as having the significantly upsetting effect sought to be attributed to them" and hence, they were not severe enough to justify a criminal conviction.⁶⁶ Even though Mr. Perinçek's speech might be seen as offensive, it should not be restricted. Further, this speech is entitled to protection as a matter of public interest and political debate.

Although this article does not provide a complete study of how the Court has interpreted the right provided by Article 10 of the Convention, it is important to focus on one specific case, *Salov v. Ukraine*.⁶⁷ This is one of the few cases that confront the problem of dissemination of false news. On the 30th and 31st of October, 1999, Sergey Petrovich Salov disseminated information about the alleged death of the incumbent President, Mr. Leonid D. Kuchmaon, who was running for reelection. He did so by publishing a false statement attributed to the Speaker of the Verkhovna Rada (Parliament) in a special nationwide issue of the Verkhovna Rada newspaper, *Holos Ukrainy* ("Голос України").⁶⁸ Mr. Salov was consequently convicted for interfering with the citizens' right to vote by influencing election results by means of fraudulent behavior. He appealed to the ECtHR complaining that the conviction infringed on the right to receive and impart information set out under Article 10. While the first part of the judgment assessed the compatibility of the Ukrainian trial with Article 6 of the Convention, a relevant part of the ruling was dedicated to evaluating the possibility of an interference with freedom of speech. As usual, the Court tested "whether the 'interference' complained of corresponded to a 'pressing social need,' whether it was proportionate to the legitimate aim pursued, and whether the reasons given by the national authorities to justify it [were] relevant and

⁶⁴ "Another principle that has been consistently emphasized in the Court's case-law is that there is little scope under Article 10 § 2 of the Convention for restrictions on political expression or on debate on questions of public interest." *Id.* at § 197.

⁶⁵ *Id.* at § 209.

⁶⁶ *Id.*

⁶⁷ *Salov v. Ukr.* (2005), Application no. 65518/01, <https://www.legal-tools.org/doc/9971ef/pdf/>.

⁶⁸ *Id.*

sufficient.”⁶⁹ Through this test, the Court’s discussion touched, sometimes indirectly, on the lawfulness of false information.

First, the Court decided that the aim pursued by the Ukrainian law when limiting freedom of speech in order to prevent improper influence on democratic elections was legitimate.⁷⁰ More precisely, the judgment contained a statement—perhaps expressed too lightly—stating that a legitimate goal for the government would be to “provid[e] the voters with *true information* in the course of the presidential campaign of 1999.”⁷¹ It would be easy for the Court to declare that the newspaper’s article should be described as a “false statement of fact.” In the *Harlanova v. Latvia* case, the court distinguished between “facts” and “value judgments,” stating,⁷² “the fact that Mr. Kuchma is not dead is easily verifiable, and it must be said any false news about this circumstance is unlikely to be believed.” What the Court did not foresee is that such a statement implies the government has the ability, or even the right, to assess the truthfulness of a piece of news and to prevent any further dissemination of information that is believed to be false. This is an undeniable major threat to freedom of expression itself (see *infra* Section 4). Even though the judges marginally confront the issue of falsity in this case, the Court appears to make a strong, contradictory, yet acceptable, statement on false information:

Article 10 of the Convention as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression set forth in Article 10 of the Convention.⁷³

The Court has not expressed other explicit opinions on the falsehood of a piece of news in situations where it is unlinked from other different types of criminalization like defamation. Thus, this is the only case in which the Court has taken an explicit position on this issue. However, it is possible to understand the value that the ECtHR places upon the dissemination of information, no matter if it is true or false. Limiting speech simply based on the fact that the news “is strongly suspected to be not truthful” would be an unreasonable restriction and dangerously hinder the right to freedom of expression. It is worth repeating that the case at the center of this Court’s assessment was of a particularly easy solution, under two aspects. First, as I

⁶⁹ *Id.* at § 105.

⁷⁰ *Id.* at § 186.

⁷¹ *Id.* at § 110.

⁷² *Harlanova v. Lat.* (2003), Application no. 57313/00.

⁷³ Press release issued by the Registrar of the Court, *supra* note 61, at § 113.

have already illustrated, it was far too easy to prove the facts narrated in the article to be wrong. The candidate could have been either alive or dead; the proof was undemanding. As I will describe later, truth and falsity are usually far from being binary concepts; providing evidence for the falsehood of an utterance does not give any information about “what it really is,” only “what it is not.” Second, the Court could easily assess the impact of the false news on the population, clearly connecting the consequences to the actions of Mr. Salov. Indeed, he made and spread only eight copies of the tampered newspaper article—the context is entirely different from the one in which the discussion on false news has developed.

In conclusion, the preceding has attempted to paint the big picture of the European perspective on possible limitations of freedom of speech; according to the rulings of the ECtHR, there is an opportunity for countries to adopt legislation that restricts this right. Moreover, this case is one of the very few examples where the Court has been presented with and then discussed the false news issue. Here, the Court permitted the restriction based upon the context of the specific case, even though the Court found the limitation disproportionate to the aim.

III. FALSITY AND FALSE NEWS.

A. Three Key Points to Define False News

The previous sections have briefly illustrated the two main doctrines and their origins when dealing with freedom of expression. On one side, the U.S. approach aims to protect the speaker, and generally opposes content-based restrictions. On the other side lies the European school of thought, where the notion of public interest is very often the criterion upon which speech’s lawfulness is evaluated. Although I focused on pointing out the differences between these two doctrines, they are generally closer than one might imagine; moreover, sometimes these systems even influence each other. Nevertheless, the issues raised in the last year about false news force us to change perspective and analyze truth and falsity from a different point of view.

Historically, the biggest effort of philosophy and academics was either to give truth a definition—and hence objectivity—or to establish that truth itself exists. False news, conversely—and complementarily—requires the focus to shift to the falsehood instead: the problem is not to establish a universally-accepted statement, struggling to reach the best possible idea, but rather to allow or not allow a lie to spread. The problem may seem to arise from the same dispute about the existence of objective truth, but this is not

the case. If the goal is to expose falsity, it is not necessary to affirm and prove the positive statement, but it would be enough to falsify what has been told.

To proceed with the analysis concepts surrounding what I refer to as false news, the three most important aspects must be clarified: (i) falsity, truthfulness, and proof; (ii) the scope of the definition of false news, and (iii) to what extent we should care about the speaker. I will illustrate how the second point will assume particular importance in answering the legal question of responsibility; the idea is to draw a line, using the concept of harm to others, inside of which no one should be held responsible for falsity.

B. Falsity, Truthfulness and Proof

To be clear, the scope of this investigation is to understand if, when the news has already been proven to be false, a subject can be responsible for sharing that kind of content. The problem of defining falsity will also be taken into account, but only to the extent to which authority can be entitled to decide what is true and what is false—indeed, this appears to be the only logical landing spot if we admit the possibility of holding someone responsible for sharing false statements. From one point of view, this seems to be an easy solution in cases where facts can prove with clarity the truthfulness or the falsity of a piece of news, the struggle begins when none of the above can be unquestionably affirmed or refuted.

At this point, it is important to focus on the difference between the usual narrative of the state, which tries to affirm a universal truth, and this peculiar case in which news only has to be falsified. In the first situation, famously represented by Orwell in *1984*, the Ministry of Truth is entitled to establish—from time to time—an official truth. This metaphor is not accurate enough, however; the goal here is rather just to state that a piece of news is not true. In order to do this, it is sufficient to falsify one aspect of the statement, and it does not require the establishment of any other truth. It would be “just not that”—from a Ministry of Truth to a Ministry of Falsity. Leaving aside the metaphors, what changes in the two cases, and remains problematic, is the burden of proof. Almost all legal systems, in their procedural laws, agree upon giving the duty of proving a statement to the person who made it. Conversely, when someone challenges a statement, it is her own burden to demonstrate the falsity. In the false news case then, one would expect no proof from who makes the false statement;⁷⁴ on the contrary, it should be

⁷⁴ It should be underlined that this perspective is oriented in favor of the freedom of speech. On the other hand, of course, the discussion may be further developed from an ethical point of view, especially if we consider news and thus journalistic deontology. There should be a duty on the writer to provide the reader with enough evidence that can support the news and always make the best

assumed true unless convincing facts are presented – facts not about the “real truth,” but only on the falsity of that particular piece of news.

Truth and falsity are not a precise binary concept, nor are the two dimensions equally divided; for each utterance, there can be one truth and thousands—maybe infinite—different levels of falsity. Proving a statement as false gives no information about what the truth actually is, only what it is not. Conversely, providing enough evidence in favor of the truthfulness of a statement can lead to the assumption that it is, in fact, true. Finally, while finding a definition of truth has been and still is a substantial topic in philosophy, for this article I will refer to this concept as the correspondence theory. According to this, truth consists of reality;⁷⁵ in its simple version, it may be expressed as such: “a statement is true if and only if it corresponds to some facts.” Naturally, many objections have been made against this theory—and against its variants proposed by great philosophers like Wittgenstein, Russel, and Austin. However, given the legal character of this article, the correspondence theory will be sufficient and suitable. Indeed, what the law usually seeks is making a connection with the reality of facts that are ultimately verified by a final arbiter, which is typically the court.

