

Do Androids Defame with Actual Malice? Libel in the World of Automated Journalism

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I. INTRODUCTION

Automation has been a disruptive influence for many professions, and now even journalists are facing the effects. Automated journalism is the use of artificial intelligence (AI), or algorithmic computer programs, to produce news articles.¹ It has been used effectively by news outlets such as *The Washington Post*, *The Associated Press*, and *The New York Times* in sports scores, financial news, and reporting the weather.² In September 2020, *The Guardian* published a long-form article produced by OpenAI's GPT-3 language generator, demonstrating the potential of automated journalism.³ Microsoft announced in 2020 that it would not renew contracts with roughly fifty of its news production contractors and that it planned to use AI to replace them.⁴ In the next several years, AI is expected to transform the news industry, presenting novel legal challenges to those practicing communications law.⁵

Automated journalism creates a unique risk to news publishers with respect to the possible production of defamatory or libelous statements.⁶ Courts in the past have created standards dependent on an author-defendant's malice or their understanding that a defamatory statement is false or hurtful.⁷ However, traditional methods cannot show that an algorithm possessed malice or that a machine produced a statement knowing it was false or hurtful.⁸ And yet, AI-generated defamation is still harmful to the individuals about whom it is written and to the general public consuming the false information.⁹ Some argue that statements produced by an algorithm are owed

1. Andreas Graefe, *Guide to Automated Journalism*, TOW CTR. FOR DIGIT. JOURNALISM (Jan. 7, 2016), https://www.cjr.org/tow_center_reports/guide_to_automated_journalism.php [<https://perma.cc/Z4PX-Q24H>]; *Here Come the Writing Robots: How Is Automated Journalism Impacting the Media?*, TECHSLANG (Nov. 12, 2020), <https://www.techslang.com/how-is-automated-journalism-impacting-the-media/> [<https://perma.cc/ES9D-6D5B>].

2. Corinna Underwood, *Automated Journalism – AI Applications at New York Times, Reuters, and Other Media Giants*, EMERJ ARTIFICIAL INTEL. RSCH. (Nov. 17, 2019), <https://emerj.com/ai-sector-overviews/automated-journalism-applications/> [<https://perma.cc/QAE5-JXBB>].

3. GPT-3, *A Robot Wrote This Entire Article. Are You Scared Yet, Human?*, GUARDIAN (Sept. 8, 2020, 4:45 AM), <https://www.theguardian.com/commentisfree/2020/sep/08/robot-wrote-this-article-gpt-3> [<https://perma.cc/ZA9F-WT4X>].

4. Geoff Baker, *Microsoft Is Cutting Dozens of MSN News Production Workers and Replacing Them with Artificial Intelligence*, SEATTLE TIMES (May 29, 2020, 8:43 PM), <https://www.seattletimes.com/business/local-business/microsoft-is-cutting-dozens-of-msn-news-production-workers-and-replacing-them-with-artificial-intelligence/> [<https://perma.cc/8Y8Z-HA4Z>].

5. Ron Schmelzer, *AI Making Waves in News and Journalism*, FORBES (Aug. 23, 2019, 10:48 AM), <https://www.forbes.com/sites/cognitiveworld/2019/08/23/ai-making-waves-in-news-and-journalism/> [<https://perma.cc/8Y8Z-HA4Z>].

6. Seth C. Lewis et al., *Libel by Algorithm? Automated Journalism and the Threat of Liability*, 96 JOURNALISM & MASS COMM. Q. 60, 61 (2019).

7. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

8. Lewis et al., *supra* note 6, at 68.

9. See Pascal Podvin, *The Social Impact of Bad Bots and What to Do About Them*, FORBES: TECH. COUNCIL (Dec. 4, 2020, 9:00 AM), <https://www.forbes.com/sites/forbestechcouncil/2020/12/04/the-social-impact-of-bad-bots-and-what-to-do-about-them/> [<https://perma.cc/BW4E-SFEB>].

the same protections afforded to the statements made by living individuals.¹⁰ Others believe that as non-human actors, algorithms do not warrant the same level of protection as human speakers.¹¹

This Note argues that the actual malice standard for defamation should not apply to statements produced by AI, even when the statements discuss public officials or public figures. Rather, defamation claims for AI-generated statements should be evaluated under the more appropriate negligence standard, which is usually applied to statements about private individuals. Under the negligence standard, defendants would have a reasonable duty of care to follow journalistic practices and attempt to ascertain the truthfulness of statements generated by AI. This is more appropriate than the actual malice standard, which requires only that a defendant did not have serious doubts about a statement's truthfulness and was not recklessly indifferent in publishing them.

This Note will first review the nature and development of algorithmic speech before analyzing how the negligence standard could be applied to cases involving AI. The Background section will review how algorithms create statements through mechanical patterns with various degrees of human input, and how this process can sometimes lead to unpredictable results. This section will also review the elements of libel law, demonstrating the unique protection given to defendants who make statements about public officials and public figures on account of a constitutional concern for freedom of speech. The Analysis section will then examine the reasoning behind imposing a stricter duty upon defendants that use AI on account of its unique power to spread disinformation if left unchecked. Then, this Note will address concerns that free speech advocates may have against removing the actual malice requirement by analyzing the difference between algorithmic speakers and human speakers. AI poses a unique challenge to legal and journalistic institutions, and only by adapting quickly can courts keep up with rapidly developing technology.

II. BACKGROUND

To understand the reasons for removing the actual malice requirement for libel when speech is produced by AI, it is necessary to understand the basic nature of artificial intelligence and the legal framework surrounding defamation. Autonomous journalism currently requires significant human input, but as the technology becomes more sophisticated, it will require less and less independent human judgment to create and share statements.¹² This can lead to false, inappropriate, or misleading statements being shared with the public if not properly reviewed or controlled.¹³ The elements of libel

10. See Toni M. Massaro & Helen Norton, *Siri-ously? Free Speech Rights and Artificial Intelligence*, 110 NW. U. L. REV. 1169, 1178-79 (2016) (quoting JOEL FEINBERG, *FREEDOM AND FULFILLMENT: PHILOSOPHICAL ESSAYS* 52 (1992)).

11. See, e.g., Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149 (2008).

12. See Graefe, *supra* note 1.

13. See Podvin, *supra* note 9.

against public figures require that, in addition to the statement being untrue, a defamatory statement is shared with actual malice or reckless disregard for the truth.¹⁴ This could create a difficult barrier for those damaged by autonomously-generated libel to overcome because algorithms cannot be shown to possess actual malice or reckless disregard for the truth in the same way human authors can possess.

A. Algorithmic Speech

Statements produced by AI are commonly called “algorithmic speech,” and can be classified in several broad categories based on the level of user input required to produce statements.¹⁵ This Note will adopt the categories of Curated Production, Semi-Autonomous Production, and Fully Autonomous Production.¹⁶ Before addressing legal challenges presented by speech produced by AI, it is essential for this Note to define and describe these categories of speech.

