

THE PRECARIOUS POSITION OF THE FOURTH ESTATE IN TRUMPTOPIA: THE ROLE OF POPULAR CULTURE AND THE LAW IN PROTECTING MEDIA FREEDOM

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In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.

--Mr. Justice Black concurring in *New York Times Co. v. United States*¹

I. INTRODUCTION: WELCOME TO TRUMPTOPIA

In common parlance, the word "Utopia" conjures up a vision of a future where individuals are able to fulfill their unique potential while living together harmoniously in a well-ordered society.² It would be a world with

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1. *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (Black, J., concurring).

2. This article uses the term "Utopia" as being interchangeable or equivalent to the word "Eutopia." In Latin, the word Utopia literally means "nowhere." In contrast, the word Eutopia is the one which actually describes a place in which human, societal, and natural conditions are so ideally perfect that there is complete contentment. PATRICK GEDDES, *CIVICS: AS APPLIED SOCIOLOGY* (Project Gutenberg 2004) (ebook). Utopia gained its current connotation due to its use by Sir Thomas More in 1516, as the title of his novel which told the tale of an imaginary island

no war, a benevolent government, a secure environment, and there would be equality for all citizens irrespective of race, religion, gender, sexual orientation, or any other immutable characteristic. In contrast, a “dystopian” world is one where the visionary is confronted by the harsh reality that the majority of the world’s population lead wretched lives where they experience fear, oppression, suffering, and are often de-humanized.³

Clearly, for many people living in the United States, life is far from utopian. Some may have been merely disillusioned. For example, although initial hopes were that the internet’s journalistic freedom would be a road to Utopia,⁴ it now appears that rather than being “the great equalizer of information,” what is being experienced is closer to “Internet Dystopia.”⁵ For others, the situation is far more dire.⁶ Movements, such as Black Lives Matter⁷ or #MeToo,⁸ are concrete evidence of the dystopian traits which taint

where society had achieved experienced perfection in its legal, social, and political systems. According to the British Library, Moore “coined the word ‘utopia’ from the Greek *ou-topos* meaning ‘no place’ or ‘nowhere.’ But this was a pun—the almost identical Greek word *eu-topos* means a good place. So at the very heart of the word is a vital question: can a perfect world ever be realised?” British Library Board, *Utopia*, BRITISH LIBRARY: LEARNING DREAMERS AND DISSENTER, <https://www.bl.uk/learning/histcitizen/21cc/utopia/utopia.html> (last visited Dec. 29, 2019).

3. For an excellent overview of the utopian/dystopian dichotomy, including concept of and definitions surrounding the utopian ideal, see LAWRENCE DOUGLAS ET AL., *Law and the Utopian Imagination: An Introduction*, in *LAW AND THE UTOPIAN IMAGINATION* 1-22 (Austin Sarat et al. eds., 2014).

4. See, e.g., Jamie Bartlett, *The Utopian Dream of the Internet Has Become a Nightmare—and Donald Trump is its Spawn*, TELEGRAPH (Jan. 20, 2017, 10:39 AM), <https://www.telegraph.co.uk/technology/2017/01/20/utopian-dream-internet-has-become-nightmare-donald-trump-spawn/>; Debra Howcroft & Brian Fitzgerald, *From Utopia to Dystopia: The Twin Faces of the Internet*, RESEARCHGATE (Jan. 1998), https://www.researchgate.net/publication/228817859_From_Utopia_to_Dystopia_the_twin_faces_of_the_Internet (download full-text PDF).

5. Frank R. Baumgartner et al., *The Diversity of Internet Media: Utopia or Dystopia?*, <http://fbaum.unc.edu/papers/MPSA2014-InternetDystopia.pdf> (paper prepared for presentation at the meeting of the Midwest Political Science Association, April 3-6, 2014).

6. *Id.* It is true that recent advancements have been made in terms of combating sexual harassment with the #MeToo Movement. But the ramifications of early actions and their longevity have yet to be seen. See Vikki Ortiz & Angie Leventis Lourgos, *Sexual Harassment and the #MeToo Movement: Catalyst for Change or Fleeting Moment?*, CHIC. TRIB. (Oct. 28, 2017, 9:29 AM), <https://www.chicagotribune.com/news/ct-met-sexual-harassment-tipping-point-20171027-story.html>.

7. Jelani Cobb, *The Matter of Black Lives*, NEW YORKER (Mar. 6, 2016), <https://www.newyorker.com/magazine/2016/03/14/where-is-black-lives-matter-headed> (“The phrase ‘black lives matter’ was born in July of 2013, in a Facebook post by Alicia Garza, called a ‘love letter to black people.’ The post was intended as an affirmation for a community distraught over George Zimmerman’s acquittal in the shooting death of seventeen-year-old Trayvon Martin, in Sanford, Florida.”).

8. *#MeToo: A Timeline of Events*, CHIC. TRIB. (May 2, 2019, 3:56 PM), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html> (“In 2006, Tarana

America. Perhaps the problem is that achieving the nirvana of a utopian state in the real world is not possible nor may it be desirable. Arguably, what would be Utopia for one set of society would constitute Dystopia for another. For example, even in the pages of Sir Thomas More's original *Utopia*, the reader finds that slavery is tolerated and that society benefits from the institution.⁹ Or consider the individualist who cannot or will not submit to "the exceptional lever of order needed to achieve and maintain communities of perpetual peace, guaranteed abundance, and conditioned virtue"¹⁰ While such harmony may at first seem desirable, arguably it would stifle artistic, scientific, and moral growth.¹¹

Throughout history, there have been numerous critiques regarding the feasibility and/or desirability of achieving a utopian society. In the mid-twentieth century, some of the most influential thinkers condemned the utopian thinking, arguing "that utopianism pav[ed] the way to totalitarianism."¹² Due to the ultimate goal of a utopian of achieving an "Ideal State," a blueprint for society is a necessity.¹³ Achieving this Ideal State will also entail "the reconstruction of society as a whole."¹⁴ The result of this endeavor will be a clash between utopian ideals and other beliefs, convictions or moral values contained in other blueprints.¹⁵ Consequently, the only way to secure the utopian ideal is by the "suppress[ion] [of] unreasonable objections" which threaten the entire endeavor.¹⁶ According to political philosopher and professor Karl Popper, utopianism can ultimately only result in violence "when differences of opinion can no longer be settled by argument."¹⁷ In Popper's view, the soul in search of Utopia will employ "violent methods for the suppression of competing aims" in order to eradicate

Burke coined the phrase 'Me Too' as a way to help women who had survived sexual violence." By 2019, "the phrase has been reignited as the slogan of the anti-sexual harassment movement.").

9. Alexander Marriott, *A Slave State: Society in Sir Thomas More's Utopia*, CAPITALISM MAG. (Jan. 12, 2004), <https://www.capitalismmagazine.com/2004/01/a-slave-state-society-in-sir-thomas-mores-utopia/>.

10. DOUGLAS ET AL., *supra* note 3, at 4.

11. *See id.* at 8.

12. *Id.* at 1.

13. *See* Lucas Van Milders, *Beware the Utopians: John Rawls, E.H. Carr, Karl Popper, and the Notion of a Realistic Utopia*, E-INTERNATIONAL RELATIONS STUDENTS (Aug. 1, 2012), <http://www.e-ir.info/2012/08/01/beware-the-utopians/>; *see also* 1 KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 157 (5th ed. rev. 1966) ("[O]nly when we are in possession of something like a blueprint of the society at which we aim, only then can we consider the best ways and means of its realization. . . .").

14. POPPER, *supra* note 13, at 161.

15. Van Milders, *supra* note 13.

16. POPPER, *supra* note 13, at 160.

17. Van Milders, *supra* note 13.

all “heretical competing views.”¹⁸ The conclusion—utopianism is the pathway to totalitarianism.

In contrast to a complete indictment of utopian ideals, others may question the viability of attaining Utopia or may not even be able to imagine such a world.¹⁹ In essence, it is a conflict between idealism and realism. As Jean-Jacques Rousseau noted in 1762, reality is “men as they are” while Utopia is “laws as they can be.”²⁰

Perhaps the answer is a blending of the two, a “utopian realism” approach which combines practicality with the ideals of utopianism. Society does not need “final destinations or future blueprints. And even if [it] had those, they would not work in the long run.”²¹ Rather, society needs to concentrate on the undertaking in order to “make a better world somewhat more probable for future generations.”²² Clearly, American society is not a Utopia. However, it has not yet descended to the lower depths of Dystopia. Rather, it is arguably in limbo, trapped in a descending spiral toward Dystopia that could appropriately be denominated as “Trumptopia.” To escape this end, this article proposes that society needs to reintroduce a utopian element into its vision for America’s destiny while simultaneously recognizing the confines of the reality created by the status quo. In this manner, it can embrace the idea of a “usable future,” one filled with reasonable hope for something better and where what is yet to come remains to be imagined and realized.²³ Such a “usable future” will “seek to steer the community conscientiously (if sometimes in a counter-majoritarian fashion) away from the horrors of Dystopia (and what may lead to it) toward what is realistic and achievable of Utopia.”²⁴

Specifically, this piece will highlight the essential role that a free press will play in this endeavor. It will further suggest that positive portrayals in

18. KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE (Routledge 2002) (1963).

19. Keith Aoki, *Welcome to Amerizona-Immigrants Out: Assessing Dystopian Dreams and Usable Futures of Immigration Reform, and Considering Whether Immigration Regionalism Is an Idea Whose Time Has Come*, 38 FORDHAM URB. L.J. 1, 32 (2010) (Regarding the future, “[t]he alarmist sees severe uncertainty and likelihood of dystopia without urgent thought and planning” while “[t]he pessimist believes all that can be hoped for is better-than-dystopia.”).

20. Jean-Jacques Rousseau, *Of the Social Contract*, in OF THE SOCIAL CONTRACT AND OTHER POLITICAL WRITINGS (Christopher Bertram ed., Quintin Hoare trans., Penguin Classics 2012) (1762).

21. Van Milders, *supra* note 13.

22. Ken Booth, *Security in Anarchy: Utopian Realism in Theory and Practice*, 67 INT’L AFF. 527, 536 (1991) (arguing that a utopian element should be reintroduced in International Relations theory).

23. Aoki, *supra* note 19, at 32.

24. *Id.*

popular culture of the free press, particularly via film, have been and can continue to be a powerful instrument for good by reminding the public of the imperative for a free press if society is ever to attain what might be termed a “Realistic Utopia.”

First, the ground work will be laid establishing the threat to, and the attack upon, the free press under the Trumptopian regime. The primary focus of this section will be upon the impact of the Trump Administration’s attack on the free press in terms of its ramifications domestically. Simultaneously, however, it is important to recognize that Trump’s attack on the media is arguably affecting members of the foreign press corps who face danger and risk or even lose their lives as they strive to bring truth to light.²⁵ Popular Culture has contributed to this recognition via a number of films, such as *Missing*²⁶ and *The Killing Fields*,²⁷ which bring to life true tales of fearless reporting. Another powerful film demonstrating the courage and commitment of certain members of the press corps, *A Mighty Heart*,²⁸ is based upon the memoir by Mariane Pearl.²⁹ This moving work recounts the days surrounding the kidnapping and ultimate beheading of her journalist husband, Daniel, by terrorists in Pakistan.³⁰ In particular, the heinous murder of journalist Jamal Khashoggi demonstrates the substantial dangers journalists face in their pursuit of truth.³¹ In 2018, the human rights organization, Article 19, reported that “78 journalists were killed last year while doing their job.”³² In addition, the number of reprisal murders of journalists because of their work soared to thirty-four killings in 2018, as compared to eighteen in 2017, thereby reaching the highest number in three years.³³ According to these numbers, working as a journalist “is more

25. Rick Gladstone, *Not Just Khashoggi: Reprisal Killings of Journalists Surged This Year*, N.Y. TIMES (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/world/middleeast/journalist-deaths-2018.html>.

26. MISSING (PolyGram Filmed Entertainment 1982).

27. THE KILLING FIELDS (Golderest Films International et al. 1984).

28. A MIGHTY HEART (Paramount Vantage et al. 2007).

29. MARIANE PEARL, *A MIGHTY HEART: THE BRAVE LIFE AND DEATH OF MY HUSBAND*, DANNY PEARL (2003).

30. *Id.* Pearl’s sacrifice resulted in the enactment of the Daniel Pearl Freedom of the Press Act of 2009. Daniel Pearl Freedom of the Press Act of 2009, Pub. L. No. 111-166, 124 Stat. 1186 (codified at 22 U.S.C. § 2151 (2010)).

31. See Lawrence Wright, *A Memorial for Jamal Khashoggi*, NEW YORKER (Jan. 9, 2019), <https://www.newyorker.com/news/daily-comment/a-memorial-for-jamal-khashoggi>.

32. Jim Waterson, *Threat to Journalists at Highest Level in 10 years, Report Says*, GUARDIAN (Dec. 4, 2018, 7:01 PM), <https://www.theguardian.com/media/2018/dec/05/threat-journalists-highest-level-10-years-report>.

33. See Gladstone, *supra* note 25.

dangerous” and the free media is “more under threat—than at any point in the last decade. . . .”³⁴

There is growing evidence that Donald Trump’s approach of demonizing reporters as “nasty” and “terrible” and “damning mainstream outlets as purveyors of fake news . . . is emboldening others, from Hungary to the Philippines, Albania and Canada.”³⁵ According to Thomas Hughes, the Executive Director of Article 19, “hostility towards the media is becoming normalized around the world, amid a proliferation of ‘strongman’ populist leaders who have echoed the language of the U.S. president and vilified journalists simply for doing their jobs.”³⁶ The result is that “[t]he price of protecting the right to freedom of expression and information has become extremely high: death, detention, and fear loom large for communicators and activists across the globe, and the space for meaningful discussion and communication is under siege”³⁷

That the frequency of such disturbing incidents is on the rise throughout both the United States and the world is a strong indicia the pernicious reality of the Trumptopian disdain for the members of the press may have become a virus that is now infecting global perspectives about the institution.³⁸ Despite the evidence, Trump has continued to lambaste the press even in the face of being advised to desist due to the influence his chastisements were having internationally. On July 20, 2018, A. G. Sulzberger, the new publisher of the *New York Times*, accepted President Trump’s invitation to meet with him in the Oval Office.³⁹ While Sulzberger had not been told the purpose of the

34. Waterson, *supra* note 32.

35. *Id.*

36. *Id.*

37. *Id.* (quoting Thomas Hughes, Executive Director of the human rights organization, Article 19.); see also Uri Friedman, *The Real-World Consequences of ‘Fake News,’* ATLANTIC (Dec. 23, 2017), <https://www.theatlantic.com/international/archive/2017/12/trump-world-fake-news/548888/>.