C. Scope of the Definition of False News

The previous section discussed the concepts of truth and falsehood, and how they should be understood. Again, the aim of this paper is not to expressly dictate who decides what is true or what is false, but is instead to explore whether, once falsity has been proven, the statement can still be made without legal repercussions. However, all false news is not equal, and; to answer the question about responsibility, first the definition must be narrowed and the exact scope of the research set. I suggest that false news be defined *by exclusion*. The false news included in this analysis falls in a grey area so far left untouched by legal research. On one extreme, there are false statements that have already been regulated and deemed “unlawful” by legislative regulation, as crime or mere civil responsibility have. This category includes, among others, defamation, illegitimate influencing of the stock markets and hate speech. In each of these cases, a piece of false news is defined as unlawful and a punishment is set. On the other extreme, there are false statements that are completely irrelevant; where the news is

effort to reach the highest quality possible. Unlikely, as often happens, the public discussion about false news always confuses the two layers, mixing ethics (how a speaker should behave) with law and rights (what a speaker is allowed to do), pushing the solution of the debate—if one exists—farther and farther away.

⁷⁵ David Marian, *The Correspondence Theory of Truth*, STAN. ENCYCLOPEDIA OF PHIL. (E.N. Zalta ed., Winter ed. 2010), <https://plato.stanford.edu/entries/truth-correspondence>.

completely deprived of any public interest. These statements include, for example, false information about the breakfast I had this morning or my performances at the gym. This kind of news is what society generally calls a “lie” and where—we mostly agree, credible or not—the law should not interfere.

The remaining category of statements falls between these extremes; where the law has not already intervened yet there are still consequences. This is the most accurate definition that can be given to false news. In the last year, following the media hype about the urgency of fighting fake news, several authors have tried to legally address the problem, but these attempts are predicated on a wrong assumption in the definition. For example, in a recent paper by Klein and Wueller,⁷⁶ the analysis is built on a definition of fake news “as the online publication of intentionally or knowingly false statements of fact.”⁷⁷ The authors do not differentiate in their categorization. Thus, they merely list possible legal concerns that are already in place, completely missing the point as to if—and to what extent—piece of false news is legally defined.⁷⁸

Several examples—dated before the “post-truth era” media hype—will give more texture to the definition of false news given in the previous paragraph. The first case happened in Germany in 2016 when a thirteen-year-old Russian-German girl claimed to be kidnapped and raped by Middle Eastern or North African migrants.⁷⁹ Due to the Russian origins of the girl, the allegations caused significant discussions and demonstrations, which even led the Russian Foreign Minister to strongly criticize German authorities for lack of commitment into the investigations.⁸⁰ This news, proven to be false by admission of the same girl, exacerbated the already strong anti-immigration sentiments of much of the German population after

⁷⁶ David Klein & Joshua Wueller, *Fake News: A Legal Perspective*, 20 J. INTERNET L. 5, 6 (2017).

⁷⁷ *Id.*

⁷⁸ The authors explore all possible consequences of false news such as defamation, intentional infliction of emotional distress, and intellectual property violation. Even though it is clear that false news can lead to one of these situations, there is no point in carrying out this analysis because they are listing cases already taken into account by the law. As further proof, in all of the examples they bring, the content is false, but always addressed to someone specific. The real false news issue instead is located *before* the law steps in, in the grey area already mentioned in my definition.

⁷⁹ Ben Knight, *Teenage Girl Admits Making Up Migrant Rape Claim that Outraged Germany*, GUARDIAN (Jan. 31, 2016), <https://www.theguardian.com/world/2016/jan/31/teenage-girl-made-up-migrant-claim-that-caused-uproar-in-germany>.

⁸⁰ *Id.*

the alleged mass sexual assault on the 1st of January, 2016 in Cologne—which also happened to be a partially false piece of news.⁸¹

Another political example that contains all of the characteristics of this definition of fake news comes not from a single episode but from a precise political strategy adopted by Silvio Berlusconi in the years he spent governing Italy (especially in the years between 2005 and 2011), sometimes reductively labelled “wishful thinking.” Berlusconi was aided in this strategy by his unconventional power over both private and public media outlets,⁸² his well-known plan to improve his popular approval rating and his decision to consistently support his statements with empirical data from surveys and polls while denigrating all other sources not in his favor. No matter what the real feeling of the country was, media outlets always reported an increasing support for his policies.⁸³ In this example—or rather series of similar examples—there is, of course, no direct harm to anyone: Berlusconi’s goal was to slowly capture as many votes as possible by influencing the public opinion.

⁸¹ *Tensions rise in Germany over handling of mass sexual assaults in Cologne*, GUARDIAN (Jan. 7, 2016), <https://web.archive.org/web/20170617160142/https://www.theguardian.com/world/2016/jan/06/tensions-rise-in-germany-over-handling-of-mass-sexual-assaults-in-cologne>. On the other hand, foreign news outlets (almost always right-wing oriented) reported the story dramatically increasing the number of both the assaulters and the victims, in order to encourage anti-immigrant feeling. For example, major Italian news outlet, *Il Giornale*, reported that over 1,000 immigrants raped 80 women. L. Steinmann, *Stupro Di Massa in Germania: Mille Immigrati Violentano 80 Donne*, IL GIORNALE (Jan. 5, 2016), <https://web.archive.org/web/20170617160246/http://www.ilgiornale.it/news/mondo/capodanno-germania-altri-stupri-massa-degli-immigrati-1210201.html>. The same numbers were reported right after by *Libero Quotidiano*, *Corriere.it*, and *Il Fatto Quotidiano*. See *Scena ‘Mostruosa’ La Notte di Capodanno. Stuprate 80 Donne: ‘Da Mille Nordafricani*, *LiberoQuotidiano* (Jan. 5, 2016), <https://web.archive.org/web/20170617160511/http://www.liberoquotidiano.it/news/esteri/11865087/colonia-stupro-80-donne-germania-capodanno-arabi-nordafricani.html>; see also *Colonia, A Capodanno un Migliaio di Uomini Aggredisce Decine di Donne*, *Corriere della Sera* (Jan. 6, 2016), https://web.archive.org/web/20170617160834/http://www.corriere.it/esteri/16_gennaio_05/colonia-a-capodanno-migliaio-uomini-aggredisce-decine-donne-1297cedc-b392-11e5-9fa2-487e9759599e.shtml; *Colonia: A Capodanno Donne Aggredite da Mille Omini Ubriachi ‘Di Origini Arabe o Nordafricane’*, *Il Fatto Quotidiano* (Jan. 5, 2016), <https://web.archive.org/web/20170617161000/http://www.ilfattoquotidiano.it/2016/01/05/colonia-a-capodanno-donne-aggredite-da-mille-uomini-ubriachi-di-origini-arabe-o-nordafricane/2350525>. As verified by the Italian debunking website *Bufale.net*, the 1,000 immigrants were just the people counted by the police outside the Cologne train station, only one girl has been raped and the police confirmed that no link can be established between the assaulters and the refugees. *Dizinformazione Stupro di Massa in Germania: Mille Immigrati Violentano 80 Donne*, *Bufale.net* (Jan. 5, 2016), <https://www.bufale.net/home/dizinformazione-stupro-di-massa-in-germania-mille-immigrati-violentano-80-donne-bufale-net>.

⁸² OSTER, *supra* note 15, at 261.

⁸³ Nando Pagnoncelli, *Il Sondaggio Americano*, 7 COMUNICAZIONE POLITICA 369 (2006).

Another crucial aspect is that in the current mainstream debate over false news, people tend to include statements that could already generate liability, whether civil or criminal. Conversely, the residual category of statements that do not fall under the scope of any other legal provision must be taken into account because a remedy, even if difficult to achieve, is always provided for statements in the other categories.⁸⁴

D. Insincerity: The Point of View of the Speaker

The last aspect to take into account in order to correctly understand the scope of false news is a subjective one, namely the point of view of the speaker. When giving a false statement, the author can either be convinced or unconvinced of what he is saying: the latter being insincerity. Even though it will not affect the truthfulness of the content, sometimes the mindset of the speaker is taken into account in evaluating the lawfulness of the speech. This is the case examined by the U.S. Supreme Court in *New York Times v. Sullivan*,⁸⁵ in which it set the rule that in cases of defamation of a public person, the statement must be both false *and* insincere to be criminalized. That is, the speaker must believe, or recklessly disregard, that his or her statement is false—i.e., “actual malice.” In contrast, other national laws (e.g., in the UK⁸⁶, France⁸⁷ and Italy⁸⁸) do not require such intent, thus accidental libel is punished as well. Moreover, in the countries where a civil action for defamation exists, the subjective factor is even less important as long as a causal connection can be established between the event and the harm.

