

CONSUMER PROTECTION IN THE MARKETPLACE OF IDEAS: A PROPOSAL TO EXTEND THE NEWS DISTORTION DOCTRINE TO CABLE TELEVISION NEWS PROGRAMS

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“Slavery is not wrong.” - Abraham Lincoln

“Speak softly.” – Theodore Roosevelt

“Ask what your country can do for you.” - John F. Kennedy

The above quotes may be unfamiliar to the reader. If one is unfamiliar with Lincoln’s unequivocal support for slavery, Teddy Roosevelt’s defense of mild manners, or Kennedy’s exhortation to the public to request as much from the government as possible, fear not. The fault lies not with the reader, but the author. The reader is unfamiliar with these quotes because they simply do not exist – at least not as reproduced above.

Abraham Lincoln did use the words “slavery is not wrong.” However, the context of the quote is missing. Lincoln actually said, “If slavery is not wrong, then nothing is wrong.”² Roosevelt did say, “speak softly,” but the entire quote is, “Speak softly and carry a big stick.”³ Finally, the Kennedy quote is missing a key word. The full quote is, “Ask not what your country can do for you, but what you can do for your country.”⁴

The foregoing exercise is designed to demonstrate that even a slight change in a quote can change its meaning. This article will address what should happen when the news media – particularly cable news outlets – alter quotes or other material in a fashion that misleads viewers.

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2. Letter from President Abraham Lincoln to Albert G. Hodges, AMERICAN TREASURES OF THE LIBRARY OF CONGRESS (April 4, 1864), *available at* <http://www.loc.gov/exhibits/treasures/trt027.html>. (JPG file of original handwritten letter available at <http://www.loc.gov/exhibits/treasures/images/lt01.jpg>).

3. Letter from New York Governor Theodore Roosevelt to Henry L. Sprague, AMERICAN TREASURES OF THE LIBRARY OF CONGRESS (Jan. 26, 1900), *available at* <http://www.loc.gov/exhibits/treasures/trm139.html>. (JPG file of original typewritten letter available at <http://www.loc.gov/exhibits/treasures/images/at0052as.jpg>).

4. John F. Kennedy, President, Inaugural Address (Jan. 20, 1961) *in* JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM, at <http://www.jfklibrary.org/Asset-Viewer/BqXIEM9F4024ntF17SVAjA.aspx>. (Both the video and transcript of the address are available on the same page).

Recently, cable news outlets, such as the Cable News Network (CNN), Fox News, and MSNBC, have begun to engage in what appears to be a pattern or practice of airing quotes that differ from the original form. For instance, in 2009, Fox News aired a video showing Vice President Joe Biden stating, “The fundamentals of our economy are strong.”⁵ However, Vice President Biden was quoting a remark made by Senator John McCain during the 2008 campaign season.⁶ The entire quote stated, “Ladies and gentlemen, I believe that’s why John McCain could say with a straight face, as recently as this morning -- and this is a quote: ‘The fundamentals of the economy are strong.’ That’s what John says.”⁷ Similarly, in 2013, MSNBC claimed that Vice President Biden had made these remarks about the effects of gun violence on American children: “No child should predecease their parents. I wish I could tell you we aren’t going to add any more names with this wall. I wish I could say that with certainty, but the truth of the matter is, there will be more. There will be more.”⁸ While these were the Vice President’s words, he made them in reference to the victims of the attack on the American embassy in Benghazi, Libya.⁹ At no point did Vice President Biden refer to American children. These two illustrations are but two of many examples of the liberties taken by cable broadcasters in recent years.¹⁰

When a quote is taken out of context to make it appear that someone said something that was never said, the media has failed in its duty to inform the public. This mendacious behavior is problematic for two reasons. First, cable news networks’ propensity to distort the truth impacts our democracy. When cable news broadcasts distorts facts, the citizenry becomes misinformed. In turn, the misinformed public will support policies based on false data.¹¹ Thus, the spreading of false news is antithetical to the goals of a properly functioning democracy.

Second, not only do cable news outlets mislead their viewers, they do so willfully and can do so with impunity. At present, there is no recourse

5. Eric Hananoki, *Fox News Presents Deceptively Cropped Six-Month-Old Biden Clip as New*, MEDIA MATTERS FOR AMERICA (Mar.16, 2009, 4:56 PM), <http://mediamatters.org/research/2009/03/16/fox-news-presents-deceptively-cropped-six-month/148314>.

6. *See id.*

7. Hananoki, *supra* note 5.

8. Josh Feldman, *MSNBC Forced To Apologize After Misleading Edit Of Biden Benghazi Speech*, MEDIAITE (May 3, 2013, 11:48 PM), <http://www.mediaite.com/tv/msnbc-forced-to-apologize-after-misleading-edit-of-biden-gun-speech/>.

9. *See id.*

10. For a more comprehensive listing of media distortions, *see infra* Part I.

11. *See* discussion *infra* Part II (damage will be further explained).

for their actions. The law should intervene to protect viewers from the most egregious misrepresentations.

For many years, the Supreme Court has justified its rulings on free speech by using the “marketplace of ideas” analogy.¹² While ideas may be reprehensible or demonstrably incorrect, marketplace theory states that the cure for such speech is not to curtail the offending speech. Rather, “Classic marketplace theory assumes that truth is discovered through competition with falsehood and stresses that any authoritatively imposed truth is plagued with the danger of error.”¹³ Thus, “ideas and information . . . operate like goods in a vibrant bazaar – consumers examine, compare, and ultimately choose among them, seeking the best value for the currency of their allegiance.”¹⁴

However, marketplace theory makes several assumptions that have been challenged over the years.¹⁵ One of those assumptions is exemplified in the bazaar hypothetical above. Assume that someone in the bazaar is selling fruit. One could presume that the buyer will be able to discern a bruised apple from an undamaged one without the assistance of the seller. Similarly, one could safely presume that the buyer, with no further direction from the seller, can determine whether an orange is unripe, ripe, or overripe. In the bazaar context, leaving the buyer to her own devices makes some sense provided that the buyer and seller have the same opportunity to examine the product as well as the same level of expertise in evaluating the quality of the product.

Ideas, however, are neither apples nor oranges. Unlike the hypothetical purchaser of fruit who is able to evaluate the quality of the product before purchase, idea “consumers” have no such access to the

12. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 2 (1984).

13. *Id.* at 6.

14. Derek E. Baumbauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 652 (2006).

15. *See id.* at 649 (“The marketplace model errs in describing how we interact with information; accordingly, it cannot reliably assess when regulation is desirable.”); *see also* Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 825 (2008) (calling marketplace theory “simplistic”); Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951, 953-57 (1997) (critiquing the assumptions that underlie the marketplace theory); Karl S. Coplan, *Climate Change, Political Truth, and the Marketplace of Ideas*, 2012 UTAH L. REV. 545, 549-53 (2012) (listing prominent critics of marketplace theory and noting that marketplace theory persists despite these criticisms and “demonstrable failures”); Johnathan Weinberg, *Broadcasting and Speech*, 81 CALIF. L. REV. 1101, 1148-58 (1993) (criticizing the underlying premises of marketplace theory).

“product” before “purchase” to examine its quality. Moreover, in contrast to the fruit buyer, buyers in the marketplace for ideas frequently – if not always – do not have the expertise or ability to evaluate the quality of what is being “sold” to them by media outlets. The fallacy of equating the grocery shopper with the idea “purchaser” has been explained thusly:

Imperfect information is arguably the most significant and pervasive source of market failure in a marketplace of ideas. The problem is not that all ideas in the marketplace of ideas are somehow examples of imperfect information, but that consumers possess imperfect information about the ideas that they encounter. In particular, consumers often possess imperfect information about whether an idea is true. Ideas do not come with labels attached indicating their truth content. . . .

Unfortunately, imperfect information in idea markets is not only pervasive, but, in many cases more problematic than the imperfect information found in more traditional economic contexts. The economist’s standard example of imperfect information involves the difficulty for consumers of determining whether a used car is a ‘lemon.’ But in many cases, determining whether an idea is true, or a lemon of falsehood, can be even more difficult. It may require a lifetime of research, and even then the solution may elude the investigator. . . .¹⁶

Thus, where media dissemination of ideas is concerned, it seems the proper analogy is not a bazaar, but a used car lot. Just as it is difficult for the purchaser of a used automobile to determine the quality of her purchase, it is difficult for a consumer of ideas to verify the quality of the goods being sold, as in both instances; the seller is in a superior position to determine the quality of the goods. This latter difficulty is compounded by the fact that the purveyors of used cars and ideas both have incentives to persuade the consumer of things that simply are not true. “For instance, a cable news network identified with a certain ideological or partisan brand might have a variety of incentives to rate ideas as true even if the ideas were false and the network’s viewers would benefit from being informed of their falsity.”¹⁷

The last sentence is key. If cable news outlets have incentives to falsify news and know that they can do so without repercussions, they will continue to distort quotes when it suits them to do so. Just as a vendor

16. Gregory Brazeal, *How Much Does a Belief Cost?: Revisiting the Marketplace of Ideas*, 21 S. CAL. INTERDISC. L.J. 1, 32-33 (2011).

17. *Id.* at 33 (emphasis added).

would not be allowed to knowingly sell a defective automobile without repercussions, neither should media outlets be permitted to knowingly or recklessly “sell” defective ideas to the public. Just as consumers are protected in other marketplaces, they should be protected in the proverbial market of ideas. This article proposes that when cable news outlets knowingly or recklessly edit footage to take a quote out of context, there should be penalties. This article proposes that due to the gravity of harm inflicted on our society by dishonest news shows, cable news outlets should be required to air a retraction and pay a fine for each instance of distorted footage. The amount of the fines would increase each time a news organization is found to have purposefully or recklessly aired inaccurate news footage.

At this point, the reader may already have concerns. Three possible concerns will be addressed at the outset. First, while the idea of government oversight over news broadcasts may seem radical at first glance, the Federal Communications Commission (“FCC”) already has a news distortion policy – the aptly-named “news distortion doctrine” – that applies to broadcast news programs.¹⁸ However, the doctrine has not yet been applied to cable television. The easiest way for Congress to regulate cable television broadcasts would be to expand the news distortion doctrine to cable television.

However, applying the doctrine to cable networks, is merely the first step. The doctrine has two components. First, the distortion “[must] be deliberately intended to slant or mislead.”¹⁹ In evaluating this requirement, the FCC and the courts require “evidence other than the broadcast itself, such as written or oral instructions from station management, outtakes, or evidence of bribery.”²⁰ There must be proof that the distortion was known by “principals, top level management, or new management.”²¹ The second part of the test requires that the distortion must involve a significant event “not merely a minor or incidental aspect of the news report.”²² The problem here lies primarily with the first prong. Even if one can prove that the distorted matter is “one of significance,” the first prong’s extrinsic

18. *Galloway v. F.C.C.*, 778 F.2d 16, 20 (D.C. Cir. 1985).

19. *Id.*

20. *Id.*

21. Chad Raphael, *The FCC’s Broadcast News Distortion Rules: Regulation by Drooping Eyelid*, 6 COMM L. & POL’Y 485 (2001) (citing In re Complaints Covering CBS Program “Hunger in America,” 20 F.C.C.2d 143, 150 (1969)).

22. *Galloway*, 778 F.2d at 20.

evidence requirement means that the scienter demanded by that prong will be difficult – if not impossible – to prove. Even if complainants were able to demand such documents, a savvy network operator would not reduce such an edict to writing. So, it is highly unlikely that such materials even exist. This article proposes not only that the news distortion doctrine should apply to cable, but also that the standards of the doctrine be modified to make it easier for complainants and plaintiffs to assert claims.

Second, this article is novel. There have been several articles about news distortion in the past decade. While most mention the policy tangentially to make a larger point,²³ Professors Chad Raphael and Lili Levi have authored recent articles that actually dissect the doctrine.

