

# **LUNCHEON KEYNOTE FAKE NEWS: REFLECTIONS FROM HISTORY**

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“Fake news” is hardly a new phenomenon. Throughout the course of human history, individuals have disseminated false facts and false information in an effort to distort or gain an advantage in public debates. Some of this “fake news” has involved outright lies designed to damage or destroy an individual’s reputation. Other types of fake news came in the form of satire in which newspapers (or others) attributed false characteristics, or exaggerated personal characteristics, in an effort to attack individuals, especially politicians or other prominent individuals.

Fake news has taken on a whole new meaning in recent years because of dramatic changes in communications technologies that enable ordinary people to engage in mass communication. For centuries, with some exceptions, information moved at the speed at which people could move, and mass communication was beyond the realm of most people. When an ancient Roman battle was fought in a place far from Rome, a Roman emperor might have to wait days or weeks to learn the outcome of that battle. Information regarding the battle usually returned to Rome by foot, horse, chariot or boat, but would often be hand-carried by a person (or people). In other words, information moved slowly and inefficiently.

The use of books and pamphlets as a means of mass communication is a relatively recent phenomenon. Although written works have existed for a long time, for centuries most books were handwritten by monks, in Latin, and almost invariably were religious in nature. As a result, prior to the fifteenth century, books were relatively rare commodities. In 1050, Exeter Cathedral had only five books in its entire library. Even as late as the early fifteenth

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century, Cambridge University's library contained only 122 books. The impact of these books was necessarily limited since most people were illiterate even in their native languages.

The first major communications breakthrough came in the fifteenth century when Johannes Gutenberg invented movable type thereby creating the printing press. Although printing had existed for centuries, most printing before that time had involved carved blocks of wood. The carving process was time-consuming, and the printed pages that resulted usually contained only floral motifs. Words were added later by hand. Gutenberg's idea was to cast all of the letters of the alphabet in both lower-case and upper-case. These letters could be relatively quickly assembled into a wooden box to create a page that was ready for printing. After ink and paper were placed over the type, the press would be screwed down to create an impression of the typeset page. The press would then be screwed back up, and the page would be removed and hung up to dry. By repeating this process, a printer could create multiple copies of pages.

Even though the Gutenberg printing press did not alter the speed at which information could move, it did enable individuals to more easily create multiple copies of documents, and ultimately led to the widespread dissemination of information, knowledge and ideas. The end result was revolutionary. The spread of information led to dramatic advances in the areas of science, government and religion, and ultimately to the scientific revolution and the Protestant Reformation.

The Gutenberg press also led to fundamental changes in the way that people viewed their governments. At one point in history, some European monarchies claimed to rule by Divine Right – the idea that monarchs were placed on their thrones by God, and that their actions reflected God's will. The Gutenberg press led to attacks on the concept of Divine Right, and ultimately to the demise of monarchical power.

The U.S. Declaration of Independence reflected Gutenberg's influence. Philosophical books, published in Europe, gradually made their way across the Atlantic Ocean to the American colonies where they influenced American thought, leading Thomas Jefferson to implicitly reject the idea of Divine Right in the U.S. Declaration of Independence and to flatly declare that the power to govern derives from the "consent of the governed." Those same books also led to the demise of many monarchies across Europe, as the Bourbon and Hapsburg dynasties fell, and to limitations on the powers of other monarchies (e.g., the British monarchy).

Communications technologies did not advance much further until the nineteenth century when society was able to harness electricity. Electricity

enabled the creation of a multitude of new technologies, including the telegraph, radio, television, and eventually satellite and cable technologies and the internet. These new technologies were transformative because they allowed information to move much more quickly than the speed at which people could move, and they also enabled relatively high-speed communication over long distances. For example, the telegraph reduced the time required to send a message across the United States from a matter of weeks to a few seconds and led to the demise of the Pony Express relay system. Radio made it possible to broadcast words and information all over the country, almost simultaneously. During World War II, President Franklin Delano Roosevelt used the radio to communicate his fireside chats to all Americans. Also during World War II, Americans could sit in their living rooms and listen to the bombing of London over the radio. Television made it possible to communicate, not only audio content, but also video content, in real time. Satellite impact on communication was similarly revolutionary. During the first Persian Gulf War, CNN journalists, who were holed up in a Baghdad hotel, were able to broadcast images of U.S. cruise missile attacks around the world. Thus, U.S. citizens could witness the U.S. cruise missile attacks from their own homes. Of course, electricity also led to the development of the internet, which involved another revolutionary communications advance. But more about the internet later.

Even though communications technologies have steadily advanced over the centuries, each new technology came with one major drawback: It was almost invariably owned and controlled either by the government, or by relatively rich individuals or corporations, who had the capacity to control their use. In other words, even though new technologies revolutionized communication, these technologies were not generally accessible by the masses for the communication of their ideas.