1. Curated Production

Curated production is a form of algorithmic speech where computer programs are fed data internally by users to produce text.¹⁷ This level of AI possesses less freedom to generate unexpected statements and the greatest amount of user control.¹⁸ Programs like these are fed information to produce text that is formulaic and predictable.¹⁹

Most current autonomously-generated news stories would be categorized as Curated Production.²⁰ News companies feed a program data from sports matches, weather forecasts, or the financial markets, and the program produces simple stories that resemble those written by a human.²¹ Since these news stories are mostly “by-the-numbers” with little to no commentary or analysis, they are ideal for autonomous journalism, and many news publishers have adopted the technology specifically to cover these fields.²²

14. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

15. See Alan M. Sears, *Algorithmic Speech and Freedom of Expression*, 53 VAND. J. TRANSNAT'L L. 1327, 1333-34 (2020).

16. *Id.*

17. *Id.* at 1333.

18. See *id.* at 1333-34.

19. Stephen Beckett, *Robo-Journalism: How a Computer Describes a Sports Match*, BBC: CLICK TV (Sept. 12, 2015), <https://www.bbc.com/news/technology-34204052> [<https://perma.cc/3Q2B-DJJA>].

20. See Sears, *supra* note 15, at 1333.

21. Graefe, *supra* note 1.

22. *Id.*

2. Semi-Autonomous Production

When algorithms are designed to respond to data from external sources, they qualify as Semi-Autonomous.²³ These programs behave with a greater degree of freedom to produce statements that are not immediately intended by the programmer.²⁴ This can result in text that appears more natural and “human,” which can be a desirable trait when interacting with external information.²⁵ This level of sophistication could also require less internal input and oversight, saving an operator’s time and resources.²⁶

One (in)famous example of Semi-Autonomous Production is Microsoft’s AI chatbot, “Tay,” for which Microsoft created an account on Twitter in 2016.²⁷ The program was designed to learn from external sources by interacting with other users on the platform, allowing it to appear more human.²⁸ Unfortunately, within a day of its debut, Tay’s Twitter account began posting inflammatory and inappropriate statements based upon its interactions with other Twitter users.²⁹ The chatbot was quickly taken down by an embarrassed Microsoft, but the episode provides a significant warning about the dangers of allowing AI to generate and publish statements without oversight.³⁰

A more familiar, everyday example of Semi-Autonomous Production is the autocomplete function available in search engines and word processors.³¹ These functions are designed to respond to external user input and predict the next several words a user would like to type.³² Like Tay, these programs take user input and extrapolate new statements to varying results: sometimes the statements produced by autocomplete are acceptable, and other times they can be problematic.³³

There are few examples of Semi-Autonomous news stories which have made it to print. Two articles—one published in *The Guardian* in 2020 and one in *The New York Times* in 2021—were written using artificial intelligence

23. See Sears, *supra* note 15, at 1333-34.

24. *Id.*

25. See *id.*

26. Graefe, *supra* note 1.

27. John West, *Microsoft’s Disastrous Tay Experiment Shows the Hidden Dangers of AI*, QUARTZ (July 21, 2022), <https://qz.com/653084/microsofts-disastrous-tay-experiment-shows-the-hidden-dangers-of-ai/> [<https://perma.cc/T4M5-NFQ7>].

28. *Id.*

29. *Id.*

30. See, e.g., *id.*

31. See Sears, *supra* note 15, at 1333-34.

32. Danny Sullivan, *How Google Autocomplete Works in Search*, GOOGLE SEARCH: THE KEYWORD (Apr. 20, 2018), <https://blog.google/products/search/how-google-autocomplete-works-search/> [<https://perma.cc/Y6AQ-AWJV>].

33. Alex Hern, *(Auto)complete Fail: How Search Suggestions Keep Catching Google Out*, GUARDIAN (May 22, 2018, 8:09 AM), <https://www.theguardian.com/technology/shortcuts/2018/may/22/autocomplete-fail-how-search-suggestions-keep-catching-google-out> [<https://perma.cc/DNF3-Q6N7>].

to talk about artificial intelligence.³⁴ However, both of these articles required a good deal of editorial control over the algorithm in order to generate text that was suitable to print.³⁵ One editor noted that generating the article required producing eight different iterations and splicing them together,³⁶ while another pointed out that the algorithm took several tries because it kept getting stuck in an iterative loop.³⁷ If the goal of autonomous journalism is to require less user input while still generating seemingly natural statements, Semi-Autonomous Production may still have a long way to go.

So far, the question of liability for Semi-Autonomous Production has been averted through the application of Section 230 of the Communications Decency Act.³⁸ This Section provides in part that “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”³⁹ In other words, websites and content platforms cannot be held liable for information shared by third-party users. This is important because Semi-Autonomous Production is used most frequently by search engines and social media platforms.⁴⁰ These parties can argue that algorithmic statements occur because of third-party posts or links, meaning they cannot be held liable.⁴¹

As a result, cases involving liability for Semi-Autonomous Production have generally originated outside the United States.⁴² a surgeon from Australia who sued Google for implying he was bankrupt through its autocorrect,⁴³ a former First Lady in Germany who sued because it implied she was a former escort,⁴⁴ and a Japanese man who sued Google for appending various crimes to his name when it was typed into the search bar.⁴⁵ As AI is

34. GPT-3, *supra* note 3; Kevin Roose, *A Robot Wrote This Book Review*, N.Y. TIMES (Nov. 21, 2021), <https://www.nytimes.com/2021/11/21/books/review/the-age-of-ai-henry-kissinger-eric-schmidt-daniel-huttenlocher.html> [<https://perma.cc/ZSM2-YUZ7>].

35. GPT-3, *supra* note 3 (editor’s note describing how GPT-3 generated the article’s text); Roose, *supra* note 32 (author’s note describing how GPT-3 generated the text featured in the book review).

36. GPT-3, *supra* note 3 (editor’s note describing how GPT-3 generated the article’s text).

37. Roose, *supra* note 34 (author’s note describing how GPT-3 generated the text featured in the book review).

38. Communications Decency Act of 1996, 47 U.S.C. § 230 (2016).

39. *Id.*

40. *See* Sears, *supra* note 15, at 1332-33.

41. Seema Ghatnekar, *Injury by Algorithm: A Look into Google’s Liability for Defamatory Autocompleted Search Suggestions*, 33 LOY. L.A. ENT. L. REV. 171, 172 (2013).

42. *Id.* at 173-74.

43. Jeffrey P. Hermes, *Filing Lawsuits in the United States over Google Autocomplete Is . . .*, DIGIT. MEDIA L. PROJECT (Jan. 23, 2013, 5:03 PM), <http://www.dmlp.org/blog/2013/filing-lawsuits-united-states-over-google-autocomplete> [<https://perma.cc/5YBR-A2BM>].