Professor Levi's article, *Reporting the Official Truth: The Revival of the FCC's News Distortion Policy*,²⁴ compares the news distortion doctrine to other legal doctrines. She claims that the policy has been applied in a manner similar to the actual malice standard for defamation.²⁵ However, she cautions that "[a]ny interpretation of the news distortion doctrine that goes beyond the notion of deliberate, subjective intent to distort" would run afoul of the defamation doctrine.²⁶ On policy grounds, Professor Levi is opposed to the distortion doctrine. Of all of her arguments, Professor Levi argues that providing an "official truth" is harmful to the democratic ideal.²⁷ Moreover, she states that "traditional norms of truth and objectivity are at the least unattainable and more likely unintelligible."²⁸ In all, she believes that even a significantly narrowed news distortion doctrine carries great cost than benefit to the public and the democratic ideal.²⁹

23. See, e.g., Clay Calvert, *What is News?: The FCC and the New Battle over Regulation of Video News Releases*, 16 COMMLAW CONSPECTUS 361 (2008) (discussing, but not dissecting, the news distortion policy as part of a larger discussion on the use of video news releases – tactics used by the government or businesses that are prepackaged stories); see generally Jessica Bisignano, 'Whistleblowing' and the Intentional Distortion of News, 6 RUTGERS J.L. & PUB. POL'Y 745 (2009) (discussing news distortion policy in the larger context of whistleblower actions without in-depth analysis of the doctrine); see generally Mark Emery, Note, *Regulating Televised News: A New Season for the Public Interest Standard*, 19 NOTRE DAME J. L. ETHICS & PUB. POL'Y 737 (2005) (discussing the news distortion policy as one of three doctrines in a larger discussion of the FCC's duties to act in the public interest).

24. Lili Levi, *Reporting the Official Truth: The Revival of the FCC's News Distortion Policy*, 78 WASH. U. L. Q. 1005 (2000).

25. See *id.* at 1080.

26. *Id.* at 1082.

27. *Id.* at 1109.

28. *Id.* at 1117.

29. *Id.* at 1131.

Professor Chad Raphael takes a considerably different approach. He favors the doctrine, but argues that it is ineffective because currently the FCC rarely enforces it.³⁰ Professor Raphael also argues that the high burden of proof presented in news distortion cases makes little sense when compared to other areas of FCC regulation.³¹ Neither intent nor a pattern of indecency need be proven for those sanctions to be imposed on a broadcaster, but both are relevant in the news distortion context.³² He argues that the current burden of proof for intent is “an almost impossible standard of proof.”³³ He also argues for a broader range of penalties beyond license revocation.³⁴

The current article builds on and differs from the commendable work of Professor Levi and Professor Raphael in several respects. First, neither of the previous writings addressed the application of the news distortion doctrine in the cable news context as the current article does. This difference alone makes this article novel. Furthermore, while Professor Raphael suggests that the current *mens rea* standard under the news distortion doctrine is too stringent and briefly mentions defamation, neither proposes the solution here. Moreover, unlike Professor Levi, the current writing embraces the ability of government to evaluate truth – at least in cases where the truth is objectively verifiable. Finally, both professors offered their thoughts prior to *United States v. Alvarez*, the Supreme Court’s most recent First Amendment decision regarding truth and falsity.³⁵ As such, neither article discusses the implications of that case nor what it means for the government to evaluate “truth.” For all of the foregoing reasons, this writing provides a new approach to this issue.

Finally, any regulation of speech may raise First Amendment concerns. Congress can legislate in this area without violating the established limits of the First Amendment. In *United States v. Alvarez*,³⁶ the Supreme Court evaluated the Stolen Valor Act.³⁷ The Court declined the government’s invitation to rule that lying is categorically unprotected speech that may be subjected to content based regulation.³⁸ However,

30. See Raphael, *supra* note 21, at 510.

31. See *id.* at 530-31.

32. See *id.* at 530.

33. *Id.* at 532.

34. *Id.* at 534.

35. *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012).

36. *Id.*

37. See *id.* at 2542.

38. See *id.* at 2544.

Alvarez did not modify the Court's rulings in *New York Times v. Sullivan*³⁹ and *Gertz v. Robert Welch, Inc.*⁴⁰ – both defamation cases.⁴¹ Moreover, the court reiterated that fraudulent statements remain constitutionally unprotected.⁴² So, while *Alvarez* may be reasonably understood to have rejected the categorical rule that “falsity is always constitutionally unprotected,” *Alvarez* also quite clearly reaffirms that knowing or reckless falsehoods may still be subjected to content-based regulation without violating the Constitution.⁴³ Since this article focuses only on knowing or reckless falsehoods made by cable news organizations, Congress should be able to regulate these statements without violating the strictures of the First Amendment.

In sum, as cable news continues to occupy a larger space in our national news they must be held accountable for the selective editing of quotes aired on their networks. The action of leading the public to believe that one version of events occurred when it did not occur does damage to our democracy. To prevent continued damage, Congress should apply the existing news distortion doctrine to cable news networks. Moreover, the news distortion doctrine should be re-tooled because at present, the chances of being able to provide the evidence currently required by the doctrine are minimal. Under the new doctrine, news organizations would be required to air retractions and pay fines when they are found to have aired falsely cropped quotes. Congress should be able to create this new regulation and impose fines without running afoul of the First Amendment.

Part I of this paper will discuss the history of cable news and the influence of this medium on its viewers. Part II will review the current law on the FCC's news distortion doctrine. Part III will provide a detailed recommendation for reforming the news distortion doctrine and applying it to cable news. Part IV will address some of the First Amendment and policy issues that may be raised by the proposal.

39. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); see *Alvarez*, 132 S. Ct. at 2537.

40. *Gertz v. Robert Welch*, 418 U.S. 323 (1974).

41. *Alvarez*, 132 S. Ct. at 2544.

42. See *id.* (citing *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

43. See *id.* at 2545.

PART I – THE PROBLEM OF DISTORTED NEWS

Subpart A will briefly provide a history of the growth of cable news. Subpart B will discuss its current position and influence in American culture. Subpart C will provide examples of falsehoods that have been aired on cable newscasts.⁴⁴ Subpart D will explain why false news stories adversely impact the public. Subpart E will explain how these falsehoods may impact public policy.

A. *A Brief History of Cable News*

Print was the earliest form of mass news communication in America.⁴⁵ Radio, the first prominent form of electronic media, became a prominent source of news by the 1940s.⁴⁶ By 1946, sixty-three percent of Americans said radio was their primary source of news.⁴⁷ Radio's dominance was, however, short-lived. In the 1950s, broadcast television entered the news market and quickly became the preferred choice.⁴⁸ By the 1970s, over ninety percent of Americans watched one of the three major broadcast networks during prime time.⁴⁹

Initially, broadcast television signals were difficult to receive in remote areas.⁵⁰ As a result, Community Antenna Television (CATV) - later known as cable - systems were developed to serve these customers.⁵¹ While

44. See *infra* Subpart C. Before proceeding, a general note about politics and policy. While a diligent effort has been made to look for erroneous stories by all cable news networks, the majority of the examples come from Fox News. This is not due to any particular ideological point of view. However, possibly due to the fact that Fox has perhaps the strongest ideological bent of the cable news networks, there are more entities that are keeping track of the mistakes at Fox. Moreover, because Fox News is currently the ratings leader among the cable news networks, it makes sense to focus on Fox News, as Fox appears to be a sort of bell weather in the cable news industry.

45. See DON R. PEMBER, *MASS MEDIA LAW* 35-38 (2001-2002) (describing use of printed material in Colonial America).

46. See *AMERICAN HISTORY MAGAZINE*, EDWARD R. MURROW: INVENTING BROADCAST JOURNALISM (June 12, 2006) <http://www.historynet.com/edward-r-murrow-inventing-broadcast-journalism.htm>.

47. See *id.*

48. See *History of Television News*, <http://history.sandiego.edu/gen/recording/radio2.html> (chronicling the many broadcast news milestones of the 1960s and 1970s).

49. See *id.*

50. See Charles D. Ferris & Frank W. Lloyd, *Telecommunications Regulation: Cable, Broadcasting, Satellite, and Internet*, § 5.03 (1998, last updated 2009).

51. See *id.*

cable initially existed merely to carry broadcast programming, cable eventually began developing unique content.⁵²

In 1980, CNN became the first 24-hour cable news channel.⁵³ CNN attempted to cover as many stories as possible and become “the news network of record.”⁵⁴ CNN was the sole 24/7-cable news channel until 1996. In that year, two challengers entered the cable news arena.⁵⁵ First, Rupert Murdoch’s News Corps launched Fox News.⁵⁶ A second network, owned by Microsoft and NBC, became MSNBC.⁵⁷

Fox News distinguished itself immediately.⁵⁸ Unlike CNN, from the outset, Fox News purposefully brought a clear ideological perspective to its coverage.⁵⁹ Studies have shown that the network’s coverage is sometimes biased toward conservative persons and issues.⁶⁰ During the 2012 campaign season, only fourteen percent of Fox News stories concerning Barack Obama were positive.⁶¹ Conversely, Fox News’ coverage of Republican candidate Mitt Romney was forty-four percent positive.⁶² Moreover, the majority of the network’s viewership identifies as conservative. The Pew Research Center notes that more than three quarters of regular Sean Hannity viewers consider themselves conservative, and the same is true for two-thirds of Bill O’Reilly viewers.⁶³

52. *See id.*

53. *Cable News Network*, THE MUSEUM OF BROADCAST COMMUNICATIONS, <http://www.museum.tv/eotvsection.php?entrycode=cablenewsne> (last visited Feb. 27, 2010).

54. Kelly Heyboer, *Cable Clash*, 22 AM. JOURN. REV. 20, 22 (Jun. 2000).

55. *See* Steve McClellan, *MSNBC has Big Leg up in News Race*, 126 BROADCASTING & CABLE 80, 80 (1996) (noting launch of Fox News and MSNBC).

56. *See id.*

57. *See id.*

58. *See* Heyboer, *supra* note 54, at 22.

59. *See, e.g.,* OutFoxed, a documentary chronicling the early days of the Fox Network and its commitment from the beginning to favor Republican topics and issues. The document also highlights several internal memos from Fox editors dictating that the news be spun in a manner favorable to Republican politicians and candidates.

60. *See* Tim Groeling, *Who’s the Fairest of Them All?: An Empirical Test for Partisan bias on ABC, CBS, NBC, and Fox News*, 38 PRES. STUDIES Q. 631, 652 (Dec. 2008) (noting that Fox News tended to favor stories that were favorable to George Bush but unfavorable to Bill Clinton).

61. Jesse Holcomb and Amy Mitchell, *The State of the News Media 2013: An Annual Report on American Journalism*, PEW RESEARCH CTR.’S PROJECT FOR EXCELLENCE IN JOURNALISM 1, http://www.stateofthemediamedia.org/print-chapter/?print_id=12996 (last visited Mar. 15, 2015).

62. *Id.*

63. *See* Pew Research Center for The People & The Press, In Changing News Landscape, *Even Television is Vulnerable*, 16 (Sept. 27, 2012), <http://www.people-press.org/2012/09/27/section-1-watching-reading-and-listening-to-the-news-3>.

Initially, MSNBC struggled to determine where it fit in the cable news landscape. First, the network tried to eschew traditional news tropes and target a youthful audience.⁶⁴ Then, it described itself as “fiercely independent.”⁶⁵ However, over time, MSNBC has carved out a niche as the liberal counterpart to Fox News.⁶⁶ Just as the majority of Fox News’ coverage of President Obama was negative, a Pew Research study also found that during the 2012 campaign, merely three percent of MSNBC’s coverage of Romney was positive, while seventy-one percent of the stories were negative.⁶⁷ In addition, like Fox News viewers, MSNBC viewers have an ideological preference. Over half of regular viewers of The Rachael Maddow Show – fifty-seven percent – identify as liberal.⁶⁸ Nearly half of the viewers of Hardball with Chris Matthews consider themselves liberal as well.⁶⁹

B. *The Influence of Cable News*

In an age of computers, smart phones, and social media, Americans now have more options for obtaining news than previous generations.⁷⁰ The advent of digitized news has resulted in a distinct decline for traditional print news sources.⁷¹ Despite changes in the news market, television news viewership has remained stable.⁷² At present, fifty-five percent of Americans report that they receive their news from television.⁷³

Television news, however, is not a monolith. There are local broadcast channels (“local news”) that cover metropolitan and regional stories. There are also national network news (“network news”) broadcasts such as NBC Nightly News, ABC’s World News Tonight, and The CBS Evening News. These programs cover national stories. Then there are, as

64. See Josh Ellis, *MSNBC turns into a Freak Show*, FAST COMPANY, 63 (Apr. 2003), <http://www.fastcompany.com/46254/msnbc-turns-freak-show>.