The phrase [fake news] has escaped the confines of the American president’s Twitter feed. Bashar al-Assad and other Syrian officials have trotted out the expression to reject evidence that the government summarily executed prisoners and massacred civilians with chemical weapons. The Chinese military just launched a website for the public to report ‘fake news,’ including ‘malicious posts,’ about the People’s Liberation Army, while the Russian foreign Ministry now operates a webpage where international media reports that it considers problematical are slapped with a bright-red ‘FAKE’ stamp.

Id.

38. See, e.g., Patrick Kingsley, *Hungarian Site Shows How a Free Press Can Die*, N.Y. TIMES, Nov. 24, 2018, at A1; National Press Club, *National Press Club Calls for Probe of Murdered Ghanaian Reporter*, (Jan. 25, 2019, 9:57 AM), <https://www.prnewswire.com/news-releases/national-press-club-calls-for-probe-of-murdered-ghanaian-reporter-300784322.html>.

39. David Remnick, *Trump vs. the Times: Inside an Off-the-Record Meeting*, NEW YORKER (July 30, 2018), <https://www.newyorker.com/news/news-desk/trump-vs-the-times-inside-an-off-the-record-meeting>. Sulzberger was accompanied at the session by James Bennet. *Id.*

meeting, Trump soon made it clear that his motive was to brag about his accomplishments since taking office and complain about the negative press coverage he was receiving from the “failing” *New York Times* and other “fake news” outlets.⁴⁰

At the meeting, which was supposed to have been “off the record” at the President’s request, Sulzberger expressly told the president that his “deeply troubling anti-press rhetoric’ [was] ‘not just divisive but increasingly dangerous.’”⁴¹ Only nine days after their conversation, Trump broke the confidentiality that was to have surrounded their meeting by tweeting about it:

Had a very good and interesting meeting at the White House with A.G. Sulzberger, Publisher of the New York Times. Spent much time talking about the vast amounts of Fake News being put out by the media & how the Fake News has morphed into phrase, “Enemy of the People.” Sad!⁴²

In light of Trump’s mischaracterization of their exchange, Sulzberger felt compelled to immediately pen and publish a statement in reply.⁴³ In his statement, Sulzberger pushed back at the President’s rhetoric, observing that foreign leaders in marginally democratic countries such as the Philippines, China, Syria, Myanmar, Venezuela and Cambodia, were imitating the

40. *Id.*

41. *Id.*

42. Donald J. Trump (@realDonaldTrump), TWITTER (July 29, 2018, 5:30 AM), <https://twitter.com/realDonaldTrump/status/1023546197129224192>; see also *New York Times Publisher Asked Trump to Tamp Down Anti-Press Rhetoric at White House Meeting*, CBS NEWS (July 29, 2018, 11:26 AM), <https://www.cbsnews.com/news/trump-tweets-he-met-with-new-york-times-publisher-a-g-sulzberger-at-white-house/>.

43. Statement of A.G. Sulzberger, Publisher, The New York Times:

My main purpose for accepting the meeting was to raise concerns about the president’s deeply troubling anti-press rhetoric.

I told the president directly that I thought that his language was not just divisive but increasingly dangerous.

I told him that although the phrase ‘fake news’ is untrue and harmful, I am far more concerned about his labeling journalists ‘the enemy of the people.’ I warned that this inflammatory language is contributing to a rise in threats against journalists and will lead to violence.

I repeatedly stressed that this is particularly true abroad, where the president’s rhetoric is being used by some regimes to justify sweeping crackdowns on journalists. I warned that it was putting lives at risk, that it was undermining the democratic ideals of our nation, and that it was eroding one of our country’s greatest exports: a commitment to free speech and a free press.

Throughout the conversation I emphasized that if President Trump, like previous presidents, was upset with coverage of his administration he was of course free to tell the world. I made clear repeatedly that I was not asking for him to soften his attacks on the Times if he felt our coverage was unfair. Instead, I implored him to reconsider his broader attacks on journalism, which I believe are dangerous and harmful to our country.

Press Statement, A.G. Sulzberger, Publisher, The New York Times, In Response to President Trump’s Tweet About Their Meeting, (July 29, 2018), <https://www.nytc.com/press/statement-of-a-g-sulzberger-publisher-the-new-york-times-in-response-to-president-trumps-tweet-about-their-meeting/>.

President to criticize the media in their own countries in order to minimize their regimes' human rights abuses.⁴⁴

The Publisher went further to warn the President that his characterization of the press as “enemies of the people” was even more disturbing because it was reminiscent of Communist Russia and its totalitarian dictators of the 1950s.⁴⁵ In America, journalists were now getting physical threats, with news offices forced to hire armed guards. Even worse, journalists overseas were being killed or imprisoned.⁴⁶

Trump's reaction to the publisher's statement was predictable. He made it clear in a barrage of tweets that he had no intention of “rethinking the phrase ‘enemies of the people.’” Instead, he made it abundantly clear that his position was unchanged and that it was the “insane” media that poses the “true danger.”⁴⁷ Since February 17, 2017, when Trump first employed the phrase “enemy of the people” by tweeting “The FAKE NEWS media (failing New York Times, NBC News, ABC, CBS, CNN) is not my enemy, it is the enemy of the American People!”⁴⁸ He has proudly taken “credit for popularizing,” if not inventing, the term.⁴⁹ However, his response to Salzberger's entreaties to temper his dangerous and inflammatory language indicates that in his view, any repercussions that might flow from his actions are clearly not his problem. Further, the President seems unwilling to recognize, or perhaps doesn't care, or is even proud of the fact, that his vitriolic characterization of the media as “enemies of the people” evokes echoes of dangerous regimes, tyrants, and “murderous dictators” of the past,

44. See Remnick, *supra* note 39.

45. *Id.*

46. *Id.*

47. *Id.*

A portion of the tweets sent by Trump in response to Sulzberger's statement read as follows:

When the media—driven insane by their Trump Derangement Syndrome—reveals internal deliberations of our government, it truly puts the lives of many, not just journalists, at risk! Very unpatriotic! Freedom of the press also comes with a responsibility to report the news [A]ccurately. 90% of media coverage of my Administration is negative, despite the tremendously positive results we are achieving, it's no surprise that confidence in the media is at an all time low! I will not allow our great country to be sold out by anti-Trump haters in the
 . . . [D]ying newspaper industry. No matter how much they try to distract and cover it up, our country is making great progress under my leadership and I will never stop fighting for the American people! As an example, the failing New York Times . . .
 . . . [A]nd the Amazon Washington Post do nothing but writer bad stories even on very positive achievements—and they will never change!

Id.

48. Michael M. Grynbaum, *Challenge to President and His View of News*, N.Y. TIMES, Feb. 1, 2019, at A14.

49. *Id.* See *infra* notes 74-82 and accompanying text for a more detailed discussion of the term “fake news.”

including the Roman Emperor, Nero, Propaganda Minister for the Third Reich, Joseph Goebbels, and the Soviet Leader, Joseph Stalin.⁵⁰

This article will next consider the role of the courts in combating the erosion of freedom of, and trust in, the press. A recent 2019 ruling by the Honorable Mark Walker, U.S. District Court Judge for the Northern District of Florida, and the Supreme Court's 1998 decision in *Hustler Magazine v. Falwell* and the film based upon this case serve as the cornerstones of this section.

Finally, this piece will underscore Trump's false agitprop about the free press which he primarily disseminates via Twitter in order to circumvent the filter of the maligned media.⁵¹ As will be illustrated, film portrayals of the press based upon and inspired by true events clearly demonstrate that the Fourth Estate is not the enemy of the people. Rather it can be a heroic institution which, often with the assistance of attorneys and the courts, valiantly brings to light government cover-ups and corruption.⁵² The cinema also imparts to viewers true tales of intrepid reporters who, along with members of the legal community, uncover stories which bring awareness and aid in stopping acts of oppression, cruelty, or suffering.⁵³

II. THE BLEAK LANDSCAPE OF POST-TRUTH TRUMPTOPIA.

A. 2019 or Is It 1984?

That American society is currently courting a dystopian future is illustrated by comparing the Trump administration's tactics and methodologies with those found in George Orwell's brilliant portrait of a

50. Veronika Bondarenko, *Trump Keeps Saying 'Enemies of the People'—but the Phrase Has a Very Ugly History*, BUS. INSIDER (Feb. 27, 2017, 11:25 AM), <https://www.businessinsider.com/history-of-president-trumps-phrase-an-enemy-of-the-people-2017-2>; see also Andrew Higgins, *Phrase with a Venomous Past Now Rattles American Politics*, N.Y. TIMES, Feb. 26, 2017, at A1; *'Enemies of the People': Trump Remark Echoes History's Worst Tyrants*, BBC NEWS (Feb. 18, 2017), <https://www.bbc.com/news/world-us-canada-39015559>.

51. Trump's excessive use of Twitter has been compared to a new twist on Franklin Roosevelt's fireside chats. Matt Lewis, Opinion, *Trump and Twitter: A Latter-Day 'Fireside Chat'*, TAMPA BAY TIMES (Nov. 23, 2016), <http://www.tampabay.com/opinion/columns/matt-lewis-trump-and-twitter-a-latter-day-fireside-chat/2303981> ("With Twitter, Trump is able to go around the media filter. This was sometimes true with TV (Reagan would certainly use TV to go over the heads of his critics), but the last time a medium allowed a president to do such a thing to this degree was when FDR used the 'fireside chat.'").

52. See THE POST (Twentieth Century Fox et al. 2017).

53. See SPOTLIGHT (Participant Media et al. 2015).

dystopian world in *1984*.⁵⁴ This classic, cautionary tale brings to life the country of Oceania, where the society is one of perpetual war, surveillance, and propaganda. One of its key characteristics is the lack of any dissemination of accurate information. Instead, “whatever the Party holds to be truth is truth” and the primary job of “the Ministry of Truth” is to rewrite the history and documentation of the State in order to coincide with the current policies and interpretation of the ruling party.⁵⁵ In essence, its *raison d’être* is to lie and keep the people ignorant of what is really going on behind the scenes. It effectively achieves this goal by employing “doublethink,” a part of “Newspeak,” the official language of the ruling Party.⁵⁶ Newspeak reduces the number of words in the language in order to “narrow the range of thought” in order to make “thoughtcrime [any thoughts diverging from the principles of the ruling party] literally impossible, because there will be no words in which to express it.”⁵⁷

In Trumptonia, such concepts are alive and well. Trump is a master of doublethink which, according to the novel, is:

To know and not to know, to be conscious of complete truthfulness while telling carefully constructed lies, to hold simultaneously two opinions which cancelled out, knowing them to be contradictory and believing in both of them, to use logic against logic, to repudiate morality while laying claim to it, to believe that democracy was impossible and that the Party was the guardian of democracy, to forget whatever it was necessary to forget, then to draw back into memory again at the moment when it was needed, and then promptly to forget it again . . .⁵⁸

In Trumptonia, Trump, or his surrogates, blatantly lie about things which are clearly false and provably untrue. Then, rather than try to convince the public that it’s true, they will just insist that the lie be treated as *true*. There are no falsehoods issued by the administration in Trumptonia. There are simply “*alternative facts*.”⁵⁹ It can be maintained that the “animating principle” of Trump’s campaign against the mainstream media is to create such a low public opinion of journalism that he is able to peddle his own version of reality, irrespective of its adherence to the truth.⁶⁰ “To be able to

54. GEORGE ORWELL, *1984* (Signet Classics 1950) (1949). There are also two excellent film versions of the novel. 1984 (Virgin Films & Umbrella-Rosenblum Films Production 1984); 1984 (Holiday Film Productions Ltd. 1956).

55. ORWELL, *supra* note 54.

56. See Jean Seaton, *Why Orwell’s 1984 Could Be About Now*, BBC: CULTURE (May 7, 2018), <http://www.bbc.com/culture/story/20180507-why-orwells-1984-could-be-about-now>.

57. ORWELL, *supra* note 54, at 52.

58. *Id.* at 35.

59. Jim Rutenberg, *The Costs of Trump’s Brand of Reality*, N.Y. TIMES, Jan. 22, 2017, at B1.

60. *Id.*

constantly lie and get people to accept contrary statements is, after all, an assertion of power. And it's a type of power Trump understands all too well."⁶¹ It can be maintained that Trump's lies are not merely "incidental to his approach to politics but essential to it," that the President "sees lying as the source of his authority rather than something that undermines it."⁶²

The effect of the barrage of false and misleading statements by Trump and his administration is two-fold: it allows Trump to cater to the current audience and change his position the next day if necessary to appeal to a different audience, plus, and most importantly, it "creates a post-truth world where Trump's assertion of the moment is the only thing that counts."⁶³ Arguably, in this post-truth world, it isn't that the public is unaware that Trump is lying to them. Rather, some are simply willing to sacrifice the importance of truth in favor of their allegiance to one man. Others are simply so worn down by the barrage of intentional and systematic lies that they stop trying to discern what is true.⁶⁴ As Orwell noted, "if thought corrupts language, language can also corrupt thought."⁶⁵ The result is that if you "[a]ssert anything often enough and with enough vigor," the people will ultimately believe it.⁶⁶ Trump has instinctually discerned that if he "constantly repeat[s] that he's a winner" or "that people love him . . . he can marginalize the non-believers."⁶⁷ As in Orwell's Oceania, if Trump says $2+2=5$ often enough and the populous repeats it, it must be the de facto truth.⁶⁸

In 1984, the "final, most essential command" of the ruling totalitarian regime is "to reject the evidence of your eyes and ears."⁶⁹ Recently, similar words rang out in Trumptonia at a gathering of Veterans of Foreign Wars

61. Jeet Heer, *Trump's Lies Destroy Logic as Well as Truth*, NEW REPUBLIC (Nov. 28, 2016), <https://newrepublic.com/article/139025/trumps-lies-destroy-logic-well-truth>.

62. *Id.*

63. *Id.*

64. Maggie Fox, *Some Experts Say Trump Team's Falsehoods Are Classic 'Gaslighting'*, NBC NEWS (Jan. 25, 2017, 5:55 AM), <https://www.nbcnews.com/better/wellness/some-experts-say-trump-team-s-falsehoods-are-classic-gaslighting-n711021> (summarizing Robert Feldman, a psychologist and deputy chancellor at the University of Massachusetts).