44. *Google Auto-Correct Libellous, German Court Finds*, SYDNEY MORNING HERALD (May 15, 2013, 9:18 AM), <https://www.smh.com.au/technology/google-autocorrect-libellous-german-court-finds-20130516-2jnf1.html> [<https://perma.cc/2VYN-EHQD>].

45. Damien Gayle, *Google in Court After Man Complains Search Engine Automatically Adds Crimes After His Name*, DAILY MAIL (June 19, 2012, 2:25 PM), <https://www.dailymail.co.uk/sciencetech/article-2161580/Google-court-man-complains-search-engine-automatically-adds-crimes-name.html> [<https://perma.cc/X7HE-796D>].

more widely used by publishers rather than platforms, liability for defamation by algorithms may be extended to more defendants in the United States as well.

3. Fully Autonomous Production

The culmination of text-creating AI will be the fully autonomous production of speech.⁴⁶ This level of AI can create speech with little to no user input or intervention.⁴⁷ However, without a human overseer, a Fully Autonomous program could produce problematic statements that ultimately make it to publication. This category of AI is the least understood because it has not yet been fully realized.⁴⁸

One specific risk associated with algorithmic speech is that false or defamatory statements produced by AI ultimately make it to print, leading to a publisher being sued for libel.⁴⁹ The concern has arisen in litigation but has not been directly addressed by American courts.⁵⁰ Another concern is the capacity for AI to be used in the spread of misinformation either intentionally or unintentionally.

4. Artificial Intelligence and Misinformation

Algorithmic speech may be a powerful tool for news organizations attempting to share legitimate news stories, but it may also become a weapon used in the propagation of disinformation.⁵¹ Researchers have identified how advances in AI might be used to increase the effectiveness of disinformation campaigns by malicious actors.⁵² Individuals who encounter false statements from these or other sources often have difficulty discerning that they are

46. See Sears, *supra* note 15, at 1333.

47. *Id.*

48. See *id.*

49. Lewis et al., *supra* note 6, at 65.

50. Ben Grubb, *Australian Doctor Withdraws Lawsuit Against Google*, EXAMINER (June 17, 2013), <https://www.examiner.com.au/story/1579970/australian-doctor-withdraws-lawsuit-against-google/> [<https://perma.cc/LRA3-MRGX>]. After bringing a federal lawsuit in California, plaintiff Guy Hingston argued that Google should be held responsible for defamation by alleging he was bankrupt through its autocomplete feature. *Id.* When he typed his name into the search bar, the earliest options included “Guy Hingston bankrupt.” *Id.* The case was never decided because the plaintiff withdrew the lawsuit. *Id.*

51. Cade Metz & Scott Blumenthal, *How A.I. Could be Weaponized to Spread Disinformation*, N.Y. TIMES (June 7, 2019), <https://www.nytimes.com/interactive/2019/06/07/technology/ai-text-disinformation.html> [<https://perma.cc/EN5C-DNVE>]; Giancarlo Mori, *The Rise of AI-Enabled Disinformation*, MEDIUM (May 7, 2021), <https://gcmori.medium.com/the-rise-of-ai-enabled-disinformation-577e38fe724a> [<https://perma.cc/D2AN-SZSZ>].

52. KATERINA SEDOVA ET AL., CTR. FOR SEC. & EMERGING TECH., AI AND THE FUTURE OF DISINFORMATION CAMPAIGNS 6 (2021), <https://cset.georgetown.edu/wp-content/uploads/CSET-AI-and-the-Future-of-Disinformation-Campaigns.pdf> [<https://perma.cc/3UB4-Y93R>].

untrue and may actively spread it further.⁵³ If an AI news aggregator or algorithmic speech program receives false or misleading statements without editorial safeguards, it may incorporate false statements into its news production.⁵⁴ This can create a significant problem for the truth-seeking public and for individuals who may be harmed by defamation.

The public's increased access to channels of communication through the Internet has compounded the problem of the potential spread of false information. Disinformation campaigns can use AI on social media particularly effectively because social media posts are usually short enough that it is difficult to distinguish between a human speaker and an algorithmic speaker.⁵⁵ Furthermore, after false or misleading statements are initially published, dissemination follows naturally as users post, repost, or share information with one another through various channels.⁵⁶

As algorithmic speech increases in its use and sophistication, the threat of false or misleading statements also increases.⁵⁷ Inevitably, this misinformation will start to affect real individuals, causing reputational and other damage.⁵⁸ Legal and policy measures must be taken to ensure that the threat of reputational damage is kept to a minimum and that the public has access to trustworthy and reliable news, even from AI. One measure should be requiring publishers who use algorithmic speech for news production to exercise a reasonable duty of care in its journalistic process.

B. Libel and Defamation

Libel is a type of defamation, specifically “the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.”⁵⁹ Defamatory communication is that which “harm[s] the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”⁶⁰ State courts generally follow the

53. Tom Buchanan, *Why Do People Spread False Information Online? The Effects of Message and Viewer Characteristics on Self-Reported Likelihood of Sharing Social Media Disinformation*, PLOS ONE 1 (Oct. 7, 2020), <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0239666&type=printable> [https://perma.cc/8YRB-K3T5].

54. John Villasenor, *How to Deal With AI-Enabled Disinformation*, BROOKINGS INST.: CTR. FOR TECH. INNOVATION (Nov. 23, 2020), <https://www.brookings.edu/research/how-to-deal-with-ai-enabled-disinformation/> [https://perma.cc/UV7K-NZG8].

55. SEDOVA, *supra* note 52, at 5-6.

56. Buchanan, *supra* note 53, at 2-3; Villasenor, *supra* note 51.

57. See generally Saahil Desai, *Misinformation Is About to Get So Much Worse*, ATLANTIC (Sept. 27, 2021), <https://www.theatlantic.com/technology/archive/2021/09/eric-schmidt-artificial-intelligence-misinformation/620218/> [https://perma.cc/D58A-SGR5].

58. Villasenor, *supra* note 54.

59. RESTATEMENT (SECOND) OF TORTS § 568 (AM. L. INST. 1977).

60. RESTATEMENT (SECOND) OF TORTS § 559 (AM. L. INST. 1977).

Restatement (Second) of Torts § 558⁶¹ and recognize that a claim of libel requires:

- (a) false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting at least to negligence on the part of the publisher; and
- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.⁶²

For purposes of analyzing claims with respect to autonomous journalism, this Note is most concerned with the third element of fault.

