

As Fake News Rises, Courts Can Be A Weapon

A gunman recently walked into a pizza parlor, reportedly spurred by fake news from the internet.

BY MARK MACDOUGALL
AND KAREN WILLIAMS

The public debate about how fake news stories may have impacted the presidential election was in full rumble on Dec. 11. That was the day that Edgar Madison Welch walked into a pizza joint called Comet Ping-Pong in Washington with a loaded assault rifle, police said.

After he surrendered, Welch, according to news reports, told police that he had traveled from North Carolina to free child sex slaves held by Hillary Clinton. He read all about it on the internet.

The fantastical story that launched Welch on his rescue mission had circulated on the web for weeks before the November election.

Of course it was a lie, but the story of Clinton, child sex and the pizza parlor was posted beneath screaming headlines on web sites with genuine-sounding names like State of the Nation and The Conservative Daily Post.



JOSE LUIS MAGANA/AP

Three days before Welch went searching for sex slaves, CNN anchor Alisyn Camerota interviewed five voters whom she had followed throughout the presidential campaign. When members of the group cited equally

bizarre—if less colorful—news stories of millions of illegal voters in California, Camerota called them out.

“So where are you getting your information?” Camerota asked. “Media,” responded a lady from New Hampshire.

When Camerota asked the same question about the claim that President Barack Obama had told undocumented aliens that they could vote, another voter immediately replied, “[Y]ou could find it. Google it. ... You could find it on Facebook.”

There was a time in living memory when fake news would have been impossible. Before the internet, news was a capital-intensive industry.

Newspapers and magazines required printing plants, delivery trucks, staffs of journalists, editors and photographers—as well as subscribers willing to buy and advertisers willing to pay.

Radio and television required studios, broadcast towers, licenses as well as viewers and advertisers. People bought their newspaper and watched the network news because they could believe what they read and heard.

THE RISE OF THE IMPOSTERS

The internet allows anyone with a laptop computer to play investigative journalist and publisher. With a few key strokes, a detailed lie dressed up to look like journalism can go around the world.

Web site names nearly identical to mainstream news sources can be reserved for a nominal fee along with mastheads designed to bolster the appearance of legitimate journalism.

The purveyors of fake news mostly hide in the shadows. When they are located through good investigative work, the first response often appears to be, “How did you get my number?”

As the possible impact of fake news on our elections came into focus, calls circulated for social-media channels like Facebook, Google and Twitter to block sites that promote phony journalism. (Facebook announced its plans to combat fake news on Dec. 15, according to news reports, including partnering with fact-checkers.)

THE ROLE OF THE COURTS

Another way to combat fake news is through the most independent institution in our society—the courts.

Mainstream journalists despise libel litigation as a tool of the wealthy and powerful to stifle First Amendment rights.

In February, Donald Trump promised to “open up” the libel laws to make it easier to sue the media for defamation.

Legal observers quickly pointed out that neither the president nor the Congress can dislodge the protections of the First Amendment or the legal doctrines that the U.S. Supreme Court has applied to those protections. That kind of change would require a constitutional amendment—and that is not going to happen.

Nonetheless, the right of an individual harmed by fake news to bring a civil suit remains a live legal option. Doubters can look to the \$3 million jury verdict returned last month against Rolling Stone and the journalist Sabrina Erdely in a federal court in Virginia.

The plaintiff in that case was an administrator at the University of Virginia who had been accused in Erdely’s Rolling Stone piece of

negligence in handling the alleged gang rape of a female student.

The jury concluded that certain statements in the story had been published with “actual malice,” which is defined as publishing something knowing it was false or doing so with a reckless disregard for the truth.

Justice Louis Brandeis wrote, “Sunlight is said to be the best of disinfectants.” The publishers of false news infect public debate while hiding on the internet. The most potent way to shine light on their insidious conduct is through the tools of civil litigation.

Individuals and organizations need to have the courage to bring the manufacturers of fake news into the broad daylight of federal courtrooms.

As most federal judges will privately acknowledge these days, the courts are far from overworked as civil trials disappear from the dockets and most criminal cases are resolved through negotiated plea deals.

There is no better system for getting at the truth than the Rules of Evidence and the adversarial system of trial.

Federal courts may prove to be the best places to shine a light on those who traffic in lies marketed as journalism. They will ultimately help move us closer toward eliminating fake news from American life.

Mark MacDougall is a litigation partner in Akin Gump Strauss Hauer & Feld’s Washington office, where he focuses on criminal defense and civil litigation. Karen Williams is counsel in the firm’s litigation practice.