Lastly, in any other case in which civil or criminal liability may arise from speech (e.g., violation of privacy, Holocaust denial, etc.), the lawfulness of the statement is evaluated without taking into account the mindset of the speaker.

In conclusion, and having taken the forgoing into account, no importance should be given to the intent of the person who makes the allegedly false statement for two reasons.⁸⁹ First, as is explained in the next section, false

⁸⁴ See *Gertz*, 418 U.S. at 339-40.

⁸⁵ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁸⁶ Defamation is provided by Article 595 of the Italian Penal Code and it does not require intent. Case law has clarified that even the acceptance of the risk of making a defamatory statement is enough for it to be punished. Defamation Law, Article 595 (Italy).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ A dissenting opinion was expressed by Spottswood, according to him, under the framework of the First Amendment of the U.S. Constitution, “speech that is false but sincerely believed by its utterer is generally protected by the First Amendment because such speech generally promotes the growth of social knowledge. Insincere speech, however, is excluded from First Amendment

news as defined before, namely as false statements that have consequences but not severe enough to become harmful, and it is useless to question the sincerity or insincerity of the speaker. Second, if my hypothesis of non-liability cannot be accepted, it means that false news is believed to be so harmful that a punishment is actually required. Thus, it must be effectuated regardless of the honesty of the speaker since protected interests are, in any case, at risk no matter the original intention of the speaker.⁹⁰ Moreover, in this case the investigation over the state of mind of the actor would reach a point where the questioning would be quite circular and there is no room for this kind of evaluation in a courtroom. The only way to discern such intent would be through the statement—or perhaps confession—of the speaker.

IV. LEGALLY IDENTIFIABLE HARM

A. Harm to Others as Criterion for Liability

1. Public Interest as a Not Suitable Approach

In the previous section, the scope of false news was specified, giving it a definition by exclusion and analyzing its key points. It is now necessary to examine the lawfulness of the false news issue. Two approaches may be used: a purely Millian point of view, in which the only limit to free speech is the harm to others, or, a subtle one, through the viewpoint of civic republicanism and the European doctrine in which the public interest has a strong role. In the latter, speech can lose protection even if it does not cause a direct and quantifiable harm; on the contrary, the role of the content is analyzed, and its judgment depends upon the potential limitation. Moreover, the notion of harm is less strict and more open to less ‘practical’ damages, like incitement to hatred and racism. This section will explain why a “public interest approach” cannot be adopted to solve the false news issue.

Accepting the public interest as a criterion upon which it is possible to limit freedom of speech in cases of false statements naturally implies a value assessment of the news for the community, because “speech is protected only if and insofar as it contributes to finding the truth or the ‘best ideas’ for society in general.”⁹¹ Whether the scrutiny of such content is acceptable and

protection in almost all cases because it tends to inhibit, rather than promote, the increase of knowledge.” See Mark Spottswood, *Falsity, Insincerity, and the Freedom of Expression*, 16 WM. & MARY BILL OF RTS. J. 1203 (2009), <http://ir.law.fsu.edu/articles/102>.

⁹⁰ Yet if the harm is believed to arise from the false news, we will be outside the scope of the definition given earlier: the transition from consequence to harm is exactly the step it takes to go to the case of a different criminalization.

⁹¹ OSTER, *supra* note 15, at 22.

represents the best way to regulate freedom of expression is currently a hot debated topic and remains ongoing among both scholars and courts. However, when approaching the false news issue, the discussion slightly deviates from the 'standard' path and other, more difficult, questions are considered. This difficulty stems from the assessment of the public interest becoming an analysis of falsity and its current role in society.

The first challenge faced if we decide to embrace this reasoning is far from easy: we must determine if a piece of false news may be useful for society. In other words, if falsity may be of any interest to the public. One could simply answer that only truth contributes to society, directly excluding any protection for false news. As will soon be illustrated, this solution implies the necessity of an objective judgment upon the truthfulness of a statement by someone entitled to do so, with all the consequent issues that undoubtedly will arise. By contrast, it has been stated—both by scholars and jurisprudence—that even falsity *per se* might have a positive role in the society. Spottswood, in “*Falsity, Insincerity, and the Freedom of Expression,*” powerfully argues that every false statement can be useful and thus, may be accepted under the public interest theory. The author divides falsity into three categories, based upon the degree of acceptance: “the false proposition is believed by no one or by very few people (other than the speaker); the false proposition is widely believed; or the false proposition is believed by some and disbelieved by others.”⁹² The first group is likely to be of no interest to the public, completely irrelevant, as only a very few people believed it. Moreover, it may be extremely useful to others in judging the reliability of the speaker. When we hear someone—even if not an expert—stating that the Earth is flat, we immediately make judgments about his or her discerning ability. Thus, false news of this kind might bring more useful information about the speaker, than actual harm to society. The second group constitutes false statements believed by almost everyone, as more theoretical than real: indeed, the possibility of providing examples in itself would mean that we are aware of the falsity. However, Spottswood argues that even assuming the existence of this, according protection to falsity would mean according protection to what is instead true. The last and more problematic group is comprised of all of the statements in which approximately the same amount of people believes to be both true and false. In this case, the inevitable solution for the Author is going back to Mill’s doctrine: “The false statement is the signal that shows the existence of disagreement, creates the motivation to inquire further into the matter through the tools of argument, and begins

⁹² Spottswood, *supra* note 89, at 1238-41.

the process that leads to a gain in knowledge for both parties.”⁹³ The conclusion at this point is that, if a debate were possible about whether there is a role for falsity in society, the answer would be in the affirmative. Hence, it is not possible to deny the public interest based solely on the falsehood of the statement; other factors, already identified by various national and international courts, must be taken into account.

As mentioned above, the case of someone making false statements cannot be, in any case, of public interest. In this situation, assessing the relevance of the news would mean assessing its truthfulness; this would again be the “Ministry of Falsity” scenario, in which a government would be entitled to affirm what is true and what is false, leading to unimaginable possibilities of abuse. Because of the obvious and enormous risks that this situation brings, any solution to the false news issue that leads to the point where an authority—regardless of its form and composition—is called to make such a decision should not be considered acceptable. It is evident that giving an authority the power to express judgment on the falsity of a piece of news puts freedom of expression itself in danger.⁹⁴ In conclusion, choosing the public interest lens to look at the false news issue is, in all likelihood, not the best choice. Indeed, this road would lead to two different inquiries and two difficult-to-accept conclusions. On the one hand, can falsity be useful to society to some extent, and on the other hand, who is entitled to discern “official” truth from falsehood? My suggestion, by contrast, is to leave the public interest aside and rely solely on the harm-to-others doctrine.

2. Harm to Others as Measure of Responsibility

The definition of false news by exclusion for every reasonably false statement spread to the public which falls between what is already punished by the law and what remains completely irrelevant and without consequences for the public and the law has already been given. The question now is whether existing law encompasses every necessary scenario or whether it should be enlarged to also address a portion of this grey area. Perhaps the

⁹³ *Id.* at 1243.

⁹⁴ See Rick Noack, *The Ugly History of ‘Lügenpresse’, A Nazi Slur Shouted at a Trump Rally*, WASH. POST (Oct. 24 2016), <https://web.archive.org/web/20170617161153/https://www.washingtonpost.com/news/worldviews/wp/2016/10/24/the-ugly-history-of-luegenpresse-a-nazi-slur-shouted-at-a-trump-rally>. See, for example, *Kılıçdaroğlu diyor ki, ‘hayır diyenler terörist’ diyormuşuz, yalan söylüyor - Kılıçdaroğlu* [the leader of the Republican's People Party (CHP) which is the main opponent political party in Turkey] *is claiming that we are accusing people, who support "no", as terrorists but he is lying!*, DEMOKRAT HABER (Apr. 2 2017), <https://web.archive.org/web/20170617161356/http://www.demokrathaber.org/siyaset/kilicdaroğlu-diyor-ki-hayir-diyenler-terorist-h82060.html>.

former question should be answered in the affirmative, as governments sometimes restrict freedom of expression too much, partially violating human rights. In the public debate over the past year, false news attracted the attention of legislators toward imposing new restrictions. In the following paragraphs, further evidence will demonstrate that false news does not cause harm sufficient to generate liability, or to switch from a focus on consequences to a focus on harm.

