

The Business, Entrepreneurship & Tax Law Review

Volume 2
Issue 2 *Symposium: Innovation in Media and
Entertainment Law*

Article 6

2018

Clicks at Any Cost: Why Regulation Won't Upend the Economics of Fake News

Amy Kristin Sanders

Rachael L. Jones

Follow this and additional works at: <https://scholarship.law.missouri.edu/betr>



Part of the [Law Commons](#)

Recommended Citation

Amy K. Sanders & Rachael L. Jones, *Clicks at Any Cost: Why Regulation Won't Upend the Economics of Fake News*, 2 BUS. ENTREPRENEURSHIP & TAX L. REV. 339 (2018).

Available at: <https://scholarship.law.missouri.edu/betr/vol2/iss2/6>

This Conference Proceeding is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in The Business, Entrepreneurship & Tax Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Clicks at Any Cost: Why Regulation Won't Upend the Economics of Fake News

*Amy Kristin Sanders & Rachael L. Jones**

ABSTRACT

Increasingly, the production of fake news has become industrialized; enterprising entrepreneurs are deceiving Internet users with false information while earning significant sums of money. The problem of fake news and misinformation, however, is not one solely brought about by the increase in digital technology. Historically, campaigns of misinformation have been used to achieve social, political, and economic goals long before the Internet was commonplace. But, recent calls to regulate fake news content contravene American law and run afoul of our nation's laissez-faire approach to the regulation of false or misleading information. We argue that government-imposed, speech-limiting restrictions cannot contain fake news and, as a result, should not be the answer to the modern fake news epidemic. Instead, the key to combatting the effects of fake news lies in a variety of private-sector initiatives and speech-enhancing protocols. Programs designed to reiterate the importance of media literacy and revitalize civic participation are the cornerstone to ensuring a successful democracy in a digital world.

* Dr. Amy Kristin Sanders is an associate professor at the University of Texas at Austin. Her research focuses on the law's response to emerging media technology. Rachael L. Jones currently serves as Senior Law Clerk to the Honorable Scott D. Makar of the First District Court of Appeal for the State of Florida.

I. INTRODUCTION

In a country where the average worker brings home 350 euros per month, an enterprising Macedonian teenager whom the BBC dubbed “Goran” earned 1,800 euros the first month he began producing fake news content prior to the 2016 U.S. presidential election.¹ Why did he do it? Quite simply, it was the money, he told the BBC: “Teenagers in our city don’t care how Americans vote. They are only satisfied that they make money and can buy expensive clothes and drinks!”² Investigations by *The Guardian* and *BuzzFeed* revealed that Veles, Macedonia, the small town where Goran lives, had registered more than 150 websites supporting Donald Trump prior to the election.³ In a 2017 profile of Veles, *Wired* magazine writer Samantha Subramanian relayed the story of an 18-year-old called “Boris,” whose “English is halting and fractured—certainly not good enough to turn out five to [ten] articles about Trump and Clinton every day for weeks on end.”⁴ Yet, in the three months leading up to the election, his two websites garnered \$16,000; his foray into fake news paid off enough that he even stopped attending high school.⁵ And given the economics of the situation, who could fault his youthful indiscretion?

As major news corporations fret over declining advertising revenue and waning readership, purveyors of fake news content are reaping the rewards. This article discusses how the existence of fake news—however one defines the concept—can be traced alongside the development of modern media. But, the recent alarm over fake news, though often poorly articulated, seems to stem from the amplification of misinformation made possible by the growth of social media. If more than two-thirds of American adults get their news from social media, as a recent study suggests, then concern over the spread of fake news on various social media platforms is understandable.⁶ But, to date, little has been done—either politically, economically, or socially—to effectively control the impact of fake news. Our previous research discussed global attempts to regulate fake news, arguing that such attempts are largely impractical.⁷ Alternatively, we advocated for greater emphasis on media literacy to mitigate the effects of fake news.⁸ Now, we consider possible means of upending the economic benefits associated with producing fake news while suggesting incentives for the distribution of truthful information that address matters of public concern.

This article explores the increasing industrial production of fake news content with an eye toward the economics of the practice. In Part II, we discuss the rise of fake news in the modern era, noting the problem is not one solely brought about by

1. Emma Jane Kirby, *The City Getting Rich from Fake News*, BBC (Dec. 5, 2016), <http://www.bbc.com/news/magazine-38168281>.

2. *Id.*

3. Dan Tynan, *How Facebook Powers Money Machines for Obscure Political ‘News’ Sites*, GUARDIAN (Aug. 24, 2016), <https://www.theguardian.com/technology/2016/aug/24/facebook-clickbait-political-news-sites-us-election-trump>.

4. Samanth Subramanian, *Inside the Macedonian Fake-News Complex*, WIRED (Feb. 15, 2017), <https://www.wired.com/2017/02/veles-macedonia-fake-news/>.

5. *Id.*

6. Elisa Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms 2017*, PEW RES. CTR. (Sep. 7, 2017), <http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/>.

7. Amy Kristin Sanders, Rachael L. Jones & Xiran Liu, *Stemming the Tide of Fake News: A Global Case Study of Decisions to Regulate*, 8 J. OF INT’L MEDIA & ENT. L. (forthcoming 2018) (manuscript at 48) (on file with authors).

8. *Id.*

the increase in digital technology. In Part III, we examine the history and economics of fake news in comparison to the economics of the mainstream media from the “dot.com era” forward. Part IV asserts that regulating fake news content contravenes American law and emphasizes our nation’s historical lack of regulation aimed at curbing false or misleading information. Part V makes a theory-based argument to promote various approaches to combatting fake news in the hopes of limiting government intervention in speech. In our conclusion, we assert that government-imposed, speech-limiting restrictions will not contain fake news and, as a result, are not the answer to the modern fake news epidemic. Instead, a variety of private-sector initiatives and speech-enhancing protocols should be implemented to revitalize civic participation and reiterate the importance of media literacy in a digital world.

II. THE RISE OF MODERN FAKE NEWS

Before discussing the recent alarm over the rise of fake news, it is important to understand the meaning of the term. The definition of fake news, like its practice, is slippery. If one were to go by U.S. President Donald Trump’s assertions, broadcast news networks ABC, CBS, and NBC, along with CNN,⁹ *The New York Times*,¹⁰ and *Washington Post*¹¹ are fake news. In fact, in a May 2018 tweet, Trump equated news that is negative with fake news:

The Fake News is working overtime. Just reported that, despite the tremendous success we are having with the economy & all things else, 91% of the Network News about me is negative (Fake). Why do we work so hard in working with the media when it is corrupt? Take away credentials?¹²

However, pinning down an actual definition of fake news, which is necessary to frame an argument about how to control its spread, is critical to the discussion. In general, the term fake news is used far too loosely by both the president and the populace alike. For example, *The Telegraph* noted the following:

‘Fake news’ was not a term many people used 18 months ago, but it is now seen as one of the greatest threats to democracy, free debate[,] and the

9. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 3, 2018, 3:34 AM), <https://twitter.com/realDonaldTrump/status/981117684489379840> (“The Fake News Networks, those that knowingly have a sick and biased AGENDA, are worried about the competition and quality of Sinclair Broadcast. The “Fakers” at CNN, NBC, ABC & CBS have done so much dishonest reporting that they should only be allowed to get awards for fiction!”).

10. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 12, 2018, 3:03 AM), <https://twitter.com/realDonaldTrump/status/984371491277099010> (“If I wanted to fire Robert Mueller in December, as reported by the Failing New York Times, I would have fired him. Just more Fake News from a biased newspaper!”).

11. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 19, 2017, 7:07 AM), <https://twitter.com/realDonaldTrump/status/943135588496093190> (“A story in the @washingtonpost that I was close to “rescinding” the nomination of Justice Gorsuch prior to confirmation is FAKE NEWS. I never even wavered and am very proud of him and the job he is doing as a Justice of the U.S. Supreme Court. The unnamed sources don’t exist!”).