65. GEORGE ORWELL, *POLITICS AND THE ENGLISH LANGUAGE* 16 (Penguin Modern Classics 2013) (1946).

66. Julie Wittes Schlack, *Pure Wind: Using '1984' to Understand Election 2016*, WBUR: COGNOSCENTI (Feb. 24, 2016), <https://www.wbur.org/cognoscenti/2016/02/24/make-oceania-great-again-julie-wittes-schlack>.

67. *Id.*

68. *Id.* The reference of $2+2=5$ is to the scene in the film where the main character, Winston, is being tortured and is forced to admit that five fingers are being held up when in truth, he knows that there are only four. Because if the party says that $2+2=5$, it is reality. 1984 (Virgin Films & Umbrella-Rosenblum Films Production 1984).

69. ORWELL, *supra* note 54, at 81.

(VFW) in Kansas City, when President Trump implored his audience to forget about what they see and read—and instead just listen to him.⁷⁰

“Don’t believe the crap you see from these people, the fake news,” Trump said, pointing at reporters as the crowd broke out in boos.⁷¹ “Just remember, what you’re seeing and what you’re reading is not what’s happening.”⁷²

One might add, “Oceania was at war with Eurasia: therefore Oceania had always been at war with Eurasia.”⁷³

Consequently, it is not surprising that, like in Oceania, one of the overarching characteristics of Trumptopia is a continued attack on the value and credibility of the press, the watchman guarding truth and honesty.⁷⁴

B. *Would the True “Enemy of the People” . . .*

Please step forward.

While candidate Trump frequently treated the press with great disdain,⁷⁵ once elected, he escalated his war against the free press when he branded it

70. Shane Croucher, *Trump Warns Veterans in Kansas: Don’t Believe ‘Crap’ Fake News Media Tells You*, NEWSWEEK (July 25, 2018, 4:36 AM), <https://www.newsweek.com/trump-warns-veterans-kansas-dont-believe-crap-fake-news-media-tells-you-1040992>.

71. *Id.*

72. *Id.*

73. ORWELL, *supra* note 54, at 34. In Part I, Chapter 3 of *1984*, the main character, Winston, remembers that only four years ago Oceania was at war with Eastasia and allied with Eurasia. *Id.* at 34-35. Irrespective of the truth, the Party claims that Oceania has always been at war with Eurasia and allied with Eastasia. *Id.* at 34. In this altering of the past, the Party is aided by “reality control,” in Newspeak called *doublethink*, a mental process by which a Party member can accept a lie as truth and then forget that truth was ever a lie. *Id.* at 35.

74. Another outstanding example of a dystopian world where all information to the masses is controlled by the government is RAY BRADBURY, *FAHRENHEIT 451* (Simon & Schuster 2012) (1953). Set in the twenty-fourth century, both the book and the film versions of the novel introduce a new world where the masses are controlled by the media and censorship. *Id.*; *FAHRENHEIT 451* (HBO Films 2018). The majority of people are addicted to the media as if on opioids; books, which threaten the hold the regime has over the masses because they might cause a person to question the status quo or ponder alternatives, are illegal and must be burned. *Id.* While the collective is glorified, the individual or intellectual is vilified. *Id.* It is a world with no past or history and television now constitutes one’s family. *Id.* All that matters is the present as defined by the news delivered via large screen television which has basically brainwashed the population. *Id.*

75. For example, in February of 2016, Trump promised to launch a full-fledged assault on the free press by expanding libel laws “so when they write purposely negative and horrible and false articles, we can sue them and win lots of money.” Jason Easley, *Trump Threatens to End the Freedom of the Press If He Is Elected President*, POLITICUSUSA (Aug. 14, 2016), <https://www.politicususa.com/2016/08/14/trump-threatens-freedom-press-elected-president.html>.

“the enemy of the [American] people.”⁷⁶ Trump continued to attack the public image and reputation of the media when speaking to CPAC in 2017:

A few days ago, I called the fake news the enemy of the people, and they are. They are the enemy of the people. They have no sources, they just make them up when there are none. I saw one story recently where they said nine people have confirmed. There are no nine people, I don't believe there were one or two people. Nine people! And I said, 'Give me a break, I know the people, I know who they talk to. There were no nine people.' But they say nine people and somebody reads it and thinks, 'Oh, nine people, they have nine sources.' They make up sources. They are very dishonest people. In fact, in covering my comments, the dishonest media did not explain that I called the fake news the enemy of the people, the fake news. They dropped off the word 'fake,' and all of a sudden, the story became the media is the enemy. They take the word 'fake' out and now I'm saying, 'Oh, no, this is no good.' But that is the way they are.⁷⁷

President Trump also relishes taking credit for inventing the term “fake news.”⁷⁸ In October of 2017, during an interview with Mike Huckabee, Trump described the media as follows: “The media is really, the word, one of the greatest of all terms I've come up with, is 'fake.’”⁷⁹ He went on to note that while others might have used the word, he wasn't aware of it. “And it's a shame. And they [the media] really hurt the country.”⁸⁰

Actually, the term has existed for centuries, perhaps even dating back to the invention of the printing press by Gutenberg in 1439.⁸¹ It appears that the term “fake” may be traced to the “‘flash’ language” or “secret slang of 19th century criminals.”⁸² For example, a portion of “an extract from *A New and Comprehensive Vocabulary of the Flash Language*, a dictionary of criminal slang compiled by James Hardy

76. Michael M. Grynbaum, *Trump Calls the News Media the 'Enemy of the American People,'* N.Y. TIMES, Feb. 17, 2017, at A15.

77. President Donald Trump, Excerpt of Address at the Conservative Political Action Conference (Feb. 25, 2017), <https://grabien.com/story.php?id=91091>.

78. Chris Cillizza, *Donald Trump Just Claimed He Invented 'Fake News,'* CNN: POLITICS (Oct. 26, 2017, 2:15PM), <https://www.cnn.com/2017/10/08/politics/trump-huckabee-fake/index.html>; Steve Coll, *Donald Trump's "Fake News" Tactics,* NEW YORKER (Dec. 3, 2017), <https://www.newyorker.com/magazine/2017/12/11/donald-trumps-fake-news-tactics>.

79. Cillizza, *supra* note 78.

80. *Id.*

81. Bente Kalsnes, *Fake News,* OXFORD RESEARCH ENCYCLOPEDIA: COMM'N (Sept. 2018), <https://perma.cc/3DJY-WD8D> (Historian Jacob Soll “explains that as printing expanded, so did fake news, appearing as spectacular stories of sea monsters and witches or claims that sinners were responsible for natural disasters.”).

82. Paul Anthony Jones, *'Fake' Etymology: The Story Behind One of the Dictionary's Most Intriguing Words,* MENTAL FLOSS (Mar. 7, 2017), <http://mentalfloss.com/article/92556/fake-etymology-story-behind-one-dictionary-s-most-intriguing-words>.

Vaux in 1819,” provides “the earliest known record of the current meaning of *fake*”:

To fake any person or place, may signify to rob them; to fake a person, may also imply to shoot, wound, or cut; to fake a man out and out, is to kill him; a man who inflicts wounds upon, or otherwise disfigures, himself, for any sinister purpose, is said to have faked himself; if a man’s shoe happens to pinch, or gall his foot, from its being overtight, he will complain that his shoe fakes his foot sadly; it also describes the doing of any act, or the fabricating any thing, as, to fake your slangs, is to cut your irons in order to escape from custody; to fake your pin, is to create a sore leg, or to cut it, as if accidentally, with an axe, etc., in hopes to obtain a discharge from the army or navy, to get into the doctor’s list, etc.; to fake a screeve, is to write a letter, or other paper; to fake a screw, is to shape out a skeleton or false key, for the purpose of screwing a particular place; to fake a cly, is to pick a pocket; etc., etc., etc.⁸³

Historically, the term was certainly employed by newspapers in 1890 and 1891 “in connection with false information.”⁸⁴ In 2017, Dictionary.com added the term to its site defining it as “[f]alse news stories, often of a sensational nature, created to be widely shared online for the purpose of generating ad revenue via web traffic or discrediting a public figure, political movement, company, etc.”⁸⁵

Trump continues not only to take credit for the phrase “fake news” but is inordinately proud of having “successfully convinced the American [public] that the media is ‘fake news.’”⁸⁶ “‘If you look at it from the day I started running to now [October 2017], I’m so proud that I have been able to convince people how fake [the media] is—because it has taken a nosedive. . . .”⁸⁷

Trump’s disdain for members of the independent press is clearly illustrated by the events leading up to the revocation of the White House credentials of journalist Jim Acosta, the Chief White House Correspondent

83. *Id.*

84. Kalsnes, *supra* note 81 (“The Merriam-Webster Dictionary cites newspapers such as The Cincinnati Commercial Tribune, The Kearney Daily Hub, and The Buffalo Commercial that all used the term fake news in articles from 1890 and 1891 in connection with false information.”).

85. Cillizza, *supra* note 78.

86. Jacqueline Thomsen, *Trump: I ‘Really Started This Whole Fake News Thing,’* THE HILL (Oct. 25, 2017, 7:40 PM), <https://thehill.com/homenews/administration/357225-trump-i-really-started-this-whole-fake-news-thing> (During an interview with Fox Business Network’s Lou Dobbs, Trump stated “that he takes credit for branding the media as ‘fake’ and that he ‘really started this whole fake news thing.’”).

87. *Id.*

for CNN.⁸⁸ At the first press conference after the midterm election in the fall of 2018, in response to some hard questions about whether the migrant caravan heading toward Mexico was really an invasion or whether the President was concerned by the indictments resulting from the Mueller investigation, the President, visibly angry, responded, telling Acosta that “‘CNN should be ashamed of itself having you work for them. You are a rude, terrible person.’”⁸⁹ Later at the conference, Acosta spoke up again, this time questioning the President’s “reference to the ‘fake news media’ as the ‘enemy of the people,’ and the pipe bombs that were sent to CNN.”⁹⁰ The President replied “‘When you report fake news, which CNN does a lot, you are the enemy of the people.’”⁹¹

In response to the revocation, CNN brought a lawsuit arguing that the actions by the White House violated Acosta’s First and Fifth Amendment rights to free speech and due process.⁹² The network prevailed when a federal district “granted the network’s request for a temporary restraining order restoring Acosta’s White House press badge.”⁹³ While Mr. Acosta’s badge was ultimately restored, the administration capitalized on the event by employing it as a catalyst to implement “a set of formal rules” to regulate the behavior of reporters “at future White House news conferences, a highly unusual step.”⁹⁴

An even more disturbing consequence of Trump’s anti-press rhetoric occurred in February 2019, when a BBC cameraman, Ron Skeans, was physically attacked by a Trump supporter at a rally being held to increase support for Trump’s proposed border wall with Mexico.⁹⁵ According to the

88. Michael M. Grynbaum, *CNN’s Press Pass Restored by White House*, N.Y. TIMES, Nov. 19, 2018, at A16.

89. Ted Johnson, *Trump Rips into CNN’s Jim Acosta: ‘You Are a Rude, Terrible Person,’* VARIETY (Nov. 7, 2018, 9:49 AM), <https://variety.com/2018/politics/news/trump-slams-cnn-jim-acosta-rude-terrible-person-1203022034/>.

90. *Id.*

91. *Id.*

92. Complaint, *Cable News Network v. Trump*, 2018 WL 5920424 (D.D.C. 2018); Maxwell Tani & Asawin Suebsaeng, *CNN, Jim Acosta Beat White House: Judge Orders Press Pass Must Be Restored*, DAILY BEAST (Nov. 16, 2018, 10:26 AM), <https://www.thedailybeast.com/cnn-wins-legal-battle-against-trump-over-acostas-press-access>.

93. Tani & Suebsaeng, *supra* note 92.

94. Grynbaum, *supra* note 88. A few months later, Acosta again pressed Trump at a news conference after the President declared a National Emergency at the border with Mexico. Pilar Melendez, *Trump Spars with CNN’s Jim Acosta During National Emergency Speech: ‘You’re Fake News,’* DAILY BEAST (Feb. 15, 2019, 7:27 PM), <https://www.thedailybeast.com/trump-spats-with-acosta-during-national-emergency-speech-youre-fake-news>. This time Trump accused Acosta of having an agenda. “You’re CNN. You’re fake news. You have an agenda.” *Id.*

95. Iliana Magra, *BBC Cameraman Is Attacked at Trump Rally*, N.Y. TIMES (Feb. 12, 2019), <https://www.nytimes.com/2019/02/12/us/politics/bbc-cameraman-attacked.html>.

reporter working with Skeans, Gary O'Donoghue, the assault occurred after a "tirade by the President against the press, in which he accused the media of failing to acknowledge his achievements and claimed '93% of the stories are negative.'"96 O'Donoghue further noted that the "goad[ing] of the crowds against the media" is a "constant feature" of Trump rallies.⁹⁷

In light of Trump's repeated attacks on a free and independent press, it is not surprising that the administration has been censured and the United States downgraded in terms of the safety it affords its journalists.

In August 2018, United Nations Special Rapporteur, David Kaye, and Edison Lanza, the Special Rapporteur on freedom of expression for the Inter-American Commission on Human Rights, "condemned U.S. President Donald Trump's repeated attacks on the free press and urged him and his administration to cease efforts to undermine the media's role of holding government accountable, honest and transparent."⁹⁸

The condemnation stemmed from the President's strategic attacks on the press "designed to undermine confidence in reporting and raise doubts about verifiable facts" resulting from his labelling of the media as the "'enemy of the American people' 'very dishonest' or 'fake news,' and accus[ing] the press of 'distorting democracy' or spreading 'conspiracy theories and blind hatred.'"99

The UN and Inter-American Human Rights Commission experts on freedom of expression found that Trump's attacks on the press "run counter to the country's obligations to respect press freedom and international human rights law" and were "especially concerned that these attacks [would] increase the risk of journalists being targeted with violence."¹⁰⁰ They "strongly urge[d] that President Trump and his administration and his supporters end these attacks."¹⁰¹

In its 2019 World Press Freedom Index, the international press freedom organization, Reporters Sans Frontiers, downgraded the United States three spots from the previous year.¹⁰² It is now ranked at 48 out of 180 countries

96. Rosa Prince, Opinion, *With Attack on BBC Cameraman, Trump's Anti-Media Speech Has Been Weaponized*, CNN (Feb. 13, 2019, 3:35 AM), <http://www.cnn.com/2019/02/12/opinions/trump-bbc-cameraman-attack-speech-weaponized-prince/index.html>.