To understand how a false statement is not able to cause such harm, it is useful to split all of the possible cases in which speech can inflict damage into two main categories. According to Schauer's theory, speech is differentiated by whether it causes harm directly to one subject (Speaker → Victim, or "S→V") or via an intermediary hearer (Speaker → Hearer → Victim).⁹⁵ The first category is perfectly exemplified by an insult directly addressed to the victim. The second is the classic case of incitement; the speaker pushes the hearer to harm the victim. All the actions that fall in the S→V group are either treated as crimes or generate liability for the speaker. There is no doubt that harm, albeit in most of the cases not physical, directly befalls the victim who is then entitled to claim compensation or request that the speaker be prosecuted.⁹⁶ Victim, harm, and causation are the three fundamental elements that justify the criminalization or civil liability of the speaker.

Things become vague and blurred when the intervention of a third-party is introduced; where the intervener and the speaker cause the harm and it has no direct influence on the victim. In these scenarios it may be argued that the speaker is an indispensable party to the action but they are not by themselves sufficient as he or she alone could not have harmed the subject—and this may not have been the speaker's intention either. The debate around this scenario has always been, understandably, around the degree of responsibility of the "inciter" in the unlawful action. Sometimes it can be clear—especially in cases where physical help is provided in committing a crime—in "speech cases" we face a lack of certainty. The mental element of the hearer becomes the most important aspect and more factors must be taken into account such

⁹⁵ Frederick Schauer, *The Phenomenology of Speech and Harm*, 3 ETHICS 103, 635-653 (1993).

⁹⁶ Indeed, in much of "speech" crime, the harm is caused onto reputation, dignity, beliefs, and privacy. Emotional distress, pain and suffering, sentimental loss and moral damages are always granted to the victims of these kind of crimes, even when a proper economical loss is completely missing.

as the predisposition of both the speaker and hearer to commit crimes, the role of the incitement, etc.⁹⁷

Still, in this trilateral dynamic, the victim, causation, and the harm are identifiable in all types of already punishable offenses. First, the victim can be a natural as well as a legal person (e.g., in a defamation case), always bearing in mind the necessity of a clearly identifiable subject who has been damaged. Second, causation must be assessed following a case by case analysis—for example, assessing to what extent the speaker caused and was a necessary element of the crime committed by the incitation. Lastly, the harm: in each of these cases, legislators have identified an interest to be protected (e.g. dignity, honor, and reputation in defamation cases, or physical integrity) when the incitement is to commit a crime against someone who, when harmed, would trigger liability. Sometimes, the identification of the damages goes much farther: the existence of a proper harm has been argued in hate speech situations⁹⁸ and in laws against Holocaust denial.⁹⁹ Nevertheless, all of these provisions have passed muster when scrutinized by international courts including the European Court of Human Rights.

Returning to the issue of false news, bearing in mind the aforementioned definition, it is evident how false news may have consequences not severe enough to cause harm, and thus not be criminalized or impose responsibility. Conversely, Feinberg provides a useful and correct indication of what harm should be sufficient to justify a punishment. He introduced two main components: first, the “setback of interests” of third parties, and second, that this setback be “wrongful.”¹⁰⁰ We can overlook the debated¹⁰¹ meaning of this last requirement and focus instead on the hindrance of others’ interests. Any kind of false news, as defined above, would never be able to accomplish such a setback: each time we observe a compression of someone’s interests, and therefore a harm, we recognize a situation already foreseen by existing legislation. This happens when a vocal utterance is recognized as a crime (defamation, incitement, etc.) but also, for example, influencing the stock market with false information, as well as when a right to compensation is granted to the victim—from the *Lex Aquilia* of Roman Law to modern tort

⁹⁷ See I.R. Scott, *The Common Law Offence of Incitement to Commit Crime*, 4 ANGLO. AM. LAW REV. 289 (1975).

⁹⁸ Robert Kahn, *Why Do Europeans Ban Hate Speech: A Debate Between Karl Loewenstein and Robert Post*, 41 HOFSTRA L. REV. 545 (2012).

⁹⁹ Lyrisa Lidsky, *Where’s the Harm?: Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. R. 1091, 1093 (2009).

¹⁰⁰ JOEL FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW, VOL. I, 45-51, 110-14 (1984).

¹⁰¹ C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 995 (1997).

law, and in every situation in which an unlawful harm is done where the speaker is held liable.

Two main scenarios have been described as consequences of the indiscriminate spreading of false news. In the first scenario, as in the alleged rape in Germany in 2016,¹⁰² the main concern is that falsity will induce, or enhance, racist feelings among the population. No matter how wrong and repulsive these sentiments can be, a false statement cannot be considered the cause of any harm subsequently performed by anyone whose racial hatred has been increased by the news. Moreover, it is clearly impossible to measure and assess this increment to an extent of establishing a threshold for liability. Lastly, it can be demonstrated how this situation does not fall within the scope of the existing norms on hate speech. If we consider the definition given by the Council of the European Union: “public incitement to violence or hatred directed against a group of persons or a member of such a group defined on the basis of race, color, descent, religion or belief, or national or ethnic origin,”¹⁰³ this form of false news does not lie within the definition because it lacks incitement. The falsity expressed is about a fact, and the association with racial hatred is a further and potential phase “left” to the public.

The second scenario mentioned as an example above was the influence on political debate. It is a fact that even in ancient Rome, political propaganda was deeply linked with falsity, to the extent that it was almost considered a part of the ‘game’.¹⁰⁴ Since then, political influence has been acutely studied and despite this, the art of influencing constituencies remains an inexact science. The current discourse regarding the influence of false news on electoral results further exemplifies how impossible it is to consider this as a harm that could lead to liability.¹⁰⁵ Furthermore, some restrictive measures already exist in this area in instances where an unlawful influence is sufficiently proven, such as the provisions that prohibit publishing survey results while polls are open on election days,¹⁰⁶ as well as other peculiar

¹⁰² *Id.* at 986-93.

¹⁰³ *Council Framework Decision 2008/913/JHA of November 28 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law*, EUROPEAN UNION: COUNCIL OF THE EUROPEAN UNION (Nov. 28 2008), <http://www.refworld.org/docid/493e8fea2.html>.

¹⁰⁴ Quintus Tullius Cicero, James Carville, *Campaign Tips from Cicero: The Art of Politics, From the Tiber to the Potomac*, 3 FOREIGN AFFAIRS 18, 18-28 (2012).

¹⁰⁵ Nikolov D, Oliveira DFM, Flammini A, Menczer F., *Measuring online social bubbles*, 1 PEER J. COMPUT. SCI. 38 (2015).

¹⁰⁶ A 2012 study by Hong Kong University found that 38 out of 83 countries surveyed had laws prohibiting publications of polls during the electoral campaigns or on election days. See Robert

examples like the one at the center of the *Salov v. Ukraine* ruling by the ECtHR.¹⁰⁷

To briefly analyze who can be considered a victim of false news, one might note that often—if not usually—this fundamental requirement is missing. Such news indeed rarely involves a specific subject or a restricted group of people to the point that they can claim a violation of their rights. If that were the case, we would again consider, for example, defamation. What remains is a false statement about an unidentified person, a vague group of people often racially identified (e.g., immigrants), or the whole population, etc. If not specifically provided for by the law as a crime, no one is entitled to claim restoration for a setback of his or her interests.

The cornerstone of the false news issue is thus the distinction between *consequence* and *harm*. The latter is a *subset* of the former and it is in the area between these ideas where the concept of false news is defined. Must the law step in every time consequences are generated? This is likely not necessary. Notably, in March 2017, a “*Joint Declaration on Freedom of Expression and ‘Fake News’, Disinformation and Propaganda*” was signed by The United Nations’ (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information.¹⁰⁸

In the document just mentioned, the parties make an important statement about the criminalization of false news in relation to the definition of hate speech given in Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR), declaring that “[g]eneral prohibitions on the dissemination of information based on vague and ambiguous ideas, including ‘false news’ or ‘non-objective information,’ are incompatible with international standards for restrictions on freedom of expression, as set out in paragraph 1(a), and should be abolished.”¹⁰⁹ Furthermore, it is foolish to pretend that all speech that has a consequence may be limited or criminalized

Chung, *The Freedom to Publish Opinion Poll Results*, Hong Kong World Assoc. Public Opin. Res. Univ. Hong Kong (2012).

¹⁰⁷ *Id.*

¹⁰⁸ *Freedom of Expression Monitors Issue Joint Declaration on ‘Fake News’, Disinformation and Propaganda*, UNITED NATIONS HUMAN RIGHTS – OFFICE OF THE HIGH COMMISSIONER (Mar. 3, 2017), <https://web.archive.org/web/20170617161524/http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21287&LangID=E>.

¹⁰⁹ JOINT DECLARATION ON FREEDOM OF EXPRESSION AND ‘FAKE NEWS’, DISINFORMATION AND PROPAGANDA art. 2(a) (Mar. 3, 2017).

and harder to find a statement completely devoid of consequences.¹¹⁰ The quality and magnitude of these consequences should be the measure of potential liability. If the outcomes were so severe as to become harms, the law should step in and limit or punish the speech.