1. The Negligence Standard

The requirement of “fault amounting at least to negligence” describes the negligence standard as the minimum degree of fault required in a defamation claim.⁶³ For plaintiffs who are neither public officials nor public figures, the courts have left it to the individual states to determine the required degree of fault for these private figures to succeed on a claim of defamation, so long as they do not impose liability without fault.⁶⁴ The vast majority of states have declined to impose additional requirements on plaintiffs beyond negligence, so the negligence standard is generally applied to private individuals.⁶⁵ This standard requires that a plaintiff prove that, in addition to a publication being false, the defendant knew it to be false *or* lacked reasonable evidence to believe it was true *or* acted negligently in failing to ascertain its truth.⁶⁶ It imposes on defendants a duty of reasonable care in verifying the truth or falsity of information published about private individuals. Publishers must be justified in the belief that their publications are true.⁶⁷

In practice, defendants seeking to prove they fulfilled the duty of reasonable care can rely on various types of evidence. Juries may be instructed to consider “the reliability, the nature of the sources of the defendant’s information, its acceptance or rejection of the sources, and its care in checking upon assertions.”⁶⁸ The amount of urgency in reporting a particular story, the need to investigate a matter thoroughly, and whether

61. See, e.g., *McAdoo v. Diaz*, 884 P.2d 1385 (Alaska 1994); *Boswell v. Phoenix Newspapers, Inc.*, 730 P.2d 178 (Ariz. Ct. App. 1985).

62. RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

63. *Id.*

64. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1974).

65. See 99 AM. JURIS. PROOF OF FACTS, 3D *Proof of Facts Establishing Affirmative Defenses Against a Claim for Defamation* § 17 (2008).

66. See *Gazette, Inc. v. Harris*, 229 Va. 1, 15 (1985); see also RESTATEMENT (SECOND) OF TORTS § 580B (AM. L. INST. 1977).

67. See *Harris*, 229 Va. at 5; see also *Carney v. Santa Cruz Women Against Rape*, 221 Cal. App. 3d 1009, 1016 (Ct. App. 1990); see also *Duchesnaye v. Munro Enters., Inc.*, 125 N.H. 244, 251 (1984).

68. *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 156 (1967).

independent efforts were taken to corroborate information may also play a role.⁶⁹ Affidavits from expert journalists attesting that publishers acted in accordance with professional journalistic standards may also provide a strong defense because these standards are well known and because courts frequently recognize them.⁷⁰ These procedures include being thorough and fair, carefully attributing sources and quotes, not phrasing statements in a way to create unsupported implications, relying on multiple sources, and giving news subjects an opportunity to respond or comment.⁷¹ When publishers depart from standard procedure in fact-checking information, they risk breaching the reasonable duty of care required of journalists under the negligence standard.

In *Gertz v. Robert Welch, Inc.*, the Supreme Court established the negligence standard as the minimum degree of fault private individuals must prove to succeed in a libel claim, abolishing the rule of strict liability for defamation.⁷² This negligence standard is less demanding to publishers than the strict liability standard, which held defendants liable for *any* false information they published, making one's only defense the truthfulness of the statement.⁷³ Under the negligence standard, publishers can successfully defend themselves by showing they exercised reasonable care and published the false information without knowing it was false.⁷⁴ However, the negligence standard is not as demanding as the actual malice standard, which requires more fault on the part of publishers when discussing public officials and public figures.⁷⁵

2. The Actual Malice Standard

In 1967, the U.S. Supreme Court ruled in *New York Times v. Sullivan* that for a printed statement about a public official to be considered libelous, the public official must show that a statement not only fulfills the original four elements of defamation (including fault amounting at least to negligence), but that the statement was also made with "actual malice."⁷⁶ The Court in that case defined actual malice as "knowledge that [a statement] was false or [made] with reckless disregard of whether it was false or not."⁷⁷ Shortly thereafter, the Court extended this standard to public figures or those about whom the public has a justified interest.⁷⁸

69. *Id.* at 157-59.

70. *Greenberg v. CBS Inc.*, 69 A.D.2d 693, 709-10 (N.Y. App. Div. 1979).

71. *Practical Tips for Avoiding Liability Associated with Harms to Reputation*, DIGIT. MEDIA L. PROJECT, <https://www.dmlp.org/legal-guide/practical-tips-avoiding-liability-associated-harms-reputation> [<https://perma.cc/PL72-ZA3T>] (last visited Sept. 12, 2022).

72. *Gertz*, 418 U.S. at 345-48.

73. *Id.* at 340-41.

74. *Id.* at 334.

75. *Id.* at 342.

76. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

77. *Id.* at 280.

78. *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 158 (1967). The Court also identified "public figures" as those who are "involved in issues in which the public has a justified and important interest." *Id.* at 134. In this case, a prominent university football coach. *Id.*

The purpose of this heightened standard is to protect the defendant's right to freedom of expression when speaking about public individuals and matters of "the highest public interest and concern."⁷⁹ As noted by the Court, citizens will likely have an interest in speaking, often critically, about public figures and officials.⁸⁰ Applying the less stringent negligence standard to libel claims may discourage free discussion and make citizens unwilling to speak out on public matters, which would be antithetical to the purpose of the First Amendment's freedom of speech.⁸¹

Another reason courts have cited for allowing the actual malice standard is that public figures and public officials have greater access to news media and resources for making public statements.⁸² Given these resources, public officials and public figures have a greater opportunity to set the record straight if a defamatory statement is widely publicized.⁸³

Proving the existence of actual malice presents an obstacle to plaintiffs, even in cases involving human authors. The Supreme Court has provided for the use of direct or circumstantial evidence, including threats, prior or subsequent statements of the defendant, evidence indicating a rivalry or hostility, and other facts showing a reckless disregard of a plaintiff's rights.⁸⁴ Malice in this case speaks to a publication's intent or motive, specifically the publisher's "ill will, spite, hatred and an intent to injure."⁸⁵ It can be difficult to prove the internal motivations of a particular party in the best of circumstances, which is why circumstantial evidence is permitted in such cases.⁸⁶ However, this creates an even bigger problem in cases involving algorithmic speech. Because speech is produced mechanically, it could be impossible for plaintiffs to demonstrate that a statement's "author" either had serious doubts about what it was saying or harbored ill will towards the subject.⁸⁷ In order to protect individuals from algorithmic defamation, and the public from misinformation, courts should modify the requirements for liability in cases involving AI.

Included in the definition of actual malice is a "wanton or reckless indifference or culpable negligence."⁸⁸ This addition to the standard can be confusing when distinguishing the actual malice standard from the negligence standard. The Court clarified its position in *St. Amant v. Thompson*, admitting that reckless disregard "cannot be fully encompassed in one infallible definition" but that requirements include "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication."⁸⁹ Including "reckless disregard" for the truth within the

79. *Sullivan*, 376 U.S. at 266.

80. *See id.* at 270-71.

81. *See id.* at 271-72, 296-97 (Black, J., concurring).

82. *Id.* at 304-05 (Goldberg, J., concurring); *Butts*, 388 U.S. at 155.