97. *Id.*

98. *Trump Attacks on Media Violate Basic Norms of Press Freedom, Human Rights Experts Say*, U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS (Aug. 2, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23425>.

99. *Id.*

100. *Id.*

101. *Id.*

102. Sanjana Karanth, *U.S. Press Freedom Gets Labeled 'Problematic' for the First Time*, HUFFPOST (Apr. 19, 2019, 12:08 AM), https://www.huffpost.com/entry/united-states-press-freedom-problematic-report_n_5cb93834e4b06605e3ed16e3.

in terms of a free press, having lost its status as a “satisfactory” place to work freely and being labeled “problematic” for the first time.¹⁰³ According to the report “‘Never before have U.S. journalists been subjected to so many death threats or turned so often to private security firms for protection’”¹⁰⁴

Clearly, in Trumptopia, the Fourth Estate is not safe to perform its all important job as the informer and protector of the constitutional rights of the people.

C. *Gaslighting the Public.*

A more disturbing issue is Trump’s “gaslighting” of the public to shape its opinion of the press.¹⁰⁵ A well-established psychological phenomenon, the term gaslighting comes from a 1938 Broadway play, *Angel Street*, written by Patrick Hamilton which was the basis for George Cukor’s 1944 academy award winning classic, *Gaslight*.¹⁰⁶ The film is a brilliant, psychological mystery/thriller which stars Ingrid Bergman as Paula, a newlywed, unaware that her seemingly charming husband, Charles Boyer, is a crazed murderer. After they move into her family’s Victorian mansion, he schemes to drive her insane while he searches for a hidden cache of rubies.¹⁰⁷ The definition of the term is fairly specific: gaslighting is a type of psychological manipulation where a person lies for their own gain to another individual or group they have targeted so repeatedly and with so much conviction that

103. *Id.*

104. Sasha Ingber, *The U.S. Ranks as a ‘Problematic’ Place for Journalists*, NPR (Apr. 18, 2019, 5:13 PM), <https://www.npr.org/2019/04/18/714625907/the-u-s-now-ranks-as-a-problematic-place-for-journalists> (quoting from the WorldPress Freedom Index report).

105. It has also been maintained that Trump has gaslighted members of the press, using them to further his own agenda by playing to their insatiable need for a story. “[B]y allowing Trump to drive the news cycle, he appears powerful to his followers, which is central to his strongman mystique.” Steve Almond, *The Media Needs a New Set of Rules for Covering Trump*, WBUR: COGNOSCENTI (Nov. 16, 2018), <https://www.wbur.org/cognoscenti/2018/11/16/media-coverage-of-trump-steve-almond>; see also Frank Bruni, Opinion, *Will the Media Be Trump’s Accomplice Again in 2020?* N.Y. TIMES, Jan. 11, 2019, § SR, at 1; Glenn Harlan Reynolds, Opinion, *Trump Is Playing with the Press: Glenn Reynolds*, USA TODAY (Jan. 27, 2017, 10:54 AM), <https://www.usatoday.com/story/opinion/2017/01/26/white-house-press-media-donald-trump-glenn-reynolds-column/97042872/>.

106. Alissa Wilkinson, *What Is Gaslighting: The 1944 Film Gaslight Is the Best Explainer.*, VOX (Jan. 21, 2017, 10:00 AM), <https://www.vox.com/culture/2017/1/21/14315372/what-is-gas-lighting-gaslight-movie-ingrid-bergman>.

107. GASLIGHT (Metro-Goldwyn-Mayer 1944). The title refers to the fact that in Victorian England, the lighting fixture were all gas flame and when one was lit, the gas supply to other fixtures nearby was reduced, so they dimmed. The problem for Ingrid Bergman is that lights are dimming when no one else in the house has lit any other lights. In addition, she hears footsteps overhead coming from an Attic that is nailed shut. In addition, neither of the two servants sees or hears either of these signs. *Id.*

those being lied to start to “doubt their own memory, perception, and reality.”¹⁰⁸ By utilizing “persistent lying, misdirection, and contradiction, the gaslighter attempts to delegitimize the victim’s beliefs by confusing and destabilizing them.”¹⁰⁹ In addition, as seen in the film, “a bit of Stockholm Syndrome develops as well: The victim, now uncertain she can perceive reality correctly, becomes dependent on the gaslighter, more attached to him than ever.”¹¹⁰ There is no question that Trump and his staff are employing this psychological tactic in a very sophisticated manner “to manipulate his supporters into doubting their reality.”¹¹¹ What is mind boggling is the fact that in Trumptopia, the Executive Branch “lies about things that are so easily contradicted” which “is amazing in terms of the degree of arrogance and the lack of respect that it shows for the American people’”¹¹²

A prime example is the falsehood told about the number of attendees at Trump’s inauguration. Despite multiple images which showed a much lower in-person turn out for Trump’s inauguration than that of Barack Obama in 2009, which was estimated at 1.8 million, Trump was angered when the media estimated attendance “at around 250,000.”¹¹³ Still angry, on his first full day in office, when the president visited the CIA, he “immediately attacked the press [commenting] ‘[a]s you know, I have a running war with the media They are among the most dishonest human beings on Earth.’”¹¹⁴ He then went on to challenge the crowd estimates by the press, stating that “[i]t looked like a million, a million and a half people” to him.¹¹⁵ Within hours of the President’s comments, then White House Press Secretary, Sean Spicer, corroborated the President’s comments and contradicted the press, stating “[t]his was the largest audience to ever witness an inauguration, period, both in person and around the globe’”¹¹⁶ This incident is a perfect example of gaslighting at its most effective. It doesn’t matter whether the public “believe[s] what the administration says. It just has to have the effect of confusing them. Then [the administration]

108. Bobby Azarian, *Trump Is Gaslighting America Again—Here’s How to Fight It*, PSYCHOL. TODAY (Aug. 31, 2018), <https://www.psychologytoday.com/us/blog/mind-in-the-machine/201808/trump-is-gaslighting-america-again-here-s-how-fight-it>.

109. *Id.*

110. Wilkinson, *supra* note 106.

111. Azarian, *supra* note 108.

112. Fox, *supra* note 64 (quoting Feldman, a psychologist and deputy chancellor at the University of Massachusetts).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* Spicer later told reporters that “our intention is never lie to you.” *Id.* He said “he got the numbers from an ‘outside agency’” and that “he meant to include people watching online and on television.” *Id.*

gain[s] more power over them'. . . ."¹¹⁷ According to experts, the lies about the size of the crowd at the inauguration had two purposes: "to inflate Trump's sense of his own popularity, and to discredit journalists."¹¹⁸ Trump and his staff engage in gaslighting by "pick[ing] a fight with the media" in order "to discredit the media as much as they can by sowing doubt about anything and everything the media report'. . . ."¹¹⁹ In essence, Trump and his staff are "com[ing] in and undercut[ing] [the public] trust in the established sources of information."¹²⁰ The message being sent by the administration to the public is "go ahead and hate this person who is delivering bad news" which opens the door for Trump to "substitute [his] own news, [his] own version of reality."¹²¹ Arguably, Trump has been successfully gaslighting the American public, thereby undermining its trust in all members of the press except those of which he approves. The result is that he now owns a portion of the public and is able to "literally implant his own version of reality."¹²²

The falsehoods surrounding the attendance at Trump's inauguration are only a single example used to illustrate the art of gaslighting. The number of false or misleading statements made by the President since taking office has been characterized as "a tsunami . . . an avalanche of falsehoods. It's a deluge, a torrent, a rockslide, a barrage, an onslaught, a blitzkrieg."¹²³ In fact,

117. *Id.* (quoting clinical psychologist, Bryant Welch, author of *STATE OF CONFUSION: POLITICAL MANIPULATION AND THE ASSAULT ON THE AMERICAN MIND* (2008)).

118. *Id.*

119. *Id.* (quoting Robert Feldman, a psychologist and deputy chancellor at the University of Massachusetts).

120. *Id.*

121. *Id.* As Kellyanne Conway would say, the public is simply being presented with "alternative facts." *Id.*

122. *Id.* Another interesting question beyond the scope of this article is which came first: Trump or Fox News? In contrast to the majority of the press which Trump characterizes as the enemy of the people, Fox News has consistently been the darling of the president. At times it is hard to decipher the co-dependent, dysfunctional relationship between Trump and Fox News: is President Trump using Fox to advance his personal agenda or is Fox News creating that agenda? See Conor Gaffey, *A Short History of Donald's Trump Relationship with Fox News*, NEWSWEEK (Mar. 29, 2017, 1:02 PM), <https://www.newsweek.com/donald-trump-fox-news-576064>; Isaac Stanley-Becker, *'Maybe I Didn't Return Her Phone Call': Trump Ridicules Ann Coulter, Slams Fox News in Fallout over Wall*, WASH. POST (Jan. 28, 2019, 2:31 AM), https://www.washingtonpost.com/nation/2019/01/28/maybe-i-didnt-return-her-phone-call-trump-ridicules-ann-coulter-slams-fox-news-fallout-over-wall/?utm_term=.4e030a3282de; Isaac Stanley-Becker, *'Sean Hannity, Come On Up': Trump Fawns over Fox News in Final Rally. 'They've Done an Incredible Job for Us.'* WASH. POST (Nov. 6, 2018), https://www.washingtonpost.com/nation/2018/11/06/sean-hannity-come-up-trump-fawns-over-fox-news-final-rally-theyve-done-an-incredible-job-us/?utm_term=.e1ca9541817b.

123. Margaret Sullivan, *Fact-Checking President Trump Isn't Enough*, WASH. POST (May 1, 2019 3:00 AM), <https://www.washingtonpost.com/lifestyle/style/with-trump-on-pace-for-22500->

the lying phenomenon has become so prevalent that oddsmakers are taking bets on the number of false statements “the prevaricator-in-chief” will tell by Election Day 2020.¹²⁴ The prediction as of May 1, 2019, was 22,500 statements. According to odds consultant John Lester, as the election draws closer and the opportunity to address policy is increased due to a heightened number of debates and rallies, “all-time highs in the number of false statements” by President Trump are expected.¹²⁵ It has been found that “Trump is more likely to bend the truth when he is ‘caught up in the excitement of crowd reaction’ and when he is discussing policy.”¹²⁶ Welcome to Trumptopia.

III. THE ROLE OF THE COURTS IN COMBATING THE EROSION OF FREEDOM OF THE PRESS.

President Trump does have his own unique view of what should be protected as free speech. In March 2019, speaking at the Conservative Political Action Conference (“CPAC”), Trump invited Hayden Williams on stage.¹²⁷ Williams, a field representative for the Leadership Institute, travels to various college and university campuses to assist “conservative clubs recruit and train new members.”¹²⁸ He caught the attention of President Trump when he was punched while recruiting on the Berkeley campus of the University of California.¹²⁹ Trump praised Williams for “taking a hard punch in the face for all of us” and encouraged him to sue not only “his attacker,” but “the college and possibly the state of California” as well.¹³⁰ “He’s going to be a very wealthy young man,” the president commented. “Go get ‘em, Hayden.”¹³¹ Trump then told his supporters that he would be “signing ‘very soon’ an executive order requiring schools to ‘support free

lies-before-election-day-fact-checking-isnt-enough/2019/04/30/f54bb35e-6b6a-11e9-8f44-e8d8bb1df986_story.html?utm_term=.45180f611ec8&wpisrc=nl_most&wpmm=1.

124. *Id.*

125. *Id.*

126. *Id.* (quoting odds consultant John Lester of BookMaker.eu).

127. Maureen Groppe & Sean Rossman, *President Donald Trump, in CPAC Speech, Said He’ll Sign ‘Free Speech’ Executive Order*, USA TODAY (Mar. 3, 2019, 6:55 AM), <https://www.usatoday.com/story/news/politics/2019/03/02/donald-trump-cpac-president-speaks-following-cohen-hearing-korea/3039138002/>.

128. Hayden Williams, Opinion, *I Was Assaulted at Berkeley Because I’m Conservative. Free Speech Is Under Attack.*, USA TODAY (Mar. 6, 2019, 3:51 PM), <https://www.usatoday.com/story/opinion/voices/2019/03/06/berkeley-conservative-students-campus-college-bias-punch-column/3065895002/>.

129. *Id.*

130. Groppe & Rossman, *supra* note 127.

131. *Id.*

speech” in order to be eligible for federal research money.¹³² “If they want our dollars, and we give it to them by the billions, they’ve got to allow people like Hayden . . . to speak’ . . .”¹³³ In response to this announcement, the crowd erupted with chants of “USA! USA! USA!”¹³⁴

In contrast to the lavish support Trump heaps upon speech of which he approves, he continually chastises members of the media who report or print articles with which he disagrees and undercuts the credibility of such news by labeling it as “fake news.”

In his fight to protect speech he thinks is deserving, he has also promised that he is,

“[G]oing 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,” Mr. Trump said on the campaign trail. “We’re going to open up those libel laws. So when The New York Times writes a hit piece which is a total disgrace or when The Washington Post, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they’re totally protected.”¹³⁵

Clearly, there is no question that in Trumptopia, the watch dog role of the Fourth Estate is being undermined. Fortunately, the laws and the courts can play an important role in helping to combat the erosion of freedom of the press. Such effort began with *New York Times Co. v. United States* in 1971,¹³⁶ where the press was praised for its “courageous reporting” and for “serving the purpose that the Founding Fathers saw so clearly” when it published a government report which exposed “the workings of the government that led to the Vietnam War.”¹³⁷ In so doing “the newspapers nobly did precisely that which the Founders hoped and trusted they would do.”¹³⁸

132. *Id.*

133. *Id.*

134. *Id.* President Trump did sign an executive order to protect free speech on university and college campuses. Despite Trump’s statement that the order was a “historic action to defend American students and American values that have been under siege.’ The order does not, on its face, make dramatic changes.” Susan Svrluga, *Trump Signs Executive Order on Free Speech on College Campuses*, WASH. POST (Mar. 21, 2019, 4:13 PM), https://www.washingtonpost.com/education/2019/03/21/trump-expected-sign-executive-order-free-speech/?utm_term=badd06c4fe7b.