65. Allison Romano, *The New News Battle*, 132 BROADCASTING & CABLE 20, 21(2002).

66. See Mark Lisher, *Is Keith Olbermann the Future of Journalism*, 29 AM. JOURN. REV. 36, 38 (Feb/Mar 2007), available at <http://ajrarchive.org/Article.asp?id=4268> (describing former MSNBC host Keith Olbermann as “unapologetically liberal” and noting the warm reception from liberal audiences).

67. Holcomb & Mitchell, *supra* note 61.

68. Pew Research Center, *supra* note 63.

69. *See id.*

70. *See id.*

71. *Id.* at 2.

72. *Id.* at 3.

73. *Id.* at 2.

discussed, the cable news networks (“cable news”), primarily CNN, Fox News, and MSNBC.⁷⁴ Like the network news, the cable news focuses on national stories. However, unlike the network news, cable news networks feature news stories and news-related programming twenty-four hours a day, seven days a week.

It is important to distinguish between the three major types of television news for three reasons. First, among the three types of television news sources, cable is the only one to produce gains in recent years. Some media prognosticators have feared that cable news may be vulnerable to the same factors that have caused print media’s market share to decline.⁷⁵ However, the data tend to show that local and network news has been much more heavily impacted. According to the Pew Center’s Project for Excellence in the Media, “Local TV audiences were down across every key time-slot and across all networks in 2012.”⁷⁶ Moreover, in 2012, network news lost nearly two percent of its audience while local news lost seven percent of its audience.⁷⁷ Conversely, (the same period of time) during that same time period, cable news *gained* by nearly one percent.⁷⁸ While a one percent gain may seem minimal, compared to a two percent or a seven percent loss, it is significant. Thus, unlike its competitors, cable news has shown stability in the marketplace.

Second, it is important to distinguish between the various news sources because Americans use them in differing ways. If one merely views the statistics, it appears that local news has the clear edge. Eighty-two percent of Americans say they watch local news, seventy-three percent report that they watch network news, and just sixty-two percent report having watching cable news.⁷⁹ So, at first glance, local news appears to have the advantage.

This advantage disappears once the topics Americans turn to for each type of news are examined. Viewers turn to local television for weather, traffic, crime, and health news.⁸⁰ By contrast, cable news is where viewers

74. Holcomb and Mitchell, *supra* note 61.

75. *Id.*

76. *Id.*

77. *See id.* at 3.

78. *See id.* at 18.

79. American Press Institute and the Associated Press-NORC Center for Public Affairs Research, *The Personal News Cycle*, THE MEDIA INSIGHT PROJECT 11, http://www.americanpressinstitute.org/wp-content/uploads/2014/03/The_Media_Insight_Project_The_Personal_News_Cycle_Final.pdf (last visited Mar. 15, 2015).

80. *See id.* at 3.

go for information about politics, international news, business and the economy, and social issues.⁸¹ In fact, thirty-one percent of Americans received news about foreign or international issues from cable news, another twenty-eight percent turned to cable news for updates on national government and politics, twenty-four percent of viewers turned to cable news to learn about social issues, and twenty-one percent used cable news as their preferred source for news about business and the economy.⁸² While these numbers may seem small, by comparison, only three percent of Americans turn to local news for information about foreign or international issues, compared to the thirty-one percent that turn to cable.⁸³ So, cable has a ten to one advantage over local news.⁸⁴ Similarly, while seven percent of Americans turn to local news for stories on national government and politics, this is far less than the twenty-eight percent that turn to cable news – a ratio of four to one.⁸⁵ While ten percent of Americans watch local news to learn about social issues or business and the economy, twice that many turn to cable for these stories.⁸⁶ Because Americans turn to cable news for information about critical issues, cable news is an important part of the television news environment.

The influence of cable news is particularly apparent in the quadrennial election cycle. In 2008, the Pew Center for Research in the Public Interest studied television news sources used in the 2008 Presidential Campaign.⁸⁷ The Center discovered that forty-six percent of the public relied on cable news sources.⁸⁸ In stark contrast, only twenty-four percent of the public used broadcast sources.⁸⁹ The 2008 study concluded that “cable news outlets clearly dominate[d] the big three networks as main sources of campaign news.”⁹⁰

A similar pattern was evident in the 2012 election. The Pew Center’s Project for Excellence in Journalism asked respondents to name which

81. *See id.*

82. *See id.* at 14.

83. *Id.*

84. *See id.*

85. *See id.*

86. *See id.*

87. *Continuing Partisan Divide in Cable TV News Audiences*, PEW RES. CENTER 2 (Oct. 31, 2008), <http://www.people-press.org/files/legacy-pdf/467.pdf> [hereinafter *Continuing Partisan Divide*].

88. *Id.*

89. *See id.*

90. *See id.*

sources of campaign news had been “most useful.”⁹¹ Approximately half of the respondents named television as their preferred source and, of those, twenty-four percent deemed cable most useful.⁹² The same report noted that, “[c]urrently, 41% of Americans say they regularly learn about the candidates or the campaign from cable news networks, up five percentage points from 36% during the primaries.”⁹³ While thirty-eight percent of Americans viewed local news for election coverage, cable still has the edge.⁹⁴

Finally, viewer engagement differs significantly among the television news platforms. The Pew Research Center found in 2013 that “over the course of [a]the month,” seventy-one percent of Americans will watch local news, sixty-five percent will watch network news, and thirty-eight percent will view cable news.⁹⁵ However, the study found that “while the largest audiences tune into local and network [news] broadcast news, it is national cable news that commands the most attention from its viewers.”⁹⁶

Indeed, cable news viewers averaged 25.3 minutes per day watching the news.⁹⁷ However, local news and network news were able to log only 12.3 minutes and 12.4 minutes, respectively.⁹⁸ These statistics only represent the averages. For heavy consumers of news, the data is even starker. The most devoted cable news viewers spend an average of seventy-two minutes per day watching cable news.⁹⁹ By comparison, the heaviest network news consumers spent only 31.6 minutes watching network news, while the most dedicated local news viewers only spent 21.8 minutes watching local news.¹⁰⁰ In fact, researchers have stated that “the deeper level of viewer engagement with cable news may help to explain why cable television – despite a more limited audience – seems to have an outsized ability to influence the national debate and news agenda.”¹⁰¹ Thus, cable

91. Tom Rosenstiel & Amy Mitchell, *As General Election Nears, Internet Gains Most as Campaign News Source but Cable TV Still Leads*, PEW RES. CENTER 1, <http://www.journalism.org/files/legacy/Final.pdf> (last visited Feb. 21, 2015).

92. *Id.*

93. *Id.* at 2.

94. *See id.*

95. Amy Mitchell et al., *How Americans Get TV News at Home*, PEW RES. CENTER 1 (Oct. 11, 2013), http://www.journalism.org/files/2013/10/Nielsen_Latest_10-11.pdf.

96. *Id.*

97. *Id.*

98. *Id.* at 1, 3.

99. *Id.* at 2-3.

100. *Id.* at 3-4.

101. *Id.* at 1.

television has a unique ability to influence what is covered on local and national news.

Even more interestingly, “heavy viewers of local TV news and network news spend *more time* watching cable news than they do watching these respective platforms.”¹⁰² The data showed that the heaviest network news watchers watched cable news for about one minute longer than network news.¹⁰³ More surprisingly, those that watched local news for approximately 22 minutes per day – the heaviest group of local news watchers – spent 32 minutes per day watching cable news.¹⁰⁴ Thus, cable news content impacts not only cable news viewers, but also network and local news consumers.

In sum, cable news is more popular than its counterparts, its viewers are more engaged, and cable news is the most accepted source of news for politics, business, and social issues. For all of these reasons, cable news is a significant part of the news environment.

C. Examples of False Stories on Cable News

The increased clout that cable news programs have should place a greater responsibility on the cable news media to ensure that the stories they air are accurate. Sadly, many news organizations do not accept this responsibility. In fact, some actively shirk it. This subsection will provide some examples of the clear distortion of objective facts. For ease of presentation, the falsified, unfairly cropped, or misattributed quotes will be presented in chronological order.

A final note on process: this article is not empirical in nature. Therefore, what follows is not a scientific study by any means. The ensuing quotes are a small selection of the many altered quotes that have aired on cable television. One could argue that there are not enough quotes presented here to make the case that cable news networks consistently mangle quotes. Nevertheless, the statements herein will prove that it does happen. Moreover, the fact that at least one incident of cropped quoting has been identified for each year over an eight year span, is persuasive evidence that over several years, cable networks have engaged in this behavior on a regular basis.

102. *Id.* at 2 (emphasis in original).

103. See Amy Mitchell et al., *How Americans Get TV News at Home*, PEW RES. CENTER 1 (Oct. 11, 2013), http://www.journalism.org/files/2013/10/Nielsen_Latest_10-11.pdf.

104. *Id.* at 4.

*1. 2007**a. Hillary Clinton/Fox News*

On August 24, 2007, Neil Cavuto, host of Fox News' *Your World*, aired a clip of then-Senator Hillary Rodham Clinton stating, "If certain things happen between now and the elections, particularly with respect to terrorism, that will automatically give the Republicans an advantage again."¹⁰⁵ Cavuto then stated to his guest, "So . . . your take on this is that she knows in her heart of hearts Republicans are tougher on terror?"¹⁰⁶ The guest responded in the affirmative.¹⁰⁷ However, the full context of Senator Clinton comments indicated where she thought the blame should lie:

It's a horrible prospect to ask yourself 'What if? What if?' But if certain things happen between now and the election, particularly with respect to terrorism, that will automatically give the Republicans an advantage again, ***no matter how badly they have mishandled it, no matter how much more dangerous they have made the world.***¹⁰⁸

Thus, in her full statement, Senator Clinton clearly repudiated the notion that the Republicans were better able to handle terror attacks. While it is true that she did state that a terror attack could work to the electoral advantage of Republicans, there is nothing in her statement to indicate that in her "heart of hearts" that the Republican response to the War on Terror was the best response.¹⁰⁹

b. Nancy Pelosi/CNN

On November 9, 2007, Tom Foreman, the host of CNN's *The Situation Room*, stated, "From Iraq to domestic programs, Democrats face White House vetoes and little support from Republicans on Capitol Hill."¹¹⁰

105. Sarah Pavlus, *Fox News' Cavuto cropped Clinton quote to suggest she "knows . . . Republicans are tougher on terror"*, MEDIA MATTERS FOR AMERICA (Aug. 24, 2007, 7:38 PM), <http://mediamatters.org/research/2007/08/24/fox-news-cavuto-cropped-clinton-quote-to-sugges/139676>.

106. *Id.*

107. *Id.*

108. *Id.* (emphasis added) (quoting Associated Press).

109. *Id.*

110. Brian Levy & Raphael Schweber-Koren, *CNN's Foreman misleadingly cropped Pelosi comments*, MEDIA MATTERS FOR AMERICA (Nov. 9, 2007, 11:28 PM),

The program then showed a clip of then-House Speaker Nancy Pelosi stating, “I know that Congress has low approval ratings. I don’t approve of Congress because we haven’t done anything.”¹¹¹

There was, however, more to the story. Pelosi did say those words during a press briefing on November 1, 2007.¹¹² But her full response indicated frustration with Congress’ action – or lack thereof – on a particular issue. When asked about the poll ratings of the Democratic Congress, Pelosi stated:

I know that Congress has low approval ratings. I don’t approve of Congress because we haven’t done anything to -- *we haven’t been effective in ending the war in Iraq*. And if you asked me in a phone call, as ardent a Democrat as I am, I would disapprove of Congress as well.¹¹³

She further stated that she had “great pride” in what the Democrats had done.¹¹⁴

There is a substantial difference between stating “I don’t approve of Congress because we haven’t done anything” and “I don’t approve of Congress because we haven’t done anything to end the war in Iraq.” Those statements are quite different. While both indicate disapproval, one is a wholesale rejection, while the other focuses on frustration with Congress’ inaction on a single issue. Cutting off Pelosi before the end of her sentence deprives the viewer of the additional context and changes the meaning of the quote.