12. Donald J. Trump (@realDonaldTrump), TWITTER (May 9, 2018, 4:38 AM), <https://twitter.com/realDonaldTrump/status/994179864436596736>.

Western order. As well as being a favourite [*sic*] term of Donald Trump, it was also named 2017's word of the year. . . .¹³

A number of definitions for fake news—many of which are quite helpful in thinking about the issue—have emerged in recent months. CNN Editor-at-Large, Chris Cillizza, whose coverage of the Trump White House has been relentless, defined fake news as “made-up news. It’s not based on traditional reporting values like facts and sourcing. It’s not ‘news’ at all.”¹⁴ *The Telegraph*, in its Technology Intelligence column, outlined five types of fake news that highlight the controversy over how to define the term: “(1) commercially driven sensational content, (2) nation state-sponsored misinformation, (3) highly partisan news sites, (4) social media itself, and (5) satire or parody.”¹⁵ Many media scholars argue the last two categories outlined by *The Telegraph* are not actually fake news.¹⁶ Certainly, social media contributes to the spread of fake news, but it is not in itself fake news.¹⁷

Social media platforms are home to many professional news organizations whose content is shared in the same manner as fake news. Additionally, and perhaps most importantly, much of the content shared on social media is not news at all. For example, cat videos and other comedic sketches, whether legitimately filmed or doctored by enterprising click-bait¹⁸ purveyors, hardly constitute information that is a matter of public concern. Similarly, satire and parody—whether editorial cartoons, completely fictitious newspapers, or late-night television shows—long predate the modern concern with fake news content.¹⁹ As a result, those who bemoan fake news as a recent development are misinformed.²⁰

Rather, our ability to share fake news with impunity, as well as to monetize such behavior, has increased with the enormous influence of social media and the public’s growing distrust of mainstream media as a source of news and information, as well as lack of trust in other major social institutions. In 2017, the Pew Research Center found “the emergence of trust-jarring digital interactions has also coincided with a sharp decline in trust for major institutions, such as government (and Congress and the presidency), the news media, public schools, the church[,] and

13. James Carson, *Fake News: What Exactly is it – and How Can You Spot it?*, TELEGRAPH (Oct. 30, 2018, 10:51 AM), <https://www.telegraph.co.uk/technology/0/fake-news-exactly-has-really-had-influence/>.

14. Chris Cillizza, *Donald Trump Just Accidentally Revealed Something Very Important About His ‘Fake News’ Attacks*, CNN (May 9, 2018, 2:50 PM), <https://edition.cnn.com/2018/05/09/politics/donald-trump-media-tweet/index.html>.

15. Carson, *supra* note 13.

16. Daniel Funke, *Is it Satire or Fake News? Depends on Who You Ask*, POYNTER (Apr. 30, 2018), <https://www.poynter.org/news/it-satire-or-fake-news-depends-who-you-ask>.

17. *See id.*; *Explained: What is Fake News?*, WEBWIDE, <https://www.webwise.ie/teachers/what-is-fake-news/> (last visited Nov. 20, 2018) [hereinafter *Explained*].

18. Click-bait refers to sensational headlines that misconstrue to content of an article in an attempt to get readers to click-through to the whole article. Common examples include phrases such as “. . . and you won’t believe what happened next.” Remington Begg, *4 Reasons Not to Use Clickbait Headlines in Your Content Marketing*, IMPULSIVE CREATIVE (Aug. 19, 2018), <https://www.impulsecreative.com/blog/4-reasons-not-to-use-clickbait-headlines-in-your-content-marketing/>.

19. *See generally* Jacob Soll, *The Long and Brutal History of Fake News*, POLITICO (Dec. 18, 2016), <https://www.politico.com/magazine/story/2016/12/fake-news-history-long-violent-214535>.

20. *See id.*; Jarrett Stepman, *We Already Have a Solution to Fake News: It’s Called the First Amendment*, INSIDER (Oct. 9, 2017), <https://www.heritage.org/insider/fall-2017-insider/we-already-have-solution-fake-news-its-called-the-first-amendment>.

banks.”²¹ Despite these declines in trust, use of the Internet and social media for news and information consumption is on the rise. A January 2018 report from the Pew Research Center details how people in 38 countries get their news from social media, providing insight into global consumption habits.²² In nearly every country, respondents with more education were more likely to get their news from social media.²³ Similarly, respondents ages 18–29 were more likely to get their news from social media than respondents ages 30–49 or 50 and older.²⁴

Americans surveyed by the Pew Research Center in December 2016 expressed concern over sharing fake news via social media. More than two-thirds agreed that “fabricated news stories cause a great deal of confusion about the basic facts of current issues and events.”²⁵ Another 24% believed it caused some confusion, meaning nearly 90% of Americans in 2016 believed fake news has at least some impact on perceptions of truth.²⁶ Yet, nearly one-quarter of those respondents also admitted to having shared fake news on the Internet, with 14% reporting they knew it was fake when they shared it.²⁷

In general, media scholars often describe fake news as including two kinds of information: misinformation and disinformation.²⁸ However, the difference between the two is often conflated. The National Endowment for Democracy notes that disinformation is the purposeful “dissemination . . . of false reports intended to mislead public opinion.”²⁹ On the other hand, misinformation comprises any information that is incorrect—regardless of the intent with which it is shared.³⁰ As media scholar Brian G. Southwell and his co-authors point out, misinformation can include “contentious information reflecting disagreement among people,” which might include whether Pluto should be considered a planet.³¹ Thus, misinformation contrasts with disinformation, which the article describes as involving “deliberate alienation or disempowerment of other people.”³²

A recent scholarly review of 34 articles published “between 2003 and 2017 resulted in a typology of . . . fake news [that included] news satire, news parody,

21. Lee Rainie & Janna Anderson, *The Fate of Online Trust in the Next Decade*, PEW RES. CTR. (Aug. 10, 2017), http://assets.pewresearch.org/wp-content/uploads/sites/14/2017/08/09163223/PI_2017.08.10_onlineTrustNextDecade_FINAL.pdf.

22. Amy Mitchell et al., *Publics Globally Want Unbiased News Coverage, But are Divided on Whether Their News Media Deliver*, PEW RES. CTR. (Jan. 11, 2018), <http://www.pewglobal.org/2018/01/11/publics-globally-want-unbiased-news-coverage-but-are-divided-on-whether-their-news-media-deliver/>.

23. *Id.*

24. *Id.*

25. Michael Barthel, Amy Mitchell & Jesse Holcomb, *Many Americans Believe Fake News is Sowing Confusion*, PEW RES. CTR. (Dec. 15, 2016), <http://www.journalism.org/2016/12/15/many-americans-believe-fake-news-is-sowing-confusion/>.

26. *Id.*

27. *Id.*

28. See generally Edson C. Tandoc Jr., Zheng Wei Lim & Richard Ling, *Defining “Fake News”: A Typology of Scholarly Definitions*, 6 DIG. JOURNALISM 137–53 (2018).

29. Dean Jackson, *Issue Brief: Distinguishing Disinformation from Propaganda, Misinformation, and “Fake News”*, NAT’L ENDOWMENT FOR DEMOCRACY (Oct. 17, 2017), <https://www.ned.org/issue-brief-distinguishing-disinformation-from-propaganda-misinformation-and-fake-news/>.

30. *Id.*

31. Brian G. Southwell, Emily A. Thorson & Laura Sheble, *The Persistence and Peril of Misinformation*, 105 AM. SCIENTIST 372 (Dec. 2017), <https://www.americanscientist.org/article/the-persistence-and-peril-of-misinformation>.

32. *Id.*

fabrication, manipulation, advertising, and propaganda.”³³ The study continues, noting, “Contemporary discourse, particularly in media coverage, seems to define fake news as viral posts based on fictitious accounts made to look like news reports.”³⁴ The article notes that definitions of the term have varied over time, making reference to how the term has been co-opted to discredit mainstream reporting that is deemed critical in its coverage.