In conclusion, false news may lead to important and long-term consequences, but it should not be limited or restricted unless it results in harm to others. Indeed, there is no sufficient ground to base the limitation or restriction upon, and the remedies would be more harmful than the damage caused by the news itself potentially leading to additional consequences like state censorship and of freedom of speech violations.

B. *Not False News*

1. Defamation

Even though the aim of this article is not to describe in detail all of the ways in which speech could be criminalized, and while false news has already been compared to other cases in which speech is punished more than once, it may be useful to briefly introduce the differences between the most important speech crimes and false news.

False news does not represent a completely separate legal category. On the contrary, we may consider other speech crimes as specific subsets of the false information group, with which they share a common trait, namely falsity. Indeed, every unlawful situation can be seen as consisting of a false statement in addition to a particular factor that triggers criminalization. For example, in cases of defamation, there is a piece of false news *and* a violation of a person's reputation; in cases of hate speech, the factor is given by incitement to hatred, etc. However, even with a common factor, it is possible to draw a line between these two large categories. Of course, it is impossible to take into account and analyze any single piece of legislation enacted in the world. Thus, the focus here is on the bigger picture: exposing the common elements and the most important points of contrast with false news. Furthermore, the European framework is taken as reference because, as explained in previous sections, it is under this schematic where the most advanced and articulated limitations to freedom of expression are visible.

The first type of case analyzed is the most consolidated and most discussed type: defamation. This is probably the first ever effort to

¹¹⁰ JOHN L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson, 2d ed., 1975).

criminalize speech. Generally, we divide speech offensive to someone's honor as either *slander* when it refers to a transient form such as through spoken words, or as *libel*, when it is permanently fixed, or written, as in the press. The ECHR specifically considers cases of defamation in its Article 10 (2) listing of possible reasons for limitations, when it includes "for the protection of the reputation or rights of others."¹¹¹ It is left to each country to give a specific and practical definition to defamation, and the Court has not provided an express definition in its jurisprudence. Even if it depends on the different implementations found in each state, a possible definition of defamation may essentially be "a civil wrong (a tort or delict) committed by one individual against another or others," sometimes including legal persons as the target of the offense.¹¹² In some European countries, defamation is also considered a crime and punishable with imprisonment,¹¹³ even though the Court has clearly and repeatedly noted "that the Parliamentary Assembly of the Council of Europe in its Resolution 1577 (2007) urged those Member States which still provide for prison sentences for defamation, even if they are not actually imposed, to abolish them without delay."¹¹⁴

The essential elements of defamation are that there must be (1) an individual whose reputation is harmed, (2) an actor, and (3) a statement that provokes the reputational damage. It is general opinion that "only false or untrue allegations or assertions will damage the reputation a person deserves to enjoy among his or her peers or community."¹¹⁵ Nevertheless, in some judicial systems it is possible to be charged with defamation even if the statement is true. This is the case in Italy, for example, where the Court of Cassation in a seminal judgment asserted that the truthfulness of a statement is only one of the three factors to be taken into account when assessing a defamation case. The other two are the presence of public interest and the correct exposition of the facts; the lack of any one of these factors is enough to constitute defamation.¹¹⁶

During the current discussions, it is a common mistake to confuse false news with cases of defamation, which have some overlapping characteristics. Both share the aspect of false information but, when a specific individual is

¹¹¹ Eur. Conv. on H.R. Art. 10.

¹¹² TARLACH MCGONAGLE, *FREEDOM OF EXPRESSION AND DEFAMATION - A STUDY OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS* 14 (Onur Andreotti, 1st ed., 2016).

¹¹³ Corte di Cassazione, Nov. 14, 2016 ruling— Feb. 1, 2017, n. 4873.

¹¹⁴ See *Mariapori v. Fin.*, § 69; *Niskasaari and Others v. Fin.*, § 77; *Saaristo and Others v. Fin.*, § 69; and *Ruokanen and Others v. Fin.*, § 50.

¹¹⁵ McGonagle, *supra* note 112, at 14.

¹¹⁶ Corte di Cassazione, sez. III Civile, 9 aprile 1998, n. 3679, in *Foro It.* 1998, I, 1834 con nota di Laghezza, <http://www.diritto-civile.it/Proprieta-e-Condominio/Cassazione-civile-sez.-III-09-aprile-1998-n.-3679.html>.

identified and a reputational damage is done, it is no longer false news but rather becomes a proper defamation case. A famous example will help to understand the difference; one of the most quoted stories in false news discussions is one that became known as *Pizzagate*—even Klein and Wueller used this case in their introduction.¹¹⁷ During the 2016 presidential campaign, a false article circulated a conspiracy theory according to which the candidate Hillary Clinton and other prominent Democratic party political figures were coordinating a child trafficking ring out of a Washington, D.C. pizzeria by the name of Comet Ping Pong.¹¹⁸ There is no doubt that this was “materially” false news; what went unnoticed is that, since the article identifies precise actors in the falsely alleged crime, it constitutes a proper case of libel. The fact that it is difficult (or impossible) to identify the author—due to the means of publication of the piece in a fake Macedonian news outlet—does not deprive this action of its criminal connotation. A law that condemns this conduct was already in place; this is not false news in the meaning used in this article, but rather a case of defamation. Going back to the two examples given above, it is clear how these examples differ from this kind of criminalization. In the case of the alleged rape, there is no individual whose reputation is harmed, and “immigrants” is not even a specific group of people who could claim damages—it will later be explained how this is not even a case of hate speech. The absence of a proper victim excludes defamation claims. The second example, even if stretched to include the general idea of a political leader faking his popularity, lacks both the reputational damage and the victim.¹¹⁹

2. Hate Speech

Above, it was illustrated how the European tradition is inclined to admit limitations on freedom of speech more intensely than the United States. The set of laws that prohibit hate speech does indeed traditionally belong to the Old Continent’s doctrine; thus, this is the second category of criminalization that will be compared to false news. Regardless of the widespread presence of laws in several European countries regulating hate

¹¹⁷ Klein & Wueller, *supra* note 76.

¹¹⁸ *Id.* at 5; see also Craig Silverman, *How the Bizarre Conspiracy Theory Behind Pizzagate Was Spread*, BUZZFEED NEWS (May 12, 2016), https://www.buzzfeed.com/craigsilverman/fever-swamp-election?utm_term=.rfNy7EWMK#.eqla7JZY8j.

¹¹⁹ It can be argued that when someone is claiming that a specific individual voted for a candidate different from the one that he or she expressed their preference for could lead to a defamation case. Indeed, some legal systems include in this type of offense to a subject of a specific quality, *per se* not offensive, if that is contrary to his or her public image—e.g., affirming that a subject eats meat when he or she is publicly known as a vegetarian advocate.

speech, there is a lack of consensus on a specific definition between them. An excellent summary of both academic and legal attempts to give a definition has been made by Andrew Sellars in his article “Defining Hate Speech.”¹²⁰ For the purposes of this article, the two main definitions that are most valuable for Europe will be taken into account: the Recommendation No. R 97(20) of the Council of Europe,¹²¹ and the European Union Council Framework Decision “on combating certain forms and expressions of racism and xenophobia by means of criminal law.”¹²² They both contain key aspects that form a clear distinction between hate speech and false news.

According to the Council of Europe, hate speech is:

Covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.¹²³

The European Union, in its Decision, provides that the Member States should punish as criminal offense, every hate speech situation defined as:

Public incitement to violence or hatred directed against a group of persons or a member of such a group defined on the basis of race, color, descent, religion or belief, or national or ethnic origin; . . . publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes . . . when the conduct is carried out in a manner likely to incite violence or hatred against such a group or a member of such a group.¹²⁴

In both definitions, it is possible to outline common traits that are peculiar to hate speech but, as will be explained just below, do not form part of the concept of false news. First of all, deriving from the very idea behind this sensible limitation of speech of protecting minorities, the target of the statement is of particular importance: it must be a group or an individual as a member of the group. Offenses against individuals without any connotation of group identity are not considered acts of hate speech. It is necessary that groups defined as “historically oppressed,”¹²⁵ “traditionally

¹²⁰ Andrew F. Sellars, *Defining Hate Speech*, BERKMAN KLEIN CENT. RES. PUBL. 20 (2016).

¹²¹ Recommendation to Members States on “Hate Speech”, No. R 97(20), Committee of Ministers of the Council of Europe (Oct. 30, 1997).

¹²² *Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law*, 2008/913/JHA, EUROPEAN UNION COUNCIL Framework (Nov. 28, 2008).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. LAW REV. 2320, 2357-58 (1988).

disadvantaged,”¹²⁶ or as a “minority”¹²⁷ are targeted. Race, color, religion, and ethnic origins are just some examples of how it is possible to outline such minorities against whom hate speech is addressed. Of course, it is not required for the target to technically represent a minority; what matters is the qualification as group. For example, it is possible—and it actually occurs frequently—to have hate speech against Muslims, even if they represent a large portion of the population.