Although the printing press marked a dramatic communications advance, printing presses were relatively expensive. Even though Benjamin Franklin was well-known as a printer (among a multitude of other things), he came from a family of limited means and struggled for many years to acquire the funds needed to buy a printing press. Those who controlled the few printing presses that existed had the power to decide who could use that technology to communicate their ideas. Not infrequently, the owners of communications technologies discriminated in favor of their preferred views and positions, and against ideas with which they disagreed. In other words, although the printing press led to a flowering of information, it did not necessarily expand the ability of ordinary people to engage in mass communication. Those who controlled the printing presses could easily

communicate their own views. Others had more limited communications possibilities.

The rich and powerful were also able to control other advanced technologies such as radio, television, cable television and satellites. While the radio may have enabled FDR to communicate with the entire U.S. population, it did not enable ordinary people to broadly disseminate their ideas. Technologies, such as radio, television and satellites, were expensive to own, and generally required a license. As a result, they were not freely available to the masses either. Again the rich and powerful were able to control access to those technologies.

As a result, although there were dramatic advances in communications technologies in the nineteenth and twentieth centuries, these new technologies could not necessarily be accessed by ordinary individuals to mass communicate their views. Their ideas and political arguments might or might not be communicated, depending on the whims of those who owned the communications technologies.

The other major historical trend that affected the use of speech technologies was governmental repression of speech. After Gutenberg's development of the printing press, even though governments might have been happy to have the printing press available for their own use, they were not keen on the idea of allowing ordinary people to print their ideas. Monarchs, justly fearful that the printing press might be used to undercut the idea of Divine Right, or to undermine the stability of their societies, sought to restrict its use. Many governments limited the number of printing presses that could exist, by requiring a license to operate a printing press, and by limiting those licenses to their allies and friends. Some governments also imposed content licensing systems that allowed them to censor speech that they found objectionable. These licensing systems required individuals to submit manuscripts in advance, and prohibited publication of the material unless a license was granted. Of course, licensors could deny licenses to documents that they found objectionable, or they might condition the grant or denial on the publisher's willingness to make additions or deletions to the document.

Perhaps the most serious governmental restraint on speech involved the British crime of seditious libel. That offense made it a crime to criticize the King and certain high-level clergy. Under this crime, truth was not a defense. Indeed, if it were shown that the defendant's allegations were true, the British would punish the individual more severely on the theory that true criticisms could harm the monarchy more than false criticisms. Seditious libel was also used in the British colonies in the Americas to repress speech. For example, those who made derogatory remarks about the King or the British governors

could be prosecuted for seditious libel. Benjamin Franklin's brother was among those who were imprisoned for this crime.

Over time, however, it became clear that the British colonists, who became the new Americans after the Revolutionary War, believed that they had (and should have) the right to free expression. For example, Peter Zenger was arrested and prosecuted for mocking the Royal Governor of New York. Although the evidence showed that he had clearly committed the alleged crime, the jury refused to convict him, creating what is widely viewed as the first example of jury nullification in the Americas.

The commitment to free speech was also evident during the adoption of the U.S. Constitution. The Framers of the U.S. Constitution initially decided that a bill of rights was not needed. The Framers, relying on the fact that they had created a government of limited and enumerated powers, and that the Constitution included Montesquieu's ideas regarding separation of powers, took the position that the Constitution need not include a formal bill of rights. There was considerable dissent, and it rapidly became clear that the Constitution would not be ratified absent inclusion of a bill of rights, including explicit protections for free expression. It was finally agreed that the Constitution would be ratified "as is," but that the first Congress would create what became known as the Bill of Rights. That is why the Bill of Rights entered the Constitution as an amendment.

The internet radically altered communication because it is an extremely democratic technology that has enabled ordinary individuals to communicate on a mass scale, allowing them to avoid the traditional media which had historically served as one of the gatekeepers and filters of communication. This broadening of communicative capacity has had a profound impact on modern societies, enabling mass communication on a scale never seen before, and resulting in profound societal changes.

A striking illustration of the internet's democratic potential is revealed by the Arab Spring uprisings in the Middle East. The internet was used by Egyptian protestors to coordinate and promote the protests in that country. Prior to the internet, when the government was in control of the traditional media, it was possible for the Egyptian government to limit the information that ordinary Egyptians received. Thus, the government might have been able to limit Egyptian knowledge of the Tunisian uprisings. In an internet era, the Egyptian people were fully aware of the uprisings that had occurred in Tunisia several weeks before.