135. Adam Liptak, *Justice Clarence Thomas Calls for Reconsideration of Landmark Libel Ruling*, N.Y. TIMES, Feb. 20, 2019, at A16.

136. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

137. *Id.* at 717 (Black, J., concurring).

138. *Id.* For a more extensive discussion of the case, see *infra* notes 147-162 and accompanying text.

A more recent example of the courts protecting free speech is the ruling by the Honorable Mark Walker, U.S. District Court Judge for the Northern District of Florida, in February 2019, that “[i]n today’s world of ‘fake news’ and near-constant attacks on the traditional media, this Court is especially sensitive to upholding the legal protections that enable the press to act effectively in its essential task of policing the government.”¹³⁹ In granting the New York Times’ Motion for Final Summary Judgment in a libel action, the Court recognized that,

Today’s environment has created a unique prism for defamation actions and the protections intended to ensure a free press. When politicians plan to ‘open up our libel laws,’ and then after winning elections, continue to pummel the press and decry anything unflattering as ‘fake news,’ it is clear the Fourth Estate is under attack.¹⁴⁰

The case concerned the fair reports privilege, which protects the news media so it can accurately report information obtained from government officials.¹⁴¹ In his ruling, while Walker was sympathetic to the individual plaintiff in the case, Kevin Folta, a professor at the University of Florida who was attempting to protect his reputation “as an independent, impartial scientist,”¹⁴² the Court reasoned that,

“A cramped reading of the privilege would undercut its very purpose. It would open the door to far less meritorious suits by far less scrupulous plaintiffs, and it would contribute to the ongoing chipping-away of the rights and privileges necessary to the press’s ability to play its intended role as government watchdog.”¹⁴³

Popular culture and the law have also played an important role in highlighting judicial responses to efforts to erode free speech. A prime example is *Hustler Magazine v. Falwell*,¹⁴⁴ a case from the 1980s involving two well known figures, Reverend Jerry Falwell, “a Baptist minister and prominent television evangelist” who was a “self-proclaimed champion of Christian virtue” and Larry Flynt, the publisher of *Hustler*, “a sexually explicit magazine famed for its lewdness and its utter contempt for traditional

139. Folta v. N.Y. Times Co., No. 1:17cv246-mw/GRJ, 2019 U.S. Dist. LEXIS 34533, at *32 (N.D. Fl. Feb. 7, 2019).

140. *Id.* at *22.

141. Jeffrey Schweers, *Tallahassee Judge Mark Walker Throws Out Federal Defamation Lawsuit Against New York Times*, TALLAHASSEE DEMOCRAT (Feb. 28, 2019, 11:30 AM), <https://www.tallahassee.com/story/news/2019/02/28/judge-mark-walker-throws-out-defamation-suit-against-new-york-times/3014079002/>.

142. *Id.*

143. *Id.*

144. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1998).

moral values.”¹⁴⁵ The issue before the Court was whether Falwell could recover for emotional distress as a result of an “[ad] parody” which “was modeled after actual Campari [Liqueur] ads”¹⁴⁶ In the actual advertisement, celebrities refer to “their ‘first time,’” referring to their initial experience tasting the liqueur.¹⁴⁷

The case became part of popular culture when depicted in the film *The People v. Larry Flynt*¹⁴⁸ which was produced by Oliver Stone and directed by Milos Forman. Although the film met with mixed reviews ranging from initial critical acclaim¹⁴⁹ to a scathing op-ed in the New York Times by Gloria Steinem in which the author argued that “Larry Flynt the Movie is even more cynical than Larry Flynt the Man.”¹⁵⁰ “‘The People v. Larry Flynt’ claims the creator of Hustler magazine is a champion of the First Amendment, deserving our respect. That isn’t true.”¹⁵¹ Ms. Steinem went on to clarify that “a pornographer is not a hero, no more than a publisher of Ku Klux Klan books or a Nazi on the Internet, no matter what constitutional protection he secures. And Mr. Flynt didn’t secure much.”¹⁵² Perhaps Ms. Steinem’s most important observation is the last line of her editorial reminding readers that “[f]ortunately, each of us has the First Amendment right to protest.”¹⁵³

In writing for a unanimous Court in the case which is the cornerstone of the finale of the film, *Hustler Magazine v. Falwell*, Chief Justice Rehnquist stated a truth that is equally important to remember in the era of Trump.¹⁵⁴

At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. ‘The freedom to speak one’s mind is not only an aspect of individual liberty . . . but also is essential to the common quest for truth and the vitality of society as a whole.’¹⁵⁵

145. Dale A. Herbeck, *The First Amendment and Popular Culture: “The People vs. Larry Flynt,”* 37 FREE SPEECH Y.B. 107, 107 (1999).

146. *Hustler Magazine*, 485 U.S. at 48.

147. Boyd C. Farnham, *Free Speech and Freedom from Speech: Hustler Magazine v. Falwell, The New York Times Actual Malice Standard and Intentional Infliction of Emotional Distress*, 63 IND. L.J. 877 n.46 (1988).

148. THE PEOPLE VS. LARRY FLYNT (Phoenix Pictures et al. 1996).

149. See, e.g., Nina Bernstein, *A Free Speech Hero? It’s Not That Simple*, N.Y. TIMES, Dec. 22, 1996, § 2, at 1 (noting that the film, a “raucous hymn to the First Amendment,” was “shown to acclaim at the New York Film Festival . . . and has been critically embraced not only as an artistic tour de force but as a kind of democratic morality play.”).

150. Gloria Steinem, Opinion, *Hollywood Cleans Up Hustler*, N.Y. TIMES, Jan. 7, 1997, at A17.

151. *Id.*

152. *Id.*

153. *Id.*

154. See 485 U.S. 46, 50-51 (1998).

155. *Id.* (quoting *Bose Corp. v. Consumers Union of U.S. Inc.*, 466 U.S. 485, 503-04 (1984)).

He then reaffirmed the duty of the Court to be “particularly vigilant” in “ensur[ing] that individual expressions of ideas remain free from governmentally imposed sanctions.”¹⁵⁶

IV. CINEMATIC PORTRAYALS AND CAUTIONARY TALES WHICH HIGHLIGHT THE IMPORTANCE OF SAFEGUARDING THE FREEDOM OF THE PRESS.

A. *Journalism: “The First Rough Draft of History.”*¹⁵⁷

An outstanding example of popular culture paying homage to the ideal of journalistic freedom and the important role the institution plays in governmental accountability is director Steven Spielberg’s *The Post*.¹⁵⁸ Inspired by true events, the film tells the saga of the events which occurred as a result of Daniel Ellsberg’s decision to leak portions of a top-secret report, later known as The Pentagon Papers, to the New York Times and later, to the Washington Post.¹⁵⁹ The Pentagon Papers, commissioned in 1967 by the current Secretary of Defense, Robert McNamara, is a classified study concerning the political and military involvement of the United States in Vietnam between 1945 and 1967.¹⁶⁰ The action of the film begins in 1971, when New York Times Reporter, Neil Sheehan, “score[s] the scoop of a lifetime” with the publication of the first excerpts from the report.¹⁶¹ The report showed that the administrations of four presidents, Truman, Eisenhower, Kennedy, and Johnson, all “willingly deceived” the public and

156. *Id.* at 51.

157. Jack Shafer, *Who Said It First? Journalism Is the “First Rough Draft of History,”* SLATE (Aug. 30, 2010, 8:04 PM), <https://slate.com/news-and-politics/2010/08/on-the-trail-of-the-question-who-first-said-or-wrote-that-journalism-is-the-first-rough-draft-of-history.html>.

158. THE POST (Twentieth Century Fox et al. 2017).

159. *Id.*

160. See Archives of *Pentagon Papers*, NAT’L ARCHIVES, <https://www.archives.gov/research/pentagon-papers> (The official title of the papers is “Report of the Office of the Secretary of Defense Vietnam Task Force.”). It was commissioned in 1967 by the Secretary of Defense, Robert McNamara. *The Post* concerns the leak to the press of a small portion of the report in June of 1971 which was then published first by the New York Times and then by the Washington Post. However, “[o]n the 40th anniversary of the leak to the press, the National Archives, along with the Kennedy, Johnson, and Nixon Presidential Libraries, has released the complete report. There are 48 boxes and approximately 7,000 declassified pages. Approximately 34% of the report is available for the first time.” *Id.*

161. Niraj Chokshi, *Behind the Race to Publish the Top-Secret Pentagon Papers*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/us/pentagon-papers-post.html>.

Congress about the true state of affairs surrounding the Vietnam War.¹⁶² On June 13, 1971, readers were introduced to the top-secret report with the following:

‘A massive study of how the United States went to war in Indochina, conducted by the Pentagon three years ago, demonstrates that four administrations progressively developed a sense of commitment to a non-Communist Vietnam, a readiness to fight the North to protect the South, and an ultimate frustration with this effort—to a much greater extent than their public statements acknowledged at the time.’¹⁶³

Ironically, Richard Nixon was not in power during the time period covered by the study.¹⁶⁴ It has also been surmised that Nixon was concerned that the leak of the Pentagon Papers was the precursor of the “disclosure of his own Vietnam secrets—specifically, the undisclosed bombing of Cambodia, one of his first acts as President, and the Chennault Affair, Nixon’s clandestine effort to forestall peace prior to the 1968 presidential election.”¹⁶⁵

As President, Nixon expressed to his White House Chief of Staff, Bob Haldeman, on June 15, 1971,

‘You cannot have a massive security breach in government . . . Christ, if you do, they’re going to steal that stuff from us. You know? That’s what I’m thinking of. I’m thinking of our own stuff. You’ve got to put papers on warning, and others that would go out and do this, that, by God, they’re going to be prosecuted.’¹⁶⁶

From the White House tapes, it can also be gleaned that Nixon believed that “the publication of the Pentagon Papers confirmed the existence of a radical, left-wing conspiracy throughout the government and media, whose purpose was to delegitimize him and topple his administration.”¹⁶⁷ Ultimately, because the leak occurred during his presidency, Nixon was convinced “that he was engaged in the battle of a lifetime—to protect his presidency as well as the nation” and determined to “fight back with every tool at his disposal. . . .”¹⁶⁸

162. Jordan Moran, *Nixon and the Pentagon Papers*, UVA | MILLER CTR., <https://millercenter.org/the-presidency/educational-resources/first-domino-nixon-and-the-pentagon-papers> (last visited Dec. 29, 2019).

163. Chokshi, *supra* note 161.

164. *See id.*

165. KEN HUGHES, CHASING SHADOWS: THE NIXON TAPES, THE CHENNAULT AFFAIR, AND THE ORIGINS OF WATERGATE 104-06 (2014).

166. *Id.* at 106, *Legal Action* n.1 (citing Conversation 521-012, 15 June 1971, 4:40-5:13 p.m., Oval Office).

167. Moran, *supra* note 162.

168. *Id.*

On June 14, 1971, the legal maneuvering by the White House began when Nixon instructed Attorney General John Mitchell to go forward with prosecuting the New York Times, commenting that “a[s] far as the Times is concerned, hell, they’re our enemies.”¹⁶⁹ The telegram the Attorney General sent to the paper requested that the Times cease its publication of the Pentagon Papers on the basis that further disclosures would result in “irreparable injury to the defense interests of the United States” and that because the material already published “relat[ed] to the national defense of the United States,” it was classified as “top secret.”¹⁷⁰ Consequently, the government argued that the publication of the Pentagon Papers violated the 1917 Espionage Act and that publishing such classified information would result in “irreparable injury to the defense interests of the United States.”¹⁷¹ When the Times declined to accede to the government’s request, the Justice Department sought an injunction to bar the paper from any further publication of the Pentagon Papers.¹⁷² When deciding to take the Times to court, neither Nixon nor the Attorney General were aware that the attempt by the Executive Branch to exercise “prior restraint” to block publication of an article by the press was unprecedented.¹⁷³ The first legal foray was won by the government when a New York Federal Judge issued a temporary restraining order prohibiting the Times from further publication.¹⁷⁴ Despite the silencing of the Times, the fight continued. On Friday, June 18, 1971, the Washington Post, which was now also in possession of a copy of the report, made the courageous decision to continue printing stories based on the Pentagon Papers even in the face of court injunction against the New York Times.¹⁷⁵

The drama surrounding the “race at the Washington Post to catch up to Mr. Sheehan’s exclusive” scoop and its bold decision to continue publication and become a part of the legal battle is brilliantly brought to life in Steven Spielberg’s drama, *The Post*, which stars Meryl Streep as Katherine Graham, who becomes the first woman publisher of a major newspaper, the Washington Post, after her husband’s suicide, and Tom Hanks as Ben Bradlee, the paper’s executive editor.¹⁷⁶ This pivotal moment in U.S. history is also a crucial time period for Mrs. Graham. The Post had been

169. HUGHES, *supra* note 165, at 107, *Legal Action* n.4 (citing Conversation 006-070, 14 June 1971, 7:19-7:22 p.m., White House Telephone).

170. Max Frankel, *Court Step Likely*, N.Y. TIMES, June 15, 1971, at 1.

171. *Id.*

172. HUGHES, *supra* note 165, at 107.

173. DAVID RUDENSTINE, *THE DAY THE PRESSES STOPPED* 9 (1996).

174. HUGHES, *supra* note 165, at 107.

175. Chokshi, *supra* note 161.

176. THE POST, *supra* note 158.

experiencing financial difficulties and the only way to save the company was by going public.¹⁷⁷ A large part of her concern about publishing the Pentagon Papers is a clause in the company's contract that would allow buyers to void the sale if some kind of catastrophic event happens within a week of the IPO.¹⁷⁸ Because felons cannot own broadcast licenses, the Post will lose its profitable TV stations if convicted under the Espionage Act.¹⁷⁹ However, as the character of Ben Bradlee so astutely notes, “[i]f we’re living in a world where the government can tell you what to print and broadcast” then the Washington Post has already ceased to exist.¹⁸⁰

The action in the film really begins at a staff meeting between Bradlee and his editorial staff, Howard Simmons, Ben Bagdikian (“Bags”), Meg Greenfield, Phil Geyelin, and Gene Patterson.¹⁸¹ Bradlee receives a message from Kay Graham informing him that she just received a call from the former Secretary of Defense letting her know that the Times will be publishing something “damning” about him this Sunday.¹⁸² The staff responds, and for the first time, “that report” is mentioned:

INT. CONFERENCE ROOM, WASHINGTON POST-LATER
 HOWARD
 (to Bagdikian)
 Could it be that report?
 BRADLEE
 What report?
 BAGDIKIAN
 There was a rumor a couple years back
 that some guys were hired by the
 White House to do a study on Vietnam.
 GEYELIN
 What kind of study?
 HOWARD
 We couldn't even confirm that the
 thing existed.