Nonetheless, the primary difference between hate speech and false news is the content of the statements. To constitute hate speech, the speech should indeed incite violence or hatred, spread and promote racism and xenophobia. This, as explained in previous sections, is a component that cannot be found in false news. As already observed, this can have consequences, and amongst these, it is possible to include an increase of the same negative feelings that hate speech laws intend to prevent. Yet this is only indirectly achieved and false news does not contain that further step that is incitement or promotion of violence. Returning to once again consider the example of the false rape allegation of the thirteen-year-old Russian-German girl described above. At the center of this news there was a group, though not well defined, of immigrants. This could have matched the target requirement for hate speech, as indicated in the definitions cited above. What is missing, however, is the incitement to intolerance or hatred. Obviously, such news would be able to increase the xenophobic sentiment across the population, but this would follow only in a second phase, when and if the reader of the news reacted to the information in the worst way possible. It is also a fact that this kind of news is exploited by some political parties to further support for anti-immigrant policies. Nonetheless, this is not enough to consider these statements as hate speech. It must be said that some authors have rejected any definition based on content. Author Kenneth Ward takes this position, stating that hate speech can be “any form of expression through which speakers primarily intend to vilify, humiliate, or incite hatred against their targets,”¹²⁸ anything that is said by the speakers can be punished if there is the “desire to injure their victims.”¹²⁹ Relying on speaker’s intent and utilizing vague factors to assess hate speech should not be seen as completely correct; this

¹²⁶ Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 WIS. L. REV. 1425, 1430 (1994).

¹²⁷ ALICE E. MARWICK & ROSS MILLER, *Online Harassment, Defamation, and Hateful Speech: A Primer of the Legal Landscape*, CTR. ON LAW AND INFO. POL., at 17 (2014).

¹²⁸ Kenneth D. Ward, *Free Speech and the Development of Liberal Virtues: An Examination of the Controversies Involving Flag-Burning and Hate Speech*, 52 U. MIAMI L. REV. 733, 765 (1997).

¹²⁹ *Id.*

kind of assessment would be too difficult—if not impossible—to perform and, when done in bad faith, it could lead to abuse and the arbitrary suppression of freedom of speech.

In closing, false news differs from hate speech for its lack of incitement, hatred or any other specific form of “call to action,” against a specific group or minority. False news is indeed a factual falsehood that does not necessarily disseminate hate; someone who might finally build up his or her hatred upon that false information could potentially do this in a successive phase. However, building a cause-effect relationship on this is, as already explained, not possible. Including false news within hate speech criminalization would be much too large of an interference with freedom of expression, and hard to justify—keeping in mind that currently, even the criminalization of hate speech is not believed compatible with the rights granted by the First Amendment of the U.S. Constitution.¹³⁰

3. Genocide Denial Laws

At this point, it should already be clear how the two main approaches on limitations to freedom of speech differ greatly from each other when it comes to justifying restrictions of hate speech; however, an even larger gap between the European and U.S. doctrines is displayed in the very peculiar case of genocide denial laws—and, in particular, in instances of Holocaust denial. Even if some countries like France¹³¹ criminalize the denial of every crime against humanity, in the vast majority of the cases, laws refer to the genocide committed by the German National-Socialist regime during the Second World War. Furthermore, since this regulation is historically the first of its kind, it is regarding this specific case that the debate, in both doctrine and courts, has been better and more widely developed. As already explained in the sections on defamation and hate speech, the aim of this thesis is not to

¹³⁰ See *Collin v. Smith*, 578 F.2d 1197, 1201 (7th Cir. 1978) (holding that a neo-Nazi march could not be restrained because “[i]t is, after all, in part the fact that our constitutional system protects minorities unpopular at a particular time or place from governmental harassment and intimidation, that distinguishes life in this country from life under the Third Reich”).

¹³¹ See *Loi du 29 juillet 1881 sur la liberté de la presse* [Law of Jul. 29, 1881 for Freedom of the Press] (explaining that the French Press Act criminalizes more generally every denial of crimes against humanity: “Those who have disputed, by one of the means stated in Article 23A, the existence of one or more crimes against humanity as they are defined by the article of the statute of the international military tribunal, annexed to the London Agreement of 8 August 1945, and which were committed by members of an organization declared criminal by the application of Article 9 of the above mentioned statute or by a person found guilty of such crimes by a French or an international tribunal, will be punished with the penalties foreseen by the sixth paragraph of Article 24.” Criminalization was added on July 13, 1990 with the Gayssot Act, which first introduced a reference to what has been defined as a crime against humanity by the International Military Tribunal enacted by the London agreement of August 8, 1945).

give an overlook of these provisions but to outline the differences of each one of these categories of crime with false news; nonetheless, I will briefly introduce the main traits of this kind of legislation.

The peculiarity of this set of norms is that they constitute *ad hoc* statutes, meaning that they target the denial, in this case, of a specific and well-established event. They were first introduced in those countries which had been directly affected by the Nazi regime: first Israel (1984), then France (1990), Austria (1992), and Germany (1994). Some statutes target genocide in general, while others have an even broader scope and use as a reference rulings made by international courts, treaties, or other decisions of independent bodies.¹³² Genocide denial laws are the closest category to false news; indeed, in this case, legislators decided to criminalize any false statement on a fact. The reasoning behind this choice is that regulators had considered these utterances able to “strip from Holocaust victims the fundamental respect to which they are entitled”¹³³ and thus they are harmful enough to justify a limitation. Both the Human Rights Committee and the ECtHR have considered Holocaust denial to also be an incitement to hatred against the Jewish community.¹³⁴ However, it must be specified that the courts took into account the consequential harm that is caused by such statements, stating; “as a consequence, both the Committee and the Court upheld Holocaust denial prohibitions not because the denial of the Holocaust is a lie and *as such* not protected by freedom of expression.”¹³⁵ Currently, Holocaust denial finds a general consensus amongst countries,¹³⁶ nonetheless, laws prohibiting such speech are not generally accepted and often criticized, especially by those who follow U.S. doctrine. For example, the American philosopher, jurist, and scholar Ronald Dworkin, perfectly expressed that of course “denying that the Holocaust ever existed is a monstrous insult to the memory of all the Jews and others who perished in it” but at the same time “it is implausible that allowing fanatics to deny the Holocaust would substantially increase the risk of fascist violence in

¹³² LUDOVIC HENNEBEL & THOMAS HENNEBEL, GENOCIDE DENIALS AND THE LAW 242 (2011).

¹³³ Lidsky, *supra* note 99, at 1093.

¹³⁴ OSTER, *supra* note 15, at 231.

¹³⁵ *Id.*

¹³⁶ Hennebel & Hochmann, *supra* note 132, at 122 (citing JUDY AITA, UNITED NATIONS CONDEMNES DENIAL OF THE HOLOCAUST (2007). “In January of 2007, the United States General Assembly passed a resolution (to coincide with International Holocaust Commemoration Day) condemning Holocaust denial. The resolution – passed by general consensus, with only Iran explicitly dissenting – called on all 192 UN member states to ‘unreservedly reject any denial of the Holocaust as a historical event, either in full or in part, or any activities to this end.’” *Id.*

Germany.”¹³⁷ Dworkin then vaguely recalls Milton’s idea on freedom of speech and states that this “Auschwitz lie” should be challenged and refused by public discourse, no matter how hard it may be, otherwise we would be unfairly limiting freedom of speech: “censorship is different. We must not endorse the principle that opinion may be banned when those in power are persuaded that it is false and that some group would be deeply and understandably wounded by its publication.”¹³⁸ Nevertheless, Dworkin’s opinion could be challenged in that this case does not involve *opinions* but *facts* that, in spite of what is asserted by deniers, have clearly been proven.¹³⁹

A special mention must go to the French framework, specifically to the Gayssot Act; indeed, this law introduced a significant change in how to refer to the denied event. Instead of “unilaterally imposing history,”¹⁴⁰ by requiring that the Holocaust cannot be denied, the French law refers to the International Military Tribunal (IMT) Charter and decisions. The State delegated to an independent body the decision on what should be identified as a crime against humanity, without detailing a specific truth to be maintained inside the same law.¹⁴¹

Now, it is important to identify what really differentiates genocide denial from any other false news. Indeed, the former is nothing more than a subset of the latter; stating that the Holocaust did not happen means giving false information about a fact. Hence, where is the difference? Why is only this case criminalized? Provided that so far nobody has investigated this set of laws from the point of view of false news and that the consensus on it is all but unanimous, a plausible explanation will be given on why it was possible to “promote” a piece of false news to a crime. The key point that allowed legislators to adopt such legislation is the narrowness of it; that’s the reason why we refer to them as *ad hoc* statutes, meaning that their scope includes only specific cases and, contrary to other “standard” regulations, they are not a generic description of the circumstances that can constitute a crime. A peculiar exception is provided by the above-mentioned Gayssot Act because it contains a provision open to any further qualification of a fact as a crime against humanity, first according to the IMT Charter and then to the rulings of the International Crime Court. Nonetheless, the majority of genocide

¹³⁷ Ronald Dworkin, *Should wrong opinions be banned?*, INDEPENDENT (May 27, 1995, 11:02 AM), <https://web.archive.org/web/20170627093221/http://www.independent.co.uk/voices/should-wrong-opinions-be-banned-1621519.html>.