2. 2008

a. Anna Wintour/MSNBC

On January 21, 2008, MSNBC co-hosts Willie Geist and Courtney Hazlett discussed remarks that *Vogue Magazine*’s editor-in-chief had made about then-Senator Hillary Clinton.¹¹⁵ Ms. Wintour had asked the Senator

<http://mediamatters.org/research/2007/11/09/cnns-foreman-misleadingly-cropped-pelosi-commen/141665>.

111. *Id.*

112. *See id.*

113. *Id.* (emphasis added) (citing *The Hill* newspaper).

114. *Id.*

115. Julie Millican, *MSNBC cropped Vogue editor quote about Clinton’s canceled photo shoot, omitting editor’s criticism of the media*, MEDIA MATTERS FOR AMERICA (Jan. 22, 2008),

and Presidential candidate to do a cover shoot for her magazine.¹¹⁶ Senator Clinton's staff declined, indicating that engaging in such a project could make her appear "too feminine."¹¹⁷ Ms. Wintour responded by writing a piece in her magazine.¹¹⁸ The MSNBC hosts quoted the letter on-air as follows:

What Anna Wintour said, in part: "Imagine my amazement, then, when I learned that Hillary Clinton, our only female president hopeful, had decided to steer clear of our pages at this point in her campaign for fear of looking feminine. The notion that a contemporary woman must look mannish in order to be taken seriously as a seeker of power is frankly dismaying. This is America, not Saudi Arabia."¹¹⁹

This, however, omitted a key portion of Ms. Wintour's letter. The letter, in full, revealed the source of her ire:

Imagine my amazement, then, when I learned that Hillary Clinton, our only female presidential hopeful, had decided to steer clear of our pages at this point in her campaign for fear of looking too feminine. The notion that a contemporary woman must look mannish in order to be taken seriously as a seeker of power is frankly dismaying. ***How has our culture come to this? How is it that The Washington Post recoils from the slightest hint of cleavage on a senator?*** This is America, not Saudi Arabia.¹²⁰

Although the change was made, at no point did MSNBC show the quote with ellipsis or otherwise indicate that it had removed a portion of the letter.¹²¹

The change is a significant one. While the cropped quote makes it appear – or could lead a viewer to infer – that Ms. Wintour was faulting Senator Clinton or her staff, the crux of her letter – the portion removed by MSNBC – focuses on her frustration with our society and our media for

5:31 PM), <http://mediamatters.org/research/2008/01/22/msnbc-cropped-vogue-editor-quote-about-clintons/142247>.

116. *See id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *See id.*

holding female candidates to a different and higher fashion standard than their male counterparts.

b. Fox News/Bill Clinton

During the September 29th edition of *Fox and Friends*, co-host Gretchen Carlson aired two clips of President Bill Clinton giving his opinion of Democratic Presidential nominee Barack Obama.¹²² In the first portion, Carlson aired a clip of a Bill Clinton interview conducted by CNBC's Maria Bartiromo.¹²³ During a portion of the interview aired on Fox, President Clinton stated, "I've never concealed my admiration for and affection for Senator McCain. I think he's a great man."¹²⁴ Carlson then showed a clip of Clinton being asked about that interview on NBC's *Meet the Press*.¹²⁵ In the clip shown on Fox News, Tom Brokaw and the president had the following exchange:

BROKAW: Would you use the same words for him that you have used for Senator McCain -- that you admire him, and that you think he's a --

CLINTON: I certainly --

BROKAW: -- and that he's a great man?

CLINTON: Well, I don't -- look, I had my first conversation with him in my entire life in Harlem.¹²⁶

After airing the clip, Ms. Carlson stated that the comments were a "major diss against Barack Obama by Bill Clinton. . . . I mean, can't he just come out and say he's a great man? He's trying to get him elected, ostensibly, but not really."¹²⁷ Ms. Carlson was incorrect on all counts.

122. Lauren Auerbach, *Fox's Carlson aired heavily cropped version of Clinton's comments on Meet the Press, then claimed it "was a major diss against Barack Obama"* MEDIA MATTERS FOR AMERICA (Sept. 29, 2008, 4:48 PM), <http://mediamatters.org/research/2008/09/29/foxs-carlson-aired-heavily-cropped-version-of-c/145307>.

123. *See id.*

124. *Id.*

125. *See id.*

126. *Id.*

127. *Id.*

During the NBC interview, the full question asked by Mr. Brokaw was, “And then to Maria Bartiromo last week, you said, “I have never concealed my admiration and affection for Senator McCain. I think he’s a great man. ***But I think on the issues that matter to our future, the Obama-Biden team is more right.***”¹²⁸ In response, President Clinton stated:

I do believe that. And I think Senator Obama has shown a remarkable ability to learn and grow in this campaign. He always was highly intelligent and always a very good politician. He got the change -- the fundamental change in -- in the calendar of this Democratic primary process, of which we were engaged, his energy program kept getting better through the campaign, his health care program kept getting better. I think what you want in a president at a time like this is somebody with good instincts who generally starts in the right position and then just keeps getting better and that’s what he’s done.¹²⁹

After the exchange cited above, the following occurred:

BROKAW: Would you use the same words for him that you have used for Senator McCain -- that you admire him, and that you think he’s a --

CLINTON: I certainly --

BROKAW: -- and that he’s a great man?

CLINTON: Well, I don’t -- look, I had my first conversation with him in my entire life in Harlem.

BROKAW: You had never talked to him before that meeting.

CLINTON: Oh, I’d talked to him, but always in passing. I did a fundraiser for him when he ran for the Senate in 2004. I saw him briefly at Senator Kennedy’s 75th birthday party. I had always, you know, I was -- Hillary’s the one who told me to go help him. She said, “This guy’s got real skills. He’s got almost unlimited potential.”

And I -- she -- so I did and I’ve always thought he was a really commanding presence. What I mean by saying that about McCain is, you know, most people would’ve been broken by what he went through.

128. *Id.*

129. *Id.*

Oh, we would've been happy just to give him an attaboy and a medal and let him wander through life. I think his greatness is that he keeps trying to come back to service without ever asking people to cut him any slack or feel sorry for him or any of that stuff because he was a POW.

But I -- I genuinely, you know, I am developing a really good relationship with Senator Obama and *I certainly admire him*. And I know he saw and imagined the way this thing could develop, this political year and this economic situation in a way that is left him in a position of leadership he's in now.

And *I think that the rest of us should admire* that. That's a big part of leadership: being able to sense, as well as see, the future.¹³⁰

Contrary to Ms. Carlson's implication, President Clinton did not diss Barack Obama. Rather, when viewed in context, President Clinton did praise his friend John McCain, but then proceeded to state that he felt that Senator Obama had better ideas. Moreover, although he did state that he'd "had my first conversation with him in my entire life in Harlem," President Clinton continued to state that both he and his wife had come to know Senator Obama was developing a relationship with him. Finally, although the president indicated that he admired Senator McCain, he also indicated that he admired Senator Obama. President Clinton's admission that he admires two persons simultaneously is a compliment to both men, and not a "diss" to either one, as implied by Ms. Carlson.

c. Barack Obama/Fox News

On October 27, 2008, Fox News aired a chyron stating, "Obama: 'A Tragedy' Supreme Court Hasn't Addressed Wealth Redistribution."¹³¹ The text was allegedly taken from a radio interview given by Obama in 2001.¹³² However, the full content of Obama's remarks were as follows:

130. Lauren Auerbach, *supra* note 122 (emphasis added).

131. Jeremy Holden, *Echoing Drudge, Fox News on-screen text flat wrong about Obama's comments on Supreme Court*, MEDIA MATTERS FOR AMERICA (Oct. 27, 2008, 1:47 PM), <http://mediamatters.org/research/2008/10/27/echoing-drudge-fox-news-on-screen-text-flat-wro/145875>.

132. *See id.*

I think that, you know, if you look at the victories and failures of the civil rights movement and its litigation strategy in the court, I think where it succeeded was to vest formal rights in previously dispossessed peoples so that I would now have the right to vote, I would now be able to sit at the lunch counter and order in, as long as I could pay for it, I'd be OK. But the Supreme Court never ventured into the issues of redistribution of wealth and sort of more basic issues of political and economic justice in this society.

And, to that extent, as radical as I think people try to characterize the Warren Court, it wasn't that radical. It didn't break free from the essential constraints that were placed by the Founding Fathers in the Constitution, at least as it's been interpreted, and Warren Court interpreted it in the same way that, generally, the Constitution is a charter of negative liberties -- says what the states can't do to you, says what the federal government can't do to you, but it doesn't say what the federal government or the state government must do on your behalf, and that hasn't shifted.

And one of the -- I think the tragedies of the civil rights movement was, because the civil rights movements became so court-focused, I think that there was a tendency to lose track of the political and community organizing, and activities on the ground that are able to put together the actual coalitions of power through which you bring about redistributive change. And, in some ways, we still suffer from that.¹³³

After this statement, a caller to the show asked, "Is it too late for that kind of reparative work, economically, and is that the appropriate place for reparative economic work to take place?"¹³⁴ Obama replied as follows:

You know, maybe I'm showing my bias here as a legislator as well as a law professor, but, you know, I'm not optimistic about bringing about major redistributive change through the courts. You know, the institution just isn't structured that way. . . .

You know, the court's just not very good at it, and politically, it's just -- it's very hard to legitimize opinions from the court in that regard. So, I mean, I think that, although, you can craft theoretical justifications for it legally -- you know, I think you can, any three of us sitting here could

133. *See id.*

134. *Id.*

come up with a rationale for bringing about economic change through the courts -- I think that, as a practical matter, our institutions just are poorly equipped to do it.¹³⁵

The context of Obama's remarks indicate that while the word "tragedy" was used, the tragedy to which Obama was referring was not the inability of the Supreme Court to address "wealth redistribution." Rather, the tragedy he described was the failure of civil rights advocates to develop non-judicial solutions to social problems – including economic injustice. Furthermore, and more troubling, at no point in his interview does Obama state that the Supreme Court could have or should have played a role in bringing about economic redistribution. He not only said that he was "not optimistic" about the Court's abilities in this role, but also that he felt that the Court, as an institution, was "poorly equipped" to "bring[] about economic change."¹³⁶ So, far from being a lament about the Court's failure to act to create wealth distribution, Obama's full message indicates that courts are not the proper venue for such a task, and that civil rights advocates should have explored other avenues rather than relying on the courts.

3. 2009

a. Barack Obama/Fox News

On the April 24 edition of Fox News' *Special Report*, host Wendell Goler aired a clip of President Obama appearing to make the following statement with respect to health care: "If you're going to fix it, why not do a universal health care system like the European countries?"¹³⁷ After the clip aired, Goler stated, "His critics worry universal health care would mean government-run health care."¹³⁸

When the full transcript of the President's remarks on that day is reviewed, the difference between what aired and what was actually stated

135. *Id.*

136. *Id.*

137. Lauren Auerbach, *Goler reverses meaning of Obama quote to falsely suggest he supports European-style health care*, MEDIA MATTERS FOR AMERICA (Apr. 25, 2009, 3:50 PM), <http://mediamatters.org/research/2009/04/25/goler-reverses-meaning-of-obama-quote-to-false/149514>.

138. *Id.*

becomes apparent. Below is the transcript from a town hall meeting the President attended:

DR. BERNSTEIN: . . . This next question -- an area close to your heart -- health care reform. From Richard in California: "Why can we not have a universal health care system, like many European countries, where people are treated based on needs rather than financial resources?"

THE PRESIDENT: . . . Now, the question is, if you're going to fix it, why not do a universal health care system like the European countries? I actually want a universal health care system; that is our goal. I think we should be able to provide health insurance to every American that they can afford and that provides them high quality.

So I think we can accomplish it. Now, whether we do it exactly the way European countries do or Canada does is a different question, because there are a variety of ways to get to universal health care coverage.

A lot of people think that in order to get universal health care, it means that you have to have what's called a single-payer system of some sort. And so Canada is the classic example: Basically, everybody pays a lot of taxes into the health care system, but if you're a Canadian, you're automatically covered. And so you go in -- England has a similar -- a variation on this same type of system. You go in and you just say, "I'm sick," and somebody treats you, and that's it.