177. *Id.*

178. *Id.*

179. *Id.*

180. Liz Hannah, *The Post 52* (film script), <https://www.scriptslug.com/assets/uploads/scripts/the-post-2017.pdf> (last visited Dec. 29, 2019).

181. *Id.*

182. *Id.* at 22.

BRADLEE

(to Bagdikian)

You talk to Rand?¹⁸³

BAGDIKIAN

A couple times. Nothing there.

BRADLEE

(tired)

Make some calls and see if this
"study" has anything to do with—

BAGDIKIAN

It doesn't exist, Ben—

BRADLEE

Just do it! I'm tired of being ten
minutes late to the party! When we
meet back in a couple of hours let's
fill in all those "someones" and
"somethings" with a few more fucking
details.¹⁸⁴

The plot thickens when Kay learns from a friend, who is also a reporter for the New York Times, just what is going to be published.¹⁸⁵ Bradlee calls the team together at 2:00 A.M. to discuss the situation.¹⁸⁶

INT. CONFERENCE ROOM, WASHINGTON POST - LATER

....

BRADLEE

I'm getting really goddamn tired of
finding out we're being scooped by
the *goddamn publisher!*

Everyone is silenced. In the background, Gene step off the elevator and see what is happening. Bradlee pulls out the shopping list—

183. Bradlee is referring to Rand Corporation, Rand conducted the study commissioned by the Pentagon resulting in the Pentagon Papers. Military analyst, Daniel Ellsberg, made a copy of the study while working at Rand.

184. Hannah, *supra* note 180, at 23.

185. *Id.* at 22.

186. *Id.* at 35.

BRADLEE

(CONT'D)

According to Scotty Reston of the New York Times, they have over "7000 documents detailing how the White House has lied about the Vietnam War for the past 30 years."

. . . .

BRADLEE

(CONT'D)

Sheehan's first article comes out Sunday, then they'll be doing a series about the documents every day. They're going after the White House with *proof* that there were ulterior motives from the begin-ning for sending our guys there. Proof that they lied, that they hid it from the public *and* that they documented the whole thing.

He lets this all settle in.¹⁸⁷

. . . .

INT. CONFERENCE ROOM, WASHINGTON POST - MORNING

. . . .

BRADLEE

(CONT'D)

The New York Times is squatting on the 11th floor of the Hilton with two guards standing watch outside the door.

. . . .

Bradlee checks his watch.

BRADLEE

So it's 9am and we've got guards outside a hotel room, the White House denying any knowledge of documents that were most likely created inside the White House and . . .

187. *Id.* at 34-35.

Bagdikian walks in.

BRADLEE

You got something?

BAGDIKIAN

(shaking his head)

They're [Rand] not budging. I'm trying to get a hold of a guy I used to know when I was there. Left a couple months ago and I can't seem to find him. Ellsberg. Dan.

GENE

He's kind of a quack isn't he?

HOWARD

I remember him — he was down here for a while working on something. Doved real quick.

BRADLEE

(absentmindedly)

If the leak didn't come from the White House, why is McNamara calling us?

Bradlee stands, moving towards the door.

BRADLEE

(CONT'D)

Bags - find Ellsberg.¹⁸⁸

And Bagdikian does.

INT. MOTEL, OUTSIDE OF BOSTON - [NIGHT]

Bagdikian sits at a ratty table, Ellsberg opposite him, coffee in front of them both. Bagdikian sees a box in the corner filled with papers.

ELLSBERG

Sorry about the rigmarole getting here.

BAGDIKIAN

A lot of guys looking for you.

A moment passes.

188. *Id.* 39-42.

ELLSBERG

How'd you figure it was me?

BAGDIKIAN

Sounded like something a crazy guy would do.

He's half-joking. Ellsberg laughs.

BAGDIKIAN

(CONT'D)

I poked around at Rand. They got nervous when I mentioned your name.

ELLSBERG

What do you know?

BAGDIKIAN

The basics. You were part of a team set up at the DoD to gather information on Vietnam.

ELLSBERG

(almost wistful)

McNamara would say "let the chips fall where they may." He wanted scholars to have the opportunity to examine Vietnam policy - all angles. I loved it. I loved the guys - the work. We had access to everything. I mean, how often does that happen, you know?

BAGDIKIAN

(treading lightly)

But.

ELLSBERG

(shrugging)

What else . . . "but" we found something.

Bagdikian holds his breath. Ellsberg lights a cigarette, his hand shakes.

ELLSBERG

(CONT'D)

None of it was ever about helping Vietnam.

BAGDIKIAN

What was it about?

ELLSBERG

What's it always about? Self interest. Expansion. Making sure we had the final say.

BAGDIKIAN

But how?

ELLSBERG

It was us. From the beginning: Covert Ops, rigged elections, guaranteed debt. It's all in there-memos, studies, cables. Since the 40s they've been doing this. The CIA, NSA, DoD . . . the White House. 80% of it is classified. They knew all along that we were sending men-boys-not to fight, but to die. They knew because they started it all. And they planned it from the start. Then they knew that we were going to lose. But they kept sending those boys over anyway.

The truth hangs between them for a moment.

BAGDIKIAN

If there's nothing in there about Nixon - why does he care? He must love how it makes the Democrats-

ELLSBERG

(CONT'D)

You think Nixon wants you guys to be able to start publishing materials like this? Nixon may not be in these, but I guarantee he's got something in a drawer he doesn't want anyone to find.¹⁸⁹

So, the Post has a copy of the papers. The big question then, which can only be answered by the paper's owner, Kay Graham, is whether or not to publish in light of the IPO and the injunction barring future publication of the material issued against the New York Times.

189. *Id.* at 59-61.

EXT. BACKYARD, GRAHAM HOUSE - MOMENTS LATER

Bradlee, Fritz Beebe (Chairman of the Board of the Post), and Paul Ignatius (President of the Washington Post) fight it out. Kay sits nearby, listening and seemingly ignored by the three men. She takes it all in.

.

BRADLEE

You want to talk about a court battle? If they start fighting back with freedom of the press - which they absolutely will - and it comes out that we had these documents and didn't publish them or stand with the Times - at best we'll look like we're scared. At worst it'll seem like the government is telling us what we can and can't print!

FRITZ

Publishing these documents could destroy this paper.

BRADLEE

There's more than one way to do that and you're just letting them have it! We're not even going to push back a little? What are you so scared of?

FRITZ

It's my job to-

BRADLEE

It's not *your* job! It's hers!

He points to Kay. They all look to her, she seems tiny compared to the three of them. They wait for her to speak.

KAY

It . . . it is Mr. Beebe's job to-

BRADLEE

No. It's yours to make this decision. Just you.

Beat.

BRADLEE

(CONT'D)

You could've told me to get off the story. But you didn't. You could've told me to not get the documents. But you didn't.

Beat.

BRADLEE

(CONT'D)

And if The Post doesn't publish these papers, you'll have to find a new executive editor tomorrow.

FRITZ

(scowling)

Don't be dramatic.

Bradlee's eyes don't leave Kay's.

KAY

You're willing to stand by that?

BRADLEE

Absolutely.

She thinks, not taking this decision lightly.

KAY

While you may feel responsible to act as an exemplification for freedom of the press, Mr. Bradlee, I have a commitment to the thousands of people employed by this company. This isn't their crusade and I refuse to put them in jeopardy over a . . . vendetta.

Bradlee is crest-fallen, Ignatius heaves a sigh of relief. . . . Finally, she stands.

KAY

(CONT'D)

I also have a responsibility to the public. To the readers. Even when it might not support our own best interests. (beat) They lied. All of them. They lied and told us that what we were doing was good. That we were helping people who couldn't help

themselves. But that wasn't it at all. No one wanted us there. So, they, we, just sent a bunch of young men to die. It wasn't just my son, or your son, that they sent over there. And it shouldn't just be us to know the truth.

She stands her ground, Fritz can't help but be moved. Kay looks to Bradlee, softening.

KAY

(CONT'D)

They knew it was wrong. Our . . . our friends knew. And they didn't care.

Bradlee stares at her - the weight of it all hangs between them. She catches herself in the emotion straightens herself back out.

KAY

(CONT'D)

Can you guarantee me that we can go to print without publishing the names of anyone in danger?

BRADLEE

I-

IGNATIUS

I can't believe this.

KAY

Mr. Ignatius, I'm-

IGNATIUS

You can't be actually considering this! This is just your maternal-

KAY

Mr. Ignatius-

Ignatius turns to Fritz.

IGNATIUS

You're just going to let her do this? She can't possibly-

FRITZ

I assure you, this is entirely Mrs. Graham's decision.

Ignatius stammers. Kay hides a smile, looking back to Bradlee.

BRADLEE

I give you my word.

She thinks again, then looks up at him.

KAY

Do it. Print them.¹⁹⁰

They go to print, and receive the expected call from the Assistant Attorney General informing them that he has:

[B]een advised by the Secretary of Defense that the material published in The Washington Post this morning contains information relating to the national defense of the United States and bears a top-secret classification. As such, the publication of this information is directly prohibited by the provision of the Espionage Law, Title 18, United States Code, Section 793. Moreover, further publication will cause irreparable injury to the defense interest of the United States. Accordingly, I respectfully request that you publish no further information of this character and advise me that you have made arrangements for the return of these documents to the Department of Defense.¹⁹¹

The Post respectfully declined.¹⁹² The paper was taken to court that very day. In contrast to the Times, the federal judge hearing the case against the Post refused to issue a temporary restraining order.¹⁹³ The government immediately appealed and the U.S. Court of Appeals for the District of Columbia reversed the lower court.¹⁹⁴ Now, the Post was also barred from publishing the papers.¹⁹⁵

Ultimately the legal battle between the Executive Branch and the press was resolved by the Supreme Court in *New York Times Co. v. United States* in which the Court addressed the issue of whether or not the news media could be prohibited from publishing the portion of Pentagon Papers in their possession.¹⁹⁶ On June 30, 1971, the Supreme Court issued a per curiam opinion, agreeing 6-3 that the *New York Times* and the *Washington Post*, and other papers, could not be enjoined from further publication of excerpts from the portion of the report in their possession.¹⁹⁷ In so ruling, the Court

190. *Id.* at 87-91.

191. *Id.* at 93-94.

192. THE POST, *supra* note 158.

193. *Id.*

194. *Id.*

195. *Id.*

196. 403 U.S. 713-14 (1971).

197. *Id.*

emphasized the First Amendment’s strong presumption against any prior restraint on free speech, holding that the government had not met the ‘heavy burden’ of showing justification for a prior restraint.¹⁹⁸ Therefore, the Court reaffirmed the role the press is to play in American society. And “for their determined pursuit of journalistic excellence,” both Kay and Bradlee received the Presidential Medal of Freedom, the highest civilian award of the United States.¹⁹⁹

Of course, it remains the decision of each viewer to determine the “present-day relevance” of the plot of *The Post* where the film uses of “snippets from the actual Nixon tapes” reveals “a touchy, overweening president” who is “going after a newspaper he deems a personal enemy”²⁰⁰ Arguably, however, there are clear parallels to be drawn between the attacks by both the Nixon and Trump Administrations against the press as “enemies of the people.”

B. “*If It Takes a Village to Raise a Child. It Takes a Village to Abuse One.*”²⁰¹

The magnitude of what can be achieved when a free press works in tandem with the legal system is brilliantly captured in the Academy Award winning 2015 film *Spotlight*.²⁰² Based on a true story, the title of the film refers to the name of a team of investigative journalists at the Boston Globe who engage in in-depth reporting on a single news story of import.²⁰³ In the film, the topic is the possibility of widespread child abuse by Catholic clergy.²⁰⁴ Investigating the story is encouraged by the new editor of the Globe, Marty Baron, who has just arrived from Miami, Florida.²⁰⁵ As illustrated in the following scene from the film, as an outsider, Baron is able to view the Archdiocese of Boston and the iconic institution of the Roman Catholic Church from a more neutral, less constrained perspective.

198. *Id.*

199. Hannah, *supra* note 180, at 117.

200. Ann Hornaday, *In ‘The Post’ Streep and Hanks Lead a Stirring Homage to the Pursuit of Truth*, WASH. POST (Dec. 7, 2017), https://www.washingtonpost.com/goingoutguide/movies/forget-the-subtle-slow-boiler-the-post-romantically-rouses-the-ideals-of-the-fourth-estate/2017/12/06/d1d32a3c-d47c-11e7-a986-d0a9770d9a3e_story.html.

201. Singer & McCarthy, *Spotlight* 68 (2014) (film script), <https://s3.amazonaws.com/thescryptlab/screenplays/2015/Spotlight-Final-Script.pdf>.

202. *See supra* note 53.

203. *Id.*

204. *Id.*

205. *Id.*

INT. GLOBE, LARGE CONFERENCE ROOM - LATER²⁰⁶

. . . .

MARTY

Great, thank you. Uh, did everyone read Eileen McNamara's column this weekend?

The room reacts. Huh? Editors look at EILEEN McNAMARA, 50s.

HELEN

That's the Geoghan case?

MARTY

Yes, what's the folo on that?

BEN

It's a column, what kind of folo were you thinking?

MARTY

Well, apparently this priest molested kids in six different parishes over the last thirty years and the attorney for the victims, Mr. . . .

EILEEN

Garabedian.

MARTY

Thanks, Eileen. Mr. Garabedian says Cardinal Law found out about it fifteen years ago and did nothing.

CANELLOS

I think that attorney's a bit of a crank. And the Church dismissed the claim.

EILEEN

He said, she said.

206. This scene is set during the first meeting between Marty and the members of his editorial staff, including Ben Bradlee, the Deputy Managing Editor, and Walter 'Robby' Robinson, the Editor for Spotlight.

MARTY

Whether Mr. Garabedian is a crank or not, he says he has documents that prove the Cardinal knew.

BEN

As I understand it, those documents are under seal.

Silence. No one knows what to do. Robby watches.

MARTY

Okay, but the fact remains, we have a Boston priest abused 80 kids, we've got a lawyer who says he has proof Law knew about it, and we've written all of . . .

(checking his notes)

. . . two stories on this in the last six months?