¹³⁸ *Id.*

¹³⁹ *Id.* at 46. Nonetheless, there are some genocide cases that fall out of the scope of the Gayssot Act; for example, the Armenian genocide of 1915.

¹⁴⁰ *Id.* at 250.

denial laws contain a specification of which cases are believed as true by that legal system and consequently when a punishment may be imposed. This is exactly the principle that makes the criminalization of this kind of false news possible; a consensus on a historical fact and the understanding that its denial can, represent hatred and cause harm—moral harm—to the victims or to their descendants. Acknowledging that a fact is believed as true almost unanimously does not automatically imply that an objective truth exists; at least, it can be seen as the recognition of an *official* truth. It has already been stated more than once in this article that this is something that should be avoided because of the tremendous risks for freedom of speech if a government is allowed to impose its version of the truth; nonetheless, the peculiarity and severity of the facts included within the scope of such legislation make them acceptable for at least the majority of courts and academics. Indubitably, strong debate is still ongoing about this topic and it is far from being solved due to the deep ideological and philosophical roots upon which this peculiar limitation of speech is built, thus it is unlikely to reach complete consensus.

Finally, genocide denial is a small and peculiar subset of false news; it is so narrow, specific, and severe that it was feasible for states to impose a truth and to prohibit falsity about it. If not completely removed, this form of limitation on speech must not be broadened to other cases and should remain only as an extremely specific exception. Indeed, more than hate speech, genocide denial laws are strongly objected to by scholars who support the U.S. doctrine on freedom of speech, in which no truth may be established by the government and the possibility of expressing opinions must be given to everyone, regardless of the content, because only public debate has the power to affirm veracity without compromising human rights.

V. LIABILITY OF INTERMEDIARIES

A. *Digital Intermediaries' Liability in the EU Framework*

If the debate on false news started in 2016 and has been at the center of discussion amongst both professionals and academics, it is also because of the important boost that digital intermediaries, and more specifically social networks, gave to the sharing of false information:

Social media platforms . . . have a dramatically different structure than previous media technologies. Content can be relayed among users with no significant third-party filtering, fact-checking, or editorial judgment. An

individual user with no track record or reputation can in some cases reach as many readers as Fox News, CNN, or the New York Times.¹⁴²

Several studies have attempted to understand whether such these dynamics influenced public opinion to the extent of changing the results of elections, and in particular the U.S. presidential election of 2016; however, the different conclusions that these studies have reached are proof of how little certainty can be found on this matter.¹⁴³ In this section, an outline will first be given of how digital intermediaries' liability has been designed in the European framework and then it will be shown that no obligation to remove or control content can be imposed on them.

The necessity of bringing clarity over the role—and thus responsibility—of digital intermediaries arose with the development of the Internet and of new possibilities for users to post their own content and thus reach an incredibly vast audience. Intermediaries assumed a fundamental role in communication and became a large part of the ecosystem; the contribution to freedom of expression had been more relevant because they provided individuals with a new efficient medium to express themselves. At the same time, digital intermediaries represented an amplifier for speech crimes that could reach a previously unimaginable target audience, leading to the necessity of striking a balance between complete indemnity for media operators and full liability for content that they did not generate. The most important provision in force is Directive 2000/31/EC (E-Commerce Directive), which basically transposed the concept of “innocent publication” into the European legal system.¹⁴⁴ Indeed, in its section named “Liability of intermediary service providers,” in Articles 12 to 15, the general principle in which a provider that constitutes only a passive medium for communication and, at the same time, has no information about the unlawfulness of the content, should not be considered liable for the user's dissemination is enshrined. More specifically, Articles 12 and 13 deal with providers which merely have a strong technical role in the communication (i.e., “mere

¹⁴² Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election* 211, NAT'L BUR. OF ECON. RES. (Jan. 2017), <http://www.nber.org/papers/w23089>.

¹⁴³ Chung, *supra* note 106; Caitlin Dewey, *Facebook Fake-News Writer: 'I Think Donald Trump is in the White House Because of Me'*, WASH. POST (Nov. 17, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/11/17/facebook-fake-news-writer-i-think-donald-trump-is-in-the-white-house-because-of-me/?utm_term=.9aaaad8caf28; Hannah J. Parkinson, *Click and Elect: How Fake News Helped Donald Trump Win a Real Election*, THE GUARDIAN (Nov. 14, 2016), <https://www.theguardian.com/commentisfree/2016/nov/14/fake-news-donald-trump-election-alt-right-social-media-tech-companies>; Max Read, *Donald Trump Won Because of Facebook*, N.Y. MAG. (Nov. 9, 2016), <http://nymag.com/selectall/2016/11/donald-trump-won-because-of-facebook.html>.

¹⁴⁴ See Jan Oster, *Communication, Defamation and Liability of Intermediaries*, LEG. STUD., at 10 (Oct. 23, 2014). The authors provide more details about the “innocent publication” principle.

conduit” and “caching” providers), so that they are seen more as “infrastructure”; Article 14 introduces a liability exemption for a content provider which does not have “actual knowledge of illegal activity” and “upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.”¹⁴⁵ Finally, Article 15 excludes a general obligation on providers to monitor content; they cannot be obliged to control all the information they manage and look for illegal content.

The provisions of the Directive were also taken into account by the European Court of Human Rights when it was called to judge several cases on a matter of intermediaries’ responsibility, especially in the two leading cases of *Delfi AS v. Estonia*¹⁴⁶ and *MTE and Index v. Hungary*.¹⁴⁷ In both situations, the Court had to deal with hate speech posted in the comment section of articles published on the applicants’ websites; however, the judges came to different conclusions, even if they had followed the same basic principles. In *Delfi AS v. Estonia*, the Court found that the role of the provider (the news outlet Delfi) was not merely passive or technical and “that the objective pursued by the applicant company was not merely the provision of an intermediary service.”¹⁴⁸ Hence, since the news outlet had a role different from being a mere intermediary and “it was in a position to assess the risks related to its activities and that it must have been able to foresee, to a reasonable degree, the consequences which these could entail,”¹⁴⁹ and thus the Court found the interference of Estonia legitimate in its right to impart information. This judgment has been severely criticized because it appeared to be in contrast with the provision that there is no general obligation to monitor;¹⁵⁰ however, it must be born in mind that it is not the duty of the ECtHR to apply the Directive, but to assess the domestic court’s judgment in accordance with the ECHR, and more specifically in this case, with Article 10. Moreover, other factors led the Court to such a decision, such as the fact that Delfi permitted comments to be posted anonymously, and that they could have foreseen such comments given their past experience, and that the system they put in place was not sufficient enough to filter hate speech content, even if it was directly offensive and not particularly elaborate. The second judgment of *MTE and Index v. Hungary* concerned a very similar case of

¹⁴⁵ Directive on Electronic Commerce 2000, SI 2000/31/EC, art. 12-15 (Eng.).

¹⁴⁶ *Delfi AS v. Est.*, 64669/09 Eur. Ct. H.R. (2015).

¹⁴⁷ *Magyar Tartalomszolgáltatók Egyesülete and Index.hu ZRT v. Hung.*, 22947/13 Eur. Ct. H.R. (2016).

¹⁴⁸ *Id.* at § 128.

¹⁴⁹ *Id.* at § 129.

¹⁵⁰ *European Court Strikes Serious Blow to Free Speech Online*, ARTICLE 19 (Oct. 14, 2013), <https://www.article19.org/resources/european-court-strikes-serious-blow-free-speech-online>.

anonymous comments posted under an article. In this second ruling, however, the Court saw an illegitimate interference with the right granted by Article 10 of the ECHR and opted for non-liability of the digital intermediary. If the principles upon which the judgment was made are the same, the differences with the *Delfi* case are important enough to justify a different conclusion. First of all, the Court found that in this situation “the incriminated comments did not constitute clearly unlawful speech, and they certainly did not amount to hate speech or incitement to violence;”¹⁵¹ hence, it was not possible to affirm that the provider had knowledge of the illegal content as in the previously examined case. Another difference the Court found was in the nature of the applicant; MTE was a non-profit organization and the business nature of the website was less evident than in the *Delfi* case. These points, combined with other smaller differences, changed the outcome of a ruling that seemed to concern a fact scenario that was thoroughly similar to *Delfi v. Estonia*—to the extent that some commentators saw the second judgment as an interpretation or even a rewriting of the previous one.¹⁵²

These cases by the ECtHR, when analyzed together with the most significant judgment of the Court of Justice of European Union (CJEU),¹⁵³ give a detailed picture of how digital intermediaries’ liability should be evaluated: when the provider has a merely passive or technical role, it cannot be held liable for third parties’ content. Moreover, the “notice and take down” system—also provided by Article 14(1)(b) of the E-Commerce Directive—“could function in many cases as an appropriate tool for balancing the rights and interests of all those involved.”¹⁵⁴ In general, the leading principle that must be followed is the one outlined in Article 15, that there is no general obligation to monitor.