The problem is . . . what evolved in America was an employer-based system. It may not be the best system if we were designing it from scratch. But that's what everybody is accustomed to. That's what everybody is used to. It works for a lot of Americans. And so I don't think the best way to fix our health care system is to suddenly completely scrap what everybody is accustomed to and the vast majority of people already have. Rather, what I think we should do is to build on the system that we have and fill some of these gaps.¹³⁹

The first problem with the edited clip is that while President Obama did use the words, "*If you're going to fix it, why not do a universal health care system like the European countries?*," the clip does not address the fact that he was merely repeating a question from the moderator. Moreover, the

139. *Id.* (emphasis added).

clip would lead one to believe that President Obama favors the European system, but that is not the case. He did say that he supports a system that would “provide health insurance to every American that they can afford and that provides them high quality.” However, Obama spent the remainder of his answer explaining why – at present, at least – a universal healthcare system patterned after those in Europe would not work in America. Contrary to the edit, Obama stated that America should “build on” the current employer-based healthcare system because it is “what everyone is accustomed to and the vast majority of people already have.” Thus, rather than being a glorification of the European system, Obama’s quote actually explains why the European system would not work in the United States.

b. Barack Obama/Fox News

On July 7, 2009, Fox News’ Senior White House Correspondent Major Garrett interviewed President Barack Obama.¹⁴⁰ Later in the day, on the *Hannity* program, host Sean Hannity, aired this edited version of the clip from the program:

GARRETT: In your speech this morning, you said the Cold War reached its conclusion because of the actions of many nations over many years.

Mr. President, are the Russian sensitivities so fragile that you can’t say the Cold War was won, the West won it, and it was led by a combination of Democratic and Republican American presidents?

OBAMA: There were a whole bunch of people throughout Eastern Europe who showed enormous courage, and I think that it is very important in this part of the world to acknowledge the degree to which people struggled for their own freedom.

We don’t have to diminish other people in order to recognize our role in that history.¹⁴¹

140. Lily Yan, *Hannity again crops Obama’s comments abroad in order to smear him*, MEDIA MATTERS FOR AMERICA (July 8, 2009, 10:30 AM), <http://mediamatters.org/research/2009/07/08/hannity-again-crops-obamas-comments-abroad-in-o/151841>.

141. *Id.*

After airing this clip, Hannity stated:

“Unbelievable. Now, that’s interesting, because Lech Walesa, the leader of the Polish Solidarity Movement, said this about the end of the Cold War; he said, quote: “We in Poland took him, Ronald Reagan, so personally. Why? Because we owe him our liberty. Now this can’t be said often enough by people who lived under oppression for half a century.”

Mr. President, if I were you, you may want to consider hitting the history books maybe before your next foreign trip.¹⁴²

According to Mr. Hannity, President Obama should be faulted for not giving credit to others. However, in the actual clip, that is precisely what Mr. Obama did. After being asked the question by Mr. Garrett, President Obama’s unedited answer was as follows:

OBAMA: Well, listen, the -- I think that you just cut out Lech Walesa and the Poles. You just cut out Havel and the Czechs. There were a whole bunch of people throughout Eastern Europe who showed enormous courage.

And I think that it is very important in this part of the world to acknowledge the degree to which people struggled for their own freedom. I’m very proud of the traditions of Democratic and Republican presidents to lift the Iron Curtain.

But, you know, we don’t have to diminish other people in order to recognize our role in that history.¹⁴³

So, in the complete quote, President Obama did in fact refer favorably to the efforts of both Democratic and Republican presidents to end communist rule in Eastern Europe. However, those that only saw the cropped quote on Hannity would believe that he had neglected to mention the role that the presidents from Truman to Reagan played in ending the Cold War. The complete quote shows the quote that Hannity aired was a fabrication.

142. *Id.*

143. *Id.*

4. 2010

a. *White House Economic Advisor Christina Romer/Fox News*

On the February 17, 2010 edition of *Hannity*, host Sean Hannity aired an edited clip from a *Good Morning America* interview of White House Economic Advisor Christina Romer.¹⁴⁴ Hannity introduced the clip by stating, “Well, this morning Christina Romer went off her talking points yet again. But this time she contradicted herself.”¹⁴⁵ Hannity then aired the following edited clip with commentary:

STEPHANOPOULOS: With unemployment still about 10 percent is the biggest bang from the stimulus behind us?

ROMER: Absolutely not.

HANNITY: That is a far cry from what Romer was saying just last year. Let’s take a look at this.

ROMER: Most analysts predict that the fiscal stimulus will have its greatest impact on growth in the second and third quarters of 2009 and by mid-2010 fiscal stimulus will likely be contributing little to further growth.

HANNITY: Well, Dr. Romer, here we are in 2010 so I guess the stimulus has all but run its course. Now it is no wonder the American people are losing trust in the president’s ability to handle the economy.

In the edited *Hannity* clip, it appears that Dr. Romer is stating that the fiscal stimulus would have no impact on the economy or employment. However, the *Hannity* clip obscured the truth of what Romer was really discussing for several reasons.

First, in her *Good Morning America* interview, Dr. Romer was discussing the impact of the stimulus on unemployment. The full context of

144. Jocelyn Wong, *Fox News crops Romer remarks to two words to falsely claim “she contradicted herself”*, MEDIA MATTERS FOR AMERICA (Feb. 18 2010, 12:39 PM), <http://mediamatters.org/research/2010/02/18/fox-news-crops-romer-remarks-to-two-words-to-fa/160583>.

145. *Id.*

the exchange between Dr. Romer and Good Morning America host George Stephanopoulos is as follows:

GEORGE STEPHANOPOULOS: So we heard in Jake's piece that, that a lot of states are just burning through this stimulus money. And with unemployment still at about 10%, is the biggest bang from the stimulus behind us?

ROMER: Absolutely not. *So certainly, in terms of the level of the things we care about, like employment and the unemployment rate, those effects are gonna grow over time.* And certainly, as, as you heard in the piece, how important one component of the fiscal stimulus has been, the state fiscal relief. It really has kept hundreds of thousands of teachers and firefighters and first responders on the job.¹⁴⁶

In the above quote, it is clear that the advisor is discussing unemployment. But in the clip Hannity used from 2009, she is discussing a completely different economic indicator – GDP.¹⁴⁷ In context, this is what she stated during her Congressional testimony:

On the weaker side, one concern is the leveling out of fiscal stimulus. Fiscal stimulus has its greatest impact on growth around the quarters when it's increasing the most strongly. When spending and tax cuts reach their maximum and level off, the contribution to growth returns to roughly zero.

Now, this does not mean that the stimulus is no longer having an effect. Rather, it means that the effect is to keep GDP growth above the level that it would have been in the absence of stimulus but not to raise growth further.

Most analysts predict that the fiscal stimulus will have its greatest impact on growth in the second and third quarters of 2009. And by mid 2010, fiscal stimulus will likely be contributing little to further growth.¹⁴⁸

Thus, in context, Dr. Romer's remark that "by mid 2010, fiscal stimulus will likely be contributing little to further growth," is clearly related to her

146. *Id.*

147. *Id.*

148. *Id.*

discussion of GDP. She was not discussing employment indicators at that time.

Second, in the same testimony, when Romer did discuss employment, she stated that employment losses would begin to level off, and the economy would begin to see more jobs added in the first quarter of 2011.¹⁴⁹ That testimony in no way contradicts her statement during the Good Morning America interview that the best parts of the stimulus were “absolutely not” in the past.

In sum, the Hannity clip’s conflation of different economic indicators could have easily mislead viewers into believing that Romer had predicted that the stimulus would have no further impact on unemployment. However, her complete remarks indicate that this is not the case.

b. Hillary Clinton/Fox News

On the September 8, 2010 episode of the Fox News program *America Live*, host Megyn Kelly began a segment by stating, “Did Hillary Clinton just effectively declare her candidacy for president of the United States?”¹⁵⁰ Afterward, Kelly aired a clip of Secretary of State Hillary Clinton stating, “I think that our rising debt levels poses a national security threat, and it poses a national security threat in two ways. It undermines our capacity to act in our own interest, and it does constrain us where constraint may be undesirable. And it also sends a message of weakness internationally.”¹⁵¹ Following the clip, Kelly opined that Clinton was “coasting along in this role of secretary of state, watching President Obama take all the hits on the economy, maybe a tweak here or there about how his policies are undermining not just our national economy, but our international security, which she does have to worry about, and then what, she emerges in a couple of years to say ‘I told you so.’”¹⁵²

The clear implication from the introduction of the clip, the edited clip, and Kelly’s remarks thereafter is that Clinton was somehow criticizing

149. *See id.*

150. Matt Gertz, *Fox News uses deceptive video editing to concoct Clinton/Obama schism*, MEDIA MATTERS FOR AMERICA (Sept. 8, 2010, 4:23 PM), <http://mediamatters.org/blog/2010/09/08/fox-news-uses-deceptive-video-editing-to-concoc/170392>.

151. *Id.*

152. *Id.*

President Obama. When the entire quote is read, however, this is not the case. In full, Clinton stated:

I think that our rising debt levels pose a national security threat, and it poses a national security threat in two ways. It undermines our capacity to act in our own interest, and it does constrain us where constraint may be undesirable. And it also sends a message of weakness internationally. . . .

So I don't think we have a choice. It's a question of how we -- how we decide to deal with this debt and deficit. *I mean, you know, it is -- we don't need to go back and sort of re-litigate how we got to where we are, but it is fair to say that, you know, we fought two wars without paying for them, and we had tax cuts that were not paid for either. And that has been a very deadly combination to fiscal sanity and responsibility.*

So the challenge is how we get out of it by making the right decisions, not the wrong decisions. I mean, there's a lot of wrong things we could do that would further undermine our strength. I mean, it is going to be very difficult for those decisions.¹⁵³

Thus, in context, Secretary Clinton was neither criticizing President Obama nor implying in any way that she would be a better president. She was, however, in referring to unpaid "wars" and "tax cuts" clearly referring to President Obama's predecessor, George W. Bush.¹⁵⁴ The wars and tax cuts she referenced begun during Bush's tenure.¹⁵⁵ This quote, as compared to the one that was edited and aired, puts the emphasis on Bush, not Obama. Viewers of Fox News without access to the original quote would or could believe Kelly's interpretation.

c. Harry Reid/Fox News

During the October 27 episode of Fox News' *Special Report*, host Bret Baier introduced a clip by stating, "The last thing Senate Majority Leader Harry Reid needed was a political scandal as he fights to hold onto his seat

153. *Id.*

154. *Id.*

155. *See id.*

from Nevada. But he has one tonight.”¹⁵⁶ Fox News reporter Shannon Bream then reported that a junior member of Senator Reid’s staff, Diana Tejada, had engaged in a sham marriage to help a friend remain in the United States.¹⁵⁷ After the report, Bream stated, “Reid’s office says, quote, “The staffer at issue is no longer with our office . . . the bottom line remains that this story was a desperation measure by partisan Republicans, who have stooped to slinging mud about junior staffers to score points in the waning days of [Sharron Angle’s] campaign.”¹⁵⁸ During the segment, an on-air graphic also stated, “Reid’s office says, quote, “The staffer at issue is no longer with our office . . . the bottom line remains that this story was a desperation measure by partisan Republicans.”¹⁵⁹

There was, however, more to the quote. The statement issued by Senator Reid’s office on the matter stated:

Our office was not previously aware of these allegations and, following an internal investigation, the staffer at issue is no longer with our office. The conduct alleged, which took place several years before the staffer worked for Senator Reid, was clearly wrong. But the bottom line remains that this story was a desperation measure by partisan Republicans, who have stooped to slinging mud about junior staffers to score points in the waning days of her campaign.¹⁶⁰

When the entire statement is compared with the cropped quote, three things become apparent that were not apparent in the initial clip. First, Senator Reid’s office was not aware of the allegations against the staffer. Second, the criminal conduct occurred before the woman entered the Senator’s employment. Finally, Reid condemned the conduct. However, a viewer who only saw the unaired clip would believe only that the staffer had been fired. No other context was provided.

