

Professor Eric Easton on Trump, Libel, and Fake News

In 1787, Thomas Jefferson wrote in a letter: “Were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter.” Two centuries later, he might have said radio or television. Today, he might have said the internet, although I’m not entirely sure of that.

I can say with some confidence, however, that the man who will become president tomorrow has a somewhat different view. During the campaign, and even after the election, Donald Trump called the media “dishonest” and “corrupt” and, with regard to BuzzFeed last week, “a failing pile of garbage.” In particular, Mr. Trump threatened to “open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money.”

So, here’s the good news. The president has very little power to change the libel laws to make it easier to sue the press. Our libel laws are principally state, not federal laws. Much more significantly, however, the basic protections accorded the press for false and defamatory statements are constitutional rights, not merely legislative acts.

There is one prospective federal initiative that could change the landscape for libel significantly: revoking or amending statutory immunity for internet platforms from liability for libelous content generated by users. Immunizing Yelp! from liability for critical product reviews might be a good thing, but immunizing Twitter from liability for cyberbullying or Snapchat for revenge porn may not be so good. In any case, enactment seems unlikely.

But if Mr. Trump’s libel threat is largely toothless, the president does have several weapons at his command for interfering with the press. Access to government information, for example, is critical to the proper functioning of the press. As Jefferson said in that same letter, “The way to prevent [the public from misapprehending what government is doing] is to give them full information of their affairs thro’ the channel of the public papers....”

Modern presidents, however, have shown a marked unwillingness to be frank and open about their conduct in office – Trump’s news conference last week was his first in six months – and they have made it increasingly difficult for the press to learn from leakers and whistleblowers. This was true of President Obama, and will likely be even more true of President Trump – although he seems to have developed a certain fondness for Julian Assange and Wikileaks.

A president also has the ability to manipulate the media by playing favorites. The press conference demonstrated the power of the president to “punish” an outlet like CNN for giving time to the Russian dossier story, even though it did not broadcast the lurid details. Not only

did Mr. Trump disparage the organization, but refused to invite a question from its reporter, Jim Acosta. You may recall, moreover, that Mr. Trump opened the press conference by praising those organizations that minimized their coverage of the dossier story.

An even more serious problem is Mr. Trump's tendency to bypass the media altogether and take his message directly to HIS people through Twitter. I emphasize "his" people and return once more to Jefferson's letter. When Jefferson said government must inform the people through the public papers, he also said government should "contrive that those papers should penetrate the whole mass of the people."

While Twitter and other social media have that potential, they are constructed to permit individuals to filter the information through their own political biases. Thus, we are locked into "bubbles" of our own preconceptions and the truth never reaches the "whole mass of the people." Nonconforming information becomes "fake news."

As I see it, there are two different kinds of fake news. One is the intentionally fabricated news story placed in the media for entertainment value (such as the *Daily Show*), or for money (from click-based advertising fees), or for more sinister disinformation purposes (such as premature reports that Clinton had already won the election to suppress the vote in Philadelphia). Common sense should be enough to identify satire, and new algorithms can deal with robo-clicks, but we have always relied on aggressive dissemination of truth to cure any disinformation campaign.

Unfortunately, the mainstream media has been unable to meet the challenge of intentional disinformation. When Edgar Maddison Welch decided to bring his AR-15 to Washington to save the children who were being trafficked by Hillary Clinton through a popular pizza joint, the people in my *NPR-Washington Post-New York Times* bubble were appalled. Most of us had never even heard that so-called news.

The second type of "fake news" is more subtle and even more pernicious. The news is not really "fake" at all, but rather true or, if wrong, at least responsibly reported. Truthful news may be labeled "fake" by those who choose not to believe it, such as the Russian hacking of the Democratic National Committee; or incorrect reporting embraced because we want to believe it, such as Hillary Clinton's commanding electoral lead.

As of now, the press has no answer for this phenomenon. And neither do I.