B. Digital Intermediaries’ Liability for False News

As explained in the previous section, it is not possible to impose liability on digital intermediaries if they are a mere medium of a communication, if they have no knowledge of the illegal content and, if notified, they promptly

¹⁵¹ Directive on Electronic Commerce 2000, *supra* note 145, at § 64.

¹⁵² Sophie Stalla-Bourdillon, *MTE v Hungary: Is the ECtHR rewriting Delfi v Estonia?*, PEEP BEEP (Feb. 2, 2016), <https://peepbeep.wordpress.com/2016/02/02/mte-v-hungary-is-the-ecthr-rewriting-delfi-v-estonia/>; *MTE v. Hungary: The ECtHR Rules Again on Intermediary Liability*, EUR. DIG. RTS., (Feb. 10, 2016), <https://edri.org/mte-v-hungary-the-ecthr-rules-again-on-intermediary-liability>.

¹⁵³ See Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, 2012; Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, 2011.

¹⁵⁴ Directive on Electronic Commerce 2000, *supra* note 145, at § 91.

removed the unlawful information. However, in the case of false news, what is at the center of attention is not the behavior of the intermediary, but rather the qualification of the content itself. Indeed, this was the conclusion in the previous section of this article with the general principle that false news should not create liability for the author. It logically follows that, if it is not unlawful to publish a piece of false information, if there is no illegality in the content, the intermediary cannot be punished based on that communication. Evidently, there is no ground to impose on the digital intermediary an obligation—and hence a punishment if not fulfilled—to delete, remove, or even flag false content, content that may be inappropriate but not illegal.

However, it may be worth analyzing the case of legislation, still framed within the European Union system, that imposes an obligation to detect and remove false news on social media.¹⁵⁵ The rationale behind this intervention would be to presume the effect of a shared piece of false news to be more severe than the content itself so that only in this successive phase of “publicity” an action should be taken. Leaving out any other issues of legitimacy of such a law that punishes only the sharer of a piece of information and maybe not its author, this regulation would be in evident contrast with what was established both by the ECtHR, the CJEU, and the E-Commerce Directive. First, no “illegal activity or information” is conducted via the services provided by the intermediary, and second, more importantly, the provider would be involved in the difficult and expensive activity of monitoring and fact checking all content that is posted by users. This duty evidently goes against the principles set by Article 15 of the E-Commerce Directive and the case law of both ECtHR and the CJEU, basically placing an obligation on the providers to monitor the information shared via their services—with the monitoring not limited to only illegal information that could be published but now also extended to false news. This activity, other than requiring an unreasonable amount of human, economic, and technical resources, could lead to unexpected and unwanted results;¹⁵⁶ a private company would be entitled (and forced) to express judgment on the truthfulness of all content posted by its users. Some actors have already introduced a proactive tool in order to flag and fact check content. Facebook, for example, signed the Code of Principles of the International Fact-checking

¹⁵⁵ See Politi, *supra* note 2; ANGELO M. CARDANI, AGCOM, *RELAZIONE ANNUALE 2017 SULL'ATTIVITÀ SVOLTA E SUI PROGRAMMI DI LAVORO* (2017) (discussing that President Mr. Cardani requested an intervention by legislators, after not being able to rely on the digital companies' self-regulation).

¹⁵⁶ Krishna Bharat, *How to Detect Fake News in Real-Time*, NEWCO (Apr. 27, 2017), <https://shift.newco.co/how-to-detect-fake-news-in-real-time-9fdae0197bfd>. The author discusses the problem of detecting, even evident, false news and does not have an easy solution.

Network (IFCN) at Poynter Institute in October 2016.¹⁵⁷ According to the social network, “if the fact checking organizations identify a story as fake, it will get flagged as disputed and there will be a link to the corresponding article explaining why. Stories that have been disputed may also appear lower in News Feed.”¹⁵⁸

In conclusion, there is no ground to impose an obligation on digital intermediaries to block, remove, limit or flag false news. Undoubtedly, it is desirable for companies who operate as social networks to adopt measures to maintain a correct and clean environment for their users; nonetheless, this should be carried out within the scope of their independent choices as private companies and in accordance with their terms and conditions. It is also true that new issues of ethics and morals would arise when a private company gains enough power to self-regulate speech at a worldwide level; however, this discussion falls out of the scope of this article and represents another critical topic that should be deeply analyzed.¹⁵⁹

VI. CONCLUSION

Over the recent years, false news has been a hot topic for discussion in the journalistic world, as well as for governments and regulators in general; new laws have been approved, and others demanded by those who believe false information to be dangerous and harmful to society. Because of the technical difficulty of finding and punishing the authors of such falsities in the digital environment, attention has shifted to intermediaries, such as social networks. It has required them to be proactive, adopting measures that could prevent the sharing of false news. If on the one hand it is true that false news has found fertile ground to grow and spread on the Internet, on the other hand the such news did not come to bear in 2016; moreover, the necessity of fighting this issue with legislative means is far from being proven necessary.

The common mistake made by several authors—both academic and professional—is to include in their discussion on false news what is already punished by law, such as defamation, hate speech, fraud, and perjury. Thus, the first step is to correctly understand the scope of this issue; hence, this article defined false news as all of the false statements that are in a grey area

¹⁵⁷ *International Fact-Checking Network Fact-Checkers' Code of Principles*, POYNTER, <https://www.poynter.org/international-fact-checking-network-fact-checkers-code-principles>.

¹⁵⁸ Adam Mosseri, *Addressing Hoaxes and Fake News*, FACEBOOK NEWSROOM (Dec. 15, 2016), <https://newsroom.fb.com/news/2016/12/news-feed-fyi-addressing-hoaxes-and-fake-news>.

¹⁵⁹ See Brett G. Johnson, *Speech, Harm, and the Duties of Digital Intermediaries: Conceptualizing Platform Ethics*, 32 J. MED. ETHICS, 16 (2017) (introducing an excellent starting point for this discussion).

between information irrelevant to the public and falsity that is already punished by law. It was then illustrated how false news produces consequences but not harm; the lack of harm should guide legislators in not adopting measures against the discussed form of falsity. Indeed, it was described how harm to others should be taken as guidance when assessing the necessity of new criminalization or liability, in turn endorsing the standard U.S. approach on freedom of speech.

Finally, the main research question can be answered. To what extent should the law prescribe responsibility for false news, and subsequently, what is the role of digital intermediaries? It is accurate to say that, if correctly understood and defined, law *per se* should not prohibit false news. Any action taken by the state concerning a piece of news that lacks the fundamental elements to be considered an existing crime or generate liability (e.g. defamation, fraud, or hate speech) is to be considered an arbitrary and unjustified interference with freedom of speech. Indeed, the main characteristic of false news is to produce not *harm* but *consequences*; the harm to others framework was utilized to show exactly how this specific kind of falsity lacks the elements to be criminalized and thus limit freedom of speech.

As a direct consequence of this, intermediaries, especially digital ones, cannot be the target of an obligation to block, remove, limit, or flag false news. First, such an obligation cannot be derived from the leading European framework set by the E-Commerce Directive because there is no “illegal activity or information” conducted via the services provided by the intermediaries.¹⁶⁰ Second, if a specific regulation were put in place to create a new obligation, it would hold intermediaries responsible for a content that, as demonstrated, is not unlawful *per se*. Finally, due to the commitment and work that identifying false news practically requires, an obligation of this kind would violate the principle that there is no general obligation to monitor set by Article 15 of the E-Commerce Directive, which without doubt represents a standard in the regulation of the digital environment. Certainly, it is desirable for companies who run services as social networks to adopt measures in order to maintain a correct and clean environment for their users; nonetheless, this should be carried out within the scope of their independent choices as private companies and in accordance with their terms and conditions. It is also true that new issues of ethics and morals would arise when a private company gains enough power to self-regulate speech at a

¹⁶⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market (“Directive on electronic commerce”).

worldwide level; however, that discussion falls out of the scope of this thesis and represents another critical topic that should be deeply analyzed.