Claire Wardle at *First Draft News* devised a continuum of misinformation and disinformation, ranging from satire and parody on one side, fabricated content on the other, and false connections, misleading content, false context, imposter content, and manipulated content rounding out the middle.³⁵ For the purposes of this article, we define fake news as including all of Wardle’s categories except satire or parody. Though it is true that this type of speech has the potential to fool an audience, the motivation behind it differs greatly from the other six types of content. Wardle defines the categories as follows:

- False connection: When headlines, visuals or captions don’t support the content.
- Misleading content: Misleading use of information to frame an individual or issue.
- False context: When genuine content is shared with false contextual information.
- Imposter content: When genuine sources are impersonated.
- Manipulated content: When genuine information or imagery is manipulated to deceive.
- Fabricated content: New content that is 100% false, designed to deceive and do harm.³⁶

III. THE HISTORY AND ECONOMICS OF FAKE NEWS

As noted earlier, the concept of intentionally distributing misinformation predates the Internet.³⁷ Governments and individuals have long capitalized on the effects of spreading falsities to gain advantage for political, economic, or social reasons. For example, the 2016 “Pizzagate” scandal, where an armed North Carolina man stormed a Washington, D.C. pizza parlor after reading Internet musings that asserted the restaurant was at the center of a child-sex ring connected to Hilary

33. Tandoc Jr., Lim & Ling, *supra* note 28, at 137.

34. *Id.* at 138.

35. Claire Wardle, *Fake News. It’s Complicated.*, FIRST DRAFT NEWS (Feb. 16, 2017), <https://first-draftnews.org/fake-news-complicated/>.

36. *Id.*

37. Soll, *supra* note 19.

Clinton,³⁸ will go down in fake news history along with a long line of events fueled by false information.

Although it is easy to blame social media for the spread of misinformation and disinformation, similar trends in the spread of misinformation can be linked to the development of nearly every new medium. Recent accounts detailing the history of fake news have emerged in the hopes of situating fake news in a proper historical context by illustrating earlier attempts at subverting public opinion.³⁹ Take Johannes Gutenberg's printing press as an example. A 2017 *Politico* article described how early campaigns used fake news to smear religious groups, noting that made-up stories were published in the late 1400s that asserted Jews drank the blood of Christian children.⁴⁰ More recently, the debate rages over whether 1938 radio broadcasts of Orson Welles's *The War of the Worlds* fooled some listeners into thinking extraterrestrial invasions actually threatened Earth.⁴¹ Was it true? Of course not. Did it likely fool some audience members whose media literacy skills were lacking? Probably so. We must also consider the widely discussed 1990s Internet scams⁴² that took hold as the world embraced email.⁴³ According to network security experts around the world, these basic Internet scams continue to evolve into more complex phishing scams that dupe unsuspecting email users.⁴⁴

Perhaps the most common motivation for fake news, both historically and in the present day, is political or ideological in nature—fake content designed to sway public opinion on societal issues.⁴⁵ In Italy, the term “pasquinde” was coined to describe Pietro Aretino's fictitious writings aimed at interfering with a pontifical election during the 16th century.⁴⁶ A century later, French satirists regularly vilified Marie Antoinette and other political figures in the hopes of disrupting their influence.⁴⁷ Since then, little has changed. In its 2017 white paper, “The Fake News Machine,” security firm Trend Micro identified three major motivations behind the current spread of fake news: political influence, financial gain, and character assassination.⁴⁸

38. Faiz Siddiqui & Susan Svrluga, *N.C. Man Told Police He Went to D.C. Pizzeria with Gun to Investigate Conspiracy Theory*, WASH. POST (Dec. 5, 2016), <https://www.washingtonpost.com>.

39. See, e.g., Mark Memmott, *75 Years Ago, 'War of the Worlds' Started a Panic. Or Did It?*, NPR (Oct. 30, 2013, 8:10 AM), <https://www.npr.org/sections/thetwo-way/2013/10/30/241797346/75-years-ago-war-of-the-worlds-started-a-panic-or-did-it>; Soll, *supra* note 19.

40. Soll, *supra* note 19.

41. Memmott, *supra* note 39.

42. As the Internet was becoming commonplace, unsuspecting users would regularly open check their email only to find a new message in their Inbox purporting to be from a Nigerian prince or other figure in need who would send them money for helping with a minor task if the recipient would provide the “prince” with personal information such as bank account numbers. As a result, many users were swindled out of money. Lily Hay Newman, *Nigerian Email Scammers are More Effective Than Ever*, WIRED (May 3, 2018, 8:00 AM), <https://www.wired.com/story/nigerian-email-scammers-more-effective-than-ever/>.

43. *Id.*

44. Frankie Leung, *Tips on Protection Against Phishing Scam*, CYBER SECURITY INFO. PORTAL (June 1, 2018), <https://www.cybersecurity.hk/en/expert-2018-06-01-Phishing-Scam.php>.

45. Lion Gu, Vladimir Kropotov & Fyodor Yarochkin, *Fake News and Cyber Propaganda: The Use and Abuse of Social Media*, TREND MICRO (June 13, 2017), <https://www.trendmicro.com/vinfo/us/security/news/cybercrime-and-digital-threats/fake-news-cyber-propaganda-the-abuse-of-social-media>.

46. Robert Darnton, *The True History of Fake News*, N.Y. REV. OF BOOKS (Feb. 13, 2017), <http://www.nybooks.com/daily/2017/02/13/the-true-history-of-fake-news/>.

47. *Id.*

48. Gu, Kropotov & Yarochkin, *supra* note 45.

Although the political motivation to create fake news is worthy of examination, we focus our attention on the economic motivation. For the right price, a person or organization can impact public opinion on the topic of their choice. In its report, Trend Micro gives several alarming examples of the economics of fake news: \$2,600 can buy a social media account with more than 300,000 followers, and \$55,000 can fund a Twitter attack that successfully discredits a journalist.⁴⁹ With around \$400,000, Trend Micro estimates that a person could influence policy changes on trade agreements, impact elections, or change the course of a referendum.⁵⁰

While the manipulation of media is old news, making money off of fake news is on the rise. For example, massive “click farms” have cropped up in Asia, where you can pay for likes from phony social media profiles.⁵¹ Additionally, Internet quizzes have sprung up, subscribing users to a “service that charges \$9.95 per month.”⁵² In the same vein, Facebook scammers use the data people share to learn their “elf name” to create marketable profiles for data-mining companies.⁵³ As long as the profit expected from fake news exceeds the cost of producing fake news, the market conditions will support the enterprise.

Fake news purveyors, like most entrepreneurs, have the ability to calculate the likelihood that their venture will generate profit. Researchers Nir Kshetri and Jeffrey Voas created a formula to illustrate the economics of fake news: “ $M_b + P_b > I_c + O_{1c} + P_c + (O_{2c}\pi_{arr}\pi_{con})$.”⁵⁴ In their equation, the benefits of producing fake news (the left side of the equation) must outweigh the possible drawbacks (the right side) for someone to be economically incentivized to produce fraudulent content.⁵⁵ On the left side of the equation, M_b stands for the economic benefit while P_b stands for the noneconomic (or psychological) benefit.⁵⁶ The right side of the equation illustrates the more complex costs of the enterprise.⁵⁷ These include “investment costs (I_c), opportunity costs of creation (O_{1c}), psychological costs of creation (P_c), and the monetary opportunity costs of criminal conviction (O_{2c}) tempered by the likelihood of arrest (π_{arr}) and conviction (π_{con}).”⁵⁸ Although some countries have criminalized the creation and distribution of fake news,⁵⁹ the chances of someone getting caught still remain relatively slim. Although some advocate altering the economic landscape of fake news through further criminalization of speech, that is not the course of action we propose for a number of reasons outlined below.⁶⁰

49. *Id.*

50. *Id.*

51. See, e.g., Louise Matsakis, *Look at This Massive Click Fraud Farm That Was Just Busted in Thailand*, VICE (June 12, 2017), https://motherboard.vice.com/en_us/article/43yqdd/look-at-this-massive-click-fraud-farm-that-was-just-busted-in-thailand.