156. Karen Famighetti, *Hatchet job: Fox crops Reid statement to pretend he has a “political scandal”*, MEDIA MATTERS FOR AMERICA (Oct. 28, 2010, 12:29 AM) <http://mediamatters.org/research/2010/10/28/hatchet-job-fox-crops-reid-statement-to-pretend/172548>.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

5. 2011

a. *James Hoffa/Fox News*

On September 5, 2011, James Hoffa, president of the International Brotherhood of Teamsters, held a Labor Day rally in Detroit, Michigan.¹⁶¹ Later that day, Fox News program *America Live* aired a quote of Hoffa stating during the rally, in an animated fashion:

We gotta keep an eye on the battle that we face: a war on workers. And you see it everywhere, it is the Tea Party. And you know, there's only one way to beat and win that war. The one thing about working people is we like a good fight. And you know what, they got a war, they got a war with us, and there's only gonna be one winner. It's gonna be the workers of Michigan and America. We're gonna win that war.

President Obama, this is your army. We are ready to march.

Let's take these son of a bitches out and give America back to America where we belong! Thank you very much!¹⁶²

After the edited clip was aired, Kelly's guest stated that the comments were "thuggery at its best," "the kind of remarks you'd expect out of Tony Soprano," and further opined that "when a union president says 'let's take these sons of bitches out,' that usually means someone's legs are going to get broken, somebody's going to disappear."¹⁶³ A few hours later, another Fox News program, *The Five*, re-aired the edited clip.¹⁶⁴ Program co-host Kimberly Guilfoyle stated that Hoffa had "essentially declared war on the Tea Party."¹⁶⁵

161. Zachery Pleat, *Timeline Of A Right-Wing Media Smear: Hoffa's Call To Vote Became "A Call For Violence"*, MEDIA MATTERS FOR AMERICA, (Sept. 6, 2011, 4:39 PM) <http://mediamatters.org/research/2011/09/06/timeline-of-a-right-wing-media-smear-hoffascal/181478>.

162. *Id.*

163. Matt Gertz, *Fox Doctors Hoffa Speech to Fabricate Call for Violence*, MEDIA MATTERS FOR AMERICA (Sept. 5, 2011, 4:55 PM), <http://mediamatters.org/blog/2011/09/05/fox-doctors-hoffa-speech-to-fabricate-call-for/181254>.

164. Zachary Pleat, *Timeline of a Right-wing Media Smear: Hoffa's Call to Vote Became a "Call for Violence"*, MEDIA MATTERS FOR AMERICA (Sept. 6, 2011, 4:39 PM), <http://mediamatters.org/research/2011/09/06/timeline-of-a-right-wing-media-smear-hoffascal/181478>.

165. *Id.*

When the entire quote is viewed, however, it is clear that Hoffa did not intend for bones to be broken nor blood to be shed. Rather, he wanted his audience to “take them out” using the ballot, not the bullet. He stated:

President Obama this is your army. We are ready to march. And President Obama we want one thing: jobs, jobs, jobs, jobs, jobs, jobs, jobs, jobs. That what we’re going to tell him. He’s going to be - and when he sees what we’re doing here he will be inspired. But he needs help and you know what? ***Everybody here’s got to vote. If we go back and we keep the eye on the prize, let’s take these son of a bitches out*** and give America back to America where we belong! Thank you very much!¹⁶⁶

Hoffa’s exhortation to vote is clearly not a call to arms in the classic sense, but rather a call to the voting booth.

In an interesting twist, before these comments were made, a reporter on another Fox News program, Ed Henry, aired a segment that included Hoffa’s full comments.¹⁶⁷ Another Fox News show re-aired the full quote later in the day. However, this did not stop the producers of *The Five* from airing the edited clip several hours after the context of Hoffa’s remarks had been made clear.

C. The Effect of False Cable News Stories on the Public

After considering the above, a reader might be disinclined to believe that any of the above instances of falsity are serious enough to warrant legal intervention. Moreover, even if the reader agrees that the behavior in the stories is egregious, the reader might not understand why the law should intervene. Actually, there are several reasons why citizens should be concerned enough to push for a change in the law.

1. The Difficulty of Correcting Falsehoods

Falsehoods, once broadcasted, are difficult to correct. One might think that once a correction is offered, any misperception would be corrected. The correction option is fallacious for at least two reasons. To begin,

166. *Id.*

167. *Id.*

corrections in print are rare, and are even rarer in electronic media.¹⁶⁸ Most modern corrections are not even offered on-air, rather being left to the channels affiliate websites.¹⁶⁹ Thus, a viewer of a falsified quote may not see the correction – if the network chooses to correct its “error.”

Furthermore, even if a correction is aired, there is no guarantee that it will be effective in remedying the original error. A Washington Post story noted that experiments had shown that there is a difference in asking people whether they “believe a falsehood immediately after hearing the correct information, and asking again a few days later.”¹⁷⁰ The story noted “the disturbing reality that once an idea has been planted in people’s minds, it is difficult to dislodge it.”¹⁷¹

Additional research buttresses this position. A University of Illinois research paper studied persons with misinformation about a social problem – welfare payments – and examined how the misinformed persons reacted when confronted with the correct information.¹⁷² The researchers concluded that while errors effected participants’ beliefs, “to a degree we cannot specify with precision, people also resist correct information.”¹⁷³ Put more bluntly, the researchers stated:

From a misinformation perspective, people’s preferences should be hard to change. Our findings support this prediction. Rather than respond willy-nilly to whatever cues the environment provides, people resist change. Unless they are “hit between the eyes” with the right facts, they continue to judge policy on the basis of their mistaken beliefs. In fact, it is likely that even those “hit between the eyes” with facts will originally return to their original beliefs and preferences.¹⁷⁴

While this study is not specifically about television, the data supports the conclusion that we should hold those responsible for disseminating facts to a high standard, as first impressions of facts matter.

168. CRAIG SILVERMAN, REGRET THE ERROR: HOW MEDIA MISTAKES POLLUTE THE PRESS AND IMPERIL FREE SPEECH 76, 78 (2d ed. 2009) (noting the low rate of corrections in general is a problem, especially with the high error rate in television).

169. *See id.* at 236.

170. Shankur Vedentum, *Persistence of Myths Could Alter Public Policy Approach*, WASH. POST, Sept. 4, 2007, at A03.

171. *Id.*

172. *See* James H. Kulkulski, et al., *Misinformation and the Currency of Democratic Citizenship*, 62 J. OF POL. 790, 795, 801 (2000).

173. *Id.* at 809.

174. *Id.* at 810.

2. Falsehoods Impact Public Policy

While there may be uncertainty on that point, misinformation can affect policy attitudes, which can in turn affect voters' perceptions of policy issues. Researchers studied Americans' factual knowledge about the Social Security System.¹⁷⁵ The researchers concluded:

Our findings reveal that misleading rhetoric during the Social Security debate of 1998-99 contributed to misperception by about a third of the public that the program is going to run out of many completely. Thus, even after controlling for a host of personal factors and behaviors, moderate levels of misleading rhetoric can degrade political knowledge. Inaccurate perceptions about Social Security's future may in turn cause citizens to favor far-reaching policy reforms.¹⁷⁶

Thus, a misinformed public will support policy based on bad information.

3. Falsehoods and Political Balkanization

Third, the problem of cable news is just beginning to come to a head. The news landscape is quickly shifting. Not only is the electorate becoming more polarized, it is obtaining its information from outlets that are polarized along political lines. In other words, the people who watch Fox News do not watch MSNBC and vice versa.¹⁷⁷ This reality is troubling for a few reasons. First, it means that even if Keith Olbermann or Jon Stewart corrects an error on Fox News, it will not matter if the Fox News viewer is not watching either program.¹⁷⁸ Second, and perhaps more disturbing, the news divide is indicative of a factual divide. As stated by one author:

In the last few year, pollsters and political researchers have begun to document a fundamental shift in the way Americans are thinking about the news. No longer are we merely holding different opinions from one another; we're also holding different facts. Increasingly, our arguments

175. Jennifer Jerit & Jason Barabas, *Bankrupt Rhetoric: How Misleading Information Affects Knowledge About Social Security*, 70 PUB. OP. Q. 278 (2006).

176. *Id.* at 294.

177. See *Continuing Partisan Divide*, *supra* note 87.

178. See, e.g., JOSEPH MINTON AMMAN AND TOM BREUER, *FAIR AND BALANCED MY ASS!: AN UNBRIDLED LOOK AT THE BIZARRE REALITY OF FOX NEWS* 255 (Nation Books, 2007) (quipping that viewers of the O'Reilly Factor will not likely look to the Huffington Post or Air America to verify what has been heard on Fox).

aren't over what we *should* be doing – in the Iraq War, in the war on terrorism, on global warming, or about any number of controversial subjects – but, instead, over *what is happening*. . . . [T]he creeping partisanship has begun to distort our very perceptions about what is “real” and what isn't. Indeed, you can go so far as to say we're now fighting over competing versions of reality. And it is more convenient than ever before for some of us to live in a world built out of our own facts.¹⁷⁹

The last sentence is particularly telling. As the viewing audience is polarized into its respective echo chambers, the possibility of dislodging distorted facts decreases. Moreover, the ability to exploit these factual differences for political gain increases when facts are placed into partisan camps. Thus, it is important to make sure that as our society debates, we are all in possession of the facts to support our various positions.

PART II – REVIEW OF LAW AND LITERATURE

The previous section demonstrated that accuracy in the news matters. This Part will briefly summarize the relevant laws on the topic. Specifically, Subpart A will discuss the regulatory scope of the FCC with regard to cable television. Subpart B will focus on the FCC's news distortion policy. Finally, Subpart C will discuss some of the literature that has been written about the news distortion policy at this time.

A. FCC Jurisdiction over Broadcast and Cable

In the early portion of the twentieth century, Congress used its Commerce Clause authority to pass legislation to regulate radio transmissions.¹⁸⁰ However, both measures were flawed, and as a result, the Federal Communications Act of 1934 (“the 1934 Act”) was passed, also

179. FARHAD MANJOO, *TRUE ENOUGH: LEARNING TO LIVE IN A POST-FACT SOCIETY* 2 (John Wiley & Sons Inc., 2008) (emphasis in original).

180. Radio Comm'n-Issuance of Licenses, 29 Op. Att'y Gen. 579 (1912) (citing Radio Act of 1912, Pub. L. No. 62-264, § 37 Stat. 302); Radio Act of 1927, Pub. L. No. 632, §44 Stat. 1162 (regulating “interstate and foreign radio transmissions and communications”).

under Congress' commerce authority.¹⁸¹ The 1934 Act also created the FCC.¹⁸² The legislation delegated to the FCC the ability to "[m]ake such regulations . . . that . . . will promote public convenience or interest or will serve public necessity."¹⁸³

As previously noted, radio and broadcast television were the primary methods of mass communication in the early 20th Century.¹⁸⁴ As originally drafted, the 1934 Act was designed to regulate "radio and wire communications."¹⁸⁵ It covered "the transmission by radio of writing, signs, signals, pictures and sounds of all kinds."¹⁸⁶ After the advent of television in the 1940s and 1950s, the act included television as well.¹⁸⁷

While it was clear from the outset that the FCC had authority over broadcast television, the FCC's authority over cable was not as clear. Initially, the FCC itself took the position that it did not have jurisdiction over cable.¹⁸⁸ However, as cable systems grew, the tension between cable and broadcast did as well, leading to several FCC complaints.¹⁸⁹ These complaints eventually reached the Supreme Court. In *United States v. Southwestern Cable Company*,¹⁹⁰ the Court ruled definitively that the FCC did have jurisdiction over cable.¹⁹¹ The Court's ruling, however, rather than being clear, seemed to tie the authority to regulate cable to the authority to regulate broadcast. The Court stated:

It is enough to emphasize that the authority which we recognize today under s 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these

181. See *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 227 (1943) ("The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce.").

182. 47 U.S.C. § 151(1996).

183. 47 U.S.C. § 303(f) (2010).

184. See *supra* Part I.A.

185. Fed. Comm'n Act of 1934, ch. 652, Title VI § 605, 48 Stat. 1064, 1103-04 (1934) (current enactment at 47 U.S.C. § 605 (1994)).

186. *Allen B. Dumont Labs. v. Carroll*, 184 F.2d 153, 155 (3d Cir. 1950).

187. 47 U.S.C.A. § 153 (West).

188. See CHARLES H. TILLINGHAST, *AMERICAN BROADCAST REGULATION AND THE FIRST AMENDMENT: ANOTHER LOOK* 101 (2000) (noting that FCC initially declined). See also FERRIS & LLOYD, *supra* note 50, § 5.04[1-2] (describing FCC's early reluctance based upon the distinction between cable and broadcast).