(then)

This strikes me as an essential story for a local paper. At the very least, we should be going after those documents.

CANELLOS

How would you like to do that?

MARTY

Well, I don't know what the laws are here, but in Florida we would go to court.

Robby raises an eyebrow. In fact, the whole room does.

BEN

You want to sue the church?

MARTY

Technically we wouldn't sue the Church. We would file a motion to lift the seal on those documents.

BEN

The church will read that as us suing them. So will everybody else.

MARTY

Good to know.²⁰⁷

After suggesting the idea of following up on the Geoghan case at the full editorial meeting, Marty then asked the spotlight team to take on the project.

INT. GLOBE, MARTY'S OFFICE - MOMENTS LATER

Ben and Robby enter. Marty's on the phone.

MARTY (INTO PHONE)

Okay, thank you. Yes. Okay, thanks.

Marty hangs up as they sit.

MARTY

(CONT'D)

I set up a meeting for tomorrow with outside counsel . . .

BEN

Jon Albano?

MARTY

Yeah.

BEN

Who's the Judge on this case?

MARTY

Uh, Constance Sweeney.

BEN

Tough.

MARTY

Why's that?

BEN

Good Catholic girl.

Marty pushes on.

MARTY

Judging from what I've read, it doesn't seem like we've done a thorough investigation of the Geoghan case. Is that right?

207. Singer & McCarthy, *supra* note 201, at 11-13.

BEN

No it's not. We looked hard at Geoghan.
David Armstrong for Metro and Michael
Paulson for Religion.

Marty isn't impressed.

MARTY

Okay, but, uh, just so I understand,
beyond our daily coverage, we haven't
committed any long-term investigative
resources to the question of whether
or not Cardinal Law knew about this?

BEN

No, we haven't.

MARTY

(to Robby)

And that's the kind of thing your team
does?

ROBBY

Spotlight? Well, yeah, but we're
still prospecting the Boston PD story
I told you about.

MARTY

Could you set it aside?

ROBBY

We could.

BEN

Marty, in the past, Spotlight has had
success in large part because they
pick their own projects.

MARTY

Would you consider picking this one?²⁰⁸

And they do. The four reporters who constitute the Spotlight team, Robby plus Sacha Pfeiffer, Matt Carroll, and Mike Rezendes,²⁰⁹ then engage in the journalistic investigation which results in them receiving a Pulitzer

208. *Id.* at 15-16.

209. SPOTLIGHT (Participant Media et al. 2015). In the film, the role of Robby is portrayed by Michael Keaton, Rachel McAdams is Sacha, and Mark Ruffalo portrays Mike. *Id.*

Prize for Public Service.²¹⁰ What ultimately emerges is that most of the victims simply settle with the church out of court using private mediation and then are required to sign a confidentiality agreement so what is happening remains secret.²¹¹

One of the first persons they decide to interview is the attorney, Mitch Garabedian, who is currently representing a number of victims of sexual abuse by priests in Boston.²¹² This task is assigned to Mike Rezendes because he likes “characters.”²¹³ As the film progresses, the two develop a mutual respect for one another. In a poignant scene on the courthouse steps, after Garabedian has been insulted by Wilson Rogers, the attorney for the Archdiocese, he makes it perfectly clear to Mike the level of cover-up that is going on to protect the church.²¹⁴

EXT. HAMPDEN SUPERIOR COURT, SPRINGFIELD, MA -
LATER

Garabedian sits on the courthouse steps, eating a packed lunch out of tupperware. Simmering.

MIKE

How you doing, Mitch?

Mike walks up, sits down.

GARABEDIAN

I'm fine.

MIKE

(pushing him)

He's tough, that Wilson Rogers.

GARABEDIAN

He's smug. And he's sloppy.

MIKE

He doesn't seem sloppy.

GARABEDIAN

You don't know the half of it. Trust me.

210. Henry Barnes, *Spotlight: The Reporters Who Uncovered Boston's Catholic Child Abuse Scandal*, GUARDIAN (Jan. 13, 2016 1:43 PM), <https://www.theguardian.com/film/2016/jan/13/spotlight-reporters-uncovered-catholic-child-abuse-boston-globe>.

211. Singer & McCarthy, *supra* note 201, at 61-63.

212. *Id.*

213. *Id.* at 17.

214. *Id.* at 93-97.

MIKE

What's the half of it? (then) Tell me
the half of it, Mitch.

Garabedian looks at him, wrestling with something.

GARABEDIAN

Off the record.

MIKE

Off the record.

GARABEDIAN

Three years ago, I get a call from an
ex-Priest. Anthony Benzevich. He was
at Blessed Sacrament back in '62 and
he saw Geoghan taking little boys up
to the Rectory bedroom. Benzevich was
appalled, he told the Bishop. And the
Bishop threatened to reassign him. To
South America.

MIKE

Jeez.

GARABEDIAN

Yeah. So, fast-forward a couple years,
Benzevich reads Geoghan's been charged
with molesting more than a hundred
kids. Benzevich feels guilty, he calls
me.

MIKE

You have testimony from a priest
telling his superiors about Geoghan in
'62?

GARABEDIAN

No, I do not. Because when I call
Benzevich in to give a deposition, he
shows up with a lawyer.

MIKE

Wilson Rogers.

GARABEDIAN

Suddenly, Father Benzevich has a foggy
memory. Can't remember anything. He's
useless. So I go back to work, I forget
about it, whatever. Until about a year

ago. I find an article about a priest who warned church officials about Geoghan.

MIKE

(stunned)

Benzevich went to the press.

GARABEDIAN

Local paper, Patriot Ledger, nobody saw it. But now I got Benzevich on record, so I file a motion to depose him a second time. And Wilson Rogers, that smug son of a bitch, he files a motion opposing my motion. And that's when I have him!

MIKE

Have him how?

GARABEDIAN

Rogers opposes my motion. So I gotta make an argument as to why I'm allowed to depose Father Benzevich a second time. But now, I'm allowed to attach exhibits. You follow what I'm saying?

MIKE

The sealed documents . . .

GARABEDIAN

Yes, I can use the sealed documents I've gotten in discovery, Mr. Rezendes, the same documents your paper is currently suing for.

MIKE

You're shitting me.

GARABEDIAN

No, I am not shitting you. So I pull out the 14 most damning docs and I attach them to my motion. And they prove everything. About the Church, about the bishops, about Law . . .

MIKE

And it's all public? Because your motion to oppose Rogers' motion . . .

GARABEDIAN

. . . is public. That's correct. Now you're paying attention.

MIKE

(head spinning)

So I can just walk into the courthouse right now and get those documents?

GARABEDIAN

No. You cannot. Because the documents are not there.

MIKE

But you just said they're public.

GARABEDIAN

I know I did. But this is Boston. And the Church doesn't want them to be found. So they are not there.

MIKE

Mitch, are you telling me that the Catholic Church had legal documents removed from the courthouse?

Mitch collects his things, turns to Mike. With clarity.

GARABEDIAN

Look, I'm not crazy, I'm not paranoid, I'm experienced. Check the docket, you'll see. They control everything. Everything.

Mitch exits. Mike watches him go, UNNERVED. Is Mitch right? And was that just the mother of all tips? A beat . . . then Mike grabs his stuff and runs towards his car.

EXT. SUFFOLK COUNTY COURTHOUSE, DOWNTOWN BOSTON-LATER

Mike gets out of his car, runs across same street into the courthouse.

INT. SUFFOLK COUNTY COURTHOUSE, RECORDS ROOM - DAY
A mousy looking CLERK #2 (O'BRIAN) pushes a BINDER across a help desk to . . . Mike. Who starts going through the file

CLOSE ON DOCKET ENTRY #49: Plaintiff's opposition to Reverend Anthony Benzevich's Motion for Protective Order. Dated: APR 2, 2001. And a list of 14 exhibits.

Mike, excited, opens the file, finds the motion and a FOLDER, EXHIBITS A-N. Mike opens it. It's empty. HOLY SHIT.²¹⁵

Spotlight is able to interview a number of survivors of abuse, including Phil Saviano, one of the victims who refused to settle with the church and so retains his right to speak about how such abuse occurs. Saviano's interview is not only heart breaking, but enlightening for the team in terms of how it occurs, as reflected in the following snippet of Saviano's dialogue:

Okay. Well, let me tell you, when you're a poor kid from a poor family, religion counts for a lot. And when a priest pays attention to you it's a big deal. He asks you to collect the hymnals or take out the trash, you feel special. It's like God asking for help. And maybe it's a little weird when he tells you a dirty joke but now you got a secret together so you go along. Then he shows you a porno mag, and you go along. And you go along, and you go along, until one day he asks you to jerk him off or give him a blow job. And so you go along with that too. Because you feel trapped. Because he has groomed you. How do you say no to God, right?²¹⁶

Phil Saviano is also instrumental in assisting the team identify additional priests in Boston who have engaged in sexually abusing children. After identifying at least thirteen and finding no court records of cases or settlements with victims, Robby and Sasha confront attorney, Eric Macleish, about the process.²¹⁷ Ten years ago, Macleish had represented the victims in a case where a priest had molested a dozens of kids in Fall River, MA.²¹⁸

INT. GREENBERG TRAUIG, CONFERENCE ROOM - MORNING
Robby and Sacha have been waiting. Macleish enters.

215. *Id.* For an excellent interview with Mitch Garabedian and the ramifications that Spotlight had upon his practice, see, Robin Young, *Real Life 'Spotlight' Lawyer Deluged with New Abuse Cases*, WBUR: HERE & NOW (Mar. 2, 2016), <https://www.wbur.org/hereandnow/2016/03/02/spotlight-garabedian-new-abuse-cases>.

216. Singer & McCarthy, *supra* note 201, at 39. Mr. Saviano is also the founding member of the New England Chapter of the Survivors Network of Those Abused by Priests ("Snap"). Barnes, *supra* note 210. According to Mr. Saviano, "[b]efore Spotlight's work, Snap members were usually ignored They were unsuccessfully training to warn parishioners, parents, police, prosecutors and the public about this massive, ongoing danger to kids." *Id.* However, "[a]fter Spotlight's work, people started to pay attention." *Id.*

217. Singer & McCarthy, *supra* note 201, at 61-63.

218. *Id.* at 84.

ERIC MACLEISH

Thanks for waiting, so sorry guys, I got stuck on a call. What's up?

SACHA

Mr. MacLeish, are you familiar with a priest named Paul Shanley?

MacLeish looks at her. Surprised. He sits back.

ERIC MACLEISH

Yes, I'm familiar with him.

SACHA

Have you settled cases against Father Shanley?

ERIC MACLEISH

As I'm sure you can understand, I can't discuss that.

ROBBY

What about Father Ronald Paquin?

ERIC MACLEISH

I can't discuss that either. Come on, guys.

SACHA

We understand you've settled several cases against each of them.

ERIC MACLEISH

Even if I'd been involved in those cases, the settlements would be confidential. I could be disbarred for acknowledging their existence.

Robby's not backing down. MacLeish shakes his head.

ERIC MACLEISH

(CONT'D)

Look, I told you, these are tough cases. Most of these folks just want some acknowledgement of what happened. We got them a sit-down with the bishop and a little dough. It was the best they could hope for.

ROBBY

It was certainly the best the priest could hope for.

ERIC MACLEISH

No, the Church promised to take the priests out of circulation.

ROBBY

And did you follow up on that?

ERIC MACLEISH

(done with this)

You guys need anything else?

SACHA

Yes. Why aren't there any records? I was just down at the courthouse, why aren't there any records of these settlements?

MacLeish pauses. Hesitant, now not so sure of himself.

ERIC MACLEISH

We dealt directly with the Church. We'd draw up a demand letter and we'd send it to the chancery.

SACHA

You never filed anything in court?

ERIC MACLEISH

It was a private mediation.

So that's a no. Jesus. Sacha and Robby react.

ROBBY

So this is just you and the archdiocese's lawyers in a room?

ERIC MACLEISH

Correct.

SACHA

Anyone else?

ERIC MACLEISH

Occasionally, the Church would bring in another defense attorney to help out.

ROBBY

You have any names?

ERIC MACLEISH

(stonewalling him)

No. No I don't.

INT. GLOBE, SPOTLIGHT - LATE AFTERNOON

Ben sits with the gang.

BEN

So this was all under the table?

SACHA

There's no paper trail at all. The victim has to sign a confidentiality agreement to get the settlement. The lawyer takes his third and the Church sweeps it under the rug.

MIKE

Jeez. It's a freakin' racket.

BEN

It's more complicated than that. MacLeish has got a duty to his clients to get the best deal he can.

SACHA

Sure, but how many victims do you represent and profit from before you say something?

MIKE

Garabedian would say none. That's why he's taking these cases to court. Because he wants people to know about this.

SACHA

I agree. And, legal ethics aside, Ben, operating the way MacLeish has all but guarantees the abuse stays under wraps.

BEN

Yeah.

(then)

Did MacLeish confirm all of Saviano's priests?

ROBBY

No. He's limited by the confidentiality agreement.

SACHA

But he's clearly settled cases against a number of them. Phil's put me in touch with some of the other victims, I'm pretty confident all of his priests are going to check out.

BEN

So it's thirteen priests?

SACHA

Yeah.

ROBBY

Looks that way.

BEN

(CONT'D)

Holy Shit. Okay. Keep going.²¹⁹

The Spotlight team does keep going and ultimately, they discover that there are far more than thirteen priests. The Father Geoghan case “was the tip of a quite large iceberg. . . .”²²⁰ The number of priests was first thirteen, then “it [was] up to 70 priests, and then 90 priests, and, in the end, it turned out to be almost 250 priests in Boston who had molested children over several decades.”²²¹

The team is aided in both the film and reality by the legal system when Judge Constance Sweeney, the product of sixteen years of Catholic education, “reverses a rare confidentiality order lawyers for the Archdiocese” had previously obtained.²²² At the behest of the Boston Globe, the judge

219. *Id.* at 61-64.

220. *Film Shines a 'Spotlight' on Boston's Clergy Sex Abuse Scandal*, NPR (Oct. 29, 2015, 2:36 PM), <https://www.npr.org/2015/10/29/452805058/film-shines-a-spotlight-on-bostons-clergy-sex-abuse-scandal> (According to “[v]eteran reporter and editor Walter [“Robby”] Robinson, who led the Globe’s Pulitzer Prize-winning Spotlight team,” the crimes committed ““were unimaginable, and that they could’ve been countenanced and enabled by such an iconic institution [the Catholic church], it gave us so much energy to pursue the story and get the story and make it public.””).