83. *Butts*, 388 U.S. at 155.

84. *Herbert v. Lando*, 441 U.S. 153, 164 n.12 (1979) (quoting 50 AM. JURIS. 2D *Libel and Slander* § 455 (1970)).

85. *Id.* at 162 (quoting *Butts*, 388 U.S. at 138 n.3).

86. *Id.* at 172-73.

87. *Lewis et al.*, *supra* note 6, at 69.

88. *Herbert*, 441 U.S. at 162.

89. *St. Amant v. Thompson*, 390 U.S. 727, 730-31 (1968).

definition of actual malice does not impose a reasonable duty to check the reliability of statements published about public officials and figures.⁹⁰

3. Who Can Be Liable?

Traditionally, the original author or publisher of defamatory information is the individual or company liable for any injury it causes.⁹¹ Under the Doctrine of Republication, the original author is not liable for its republication by a third party if they did not authorize, or could not have reasonably foreseen, its republication.⁹² In that case, the party that repeats or republishes untrue statements can be held liable.⁹³ Under the negligence standard, this essentially imposes a duty on “republishers” to fact-check the original information or risk incurring liability.

An important exception to the Doctrine of Republication is the “wire service defense,” which allows the media to republish defamatory statements without liability in some circumstances.⁹⁴ The rule was first used in *Layne v. Tribune Co.*, where a defendant newspaper company republished a libelous story about the plaintiff that it received by wire.⁹⁵ The court ruled that because the original source was a “generally recognized reliable source of daily news” there was no defamation unless the newspaper acted recklessly or carelessly in reproducing the story.⁹⁶ The defense developed a standard of reasonable duty of care, allowing smaller news outlets to share news from around the country without fear of liability, so long as they read the original article and did not detect any reason to doubt its truthfulness.⁹⁷ The existence and nature of the wire service defense differs state by state, but states that recognize it generally require that: (1) a publisher received the news from a reputable news agency; (2) they did not know the information was false; (3) the news item does not indicate any reason to doubt its veracity; and (4) the publisher does not substantially alter the news items when republishing it.⁹⁸

Ultimately, the tort of libel allows for people damaged by the untrue words of another to recover for damage to their reputations. It also provides powerful incentives to those who publish to exercise care that they are sharing information which is correct and does not infringe on a person’s right to privacy. The provisions in the Restatements provide for an injured plaintiff to recover from the actor most responsible for an injury done to them.⁹⁹ However, if an injured party cannot recover because of the requirements

90. *Id.* at 731.

91. 53 C.J.S. *Libel and Slander* § 91 (1948).

92. 53 C.J.S. *Libel and Slander* § 102 (1948).

93. RESTATEMENT (SECOND) OF TORTS § 559 (AM. L. INST. 1977).

94. Jennifer L. Del Medico, Comment, *Are Talebearers Really as Bad as Talemakers?: Rethinking Republisher Liability in an Information Age*, 31 FORDHAM URB. L.J. 1409, 1410 (2004).

95. *Layne v. Tribune Co.*, 146 So. 234, 235-36 (Fla. 1933).

96. *Id.* at 238.

97. Del Medico, *supra* note 94 at 1412-13.

98. *Wire Service Defense*, DIGIT. MEDIA L. PROJECT, <https://www.dmlp.org/legal-guide/wire-service-defense> [<https://perma.cc/3HSH-LCMG>] (last visited Sept. 12, 2022).

99. RESTATEMENT (SECOND) OF TORTS § 578 (AM. L. INST. 1977).

imposed by law, courts should reconsider those standards' purpose and effectiveness. The following analysis will consider how AI interacts with the actual malice standard and argue that the standard is insufficient to ensure that the purposes of libel are met.

III. ANALYSIS

Scholars in journalism and communications law have identified news organizations' growing concern for inadvertently spreading libel through artificial intelligence. In 2018, scholars writing for *Journalism and Mass Communication Quarterly* saw "Libel by Algorithm" as a potential legal hazard that journalists should be wary of in the near future.¹⁰⁰ They outlined several situations in which algorithms have played a part in spreading disinformation, summarized the scholarship surrounding whether First Amendment protection should be given to algorithms, and pointed out that public individuals who are plaintiffs would be unlikely to recover unless the court is willing to create a new standard of liability.¹⁰¹ One point of concern is the difficulty of showing actual malice on the part of AI users, who may not understand the algorithmic speech creation process.¹⁰² Other scholars have corroborated these concerns, pointing out prior cases that suggest libel via algorithmic speech is possible, and they assert the difficulty of successfully bringing a claim for defamation against AI under the actual malice standard.¹⁰³

Developments in communications technology have given people the ability to publish and share information on a larger scale than ever. This has led to a bounty of information being freely available to individuals across the world, but this also makes identifying the source of information, and its truthfulness, far more difficult.¹⁰⁴ Algorithms in particular have little ability to verify the truthfulness of statements and can easily republish or redistribute the libelous words of others by mistake.¹⁰⁵ This greater risk merits imposing a greater responsibility on AI users to verify the speech it produces.

The existing standard requiring actual malice for public figures to bring a claim of defamation does not sufficiently impose this responsibility. Artificial intelligence itself does not engage in the subjective decision-making process evaluated under the actual malice standard.¹⁰⁶ Actual malice requires a plaintiff to demonstrate that the author or publisher possessed ill will

100. Lewis et al., *supra* note 6, at 60-81.

101. *Id.* at 63-69.

102. *Id.* at 69.

103. Ghatnekar, *supra* note 41, at 173-74; *see also* Peter Georgiev, *A Robot Commits Libel. Who Is Responsible?*, REYNOLDS JOURNALISM INST. (Feb. 20 2019), <https://rjionline.org/news/a-robot-commits-libel-who-is-responsible/> [<https://perma.cc/3VKL-4PZT>].

104. Filippo Menczer & Thomas Hills, *Information Overload Helps Fake News Spread, and Social Media Knows It*, SCI. AM. (Dec. 1, 2020), <https://www.scientificamerican.com/article/information-overload-helps-fake-news-spread-and-social-media-knows-it/> [<https://perma.cc/R42W-6VFG>].

105. *Id.*

106. Graefe, *supra* note 1.

towards the plaintiff or had serious doubts about the veracity of a defamatory statement.¹⁰⁷ However, algorithms are designed to produce information mechanically, and it would be impossible to prove they possessed ill will or doubts in the traditional sense.¹⁰⁸ Thus, negligence is a better standard for considering claims of defamation.