52. *Top 5 Social Media Scams*, NORTON BY SYMANTEC, <https://ie.norton.com/internetsecurity-online-scams-top-5-social-media-scams.html> (last visited Aug. 27, 2018).

53. Lindsey Murray, *Police Warn: Taking Facebook Quizzes Could Get Your Identity Stolen*, GOOD HOUSEKEEPING (Dec. 22, 2017), <https://www.goodhousekeeping.com/life/news/a47419/facebook-quiz-identity-risk/>.

54. Nir Kshetri & Jeffrey Voas, *The Economics of “Fake News”*, IT PROF., Nov./Dec. 2017, at 2.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. See, e.g., Sanders, Jones & Liu, *supra* note 7.

60. *Id.*

IV. FAKE NEWS UNDER AMERICAN LAW: WHY REGULATION IS NOT ADVISABLE

Fake news and its side effects continue to plague the United States' news cycle even after the controversial 2016 presidential election.⁶¹ However, the fake news phenomenon is hardly novel; in fact, the recent election is not the first American election to endure the drama and controversy of false news stories.⁶² Records of fake news content aimed at damaging political figures go as far back the Founding Fathers. As journalism professor Barbara Freidman explained, “[t]he notion of objectivity as we think of it today didn’t exist in the early 19th century. Instead, there was a long history of newspapers being supported by political patronage.”⁶³ The contentious nature of objectivity was so prevalent in the early years of the republic that in an 1807 letter, Thomas Jefferson noted, “Nothing can now be believed which is seen in a newspaper” because of the rampant use of rumor.⁶⁴ Jefferson chided that newspapers should work to alleviate the problem “by restraining themselves to true facts and sound principles only.”⁶⁵ Thus, America’s battle between impassioned, biased, and often false “news” stories has raged for centuries.

Despite the continuing problem of fake news in American society, the nation has done little to formally address or regulate it. Recent ire over the perceived uptick in the amount of available fake news content has led many to call for a regulatory solution.⁶⁶ However, the robust protection of free speech and press in the United States is not easily thwarted. In this section, we discuss why attempts at regulating fake news would ultimately fail in the United States through an examination of the popular theories of free expression in First Amendment law.

Proponents of fake news regulation at the federal or state level will find the First Amendment of the United States Constitution to be a formidable opponent. First Amendment jurisprudence provides protection for false speech of this nature.⁶⁷ Though the Supreme Court has denounced the value of false speech in years past,⁶⁸ it is not wholly without First Amendment protection.⁶⁹ Currently, false statements of fact receive base-level protection absent a legally cognizable harm.⁷⁰ Although some may claim that any degree of protection for false content is problematic in the wake of the “fake news epidemic,” such protection is inherent in First Amendment doctrine.⁷¹ In fact, one of the main defenses for this protection lies in one of the core

61. See, e.g., Ramona Pringle, *Fake News, Even Fake Fact-Checkers, Found in Run-up to U.S. Midterms*, CBC (Nov. 6, 2018, 4:00 AM), <https://www.cbc.ca/news/technology/fake-news-midterm-elections-1.4892305>.

62. Steven Seidenberg, *Fake News Has Long Held a Role in American History*, A.B.A. J. (July 2017), http://www.abajournal.com/magazine/article/history_fake_news?icn=most_read.

63. *Id.*

64. Letter from Thomas Jefferson to John Norvell, (June 14, 1807), in 5 THE FOUNDERS' CONST. (U. of Chicago Press 2000), http://press-pubs.uchicago.edu/founders/documents/amendI_speechs29.html.

65. *Id.*

66. Sanders, Jones & Liu, *supra* note 7.

67. Lili Levi, *Real “Fake News” and Fake “Fake News”*, 16 FIRST AMEND. L. REV. 232, 305 (2017).

68. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). In *dicta*, the Court has indicated that false statements of fact have little constitutional value; see also Levi, *supra* note 67, at 305.

69. *United States v. Alvarez*, 567 U.S. 709, 719 (2012). In *Alvarez*, the Court indicated that falsity alone is not enough criminally punish speech in striking down the Stolen Valor Act; see also Levi, *supra* note 67, at 305.

70. *Alvarez*, 567 U.S. at 719.

71. *Id.*; see also David S. Han, *Categorizing Lies*, 89 U. COLO. L. REV. 613, 639–40 (2018).

principles of First Amendment law: regulations that are content-based are presumptively unconstitutional.⁷²

Generally, government regulations may not proscribe speech based on its content—the ideas expressed or subject matter of the speech.⁷³ This bedrock of American free speech doctrine is supported by two primary justifications. First, the First Amendment is understood to take a “non-paternalistic attitude” toward the recipients of speech.⁷⁴ In other words, it does not discriminate among messages; rather, the audience members are expected to decide for themselves whether they wish to listen or receive certain content and, moreover, whether they deem the speech offensive or noteworthy.⁷⁵ Second, content-based regulations have the capacity to distort public discourse.⁷⁶ As a rule, First Amendment doctrine shies away from any regime in which one actor, specifically the government, holds a monopoly on public discourse.⁷⁷ Content-based regulations, if permitted, have the capacity to manipulate the speech marketplace by allowing state actors to discriminate among messages and speakers.⁷⁸ If such regulations were permitted, they would be ripe for abuse; after all, it would be easy for government actors to introduce regulatory schemes that would further their own platforms.⁷⁹

Both of these justifications stem from broader theories of freedom of expression, namely the Marketplace Theory and the Democratic Self-Governance Theory. The Marketplace Theory, or the “Marketplace of Ideas,” was introduced into the First Amendment canon in 1919.⁸⁰ The concept of the marketplace was built upon ideas presented by both John Stuart Mill and John Milton.⁸¹ The marketplace represents the proverbial area where public discourse takes place.⁸² In the marketplace, citizens engage with ideas that are introduced by a multitude of speakers.⁸³ Using their own discernment, the public then promotes certain ideas that are truthful or

72. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

73. *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

74. DANIEL A. FARBER, *THE FIRST AMENDMENT* 33 (3d ed. 2010).

75. *See id.*

76. *Id.*

77. *See R.A.V.*, 505 U.S. at 382; Emily A. Thorson & Stephan Stohler, *Maladies in the Misinformation Marketplace*, 16 *FIRST AMEND. L. REV.* 442, 444 (2017); *see also* Anna Gonzalez & David Schulz, *Helping Truth with its Boots: Accreditation as an Antidote to Fake News*, 127 *YALE L. J. FORUM* 315, 322 (2017).

78. Gonzalez & Schulz, *supra* note 77, at 322; *Reed v. Town of Gilbert*, 135 Sup. Ct. 2218, 2234 (2015) (Breyer, J., concurring); *Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm’n of New York*, 447 U.S. 530, 537–38 (1980) (“If the marketplace of ideas is to remain free and open, governments must not be allowed to choose ‘which issues are worth discussing or debating. . . .’”).

79. *See* Lyrissa Barnett Lidsky, *Nobody’s Fools: The Rational Audience as First Amendment Ideal*, 2010 *U. ILL. L. REV.* 799, 844–49 (2010).

80. The concept of the Marketplace of Ideas was first utilized by the United States Supreme Court in the case of *Abrams v. United States*, in which Justice Oliver Wendell Holmes referred to the concept of the marketplace in his dissent. 250 U.S. 616, 630 (1919). It remains one of the most commonly cited theories to support the freedom of speech in the United States; *see* *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 295 (1981); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 592 (1980); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

81. *See* JOHN MILTON, *AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND* (1644); JOHN STUART MILL, *ON LIBERTY* (1859).

82. Collective discourse arises from the marketplace naturally—a byproduct of the First Amendment itself. *See* *McCutcheon v. Fed. Election Comm’n*, 134 Sup. Ct. 1434, 1467 (2014) (Breyer, J., dissenting).