The internet also affected the course of the Egyptian protests. Egyptian protestors were able to obtain advice from Tunisian protestors, and they were able to organize protests over the internet. Before the internet, the Egyptian

government would have been able to control the flow of information about the Egyptian uprising through their control of newspapers, as well as of radio and television stations. No longer was the Egyptian government able to control the flow of information to the Egyptian people even though it fervently attempted to do so. The internet made tight governmental control impossible.

In the U.S. itself, the impact of the internet was dramatically revealed by President Barrack Obama's 2008 presidential campaign. At the outset of the presidential primaries, many believed that Hillary Clinton would wrap up the nomination by Super Tuesday. She didn't. Obama used the internet very effectively to organize and recruit supporters, and to raise money. Not only was Clinton unable to wrap up the nomination by Super Tuesday, she was unable to win the nomination at all. She was beaten by Obama. In the general campaign, John McCain accepted campaign financing and was only able to spend \$85 million. By contrast, Obama refused to accept campaign financing, and raised approximately \$750 million for his campaign, thanks to the internet. For Obama, the internet was a game changer.

Although the events in Egypt, and the Obama campaign help illustrate the democratic potential of the internet, the internet also has a dark side: It has created the potential for individuals and governments to create and disseminate "fake news" on a global scale and influence elections in other countries. Numerous examples of "fake news" can be offered. For example, over the internet, individuals disseminated information suggesting that Hillary Clinton was involved in promoting child sexual abuse at a pizzeria. In addition, in political campaigns, individuals have made numerous false allegations against their opponents. President Trump, for instance, routinely dismisses allegations made against him as "fake news."

The existence of "fake news" has troubling implications for the U.S. governmental system. Various justifications have been offered to support the role of free expression in free societies. Many cite and rely on the so-called "marketplace of ideas" theory. In its strict sense, this theory suggests that all ideas should be allowed into the marketplace of ideas, and thereby allowed to compete against each other, and it assumes that the best ideas will ultimately prevail. Of course, there is no assurance that the marketplace of ideas will necessarily lead to the triumph of only "true" ideas. Even if there were some objective standard of "truth" against which ideas could be judged and evaluated, which there is not, there are few mechanisms in the U.S. governmental system for declaring "truth." Unlike countries like France, which have declared that certain facts cannot be denied on pain of criminal sanctions (e.g., the French Gayssot law permits the imposition of criminal

sanctions on those who deny the Holocaust), the U.S. does not allow the government to declare certain ideas to be “true” and to prohibit the expression of contrary opinions. In addition, the U.S. does not have “truth commissions.” By its very nature, freedom of expression allows the people to freely express their own beliefs, free of governmental censorship, and there is no mechanism for determining truth other than public consensus or the outcome of elections. Moreover, elections are hardly effective mechanisms for determining “truth.” The “truths” to be gleaned from elections can be opaque, and often inconsistent. For example, some of the same individuals who voted for Barack Obama openly admitted that they also voted for Donald Trump. While defamation suits are possible, the standards and burdens of proof are extremely high and difficult to satisfy.

Undoubtedly, the most compelling justification for free expression is premised on the nature of the governmental system. If the power to govern derives from the consent of the governed, the people should be free to express their ideas free from governmental restriction and should have the right to try to convince others regarding the correctness of those ideas. In such a system, governmental restrictions on speech are anathema. The U.S. no longer permits seditious libel prosecutions, and no longer allows government to punish those who do nothing more than criticize the government.

Nevertheless, if the governmental system is premised upon the “consent of the governed,” “fake news” can have very disconcerting and troubling implications. Fake news has the capacity to undercut the democratic process by misleading the people with false information and ideas. Thus, as people go to the polls to vote for candidates, or on ballot proposals, there is the potential that they will be misled by false information.

Despite the harms that flow from fake news, it is not clear that society has an effective remedy that will allow it to control the flow of fake news or its impact on the public debate. The nature of the U.S. governmental system necessarily limits the ability of government to regulate or control fake news. In general, government is not free to declare that certain facts are incontrovertible, and it is not allowed to repress ideas simply because it regards them as “false” or “fake.” Of course, although the First Amendment prohibits governmental censorship of speech, it does not require government to be “neutral” on all issues. For example, even though the U.S. government may not prohibit individuals from denying that the Holocaust occurred, it is free to support the establishment of a Holocaust Museum. But it is one thing for government to advocate in favor of an idea (or ideas), and quite another thing for it to repress countervailing ideas. Under the U.S. system of government, government is prohibited from taking the latter action.

In the final analysis, in a free society, there may be no meaningful remedy for fake news other than responsive speech. As James Madison declared:

Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press. It has accordingly been decided, by the practice of the states, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits.<sup>1</sup>

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1. James Madison, *The Report of 1800 on the Virginia Resolutions*, in 17 THE PAPERS OF JAMES MADISON 303, 303-351 (William T. Hutchinson et al. eds., Univ. Press of Va. 1991) (1801).