A. *Applying the Negligence Standard*

The best way to analyze the advantages of applying the negligence standard over the actual malice standard for cases involving algorithmic speech is through illustration. Consider the following scenario:

A tech company releases a chatbot named ALICE that is designed to interact with users on social media. ALICE can create short articles about the user's local weather, local news, and current events. ALICE is programmed to learn from the language of human users on the platform and produce statements that are calculated to foster the greatest amount of engagement with the online community. ALICE is also programmed to avoid making controversial statements or commenting on heated issues, as identified by its developers. However, despite this safeguard, ALICE engages in speech with several users about a small-town politician. Based on the information in her interactions, ALICE goes on to make statements to a large number of other users that strongly imply the politician is involved with organized crime. The users, supposing that these are news announcements, take her statements at face value. There is no evidence that the politician has connections with organized crime, but she suffers reputational damage regardless. She sues the tech company for defamation.

If ALICE were a human author ("Alice") producing news and statements for social media, her statements would be reviewed under the actual malice standard because the plaintiff is a public figure.¹⁰⁹ Under these circumstances, inquiries into Alice's journalistic process, state of mind, and her own personal knowledge would center around whether she knew that her statements were false, if she behaved with reckless disregard as to whether they were false, or if she bore ill will or an intent to injure the politician.¹¹⁰ Alice could be questioned and cross-examined, and the company's policies regarding its journalists could be used as evidence in convincing a jury that there was or was not actual malice.¹¹¹

However, in this scenario, ALICE is an algorithm. Therefore, applying the actual malice standard would yield an incoherent analysis. Inquiries into ALICE's "journalistic process" would yield little insight into whether ALICE "believed" her statements to be true.¹¹² Similarly, it would be difficult, if not impossible, to show that ALICE bore ill will or resentment towards any

107. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 283-84 (1964).

108. Lewis et al., *supra* note 6, at 69.

109. See *Sullivan*, 376 U.S. at 279-80.

110. See *id.* at 279-80, 283-84.

111. *Herbert v. Lando*, 441 U.S. 153, 164 n.12 (1979) (quoting 50 AM. JURIS. 2D *Libel and Slander* § 455 (1970)).

112. Lewis et al., *supra* note 6, at 68.

individual.¹¹³ Inquiries into ALICE’s programmers—those who created the program—and operators—those who used the program to produce statements—would also be stymied; programmers may not even be aware of the politician’s identity, and operators presumed that the program was operating properly.¹¹⁴ At best, the plaintiff could try to make a case for wanton and reckless indifference on the operators’ part concerning whether published statements were true or not.¹¹⁵ In all likelihood, the damage done to the public figure and her reputation would remain unresolved, and there would still be a risk of spreading misinformation.

However, if a court were to apply the negligence standard to the Scenario, the analysis is much more coherent. The question before the court would be whether ALICE and her handlers fulfilled a reasonable duty of care to determine the truth of her statements.¹¹⁶ A jury could be directed to consider the reliability of ALICE’s sources of information, her acceptance or rejection of particular sources, and the algorithm’s methods of checking upon assertions.¹¹⁷ Programmers and operators could testify about the nature of ALICE’s fact-checking method, and whether she derives information from any common profile or if she corroborates stories with reliable sources. Experts could testify regarding whether the algorithm’s methods meet standards of journalistic procedure. Under this standard, a defendant would still prevail if they were to show that ALICE’s safeguards and methods are reasonable enough to fulfill the duty of care.¹¹⁸ However, the plaintiff in this situation also has an opportunity to succeed if she demonstrates ALICE’s programming and publisher’s procedures lead to negligent, untrustworthy statements.¹¹⁹

B. Libel Defendants in cases involving Artificial Intelligence

The likely defendants to a claim of defamation involving artificial intelligence are the algorithm’s operators (news organizations and individuals who use AI to produce statements and publish them) and creators (programmers and software developers that create the speech-producing AI).¹²⁰ In lieu of demonstrating malice on the part of the algorithm, showing malice on the part of human operators or creators would satisfy the standard.¹²¹ However, in many cases, it may be too difficult to show that these human actors demonstrated malice.¹²² Either might argue they justifiably relied on AI tools, or they might merely assert that no duty to verify

113. *Id.*

114. *Id.*

115. *Herbert*, 441 U.S. at 162.

116. RESTATEMENT (SECOND) OF TORTS § 580B (AM. L. INST. 1977).

117. *See, e.g.*, 16B AM. JURIS. PLEADING & PRAC. FORMS *Libel and Slander* § 286 (last updated July 2022).

118. *See* RESTATEMENT (SECOND) OF TORTS § 580B cmt. d. (AM. L. INST. 1977).

119. *See id.*

120. *See* Lewis, *supra* note 6, at 71-72.

121. *See id.* at 68.

122. *See generally id.* at 69.

information exists under the standard outlined in *St. Amant v. Thompson*.¹²³ Because of this impossible standard, adopting a negligence standard would be more appropriate for cases involving autonomous journalism.

Publishers are generally the less sophisticated of the two groups when it comes to understanding the risks of utilizing an algorithmic speech program.¹²⁴ Fortunately, news organizations often have procedures in place to facilitate accurate reporting.¹²⁵ However, some publishers may allow statements produced by AI to be printed without editorial review.¹²⁶ Unless courts place an affirmative duty to review statements produced by AI, operators may avoid responsibility in cases involving public officials by citing their lack of serious doubts about the information algorithms produce. Ultimately, actual malice could become an impossible standard to prove, and AI in the wrong hands would become a tool of blatant disinformation.

Under the negligence standard, operators would have a reasonable duty of care to seek accurate reporting.¹²⁷ This is the standard to which individuals and news organizations are already held when publishing statements about private individuals, so it would merely require extending the same care to the public when producing articles autonomously.¹²⁸

Liability for software developers is a rapidly developing field, and it has only barely touched the legal topic of defamation.¹²⁹ However, software developers can be held liable for negligent design where a defect in software causes physical injury, fails to protect private information, or possesses another design defect.¹³⁰ Under a theory of negligence in software development, the plaintiff must show that (1) the developer had a duty to provide functioning software; (2) the developer breached this duty; (3) the user suffered harm; and (4) the harm was caused by the software.¹³¹ For defamation, this is the most likely route by which developers may be held liable for the actions of their programs.

Extending the negligence standard for libel to software developers would utilize the existing framework for negligence. Developers are liable for software that does not operate correctly if they were negligent in its production. Like other news producers and original authors, developers should have a duty to ensure algorithmic speech software was reasonably programmed to produce statements which are true. This could include implementing fact-checking software, requiring statements to include corroborating sources, or flagging potentially sensitive statements for human review. If an algorithm does not fulfill this duty and routinely produces statements that are false and injure another person, the software breaches this

123. See *St. Amant v. Thompson*, 390 U.S. 727, 730-31 (1968).

124. Graefe, *supra* note 1.

125. See Lewis et al., *supra* note 6, at 69-70.

126. *Id.*

127. See *Thompson*, 390 U.S. at 734 (Fortas, J., dissenting).

128. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1974).