83. Ari Ezra Waldman, *The Marketplace of Fake News*, 20 *U. PA. J. CONST. L.* 845, 851–54 (2018).

“good.”⁸⁴ Meanwhile, speech that is of little societal value dissipates when it goes unsupported in the marketplace.⁸⁵ Thus, under this theory, “good speech” is viewed as the cure for “bad speech.”⁸⁶ The idea is that the marketplace allows the best and most truthful statements to thrive and rise to the forefront of public discourse while simultaneously eradicating false or misleading speech.⁸⁷ The Marketplace Theory ultimately posits that the citizenry—from the institutionalized press to anonymous users on Twitter—will hold truthful and valuable speech in esteem and discredit harmful or misleading speech in the name of maintaining integrity in public discourse.⁸⁸

Although the Marketplace Theory focuses on public discourse as a whole, the Democratic Self-Governance Theory provides a more introspective view of free expression. The Self-Governance Theory, introduced through the work of American legal scholar and philosopher Alexander Meiklejohn, holds that nothing should hinder a citizen’s access to information.⁸⁹ For a citizen to make informed decisions about their government and personal beliefs, they “must have access to all information deemed pertinent to their decision-making, which includes access to data, opinion, records, and criticisms.”⁹⁰ Thus, speech plays an “intensely individualist[ic] role” in a healthy democracy.⁹¹

As legal scholar Martin H. Redish asserted, the uninhibited flow of expression allows for self-realization.⁹² Moreover, the free flow of information is shown to lead to a more versed, tolerant society.⁹³ The prevailing theories of free speech demonstrate that the freedom to speak and to listen encourages deliberation on the part of the citizenry, especially on matters of political concern.⁹⁴ Thus, great benefit exists to protect any form of speech that promotes deliberation and self-realization. It is for this reason that the Self-Governance Theory naturally provides robust protection for political speech given that the ability to access information and express beliefs are vital mechanisms for discerning political truth.⁹⁵ In the same vein, the Marketplace Theory curtails any censorship of speech that could influence the political public discourse. Content-based regulations on speech thwart both theories by lim-

84. See generally MILTON, *supra* note 81.

85. *Id.*

86. See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“[T]he remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.”).

87. See *id.*

88. See Thorson & Stohler, *supra* note 77, at 444.

89. The Theory of Democratic Self-governance was adopted into First Amendment jurisprudence in 1927. In *Whitney*, Justice Louis Brandeis used the theory to support his concurring opinion, stating that “the final end of [a] state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary . . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile[.]” 274 U.S. at 375 (Brandeis, J., concurring).

90. Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 73 (1989); Sanders, Jones & Liu, *supra* note 7, at 38.

91. Brian C. Murchison, *Speech and the Self-Governance Value*, 14 WM. & MARY BILL RTS. J. 1251, 1261 (2006).

92. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

93. See generally LEE C. BOLLINGER, *THE TOLERANT SOCIETY* (Oxford Univ. Press, Inc. ed. 1986).

94. See generally Lidsky, *supra* note 79.

95. See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961); Sanders, Jones & Liu, *supra* note 7.

iting the amount and type of speech available to the public, which hinders the marketplace and denies citizens access to information that may serve their political inquiries and decision-making.⁹⁶

Regulations aimed at fake news are fundamentally content-based.⁹⁷ Thus, the likelihood that such regulations are unconstitutional, both facially and as applied, is high. Crafting a regulation that is narrowly tailored to address the fake news problem without subsuming protected speech as well is a daunting task. Moreover, regulation aimed at censoring fake news content has a paternalistic undertone that is antithetical to First Amendment doctrine. This type of content-based regulation is aimed at controlling the type of speech available, meaning it serves to hinder the marketplace of ideas and the citizenry's access to information that may be useful for self-governance purposes. However, despite the strong protections afforded to false content of this nature, the harms associated with the proliferation of fake news warrant further discussion. In the following section, we address potential solutions to the fake news problem through a discussion of the nature of fake news and the law.

V. MASSAGING THE MARKET: THEORY-BASED SOLUTIONS TO THE FAKE NEWS EPIDEMIC

There is little question that fake news has affected public discourse.⁹⁸ However, the extent of that impact often depends on political beliefs of the person conducting the analysis of its impact.⁹⁹ This is an example of the problem with fake news as a concept and in practice: despite being false speech, it is not *completely* valueless in society. Although false speech is of low value in the First Amendment context,¹⁰⁰

96. Han, *supra* note 71, at 623.

97. See generally Flemming Rose & Jacob Mchangama, *History Proves How Dangerous it is to Have Government Regulate Fake News*, WASH. POST (Oct. 3, 2017), https://www.washingtonpost.com/news/worldpost/wp/2017/10/03/history-proves-how-dangerous-it-is-to-have-the-government-regulate-fake-news/?utm_term=.cf2fd693c861.

98. See Nsikan Akpan, *The Very Real Consequences of Fake News Stories and Why Your Brain Can't Ignore Them*, PBS (Dec. 5, 2016, 6:06 PM), <https://www.pbs.org/newshour/science/real-consequences-fake-news-stories-brain-cant-ignore>. Of course, the most notable incidents involving fake news center around the 2016 presidential election. The harshest accusation is that the outcome of the election was influenced by fake news. However, these claims are hard to verify due to the variety of factors which affected discourse during the election. For an overview of the impact of fake news on the election, see generally Danielle Kurtzleben, *Did Fake News on Facebook Help Elect Trump? Here's What We Know*, NPR (Apr. 11, 2018, 7:00 AM), <https://www.npr.org/2018/04/11/601323233/6-facts-we-know-about-fake-news-in-the-2016-election>; Aaron Blake, *A New Study Suggests Fake News Might Have Won Donald Trump the 2016 Election*, WASH. POST (Apr. 3, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/04/03/a-new-study-suggests-fake-news-might-have-won-donald-trump-the-2016-election/?utm_term=.03a1ae82b4d9; Carol D. Leonnig, Tom Hamburger & Rosalind S. Helderman, *Russian Firm Tied to Pro-Kremlin Propaganda Advertised on Facebook During Election*, WASH. POST (Sept. 6, 2017), https://www.washingtonpost.com/politics/facebook-says-it-sold-political-ads-to-russian-company-during-2016-election/2017/09/06/32f01fd2-931e-11e7-89fa-bb822a46da5b_story.html?utm_term=.567be38bea11.

99. See Erik Wemple, *Study: 42 Percent of Republicans Believe Accurate — But Negative — Stories Qualify as 'Fake News'*, WASH. POST (Jan. 16, 2018), https://www.washingtonpost.com/blogs/erik-wemple/wp/2018/01/16/study-42-percent-of-republicans-believe-accurate-but-negative-stories-qualify-as-fake-news/?utm_term=.8ebd86eebf27.

100. See generally Genevieve Lakier, *The Invention of Low Value Speech*, 128 HARV. L. REV. 2166 (2015).

purveyors and consumers of fake news could argue that it has high value. This is likely caused by fake news content that promotes ideology rather than fact—often addressing the political and social issues at the heart of the First Amendment’s protection. In recent years, what we consider fake news has grown from mere false and misleading content to political signaling and personal branding.¹⁰¹

Of course, this shift from mere false content to a new form of political signaling only complicates the question of regulation. Because fake news has taken on a politicized persona in public debate, governmental regulation seems highly aspirational.¹⁰² Because fake news targets listeners directly while undermining speech indirectly,¹⁰³ we must consider that laws alone—even great ones that champion free speech like the First Amendment—cannot protect us from the impacts of fake news and other forms of false political speech. Rather, we believe education is the key weapon in the war against fake news. For this reason, and the legal theories described in Part III, we argue that more speech, particularly in the form of content-neutral government support for public media and media literacy, holds the most promise for combatting fake news.