221. *Id.*

222. Kathleen Burge, *Judge’s Ruling Frees Documents in Geoghan Case*, BOS. GLOBE, Nov. 30, 2001, at B5, 2001 WLNR 2256572.

ruled that “[t]housands of pages of private documents in the child molestation lawsuits filed against defrocked priest John J. Geoghan and his superiors” should “be opened.”²²³

The members of the Spotlight team, however, did far more than report the important story of abuse by the individual priests. Instead, following the lead of their editor, Marty Baron, they went farther and reveal the mendacity of the system itself. Spotlight reveals that the priests engaging in such reprehensible conduct were being systematically reassigned to other parishes.²²⁴ The church was simply shuffling the predatory clergy from parish to parish to help prevent their crimes from being exposed.²²⁵

As the character of Marty Baron so wisely notes:

Sometimes it’s easy to forget that we spend most of our time stumbling around in the dark. Suddenly a light gets turned on, and there’s fair share of blame to go around. (then) I can’t speak to what happened before I arrived but all of you have done some very good reporting here, reporting that I believe is going to have an immediate and considerable impact on our readers. (then) For me, this kind of story is why we do this.²²⁶

Arguably, it is the work of outstanding and dedicated reporters, such as those in *Spotlight*, that prove the necessity of protecting an independent, tenacious, and free press which plays an unparalleled function in maintaining the health and continuance of a democratic society.

C. “*Good Night and Good Luck.*”

Finally, the film *Good Night and Good Luck* is a stirring homage not only to the intrepid reporter, Edward R. Murrow, but also to the dedication and courage of members of the free press evidenced in their pursuit of truth.²²⁷ Directed by George Clooney, this black-and-white photographed historical drama is an outstanding reminder that it is those journalist who “seek truth and report it,” who “minimize harm” when doing so, and who “act independently” and “be accountable and transparent” for the good of society to bring accurate news to the people who will play a critical part in the ultimate creation of a usable future.²²⁸

223. *Id.*

224. *Id.*

225. *Id.*

226. Singer & McCarthy, *supra* note 201, at 131.

227. GOOD NIGHT AND GOOD LUCK (Warner Independent Pictures et al. 2005).

228. See SPJ CODE OF ETHICS (SOC’Y OF PROF’L JOURNALISTS 2014), <https://www.spj.org/pdf/spj-code-of-ethics-poster.pdf>. “Sigma Delta Chi’s first Code of Ethics was borrowed from the American Society of Newspaper Editors in 1926. In 1973, Sigma Delta Chi wrote its own code, which was revised in 1984, 1987, 1996 and 2014.” *SPJ Code of Ethics*, SOC’Y OF PROF.

Set in the early 1950's, the film recalls a time in America when the threat of Communism created an atmosphere of paranoia in the United State. It can be maintained that the country is presently engaged in an equally destructive dance with fear. While "[f]ear has always been an effective form of political rhetoric, and one deployed to great effect by countless presidents . . . no President has weaponized fear quite like Trump."²²⁹ Not only is he "an expert at playing to the public's phobias," in his speeches and tweets, has successfully created a portrait of an America which "is a dystopian hellscape."²³⁰ To control and "shape[]" public opinion," he "emphasiz[es] dangers—both real and imaginary—that his policies purport to fix."²³¹ In Trumptopia, it seems that if radical Islamic terrorists aren't flooding U.S. airports, then illegal immigrants are storming the country's borders with drugs pouting across the Rio Grande.

Based upon actual events, in *Good Night and Good Luck*, it is Senator Joseph McCarthy who calculatingly plays upon the public's fears as he leads the House of Unamerican Activities Committee through a search for Communists in America as those who are found to be "Unamerican" are blacklisted.²³² CBS reporter Edward R. Murrow (David Strathairn) and his producer Fred W. Friendly (George Clooney) decided to take a stand and challenge McCarthy's smear tactics. As Murrow engages in his feud with the Senator, he willingly faces a number of life-altering pressures, both political, professional, and economical, in order to bring the truth to the public and eventually expose McCarthy for the scaremongering maestro he is on a national television telecast.²³³

A key scene in the film occurs when Murrow decides to take on McCarthy in his nightly broadcast. Attacking the "Senator's techniques" in

JOURNALISTS (Sept. 6, 2014, 4:49 PM), <https://www.spj.org/ethicscode.asp>. The Code "is not a set of rules, rather a guide that encourages all who engage in journalism to take responsibility for the information they provide, regardless of medium." *Id.* The "Preamble" to the Code sets out that the "members of the Society of Professional Journalists believe that public enlightenment is the forerunner of justice and the foundation of democracy." SPJ CODE OF ETHICS (SOC'Y OF PROF'L JOURNALISTS 2014), <https://www.spj.org/pdf/spj-code-of-ethics-poster.pdf>. It defines "[e]thical journalism" as journalism which "strives to ensure the free exchange of information that is accurate, fair and thorough. An ethical journalist acts with integrity." *Id.* The Society sets out "four principles as the foundation of ethical journalism and encourages their use in its practice by all people in all media." *Id.*

229. Alex Altman, *No President Has Spread Fear Like Donald Trump*, TIME (Feb. 9, 2017), <http://time.com/4665755/donald-trump-fear/>.

230. *Id.*

231. *Id.*

232. GOODNIGHT AND GOOD LUCK, *supra* note 227.

233. *Id.*

the hearings, and after pointing out the Senator's use of repeated lies,²³⁴ Murrow challenges McCarthy and the American public as follows:

No one familiar with the history of this country can deny that Congressional committees are useful. It is necessary to investigate before legislating, but the line between investigating and persecuting is a very fine one; and the Junior Senator from Wisconsin has stepped over it repeatedly. We must not confuse dissent with disloyalty. We must remember always that accusation is not proof and that conviction depends upon evidence and due process of law. We will not be driven by fear into an age of unreason, if we dig deep in our history and doctrine, and remember that we are not descended from fearful men not from men who feared to write, to speak, to associate, and to defend the causes that were for the moment unpopular. We proclaim ourselves as indeed we are, the defenders of freedom wherever it continues to exist in the world; but we cannot defend freedom abroad by deserting it at home. The actions of the Junior Senator from Wisconsin have caused alarm and dismay amongst our allies abroad and given considerable comfort to our enemies. And whose fault is that? Not really his. He didn't create this situation of fear, he merely exploited it, and rather successfully. Cassius was right. "The fault dear Brutus is not in our stars, but in ourselves." Good night. And Good luck.²³⁵

V. CONCLUSION: THE GASLIGHTS ARE FLICKERING.

One of the most effective tools to escape the trappings of Trumptopia is to imagine a "usable future." In contrast to the bleak landscape of a dystopian, where "extremism, reactionary politics, and abandonment of higher principles" reign, a usable future is found somewhere between utopia and dystopia.²³⁶ In light of the tactics and tenets glorified in Trumptopia,²³⁷

234. George Clooney & Grant Heslov, *Goodnight and Good Luck* (Oct. 20, 2004) (film script), <https://perma.cc/2RRA-6JXY>.

Twice [McCarthy] said, 'The American Civil Liberties Union was listed as a subversive front.' The Attorney General's list does not and never has listed the ACLU as subversive, nor does the FBI, or any other federal government agency. And, the ACLU holds in its files, letters of commendation from President Truman, President Eisenhower and General MacArthur.

Id. at 47.

235. *Id.* at 47-48.

236. Aoki, *supra* note 19, at 31.

237. See German Lopez, *Donald Trump's Long History of Racism, from the 1970s to 2019*, VOX (July 15, 2019, 9:40 AM), <https://www.vox.com/2016/7/25/12270880/donald-trump-racist-racism-history>. One of the most disturbing aspects of the Trump Presidency is proliferation of racism. "On the campaign trail, Trump repeatedly made explicit racist and otherwise bigoted remarks, from calling Mexican immigrants criminals and rapists to proposing a ban on all Muslims entering the US to suggesting a judge should recuse himself from a case solely because of the judge's Mexican heritage." *Id.* Unfortunately, this racist "trend has continued into his presidency. From stereotyping a black reporter to pandering to white supremacists after they held a violent rally in Charlottesville, Virginia, to cracking a joke about the Trail of Tears, Trump hasn't stopped with

arguably society is currently experiencing “the basic conditions and early warning signs of dystopia” and “without corrective intervention, dystopia will likely result.”²³⁸ To engage in attaining a usable future requires unadulterated acceptance of the concept that society is able to visualize and sculpt a future which, with “foresight and wise planning blended with good fortune,” can chart a new course away from “the horrors of dystopia . . . toward what is realistic and achievable of utopia.”²³⁹

A key to realizing a usable future is a recognition by the public of the central role that a free press will play in this endeavor. Traditionally, the Fourth Estate has “serv[ed] as a guardian for democracy, a type of watch dog that helps members of the public make informed decisions and sounds the alarm on unchecked power and threats to the Constitution and the values it embodies.”²⁴⁰ A society without a free press that the citizens trust to truthfully report is one that is susceptible to becoming a totalitarian regime. Without accurate information, the populace cannot make wise decisions. In the absence of a free press that is respected, the value systems embodied in the Constitution could be threatened, if not lost. That is why one of the hallmarks of a dystopian society is a government that controls what constitutes “the truth” and all information sources for the masses by stifling the free press.

Ultimately, the dream of a usable future and the attainment of certain aspects of a utopian world is not impractical nor is it impossible. As Murrow so aptly recognized when he quoted Shakespeare’s lines Cassius so persuasively argues to Brutus, “The fault, dear Brutus, is not in our stars, but

the racists acts after his 2016 election.” *Id.*; see also, Michael D’Antonio, *Is Donald Trump Racist? Here’s What the Record Shows*, FORTUNE (June 7, 2016), <http://fortune.com/2016/06/07/donald-trump-racism-quotes/> (“Whether he’s mocking Chinese businesspeople with broken English, contorting his body to make fun of a disabled reporter, or calling out to ‘my African American,’ again and again, Trump has provoked anxiety and played to racial divisions.”). Another area of both national and global concern resulting from the practices condoned in Trumptopia is the administration’s apparent disdain for the reality of environmental issues. Trump’s “tumultuous presidency has brought a flurry of changes—both realized and anticipated—to U.S. environmental policy. Many of the actions roll back Obama-era policies that aimed to curb climate change and limit environmental pollution, while others threaten to limit federal funding for science and the environment.” Michael Greshko et al., *A Running List of How President Trump Is Changing Environmental Policy*, NAT’L GEOGRAPHIC (May 3, 2019), <https://news.nationalgeographic.com/2017/03/how-trump-is-changing-science-environment/>.

238. Aoki, *supra* note 19, at 31.

239. *Id.* at 32.

240. Chauncey Devega, *The Normalization of Donald Trump Began in “1984”: How George Orwell’s Newspeak Has Infected the News Media*, SALON (Nov. 21, 2016, 5:59 PM), <https://www.salon.com/2016/11/21/the-normalization-of-donald-trump-began-in-1984-how-george-orwells-newspeak-has-infected-the-news-media/>.

in ourselves.”²⁴¹ It is not fate, but the actions and choices of humankind that will determine the future of the world.

However, it is important to be vigilant if society is to achieve a usable future must be cognizant of the fact that “[t]he effect of deliberate and systematic lying” which is the hallmark of the Trump administration, “can be to make some people give up trying to discern the truth. . . .”²⁴² The blatant falsehoods propounded by the Trump administration “are so egregious” that those living in Trumptopia are being led “down a path which is extremely dangerous.”²⁴³ Arguably, the point has now been reached where the number of false and misleading statements by the prevaricator-in-chief as he effectively gaslights the public has resulted in “overcome[ing] the public’s ability to care.”²⁴⁴

It is imperative that action be taken immediately to preserve and uphold the truth. As American philosopher and German Jewish refugee, Hannah Arendt, so eloquently noted “Conceptually, we may call truth what we cannot change But ‘metaphorically, it is the ground on which we stand and the sky that stretches above us.’”²⁴⁵

It is of paramount importance that the Fourth Estate continue its role “as a guardian for democracy,” the “watchdog” that assists the public in making “informed decisions” and which “sounds the alarm on unchecked power[s] and threats” to the values embodied in Constitution.²⁴⁶

As the Trumptopian administration continues to make the gaslights flicker, it is appropriate to remember the words of the message from the *Washington Post* ad, which aired to remind the American people of the vital role that journalists play by their newsgathering and the dangers that they often face in performing this crucial task.

241. Clooney & Heslov, *supra* note 234, at 47 (quoting Julius Caesar, Act I, Scene III, L. 140-141).

242. Fox, *supra* note 64 (quoting psychologist and deputy chancellor at the University of Massachusetts, Robert Feldman).

243. *Id.*

244. Sullivan, *supra* note 123.

245. HANNAH ARENDT, *Truth and Politics*, in BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT 258 (Penguin Books 1977) (1968).

246. Devega, *supra* note 240.

'Democracy Dies in Darkness'

Feb. 3, 2019

When we go off to war
When we exercise our rights
When we soar to our greatest heights
When we mourn and pray
When our neighbors are at risk
When our nation is threatened
There's someone to gather facts
To bring you the story
No matter the cost
Because knowing empowers us
Knowing helps us decide
Knowing keeps us free.²⁴⁷

247. Maura Judkis, *The Washington Post* *Airs its First Super Bowl Spot*, WASH. POST (Feb. 3, 2019, 7:08 PM), https://www.washingtonpost.com/lifestyle/style/the-washington-post-creates-its-first-super-bowl-spot-narrated-by-tom-hanks/2019/02/01/f1984a3a-263a-11e9-ad53-824486280311_story.html?utm_term=.0572ad4a7ad9; see also, Trilby Beresford, *Washington Post* *to Debut Tom Hanks Narrated Super Bowl Commercial*, HOLLYWOOD REPORTER (Feb. 1, 2019, 3:47 PM), <https://www.hollywoodreporter.com/news/washington-post-debut-tom-hanks-narrated-super-bowl-commercial-1182068>; Paul Farhir, *The Washington Post's New Slogan Turns Out to Be an Old Saying*, WASH. POST (Feb. 24, 2017), https://www.washingtonpost.com/lifestyle/style/the-washington-posts-new-slogan-turns-out-to-be-an-old-saying/2017/02/23/cb199cda-fa02-11e6-be05-1a3817ac21a5_story.html?utm_term=.76745cece1f8.