129. See 46 AM. JURIS. TRIALS 687 *Failure of Performance in Computer Sales and Leases* §§ 1, 17 (1993).

130. See 46 AM. JURIS. TRIALS 687 *Failure of Performance in Computer Sales and Leases* § 24 (1993).

131. See *id.*

duty, and the developer could be liable.¹³² This would encourage developers to design algorithmic speech in a way that does not produce libelous statements.

However, to more effectively protect themselves from this kind of liability, software companies have increasingly relied on indemnification clauses in license agreements.¹³³ Under one of these agreements, a vendor agrees to license their software to another entity in exchange for payment, but the vendor often includes language that seeks to limit the software developer's liability for injuries caused by the software.¹³⁴ In the case of AI, it is easy to imagine a situation where creators license their algorithmic speech programs to publishers under a license which limits their liability for defamation. In such a situation, they would more effectively shield themselves from responsibility for defamation claims but shift the burden of liability solely onto the operator for use of their software.

Under the actual malice standard, such license agreements would block any claim for defamation by public figures or public officials. Users could defend themselves on the grounds that they possessed no actual malice and trusted in the software to produce correct statements, while software developers would use indemnification clauses to avoid responsibility. Under the negligence standard, however, developers and users would be encouraged to make clear in the terms of their agreements who is responsible for fact-checking and which parties are responsible for potentially defamatory statements produced by algorithmic speech programs.

Adopting the negligence standard in all cases of algorithmic speech would certainly make it more difficult for those implementing it to dodge responsibility for producing libelous statements. However, there are rational reasons why the actual malice standard is used for plaintiffs who are public individuals in the first place, and there are reasonable concerns with abandoning that standard with respect to AI.

C. Concerns with the Negligence Standard

Opponents to adopting the negligence standard for algorithmic speech regarding public figures may cite several concerns. The greatest of these is that it may restrict freedom of speech. Courts have been unwilling to restrict First Amendment rights even for nontraditional speakers,¹³⁵ but the non-personhood of algorithms and the reduced human control over algorithmic speech may warrant reconsideration. Proponents of the actual malice standard may also argue that it is justified given the privileged access that public officials and figures have to certain channels of communication. However, these individuals' ability to counter disinformation has been diminished by AI, while private individuals' access to mass communication channels has

132. *See id.*

133. *See, e.g.,* Peter M. Moldave, *Software Agreements*, in *DRAFTING AND NEGOTIATING MASSACHUSETTS CONTRACTS* § 13.8 (John F. Cohan ed., 2022).

134. *See id.*

135. *See Citizens United v. FEC*, 558 U.S. 310, 372-73 (2010).

increased, closing the gap between the two groups in their ability to counter false information about themselves.¹³⁶

1. Freedom of Speech

The First Amendment does not sanction a statement of libel or defamation, nor does it remove civil liability from those who participate in it.¹³⁷ However, courts have recognized concerns that the threat of a defamation claim may stifle the freedom of expression which the First Amendment is meant to protect.¹³⁸ The original purpose of the actual malice standard was to protect individuals' freedom to speak critically about public officials and figures.¹³⁹ Applying the less permissive negligence standard may impose a burden on publishers whenever they want to criticize those in power. This could ultimately discourage editorial journalism or the free flow of information and opinions among the public.¹⁴⁰

However, the existence of automated journalism raises the question of whether algorithmic authors deserve the same free speech rights as living individuals.¹⁴¹ Human persons' freedom of speech under the actual malice standard would not be curtailed by applying the negligence standard to AI because living individuals can testify to their knowledge or ignorance of the truthfulness of their own statements.

Despite obvious differences between living individuals and non-human speakers, in the United States, many courts have been unwilling to restrict freedom of speech even for non-traditional speakers.¹⁴² In *Citizens United v. FEC*, the Supreme Court upheld a corporation's right to political speech on First Amendment grounds.¹⁴³ In his concurrence, Justice Scalia emphasized that the first Amendment "is written in terms of 'speech,' not speakers."¹⁴⁴

However, algorithmic speech can be distinguished from corporate speech on several grounds. Corporations and business entities represent groups of individual humans. One could argue that they only qualify for freedom of speech under the First Amendment because corporate "persons" are merely legal stand-ins for groups of people.¹⁴⁵ While this ground for granting personhood has been attacked by critics pointing out the nature of control of corporations,¹⁴⁶ even this defense does not apply as strongly to algorithmic speech. Groups of individual humans are involved in the

136. See Menczer & Hills, *supra* note 104.

137. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 264-65 (1964).

138. See *id.* at 266.

139. See *id.* at 270.

140. See *id.*

141. Toni M. Massaro et. al., *Siri-ously 2.0: What Artificial Intelligence Reveals About the First Amendment*, 101 MINN. L. REV. 2481, 2506 (2017).

142. See Massaro & Norton, *supra* note 10, at 1183-85.

143. *Citizens United v. FEC*, 558 U.S. 310, 372 (2010).

144. *Id.* at 392-93 (Scalia, J., concurring).

145. See Tamara R. Piety, *Why Personhood Matters*, 30 CONST. COMMENT. 361, 370-71 (2015).

146. See Nadia Imtanes, *Should Corporations Be Entitled to the Same First Amendment Protections as People?*, 39 W. ST. U. L. REV. 203, 214 (2012).

programming and calibration of AI, but the ultimate speech product is not directly produced by human input.

Human control over speech is another distinguishing factor between algorithmic speech and corporate speech. Political contributions and corporate statements are decided and controlled by individual humans.¹⁴⁷ These individuals may represent a small group of a corporate body, but all actions are ultimately decided by humans.¹⁴⁸ For algorithmic speech, human control of speech is sacrificed to one degree or another for the benefit of efficient production.¹⁴⁹ One need only consider the example of Tay AI to recall that generated speech can stray far from its intended purpose and quickly get out of control.¹⁵⁰ The closer algorithmic speech gets to fully autonomous production, the further it gets from the control of human persons.

Furthermore, many of the criticisms leveled at extending First Amendment protections and personhood to corporations also apply to extending them to AI. The foremost criticism is that our society has a “philosophical, political, and moral commitment to the equality of human beings under the law” that we do not extend to fictional persons.¹⁵¹ For many people, their basic instinct is to distinguish between the rights extended to living humans and fictional persons. Another argument against extending freedom of speech to fictional persons is that it seriously limits the power of the government to regulate in the public interest.¹⁵²

Both of these arguments may apply to algorithmic speech just as powerfully as they do to corporate speech. According to one survey, an overwhelming majority of Americans believe that AI should be carefully managed.¹⁵³ Among the highest concerns of those surveyed was the need to prevent AI from violating privacy and civil liberties, and to prevent the spread of fake and harmful content online.¹⁵⁴ These results suggest a fundamental understanding of the need for government regulation and a distinction between the rights and privileges of human beings as opposed to artificial entities.