189. See *id.*

190. 392 U.S. 157 (1968).

191. See *id.* at 178.

purposes, issue ‘such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,’ as ‘public convenience, interest, or necessity requires.’ We express no views as to the Commission’s authority, if any, to regulate CATV under any other circumstances or for any other purposes.¹⁹²

This “reasonably ancillary” standard flourished for some time, with both the Supreme Court and the FCC using the standard to evaluate regulations.¹⁹³ However, some questions remained as to the scope of that jurisdiction.¹⁹⁴

Any doubts about the FCC’s authority to regulate cable were answered conclusively in the Cable Communications Policy Act of 1984 (“The Cable Act”).¹⁹⁵ The Cable Act specifically amended the 1934 Act to state: “The provisions of this Act shall apply with respect to cable service, to all person engaged within the United States in providing such services, and the facilities of cable operators which relate to such service.”¹⁹⁶ This amendment generally had the effect of nominally giving the FCC a stronger basis for asserting jurisdiction over cable service and operators.¹⁹⁷ However, it should be noted that there remains a question regarding whether the jurisdiction of the FCC extends as well to the cable networks.¹⁹⁸ Because The Cable Act did not specifically reference “cable networks” or “cable channels” in its jurisdictional statement, there remains some confusion on that score.¹⁹⁹

One other salient feature of The Cable Act should be noted. Prior to The Cable Act, the confusion regarding jurisdiction also led to confusion as

192. *Id.*

193. *See, e.g.*, *United States v. Midwest Video Corp.*, 406 U.S. 649, 663 (1972) (applying standard to local programming origination requirements); *Home Box Office v. FCC & United States*, 567 F.2d 9 (D.C. Cir. 1977) (applying standard to rules about certain programming).

194. T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FIFTH ESTATE* 422 (7th ed. 2007).

195. Pub. L. No. 98-549, 98 Stat. 2779 (1984).

196. *Id.* § 3(a)(1).

197. CARTER ET AL., *supra* note 194, at 431.

198. “Cable networks . . . are companies that provide a programming package to cable and other non-broadcast video systems.” Charles D. Ferris & Frank W. LLOYD, *supra* note 50, at § 17B.01.

199. *See* Charles D. Ferris & Frank W. LLOYD, *supra* note 50, at § 17B.04[2] (“The new Title VI of the Communications Act added by the 1984 Cable Act, however, makes no mention of cable programming networks. As a result, the FCC would have to argue that its “reasonably ancillary” too Title III, or that its powers over cable networks are “reasonably ancillary” to its explicit Title VI powers.”).

to which policies that applied to broadcast applied to cable. This was resolved by having The Cable Act provision that the FCC would be prohibited from placing new content regulations on cable other than those in effect at the time of the act.²⁰⁰ Moreover, the statute made it clear that cable must abide by any amendments to the laws in effect prior to the Cable Act.²⁰¹

B. The News Distortion Policy

As stated, the FCC's charge is to regulate its licensees in the public interest.²⁰² To that end, early in its history, the FCC began developing a policy against the distortion of the news.²⁰³ By the 1960's, the policy had taken shape.²⁰⁴ It is important to note that at this time, the doctrine is merely a policy – it has not been adopted as a rule.²⁰⁵ In addition, penalties for violating the doctrine are minimal. Fines are not assessed; rather, the distortion allegations are considered during the licensee's renewal process. Because distortion is against the public interest, such a finding would weigh against the license renewal.

At present, the policy has two key components. First, the distortion “[must] be deliberately intended to slant or mislead.”²⁰⁶ In evaluating this *mens rea* requirement, the F.C.C. and the courts will not look merely at the broadcast itself. Rather, in determining the intent to distort, the agency and courts require “extrinsic evidence.”²⁰⁷ This evidence is “evidence other than the broadcast itself, such as written or oral instructions from station management, outtakes, or evidence of bribery.”²⁰⁸ In addition, there must be proof that the distortion was known by “principals, top level management, or new management.”²⁰⁹

200. *Id.* § 6.06[3] (citing 47 U.S.C. § 624 (8)(1)).

201. *Id.*

202. *See supra* Part II.A.

203. *See* *New World Comm'n. of Tampa, Inc. v. Akre*, 866 So.2d 1231, 1233 (Fla. Dist. Ct. App. 2003) (noting that policy's origin in 1949) (citation omitted).

204. *See id.*

205. *See id.*

206. *Galloway v. FCC*, 778 F.2d 16, 20 (D.C. Cir. 1985).

207. *Id.*

208. *Id.*

209. Chad Raphael, *The FCC's Broadcast News Distortion Rules: Regulation by Dropping Eyelid*, 6 COMM'N L & POL'Y 485, 513 n. 98 (2001)(citing FCC ruling *Hunger in America*, one of the seminal FCC doctrines on the distortion policy).

The second prong of the distortion test states that the distortion must involve a significant event “not merely a minor or incidental aspect of the news report.”²¹⁰ The FCC will not investigate “‘inaccurate embellishments concerning peripheral aspects’ of news reports or ‘attempts at window dressing which concerned the manner of presenting the news’” as long as the essential facts of the news stories to which these presentational devices related were broadcast in an accurate manner. The real criterion . . . is “whether the public is being deceived about a matter of significance.”²¹¹

While the foregoing is the basic format for the policy, scholars have argued that recent decisions have slightly modified the contours of the policy by changing the type of evidence allowed on the first prong. In *Serafyn v. F.C.C.*,²¹² the District of Columbia Court of Appeals was asked to consider whether a broadcast on the CBS news program 60 Minutes violated the news distortion policy.²¹³ The *Serafyn* Court outlined the news distortion policy as stated in the prior paragraph.²¹⁴ However, the court also made the following observations: 1) there need not be direct evidence of intent; 2) evidence showing that the factual distortion was “obvious or egregious” can suggest an intent to mislead; 3) a pattern of distortion can also be relevant in determining the intent of the news organization.²¹⁵ At least one academic, Professor Lilli Levi, has suggested that *Serafyn* represents “a radical new direction for news distortion policy.”²¹⁶

The FCC’s general approach to enforcing the policy should also be noted. The FCC has stated that it believes distorting the news “is a most heinous act against the public interest.”²¹⁷ Nevertheless, the agency has also said “in this democracy, no Government agency can authenticate the news, or should try to do so.”²¹⁸

210. *Galloway*, 778 F.2d at 20.

211. *Id.*

212. 149 F.3d 1213 (D.C. Cir. 1998).

213. *See id.* at 1216.

214. *See id.* at 1216-17.

215. *See id.* at 1220, 1223.

216. Lili Levi, *Reporting the Official Truth: The Revival of the FCC’s News Distortion Policy*, 78 WASH. U. L. Q. 1005, 1043 (2000).

217. *In re Complaints Covering CBS Program “Hunger in America”*, 20 F.C.C.2d 143, 151 (1969).

218. *Id.*

PART THREE - THE PROPOSAL

This article asserts that there are several issues with the news distortion policy as currently configured. First, there is confusion as to whether the news distortion doctrine even applies to cable. Second, as stated by some litigants, the mental state requirement does make the policy illusory. Third, if distortion is found, the current scheme only affects the violator's licensing. It is arguable that this is barely a deterrent in the broadcast context, but it is surely a lesser deterrent for cable operators, as cable franchises are granted by local entities rather than the federal government.²¹⁹

This article asserts that while there are problems with the current news distortion doctrine, these problems can and should be fixed. Subpart A will make the argument that the news distortion policy does – or should – apply to cable newscasts. Subpart B will discuss a new scheme for proving news distortion claims. Subpart C will discuss the possible punishments that should be available for violations of the policy. Subpart D will address the First Amendment issues. Finally, Subpart E will examine some of the policy issues and concerns.

A. The News Distortion Policy Should Apply to Cable News

Confusion surrounds the application of the news distortion policy to cable programming. The FCC's own literature is misleading on this issue. On the one hand, in the section of its webpage about broadcast journalism complaints, the FCC does reference cable. In the section entitled "What to Include in Your Complaint," the FCC states that complainants should list the "name and phone number of the company you are complaining about and location (city and state) if the company is a *cable or satellite operator*."²²⁰ While this is certainly ambiguous – the document is called broadcast, but then references cable in a decidedly non-committal fashion - it is at least a reference to cable.

219 "Cable franchising' is the process through which a local municipality receives bids for and subsequently enters into a contractual relationship with a cable operator to provide cable television to subscribers. Historically, the franchising process has been vested in local governments with the FCC providing guidance." Kent D. Wakeford, *Municipal Cable Franchising: An Unwarranted Intrusion into Competitive Markets*, 69 S. CAL. L. REV. 233, 246 (1995).

220. *What To Include in Your Complaint*, FCC, <http://www.fcc.gov/guides/broadcast-journalism-complaints> (last visited May 1, 2010).

By contrast, other FCC documents appear to disclaim any connection between the news distortion policy and cable television. The FCC's Fact Sheet on Cable Program Content answers several questions that the public might have about the FCC's ability to regulate cable television.²²¹ The document references the "equal opportunity" rule, rules for lotteries and children's programming, rules for obscenity and indecency, and even the defunct fairness doctrine.²²² Curiously, the document makes no mention of the news distortion policy. It would seem that if the doctrine clearly and unambiguously applied to cable, this sort of public information document would be the proper place to announce it. Moreover, while the FCC and many federal courts have decided numerous news distortion cases involving broadcast distortion, research revealed little – if any – application of the policy in the cable context.

There are at least two arguments for the application of the news distortion policy to cable. First, as previously stated, The Cable Act clarified much about the jurisdiction of the FCC and cable. However, it also exempted cable from any regulations passed after 1983. Thus, it can be assumed that the news distortion policy – a policy dating back to the 1960s, if not the 1940s – should be applicable to cable programmers for that reason alone.

Second, it should be noted that at times, the FCC has made clear that certain broadcast doctrines – such as the equal time doctrine, the fairness doctrine, and the personal attack doctrines – all applied equally to cable.²²³ Not only did the news distortion doctrine predate The Cable Act, but also it is exactly the type of policy that was favored during that time. Indeed, both Professor Raphael and Professor Levi noted the parallels between the two policies²²⁴. Most of the other policies that apply directly to cable – such as the fairness doctrine – exist to ensure fair play and an opportunity for all to be heard on important issues. The news distortion doctrine serves similar

221. See *Fact Sheet on Cable Program Content Regulations*, FCC, <http://www.fcc.gov/guides/broadcast-journalism-complaints> (last visited Mar. 1, 2010).

222. See *id.*

223. See Charles D. Ferris & Frank W. Lloyd, *supra* note 50, at § 5.04[3][e].

224. See Raphael, *supra* note 209, at 486, 489 (“[T]he distortion rules have drawn scant commentary in the regulatory literature, especially in contrast to the outpouring of debate over their cousin, the fairness doctrine.”) and “In the late 1960s, the Commission justified its narrow application of the distortion policy in part by stating that it was preferable to use the fairness doctrine to ensure that all points of view might be heard on disputed issues, rather than for the Commission to decide who was right or wrong.”). See also Levi, *supra* note 216, at 1111 (“Like the news distortion policy, the FCC’s fairness doctrine was designed to promote the public interest.”).

goals, as it attempts to prevent false information from entering the news marketplace. As such, there is no tenable reason why the news distortion doctrine should not be applied to cable.

B. The “New” News Distortion Policy

This subsection will outline the current form of the news distortion policy and then propose how that policy should be changed. The two major changes would be to revise the intent requirement and to jettison the current “significance” requirement.

1. Modifying the Mens Rea Requirement

The first prong of the news distortion doctrine requires a deliberate intent to slant or mislead.²²⁵ This requirement should be maintained. However, following in the path that *Serafyn* indicated, the evidentiary standard for proving this intent should be further loosened.²²⁶ In particular, a pattern or practice should be good evidence of intent. If a news organization has consistently played fast and loose with the truth – such as the incidents from the cable news networks recounted at the beginning of this article – the courts and the FCC should be willing to infer intent. Moreover, the use of a pattern actually helps the news organization and addresses some of the fears expressed by Professor Levi. If a pattern were good evidence of intent, an organization that does not have an established pattern of altering the news would be in a much better position to defend itself against charges of distortion.

