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# Fake News and Weaponized Defamation and the First Amendment

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# KEYNOTE ADDRESS: FAKE NEWS, WEAPONIZED DEFAMATION AND THE FIRST AMENDMENT\*

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Erwin Chemerinsky\*\*

The issue of false speech has been part of the United States since early American history. In 1798, Congress passed the Alien and Sedition Act that made it a federal crime to falsely criticize the government or government officials. Individuals were prosecuted and convicted for saying things much more tame than what you hear on the late night talk shows on a daily basis. Many years later, in 1964, the Supreme Court said in *New York Times v. Sullivan* that the Alien and Sedition Act had been held unconstitutional by the court of history. The idea of a court of history is a very romantic notion, but it does not erase the reality that Congress passed, and the President signed, a law that criminalized false speech.

Now when I say the issue of false speech is nothing new, that it has been around throughout American and throughout world history, I think it has taken on a new dimension because of the Internet. I believe that the Internet is the most powerful medium for communication to be developed since the printing press. The Internet truly democratizes the ability to reach a mass audience. In the past, in order to reach a mass audience, a person had to be rich enough to own a newspaper or get a broadcast license. Now, anyone with a smartphone or even just access to a library as a modem can immediately reach a large audience. This then means that there is the ability to spread false information—fake news—much more quickly than ever before. It also makes it possible to do this with regard to defamatory speech.

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\* This is an edited transcript of a keynote address as virtually delivered on January 26, 2018 at Southwestern Law School, Los Angeles, CA.

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A key part of this symposium is on weaponized defamation, which is an aspect of the problems of false speech. I would suggest, as this conference begins, that there are at least three major questions that will be important to talk about throughout the day. First, what should be the constitutional protection for false speech? There are reasons to say there should be no constitutional protection for false speech. The First Amendment exists to provide for the advancement of knowledge. False speech by definition contributes nothing to that. False speech can greatly harm reputation. False speech in an election can distort the democratic process. The traditional response is that we will allow all ideas, true and false, to be expressed and then let the market place of ideas sort it out. Why believe that true speech will succeed in countering false speech? Once people have heard false information, can we really erase it? Can we really believe that the true information will triumph in their minds?

When it comes to reputation, a person who has been tarnished by false speech, may never be able to regain the lost reputation, setting the record straight usually fails to eliminate the tarnish. A headline that accuses someone falsely is not really answered by a small correction at the bottom of the page. Yet, the Supreme Court has recognized the importance of protecting false speech. I think the most important case and one that has to be at the center of this symposium is *New York Times v. Sullivan*, in 1964. There, as everyone knows, the Supreme Court said that in order for the First Amendment to have the breathing space necessary for speech, there has to be protection for false speech as well. The Court said that there cannot be, at least when it comes to suits by public officials, strict liability for defamation. Justice Brennan's majority opinion was one of the most important opinions ever written with regard to free speech. After the Court decided *New York Times v. Sullivan*, the University of Chicago Law Professor Harry Kalven Jr. said that it was an occasion for "dancing in the streets." I think that in part what made this decision so important was the Supreme Court saying that tort liability is limited by the First Amendment. I also think what makes it important is the Supreme Court saying that there is First Amendment protection, even for false speech.

Subsequent cases have also said there is protection for false speech. Several years ago, the United States Supreme Court decided *United States v. Alvarez*. This case involved the Stolen Valor Act, a federal law that made it a federal crime for a person to falsely claim to have received a military honor. The law was motivated by noble motives and goals. There is no doubt that Congress was trying to protect the recognition of those in the service who had received such honors. Congress did not want the recognition of those who had been honored to be diluted by false claims.

But the United States Supreme Court, in a 6 to 3 decision, declared this unconstitutional. Justice Kennedy's plurality opinion explicitly stated that the fact that the speech is false does not mean that it is unprotected by the First Amendment. The Court stressed that there are other ways to counter the false speech, rather than criminally punishing the speaker.

I do not want to overstate the extent of the constitutional protection of false speech. There are areas where the Supreme Court has said that false speech is unprotected. For example, the Supreme Court has said that false and deceptive advertising is unprotected by the First Amendment. I think this principle is reasoned in part because commercial speech is more robust than noncommercial speech. When it comes to noncommercial speech, there is a greater danger that liability would chill expression. There is less reason to fear that in the commercial speech category.

The line between commercial and noncommercial speech becomes enormously important once we say that false commercial speech can be prohibited and other types of false speech cannot be prohibited. This is the landscape that we have to talk about. I think the question that this symposium needs to focus on is what should be the extent of First Amendment protection for false speech. If it is so called "fake-news" about political matters, should it always be protected? I think the strong presumption is that in the political arena, unlike the commercial arena, there is total protection for false speech. Should this continue to be so in the world of the Internet and the world of weaponized defamation?

The second question that I think the symposium needs to address is whether the current approach to defamation liability is desirable. The current approach was ushered in by *New York Times v. Sullivan*, and in the decades since, the Supreme Court has adopted a categorical approach to defamation depending on the identity of the plaintiff and also the nature of the speech. The Court stated in *New York Times v. Sullivan*, that if the plaintiff is a public official or the plaintiff is running for public office the plaintiff can recover for defamation only by proving with clear and convincing evidence falsity of the statement and actual malice. Actual malice requires that the speaker knew that the statement was false or the speaker acted with reckless disregard of the truth. As the Supreme Court later stated, actual malice requires that there be a subjective awareness of probable falsity.