A. Online Platforms, Advertising, and Economic Incentives

Historically, the government acted as the gatekeeper for speech, with courts and legislatures determining how and when regulation was permissible.¹⁰⁴ However, in our increasingly digital society, major internet companies and technology firms such as telecommunication giant Comcast, search-engine behemoth Google, and social media platforms like Facebook and Twitter have become the arbiters of speech, and they are not subject to the First Amendment’s constraints.¹⁰⁵ Because these companies maintain no real interest in asserting editorial control over the content they distribute, it should come as no surprise that fake news found its stride on social media.¹⁰⁶ Thanks to social media’s speed, low cost, and wide reach, these global platforms provide an unprecedented pulpit for the dissemination of fake news.¹⁰⁷

Currently, the major internet service providers (“ISPs”) and platforms are embroiled in the battle against fake news, each working towards tech-based solutions

101. See *supra* Parts II, III.

102. See Seidenberg, *supra* note 62; *Explained*, *supra* note 17; see also Cristina Tardáguila et al., *Fake News is Poisoning Brazilian Politics. WhatsApp Can Stop it.*, N.Y. TIMES (Oct. 17, 2018), <https://www.nytimes.com/2018/10/17/opinion/brazil-election-fake-news-whatsapp.html>.

103. Fake news is often aimed at listeners that have specific ideological views. However, the side effect of this targeting leads to the heart of the fake news problem: Calls for regulation. While no regulation has been passed, the entire fake news debate has eroded the public’s trust in media and the marketplace.

104. See generally Paul Levinson, *Government Regulation of Social Media Would be a ‘Cure’ Far Worse Than the Disease*, CONVERSATION (Nov. 28, 2017, 6:25 AM), <https://theconversation.com/government-regulation-of-social-media-would-be-a-cure-far-worse-than-the-disease-86911>.

105. See generally Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149 (2018) (explaining how new technology, through private governance, affects communications and speech).

106. See Maggie Fox, *Fake News: Lies Spread Faster on Social Media Than Truth Does*, NBC NEWS (Mar. 8, 2018), <https://www.nbcnews.com/health/health-news/fake-news-lies-spread-faster-social-media-truth-does-n854896>.

107. Sanders, Jones & Liu, *supra* note 7.

to curtail the “fake news pandemic.”¹⁰⁸ Facebook received significant public criticism, and in response it made a public showing of attempts to regulate fake news on its site.¹⁰⁹ The platform has actively worked to remove economic incentives for fake news content by limiting advertising space, and has even relied on its users and the will of the marketplace to alert the platform to fake news content.¹¹⁰ Moreover, Facebook and other platforms have introduced algorithms to curtail the spread of fake news.¹¹¹

Although these attempts at self-regulation may seem admirable, their success remains modest at best. As Lilli Levi writes, social media platforms’ “financial models rely on advertising and on scraping as much data as possible from the online activities of all their users to attract advertisers.”¹¹² As a result, platform-based responses to concerns about fake news may only survive so long as they are economically, socially, and politically feasible.¹¹³ However, the marketplace, though slow to react, has a way of making its desires known. After trust in social media news sources eroded through the 2016 election, many online users criticized the sites for the spread of misinformation.¹¹⁴ This “dip” in reputation affected both social media and advertising platforms alike, leading companies to reconsider their role in the spread of fake news.¹¹⁵ For example, after backlash erupted over offensive and questionable messaging, advertising companies became more sensitive to the type of content placed near its ads.¹¹⁶

Financial inducements in the form of advertising revenue have proven a strong economic incentive in the fight against fake news. Sites like YouTube and Google average \$35 billion in advertising revenue and account for 42% of the digital advertising market.¹¹⁷ Thus, social media platforms have a significant interest in appeasing consumers to facilitate advertising revenue. This powerful motivator has already proven its influence on online platforms, spurring them to be more conscious of fake news phenomenon. Law professor Lilli Levi writes the following:

[social media platforms may use] economic incentives to tweak . . . programmatic ad-buying algorithms to reduce the likelihood of embedding

108. See Balkin, *supra* note 105, at 1208; Levi, *supra* note 67, at 285.

109. See Adam Mosseri, *A New Educational Tool Against Misinformation*, FACEBOOK: NEWSROOM (Apr. 6, 2017), <https://newsroom.fb.com/news/2017/04/a-new-educational-tool-against-misinformation/>.

110. *Id.*; see also Levi, *supra* note 67, at 285.

111. Aja Romano, *Mark Zuckerberg Lays Out Facebook’s 3-Pronged Approach to Fake News*, VOX (Apr. 3, 2018, 9:10 AM), <https://www.vox.com/technology/2018/4/3/17188332/zuckerberg-kinds-of-fake-news-facebook-making-progress>.

112. Levi, *supra* note 67, at 290.

113. *Id.* at 325.

114. See Alex Roarty, *Americans Blame Facebook for Fake News, New Poll Finds*, MCCLATCHY, <https://www.mcclatchydc.com/news/nation-world/national/article175970831.html> (last updated Sept. 29, 2017, 5:35 PM); see also Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31(2) J. OF ECON. PERSP. 211, 216 (2017).

115. Levi, *supra* note 67, at 293.

116. See Stephen Battaglio, *YouTube Tells Advertisers it’s ‘Devoted’ to Keeping Ads Off Offensive Videos*, STAR (May 5, 2018), https://www.thestar.com/business/tech_news/2018/05/05/youtube-tells-advertisers-its-devoted-to-keeping-ads-off-offensive-videos.html; see also Sapna Maheshwari, *Facebook Moves to Keep Ads from Running on Objectionable Videos*, N.Y. TIMES (Sept. 13, 2017), https://www.nytimes.com/2017/09/13/business/media/facebook-ads.html?_r=0.

117. See Battaglio, *supra* note 116.

brands' ads in 'fake news' or other commercially undesirable content. Furthermore, to the extent that social bots play a significant role in the dissemination of 'fake news' soon after it is published, attempts to reveal and thus curb bot accounts might be a useful step in tackling the 'fake news' problem.¹¹⁸

Accordingly, advertisers wield significant power when it comes to online self-regulation of fake news content. Strangely, this harkens back to the concept of the Marketplace of Ideas, where good speech trumps bad.¹¹⁹ When advertisers experience negative societal pressures by being associated with fake news to hate speech, they respond in kind.¹²⁰ Thus, financial pressures may lead to favorable technological solutions that discredit or lessen the impact of fake news content. Although such solutions are arguably far from mass adoption or implementation, the notion demonstrates that workable solutions that do not implicate the First Amendment exist. Instead, by strategically targeting ad placements, the industry can encourage users to consume truthful content about matters of public concern rather than fake news. Moreover, by limiting the financial incentive to create fake news content, the advertising sector can help decrease the amount of fake news content available in the market.

B. Media Literacy

Regulatory and technological solutions designed to mitigate the effects of fake news are just knee-jerk reactions to the problems plaguing our society; they are often enacted swiftly and usually do not receive a proper vetting before being implemented. Thus, while admirable, such solutions alone are not typically enough to curtail the damage. Further, the long-term impact of removing content from the Marketplace of Ideas is surely one that merits significant consideration. Truthfully, education and awareness are the best defenses against false content. Thus, media literacy among the public and content creators remains essential in the fight against fake news. Although scholars have advocated for media literacy for years, calls for education in this arena have become more prevalent in light of the fake news epidemic.¹²¹

Scholars tend to assume that Internet users, particularly today's "Digital Natives,"¹²² come to the table with skills necessary to navigate the information-rich digital world.¹²³ In reality, the opposite is true, and there is a strong argument to be made that citizens of all ages need media literacy training now more than ever. A

118. Levi, *supra* note 67, at 294.

119. See Thorson & Stohler, *supra* note 77.

120. See Tanya Dua, *YouTube is Trying to Flip its Brand Safety Mess into an Opportunity*, BUS. INSIDER (May 5, 2018, 11:32 AM), <http://www.businessinsider.com/youtube-is-trying-to-flip-its-latest-brand-safety-mess-into-an-opportunity-2018-5>.

121. See Michael Rosenwald, *Making Media Literacy Great Again*, COLUM. JOURNALISM REV. (Fall 2017), https://www.cjr.org/special_report/media-literacy-trump-fake-news.php.