In addition, the examination of the pattern or practice should include a review of the partisan bias of the news organization. If it *just so* happens that all of the errors that a given network makes all happen to favor or disfavor people of a particular political persuasion; that should be taken into account. The partisan bias itself could be considered as part of the intent. While this may seem controversial, in reality, it is not when one considers that news is now a business as well.²²⁷ As the news viewership becomes more partisan, the news organizations profit from their increased partisan spin. Therefore, there is a monetary motive to provide a partisan bias in the news. This motive should not be discounted when discussing intent.

225. *Galloway v. FCC*, 778 F.2d 16, 20 (D.C. Cir. 1985).

226. *Serafyn v. F.C.C.*, 331 U.S.App.D.C. 340, 347 (1998).

227. See Raphael *supra* note 209, at 490-91.

Further, the extrinsic evidence standard should be jettisoned. Some statements are incorrect from the outset and should not require any further explication. To compare, equal protection claims require proof of discriminatory intent as well as discriminatory effect.²²⁸ However, it has been suggested that where the effect is so disproportionate on a particular race, that should be evidence of intent.²²⁹ Similarly, where a fact is so wrong that it cannot be right under any objective standard, it should be considered evidence of intent to distort the facts. For example, to broadcast a clip implying that Vice President Biden believed that the fundamentals of the economy were “strong” when he said nothing of the sort would qualify. The alteration of footage or declaring that footage is of one thing when it is of another – should be prima facie evidence of intent to deceive. These types of mistakes do not happen by accident. Effort must be employed to select the footage that appears favorable. (Moreover, most news video has time and date stamps for just this purpose, so errors are actually unlikely.) Under these circumstances, this should be evidence of intent.

A reader may be cautious about the wisdom or desirability of asking a governmental agency to ascertain “truth.” Because the proposal focuses on instances where a speaker’s words have been altered to lead a viewer to believe that the speaker said something other than what was said in the unaltered quote, there will, then, be a need to interpret both the original quote and the altered version. Certainly, this could seem problematic at first glance, as there will, of necessity, be some need to determine what was meant by a particular speaker. However, the proposal herein is limited to instances where there is a clear disconnect between the original quote and the altered version. Put differently, this proposal is not intended to turn the FCC into the “news police.” Rather, it is intended to give the FCC a tool to discourage cable news networks from engaging in creative editing. Even if the line between editing a quote for time and altering a quote for meaning is a fine one, that line exists and the FCC should be entrusted to monitor that line.

2. *Changing the Second Prong*

Moving to the second prong, the requirement of significance should be jettisoned. In our culture, the cable news media is one of the most

228. See *Washington v. Davis*, 426 U.S. 229, 242-44 (1976).

229. See *id.* at 253 (Stevens, J., concurring).

important sources of news, and the public trusts the media – for the most part – to tell the truth. Thus, no error should be labeled as insignificant. Rather than significance, the doctrine should be modified to examine the potential of a story to mislead the public. This requirement should be judged on a totality of the circumstances test, which focuses on, among other things, the viewer's ability to discern the falsehood independently at the time it is aired. For instance, if a cable news network aired a chyron labeling Vice President Biden as a Republican, there would be no need for intervention by the FCC because the average viewer likely knows that the vice president is a Democrat. However, a person watching a broadcast with an inaccurate quote saying that Vice President Biden says the fundamentals of the economy are strong – when he said no such thing – has no way to judge this. He or she has placed trust in the news media. The totality of the circumstances test balances the presumed intelligence of the public to know basic facts with their need to trust the news media for things it does not yet know.

Using a totality of the circumstances test may be more difficult to employ than a bright line test, but it seems appropriate given the delicate balance between press freedom and the public's right to be accurately informed. Another virtue of this approach is that it would protect the viewer. The current distortion policy has gone too far to protect the news stations without regard to the public.

In sum, the proposed test would require both intent and a resultant deception. The intent would be judged by a loosened standard. The deception would be judged by a totality of the circumstances, with an emphasis on the public's ability to evaluate the truth of the message.

C. Punishments under the New Scheme

One of the problems with the current news distortion policy is that it does not impose any sort of sanctions. On one level, this is understandable, as the press is sacred in American society. The potential for government involvement may raise a concern about the chilling effect on highly valued speech. Nevertheless, the trust of the public in the news media is also sacred and should not be violated. There should be consequences for violating this trust.

This proposal would require two components – one ameliorative and one deterrent. The ameliorative component would require a cable news organization to air a correction during the program in which the mistake

was made. For example, if Joe Biden is claimed to have made a statement during a program, that program should air a correction at a prominent time during the broadcast. The host of the program should alert the public to the error and repeat the correction in a prominent manner. In other words, a correction during the closing credits will not suffice.

Here is the deterrent component. If a news organization is deemed to engage in repeated distortion of the news, it should be required to pay a fine. The FCC should determine the amount of the fine. The fines would likely deter the misleading alterations.

D. First amendment concerns

1. Determining the appropriate level of Scrutiny

In *United States v. Alvarez*, the Supreme Court outlined the current formulation of First Amendment jurisprudence.

The facts of *Alvarez* are relatively straightforward. Xavier Alvarez stated publically that he had been awarded a Congressional Medal of Honor.²³⁰ This however, was not true.²³¹ Alvarez was subsequently prosecuted under the Stolen Valor Act.²³² The Stolen Valor Act punishes Americans who “falsely represent” that they have received military honors when they have not.²³³ The Court explained the current First Amendment jurisprudence as follows:

[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories of expression long familiar to the bar. Among these categories are advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called “fighting words, child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent, although a restriction under the last category is most difficult to sustain. These categories have a historical foundation in the Court’s free speech tradition. The vast realm of free speech and thought

230. *United States v. Alvarez*, 132 S.Ct. 2537, 2542 (2012).

231. *See id.*

232. *See id.*

233. *See id.* at 2543.

always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules.²³⁴

The government argued that false speech of the type Alvarez had engaged in had not been accorded First Amendment protection. The Court disagreed, stating:

Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.²³⁵

The Court found the statute unconstitutional.²³⁶

At first glance, the rule and the holding in *Alvarez* appear to foreclose the notion that false statements are always unprotected speech. However, it is important to note that *Alvarez* also stated that some categories of false speech were completely devoid of First Amendment protection²³⁷. While the Court declined to adopt the government's position that false speech is always unprotected, the Court did state that the precedents that the government cited "all derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation."²³⁸ The Court continued to state, "Even when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood."²³⁹ In the summary of its discussion, the Court stated,

As our law and tradition show, then, there are instances in which the falsity of speech bears upon whether it is protected. Some false speech may be prohibited even if analogous true speech could not be. This opinion does not imply that any of these targeted prohibitions are

234. *Id.* at 2544.

235. *Id.*

236. *Id.* at 2551.

237. *Id.* at 2547.

238. *Id.* at 2545.

239. *Id.*

somehow vulnerable. But it also rejects the notion that false speech should be in a general category that is presumptively unprotected.²⁴⁰

Alvarez stands for two propositions. First, false speech is not categorically denied First Amendment protection. Second, that while a categorical denial is inappropriate, some types of false speech may fall outside of the purview of the Amendment. A limitation on false speech is more likely to be upheld when the false speech is made with scienter and results in harm to the listener.

In light of *Alvarez*, the distortion of quotes should fall outside of the First Amendment and merit no additional protection, or at best, rational basis review.²⁴¹ Similar to the defamation and fraud mentioned in *Alvarez*, the modifications to the news distortion doctrine proffered here would require a showing that the statements were made with the intent to deceive the listener. Moreover, unlike *Alvarez*, who made his statement to impress others but not for gain, the cable news networks have and continue to profit – literally and figuratively – from their falsehoods. Thus, unlike the Stolen Valor Act, the proposal here would punish only those intentional falsehoods that caused real harm. Thus, it is unlikely that any higher level of scrutiny would be applicable. Nevertheless, strict scrutiny will be explored below in the event that a Court disagrees with the interpretation of *Alvarez* given above.

2. Application of Strict Scrutiny

Cable occupies an odd space in First Amendment jurisprudence. The *Pacifica* case established that the FCC had the authority to regulate indecency on broadcast.²⁴² However, the *Denver* case seemed to contradict this with respect to cable.²⁴³ At this point, cable's status is not as clear as it could be, but most content-based restrictions on cable programming have been subjected to strict scrutiny. The news distortion policy has been characterized as content-based.²⁴⁴ Strict scrutiny requires that the

240. United States v. Alvarez, 132 S. Ct. 2537, 2546-47 (2012).

241. *Id.* at 2563.

242. FCC v. Pacifica Found., 438 U.S. 726, 726 (1978).

243. See Denver Area Educ. Telecoms. Consortium v. FCC, 518 U.S. 727, 740 (1996).

244. See Levi, *supra* note 216, at 1054.

regulation be narrowly tailored to serve a compelling state interest.²⁴⁵ Both of those conditions can be satisfied here.

The compelling interest is clearly satisfied. The FCC itself has stated that “rigging or slanting the news is a most heinous act against the public interest – indeed, there is no act more harmful to the public’s ability to handle its affairs.”²⁴⁶ Thus, it seems beyond cavil that this is an interest significant enough to meet First Amendment standards.

Narrow tailoring may be a more difficult issue, but should still be able to be proven. To determine whether a regulation is narrowly tailored, the proponent of the legislation “must demonstrate that it does not “unnecessarily circumscribe protected expression.”²⁴⁷ This requirement is sometimes phrased as requiring the “least restrictive alternative.”²⁴⁸ The proposal herein meets these requirements.

The proposal here does not restrain any type of *valued* speech. To the extent that cable news stations are airing truthful, accurate stories, there will be no interference. However, once the stories are falsified, there will be government intervention. The Court has made clear that while political speech is valued, false speech is not.²⁴⁹ Thus, the useful information – the valued speech – will not be disturbed. As long as the stations adhere to journalistic standards, they should be free to carry on.

Also, there is no least restrictive alternative. Some may say that forcing corrections is compelled speech, but under the circumstances, there is no lesser intrusion on the First Amendment. How will the public know that it has been misled otherwise? The only way to correct the false speech is with true speech.

E. Possible Policy Issues

Professor Levi mentioned some intriguing policy points. Is there such a thing as truth? If so, can the government be the arbiter of said truth? As stated, even the FCC is dubious. However, as stated at the outset of this article, this proposal is concerned only with objectively verifiable facts. If something is a matter of opinion and not clearly false, it would not come within the ambit of this policy. That should be an assurance to critics.

245. *Boos v. Barry*, 485 U.S. 312, 321-22 (1988).

246. *Galloway v. FCC*, 778 F.2d 16, 19-20 (D.C. Cir. 1985).

247. *Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002).

248. Ferris & Lloyd, *supra* note 50, at 5.04[3][c].

249. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 300 (1964).

Critics may also assert that the market on ideas is self-correcting. If enough information is out there, the truth will float to the top eventually. This may have been true at some point, but is surely is not at this point in our history. As cable news becomes more partisan and balkanized, the opposite is happening. People are living in worlds of their own making. There is no marketplace of ideas outside of the ideas that people allow into their worlds. The wonder of our media age is that while there are more television channels, more Internet sites, more everything, it seems, people gravitate to a narrower spectrum of the available media. Thus, if a Sean Hannity viewer does not get the correction from Sean Hannity, it may never be corrected, as the same falsehoods are likely to be repeated on the websites and newspapers this viewer visits as well. Since the market is no longer self-correcting, the government should intervene to balance the scales.

IV. CONCLUSION

“The press plays a key role in effectuating the fundamental First Amendment interests of promoting democracy enhancing speech and the marketplace of ideas.”²⁵⁰ According to the opening quotation, an informed citizenry is the cornerstone of a functional and healthy democracy. If this is true, can a democracy function properly – or at all – if the electorate is misinformed? Thus, the active disseminating half-truths and whole lies by the news media is a threat to democracy. Hopefully, the adoption of some or all of the ideas outlined here may help strengthen our democracy in some small way.

250. Benjamin Barron, *A Proposal to Rescue New York v. Sullivan by Promoting a Responsible Press*, 57 AM. U. L. REV. 73, 97 (2007).