The second category is if the plaintiff is a public figure. In cases such as *Gertz v. Welch*, the Supreme Court has stated that if the plaintiff is a public figure, the same rules apply as if the plaintiff were a public official. The Court has not defined with any precision who constitutes a public

figure. The Court has indicated that a public figure is one who thrusts himself or herself in the limelight. A public figure is one who likely has access to media to respond to any attack. Beyond that, the Court has not given guidance with regard to who constitutes a public figure. Also, what about someone who is a public figure for some purposes but not others? What about someone who is an involuntary public figure?

The third category is if the plaintiff is a private figure and the speech involves a matter of public concern. Private figures are obviously those that are not public officials or public figures. The Supreme Court has never defined what constitutes a matter of public concern. Matters of public concern seem to be matters in which the public has a legitimate interest. The Court has said that in this category the plaintiff can recover compensatory damages if the plaintiff proves falsity of the statement and negligence on the part of the speaker. That is, the speaker was not as careful as a reasonable speaker would have been. To recover presumed or punitive damages in this category requires proof of actual malice.

The fourth category is if the plaintiff is a private figure and the speech does not involve a matter of public concern. There has been very little case law as to this category, at least with the Supreme Court. The major case is *Dun & Bradstreet v. Greenmoss Builders*. There, the Court stated that for private figures and matters not of public concern, there does not have to be proof of actual malice to recover presumed or punitive damages. However, the Supreme Court has never clarified who has the burden of proof in this category. The Court has also never clarified the standard of liability for compensatory damages.

This is the framework for the discussion at this symposium about weaponized defamation. Part of this discussion is whether this approach makes sense. Donald Trump as a candidate and as President of the United States has urged a change in this framework to make it much easier for public officials and public figures to recover for defamation. He wants the framework to be similar to the English system. Now, of course, this is not something the President of the United States can accomplish. Defamation law is state law. There is no federal statute with regard to defamation and the limits on defamation liability come from the First Amendment. The Supreme Court has shown no inclination to want to change this.

Does the traditional approach for defamation still work in the context of the Internet in weaponized defamation? For example, is the line between matters of public concern and matters not of public concern a useful one? How is that to be decided? Is it determined based on what the public is interested in; is the fact that the people are willing to go on the internet to see it or buy a magazine with it by definition enough to make it a matter of

public concern? Does the Court have to decide whether a matter of public concern is based on a sense of what is in the public's enlightened best interest? That too is very troubling. Should public figures really be treated the same as public officials? What about people who are involuntary public figures? What about people who are public figures for some purposes and not others? All of this underlies the discussion of defamation in the context of fake news and the context of the Internet.

I think there is a third question, perhaps a less obvious one that also needs to be addressed: should the identity of the speaker matter? A lot of our discussion with regard to fake news in connection with the 2016 Election was the extent to which Russia was circulating false information such as through Facebook. Some of this is about a concern with foreign interference with elections. Of course, there is an irony here as it has been well documented that the United States government since World War II has itself often interfered with foreign elections. Do we have a basis for objecting when another government is trying to do what we have done so frequently?

I think there is an even harder underlying issue and that is that one that I posed. Should the identity of the speaker matter? If you look at *Citizens United v. Federal Election Commission*, which has now celebrated its eighth birthday, Justice Kennedy very explicitly held, writing for the majority, that the identity of the speaker does not matter. That is why he said corporations should have the same speech rights as individuals. In that case, the Court held that corporations have the same ability to spend money on political campaigns as individuals. The Court's holding was based on an earlier Supreme Court case, *First National Bank of Boston v. Bellotti*. There, the Supreme Court first held that corporations have the right to freedom of speech under the First Amendment. The Court in *Bellotti*, and for that matter in *Citizens United*, accorded corporations speech rights not by defending the autonomy interest of corporations, but rather said the more speech that exists in the marketplace of ideas, the better off we all are for it. That is why corporations have the right to speak. Well, does it then matter whether the speaker is a foreign corporation, a foreign individual, or a foreign government? Should they not have the same ability to speak as those in the United States because their speech is also contributing to the marketplace of ideas? Federal law draws a distinction between foreign and domestic, say with regard to campaign expenditures, limiting the ability of foreign governments, foreign corporations, to spend money and contribute money with regard to election campaigns. Should that matter? Should we just say that with regard to the identity of the speaker—there should be

disclosure? That when it comes to a foreign government or foreign individual, should we know the source of the information?

But the reality is that another way that the Internet has changed expression is breaking down national boundaries. A country can no longer isolate itself from information. When the revolution was occurring in Egypt, one of the first things the government did was cut off Internet service. The people there could use their satellite phones and still gain the information. The United States can never close its borders to information.

So, the question is, should we be treating information that comes from foreign sources different than that for domestic sources?

This symposium could not come in a more timely manner. It could not be on a more important topic. Ultimately, democracy depends on information and it depends on accurate information. So how should we deal with fake news? How should we deal with weaponized defamation? Those questions are the focus of this symposium.