122. The term Digital Native refers to children born into the digital era as opposed to those who learned their digital skills as adults. See Marc Prensky, *Digital Natives, Digital Immigrants*, 9 ON THE HORIZON 1 (2001), <https://www.marcprensky.com/writing/Prensky%20-%20Digital%20Natives,%20Digital%20Immigrants%20-%20Part1.pdf>.

123. See generally *The Fallacy of the 'Digital Native'*, ECDL FOUND., <http://ecdcl.org/policy-publications/digital-native-fallacy> (last visited Oct. 31, 2018).

recent study conducted by Stanford University researchers indicates that modern students—the generation that has grown up in the digital world—are easily duped when it comes to identifying fake news content.¹²⁴ Thankfully, the rise of media literacy and education programs can address this challenge. The push for media literacy must include education that promotes the ability to access, analyze, evaluate, create, and act using all forms of communication, and it must teach audiences how to think critically, identify author goals, and understand the role of media in society.¹²⁵

Unfortunately, increasing the public’s media literacy skills alone is not enough to combat the impact of fake news on society. Efforts on the part of both publishers and content creators are needed to ensure access to truthful information about matters of public concern because even the most adept content consumer can be thwarted by publisher or platform obstacles that limit access to factual content or obscure the original sourcing of content. Therefore, we call on publishers and broadcasters to ensure that truthful information—the very fact-based, verified reporting that Chris Cillizza contrasts with fake news—gets into the hands of those who need it most, so readers do not turn to fake news sources.¹²⁶ As a justification for the proposals we outline below, we rely heavily on Jerome Barron’s Access Theory.¹²⁷ As the Supreme Court once noted, “[a] true marketplace of ideas existed in which there was relatively easy access to the channels of communication.”¹²⁸ However, economic disparity and the rising cost to produce journalism has limited many in their pursuit of viable information.¹²⁹ Barron’s Access Theory presupposes that the marketplace is not totally free for all; rather, it is skewed in favor of those with greater economic resources—the institutionalized press in particular.¹³⁰ We agree, and advocate that certain institutional changes and improvements may remedy the access problem and improve the state of the public discourse.

C. The Problem with Paywalls

Quality journalism comes at a cost, and modern newsrooms are struggling to stay afloat amid declining advertising revenue and resulting budget cuts. This is

124. Sam Wineburg, Sarah McGrew, Joel Breakstone & Teresa Ortega, *Evaluating Information: The Cornerstone of Civic Online Reasoning*, STAN. HIST. EDUC. GROUP (2016), <https://purl.stanford.edu/fv751yt5934>.

125. *Media Literacy Defined*, NAT’L ASS’N FOR MEDIA LITERACY EDUC., <https://namle.net/publications/media-literacy-definitions> (last visited Sept. 2, 2018).

126. See Cillizza, *supra* note 14.

127. See Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

128. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 248 (1974). In *Tornillo*, the Court rejected the version of access theory posited by *Tornillo*, holding that that the paper’s right to editorial control trumped his right to respond to negative press about his political candidacy. The access theory we address in this article differs; rather than access to a platform in the press, Barron’s access theory centers on the public’s ability to obtain information for participation in the Marketplace of Ideas and to engage in self-governance. *Id.*

129. See Ken Doctor, *Newsonomics: The Halving of America’s Daily Newsrooms*, NIEMANLAB (July 28, 2015, 8:01 AM), <http://www.niemanlab.org/2015/07/newsonomics-the-halving-of-americas-daily-newsrooms/>.

130. See Barron, *supra* note 127, at 1649–50.

evidenced by cutbacks to copy-editing¹³¹ and international correspondents,¹³² both once considered hallmarks of the institutional press. News organizations, who are heavily dependent on advertising revenue, have largely failed to adapt their traditional business models to compensate for losses that have come in the digital ecosystem.¹³³ Furthermore, Facebook's rise as a platform for news distribution has impaired revenue growth for the institutional press.¹³⁴ Newsstand and subscription revenue can hardly be expected to make up for the waning proceeds from advertising, and even paywalls that require readers to subscribe to access content had initially proven largely unsuccessful for many publications.¹³⁵

Additionally, the pay-to-read model now used by many traditional news outlets creates an unexplored barrier to media literacy and an obstacle to overcoming the challenges posed by fake news. Paywalls prevent customers who are either unwilling or unable to pay for news from being able to quickly access reliable sources of information to verify questionable content presented on other freely accessed sites.¹³⁶ Digitally distributing news through paywalls, unlike the traditional print model, also prevents the possibility of pass-along circulation. No longer can the commuter on the bus or train pick up a left-behind copy of the newspaper that he or she could otherwise not afford. Today, the existence of paywalls provides a powerful deterrent to readers who encounter them while seeking to triangulate information.¹³⁷ This deterrent is a significant disservice to readers who are not in a financial position to pay for news. Given that Pew research suggests the use of social media for consumption of news increases with youthfulness, it is likely that older, less educated audiences are left out in the cold as news organizations transition to digital business models that rely heavily on social media.¹³⁸ At the outset, news

131. Wei Tchou, *The Revolution Will Not Be Proofread*, OUTLINE (Dec. 26, 2017, 10:18 AM), <https://theoutline.com/post/2780/new-york-times-copy-editor-layoffs-aftermath?zd=1&zi=zau5tzzx>.

132. See Simon Kruse Rasmussen, *Is There Anybody Out There? Crisis and Collaboration in Foreign Reporting*, REUTERS INST. FOR THE STUDY OF JOURNALISM (2012), <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/research/files/Is%2520there%2520anybody%2520out%2520there%2520Crisis%2520and%2520Collaboration%2520in%2520Foreign%2520Reporting.pdf>.

133. Simon Bamberger et al., *Media's Future: Reinvent or Fail*, BCG (Oct. 27, 2016), <https://www.bcg.com/en-us/publications/2016/hardware-software-entertainment-media-future-reinvent-fail.aspx>.

134. Mark Sweney, *Facebook's Rise as News Source Hits Publishers' Revenues*, GUARDIAN (June 15, 2016), <https://www.theguardian.com/media/2016/jun/15/facebooks-news-publishers-reuters-institute-for-the-study-of-journalism>.

135. Alexis C. Madrigal, *Prepare for the New Paywall Era*, ATLANTIC (Nov. 30, 2017), <https://www.theatlantic.com/technology/archive/2017/11/the-big-unanswered-questions-about-paywalls/547091/>.

136. One study, conducted by researchers at MIT found "a 51[%] drop in visits after the introduction of a paywall and a far larger drop for younger readers." See Lesley Chiou & Catherine Tucker, *Paywalls and the Demand for News*, 25 INFO. ECON. & POL'Y 61 (2013).

137. See Michael Rosenwald, *Digital News Consumers Unlikely to Pay for Content and Increasingly Block Ads*, COLUM. JOURNALISM REV. (June 15, 2015), https://www.cjr.org/analysis/reuters_digital_news_report.php.

138. Although older audiences are making gains in accessing news from social media platforms, they still lag behind their younger peers. See Elisa Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms 2017*, PEW RES. CTR. (Sep. 7, 2017), <http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/>.

organizations must think critically about ways to reconfigure the paywall system to promote meaningful access and media literacy in the age of fake news.¹³⁹

Although paywalls have been a journalism staple for over two decades,¹⁴⁰ news sites have implemented some changes in recent years. To encourage readership, for example, some outlets including the *Washington Post* allow consumers to access a limited number of articles or videos before instituting a paywall.¹⁴¹ Other sites, such as ESPN, make a majority of their content free, but reserve particular “premium” content for paid access.¹⁴² Though potentially frustrating to those who simply are not interested in paying for content, these modified paywall systems allow news sites to make some content available for the education of readers. Other media organizations have further tweaked the paywall system to allow greater access to content by people who are not able to pay.¹⁴³ Some online news sites permit readers to answer a brief survey for advertising or marketing purposes in exchange for free access to the site’s content.¹⁴⁴

Small modifications to the paywall system suggest that media organizations can find ways to allow limited access to content without significant sacrifices to revenue. To combat fake news, news media must continue to explore potential tweaks to the paywall system that promote access. As a writer for the Poynter Institute suggests, news sites could explore using timers to determine when a user must pay for content.¹⁴⁵ More effectively, news sites could experiment with dropping paywalls when a story becomes popular with increased user clicks serving as an indication of a story’s high public interest factor.