There are fundamental differences between human beings with freedom of speech—the foundation for maintaining the actual malice standard—and AI. Due to these differences, algorithmic speech produced by AI does not require the same protection of the actual malice standard, and the negligence standard should be applied to statements produced by machines instead.

147. See Piety, *supra* note 145, at 372-73.

148. *Id.*

149. See Sears, *supra* note 15, at 1333-34.

150. West, *supra* note 27.

151. Piety, *supra* note 145, at 385.

152. *Id.* at 387.

153. Baobao Zhang & Allan Dafoe, *Artificial Intelligence: American Attitudes and Trends*, CTR. FOR GOVERNANCE OF AI 10 (2019), https://governanceai.github.io/US-Public-Opinion-Report-Jan-2019/us_public_opinion_report_jan_2019.pdf [<https://perma.cc/9FJL-F8N2>].

154. *Id.* at 3-4.

2. Channels of Effective Communication

One reason for allowing more permissive speech on the part of reporters with regards to public figures and public officials is that they “enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.”¹⁵⁵ However, with the rise of digital communications technology and the development of AI, public officials and figures’ ability to counteract disinformation has been impaired, while their relative advantage over private individuals has diminished. Given this effect of expanding AI, the Court should reevaluate distinguishing between private and public subjects of defamation where AI is concerned.

The expansion of social media, algorithms that drive engagement, and the glut of information and disinformation available online contribute to how difficult it is to counter false statements.¹⁵⁶ Researchers have found that the overload of information available on the internet has contributed to individuals selecting sources which confirm their own biases.¹⁵⁷ Furthermore, a large percentage of adults in the United States rely on social media to get news.¹⁵⁸ This can lead people to rely on information from bots, automated social media accounts that impersonate humans, which are often designed to share disinformation.¹⁵⁹ This, combined with diminishing trust in traditional media,¹⁶⁰ has significantly impaired the effectiveness of public officials’ resources in combating false statements.

Meanwhile, recent developments in communications technology and the social media landscape have granted the resources needed to disseminate information to more individuals. Around seven in ten Americans use social media to connect, read news, share information, and enjoy themselves.¹⁶¹ It is such an effective way of communicating that nearly all members of Congress use social media to communicate with the public,¹⁶² and lately presidents have

155. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

156. Menczer & Hills, *supra* note 104.

157. *Id.*

158. Mason Walker & Katerina Eva Matsa, *News Consumption Across Social Media in 2021*, PEW RSCH. CTR. 3-4 (Sept. 20, 2021), https://www.pewresearch.org/journalism/wp-content/uploads/sites/8/2021/09/PJ_2021.09.20_News-and-Social-Media_FINAL.pdf [<https://perma.cc/MRT6-533X>].

159. See generally *How Is Fake News Spread? Bots, People Like You, Trolls and Microtargeting*, CTR. FOR INFO. TECH. & SOC. (2022), <https://www.cits.ucsb.edu/fake-news/spread> [<https://perma.cc/74CW-S4XU>].

160. Megan Brenan, *Americans’ Trust in Media Dips to Second Lowest on Record*, GALLUP (Oct. 7, 2021), <https://news.gallup.com/poll/355526/americans-trust-media-dips-second-lowest-record.aspx> [<https://perma.cc/ZE5L-LNV5>].

161. *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/> [<https://perma.cc/EXQ2-RT4Q>].

162. Kendra Kumor et al., *Improving Communication with Public Officials on Social Media: Proposals for Protecting Social Media Users’ First Amendment Rights*, FORDHAM UNIV. SCH. L.: DEMOCRACY AND THE CONST. CLINIC 3-4 (2021), https://www.fordham.edu/download/downloads/id/15275/improving_communication_with_public_officials_on_social_media.pdf [<https://perma.cc/Q997-J94B>].

used social media as an effective means of communication.¹⁶³ These resources are widely available to Americans. This is not to say that there is no distinction between private and public individuals but demonstrates that the gap between public figures' and the majority of citizens' ability to reach large numbers of people is closing.

The expansion of channels of effective communication makes eliminating the actual malice standard appropriate specifically for AI because these new channels are how algorithmic speech can do the most harm. Public figures' ability to counter disinformation is diminished to the extent that AI is used to target willing recipients and amplify distrust in the individuals who benefit from the actual malice standard.¹⁶⁴ Even with their remaining advantages, AI will alter the landscape so dramatically that public officials may need legal protection which is currently unavailable.

IV. CONCLUSION

AI will create unique opportunities and advantages in the field of journalism as technology becomes more autonomous and sophisticated. It has already provided significant advantages by reducing the time and resources required to report stories that are largely "by-the-numbers," and it promises to become a useful tool in stories that are more nuanced and editorial in nature.¹⁶⁵ However, it has also led to some missteps which reveal the dangers of relinquishing editorial control to an algorithm and allowing programs to publish statements on their own.¹⁶⁶ Without proper editorial oversight, fully autonomous journalism risks propagating false and damaging statements about individuals.¹⁶⁷

Algorithmic speech cannot be shown to be a product of actual malice the same way that human speech can.¹⁶⁸ Algorithms produce speech mechanically according to their programming, and it cannot be demonstrated that they doubt or believe information that they produce.¹⁶⁹ Finding actual malice on the AI's operators or creators' part is also difficult, as they will only be required to show a lack of serious doubts in the statements of the program, regardless of the harm caused.¹⁷⁰

The negligence standard is better suited to addressing the concerns of defamation authored by artificial intelligence, even in the case of public officials and public figures. The negligence standard imposes a duty of reasonable care on publishers to check the truthfulness of its statements about

163. Daniel Victor, *When Joe Biden Took the White House, He Also Took @WhiteHouse*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2021/01/19/technology/biden-white-house-twitter-account.html> [<https://perma.cc/DLC6-VCDC>].

164. SEDOVA, *supra* note 52, at 5.

165. Underwood, *supra* note 2.

166. West, *supra* note 27.

167. Lewis et al., *supra* note 6, at 65.

168. *Id.*

169. *Id.*; see Sears, *supra* note 15, at 1333-34.

170. Lewis et al., *supra* note 6, at 66.

individuals.¹⁷¹ This duty is not only desirable with respect to checking statements generated by AI as a matter of policy, but it is essential in ensuring that the technology is used responsibly, in a way that does not contribute to disinformation and the erosion of the public's access to accurate information. The negligence standard can be applied effectively to both operators and developers of algorithmic speech technology.

Given the unique nature of algorithmic speech and its potential role in journalism, courts should not hesitate to adapt the standards for defamation as they apply to AI for all categories of individuals. Courts should apply the negligence standard when evaluating claims for libel or defamation of public individuals when false statements are generated by AI. By implementing this standard, human actors involved in publishing defamatory statements produced autonomously would appropriately bear the burden of ensuring those statements are accurate and that these powerful new technologies are implemented responsibly.

171. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1974).