Media organizations could also incentivize consumers on social media platforms to share truthful content that addresses matters of public concern using various mechanisms. One approach is to reward users with virtual points or “money” that would allow them to purchase access to premium content. Another possibility is to provide limited access (a few paragraphs of a story or a small portion of a video) to content that is shared via social media platforms. News organizations could also try to capitalize on social media influencers by encouraging them to share important content and making that content available for limited periods of time (perhaps the first two hours after it is shared or in perpetuity once the news is 24 hours old). We believe the institutional press has an obligation under the First

139. The need for paid subscribers is understood and we do not argue that news sites should wholly dismiss this vital form of revenue. We merely point out that there are other methods of obtaining revenue and encouraging readership.

140. Melody Kramer, *It’s Time for a Paywall Revolution*, POYNTER (Dec. 1, 2017), <https://www.poynter.org/news/its-time-paywall-revolution>.

141. See Bethonie Butler, *Commenters: Here’s What You Need to Know about the Paywall*, WASH. POST (June 13, 2013), <https://www.washingtonpost.com/news/ask-the-post/wp/2013/06/13/commenters-heres-what-you-need-to-know-about-the-paywall/>; Jeff Bercovici, *The Washington Post is Building a Paywall (With a Huge Hole)*, FORBES (Mar. 18, 2013, 3:07 PM), <https://www.forbes.com/sites/jeffbercovici/2013/03/18/the-washington-post-is-building-a-paywall-with-a-huge-hole/#3eb5a2203a15>; see also Megan McArdle, *A Farewell to Free Journalism*, WASH. POST, https://www.washingtonpost.com/blogs/post-partisan/wp/2018/04/26/a-farewell-to-free-journalism/?utm_term=.6f6d2baf1caf (lasted visited Nov. 20, 2018).

142. Kramer, *supra* note 140; see also Timothy Geigner, *ESPN to Combat Cord-Cutting by Putting Once Kinda Free Content Behind a New Paywall*, TECHDIRT (Apr. 4, 2018, 8:03 PM), <https://www.techdirt.com/articles/20180403/13394339554/espn-to-combat-cord-cutting-putting-once-kinda-free-content-behind-new-paywall.shtml>.

143. Kramer, *supra* note 140.

144. *Id.*

145. *Id.*

Amendment to find ways to provide meaningful access for the public given its unique access to the marketplace.

D. Subsidization of Content and Promotion of Public Media

The First Amendment prohibits many forms of speech-restricting regulation, but it could serve as a tool to encourage speech-enhancing legislation to advance Jerome Barron's initial emphasis on access to the media.¹⁴⁶ Congress has historically enabled content-neutral subsidization of expression in areas such as the arts, and further provisions could be made to subsidize news and information in a viewpoint-neutral manner.¹⁴⁷ Broadcast television and radio already operate in this manner. For example, the provision of access to public airwaves at no financial cost is a subsidization in exchange for the mandate that broadcasters operate in the public interest, convenience, and necessity.

As media consolidation has rocked the broadcast industries, some have bemoaned broadcasters' seeming abdication of their public interest obligations.¹⁴⁸ Using the Access Theory as a groundwork, a strong argument could be made that the Federal Communications Commission has the right to demand broadcasters toe the line on their public interest obligations. Although we are not ready to advocate for the return of Fairness Doctrine-era policies,¹⁴⁹ others have suggested as much.¹⁵⁰ Instead, we encourage creative ways to incentivize the production of truthful information about matters of public concern, whether through grant funding or tax incentives.

In some areas, the private sector has already undertaken similar projects to combat fake news and promote the creation of truthful content for audiences struggling to access civic information. Google, for example, has funded a number of initiatives under various names aimed at increasing news production and media literacy.¹⁵¹ Organizations like the Poynter Institute's International Fact-Checking Network are sponsoring competitions like Fact Forward, where the winner will be awarded \$50,000 for a project "that can represent a paradigmatic innovation for

146. See Barron, *supra* note 127, at 1667.

147. See generally *Standards for Federal Funding of the Arts: Free Expression and Political Control*, 103 HARV. L. REV. 1969, 1976 (1990).

148. See, e.g., Jeff Chester, *Advocates Call on FCC to Protect Programming and Advertising Safeguards for Children's TV*, CTR. FOR DIGITAL DEMOCRACY (Aug. 4, 2017), <https://www.democraticmedia.org/article/advocates-call-fcc-protect-programming-and-advertising-safeguards-childrens-tv>.

149. The Fairness Doctrine mandated that public broadcasters devote some airtime to the discussion of controversial issues deemed to be a matter of public importance and that opposing views on those issues be aired. See generally Dylan Matthews, *Everything You Need to Know About the Fairness Doctrine in One Post*, WASH. POST (Aug. 23, 2011), https://www.washingtonpost.com/blogs/ezra-klein/post/everything-you-need-to-know-about-the-fairness-doctrine-in-one-post/2011/08/23/gIQAN8CXZJ_blog.html?noredirect=on&utm_term=.47c059a5ceb9.

150. Steve Almond, *Want to Stop Fake News? Reinstate the Fairness Doctrine*, BOS. GLOBE (Apr. 17, 2018), <https://www.bostonglobe.com/opinion/2018/04/17/want-stop-fake-news-reinstate-fairness-doctrine/BpMw4D3s9qLrDwA2geLywN/story.html>.

151. Shan Wang, *Google Announces a \$300M 'Google News Initiative' (Though This Isn't About Giving Out Grants Directly to Newsrooms, like it Does in Europe)*, NIEMANLAB (Mar. 20, 2018, 1:01 PM), <http://www.niemanlab.org/2018/03/google-announces-a-300m-google-news-initiative-though-this-isnt-about-giving-out-grants-directly-to-newsrooms-like-it-does-in-europe/>.

fact-checkers in any of these areas: (1) formats, (2) business models, [or] (3) technology-assisted fact-checking.”¹⁵² Although other enterprises, such as Facebook’s Disputed Flag, may be short-lived,¹⁵³ their lack of success should not be interpreted as a failure.

VI. CONCLUSION: MORE SPEECH IS NOT ALWAYS BETTER, BUT LESS SPEECH IS ALWAYS WORSE

We do not assert that a single solution will work for all news organizations or media markets. Instead, we applaud a variety of ideas that promote audiences’ abilities to have access to factual content. Media literacy skills are essential and must be promoted, but as we have indicated, those skills alone will not win the war against fake news. Foundational freedom of expression theories suggest that more is needed to ensure the public has access to truthful information about matters of public concern. Returning to the Marketplace Theory, the best way to counter false speech is to shine the light of truth on shoddy sourcing and fabricated content. The Self-Governance Theory warns us that citizens who lack proper access to truthful information about matters of public concern cannot make informed choices about the society in which they exist. Finally, the Access Theory suggests we must continue to fight the imbalance of power in the marketplace, ensuring that content creators who wish to disseminate truthful information have the resources to do so—whether they be members of the institutional press or citizen journalists. We must focus on providing economic incentives to support the production and distribution of truthful news content. Without strong journalism, our democracy suffers as readers are left to fend for themselves in the fight against fake news.

152. *Fact Forward: If You Had \$50,000, How Would You Change Fact-Checking?*, POYNTER, <https://www.poynter.org/fact-forward> (last visited Sept. 2, 2018).

153. *Facebook Ditches Fake News Warning Flag*, BBC (Dec. 21, 2017), <http://www.bbc.com/news/technology-42438750>.