

# STEMMING THE TIDE OF FAKE NEWS: A GLOBAL CASE STUDY OF DECISIONS TO REGULATE

By Amy Kristin Sanders,<sup>\*</sup> Rachael L. Jones,<sup>\*\*</sup> and Xiran  
Liu<sup>\*\*\*</sup>

*“[I]t is so difficult to draw a clear line of separation between the abuse and the wholesome use . . . of the press, that as yet we have found it better to trust the public judgment, rather than the magistrate, with the discrimination between truth & falsehood. And hitherto the public judgment has performed that office with wonderful correctness.”*

—Thomas Jefferson<sup>1</sup>

## I. INTRODUCTION: THE RISE OF FAKE NEWS IN THE ERA OF SOCIAL MEDIA

“Rogue Amazon Drone Attempts To Deliver BOMB To White House.”<sup>2</sup> “Pink water comes from taps in Canada town.”<sup>3</sup> “Clinton Campaign Chairman . . . Involved in Satanic [Rituals].”<sup>4</sup> Certainly, headlines like these can’t be true. Can they?

---

<sup>\*</sup> J.D./Ph.D., Associate Professor at the Moody College of Journalism at the University of Texas.

<sup>\*\*</sup> J.D., Research Fellow for the Brechner Center for Freedom of Information at the University of Florida.

<sup>\*\*\*</sup> Graduate Student at the London School of Economics.

<sup>1</sup> Letter from Thomas Jefferson to Marc Auguste Pictet (Feb. 5, 1803), in 39 THE PAPERS OF THOMAS JEFFERSON, 13 November 1802–3 March 1803, at 456-457 (Barbara B. Oberg ed., Princeton University Press 2012), <http://founders.archives.gov/documents/Jefferson/01-39-02-0391>.

<sup>2</sup> Tom Florer, *Rogue Amazon Drone Attempts to Deliver BOMB to White House*, DAILY CHRONICLE (Oct. 25, 2017), <http://www.thedailychronicle.co.uk/2017/10/25/rogur-amazon-drone-attempts-deliver-bomb-white-house>.

<sup>3</sup> “*Pink Water Comes from Taps in Canada Town*,” SKYNEWS (Mar. 8, 2017), <https://news.sky.com/video/pink-water-comes-from-taps-in-canada-town-10794539>.

<sup>4</sup> Dan Evon, *Fact Check: Was Clinton Campaign Chairman John Podesta Involved in Satanic 'Spirit Cooking'?*, SNOPE (Nov. 4, 2016), <https://www.snopes.com/john-podesta-spirit-cooking>.

In the era of “Fake News,” readers often do not know what to believe. Around the globe, fake news has had real-world impact; for example, in early 2017, protestors gathered outside the White House in Washington, D.C. demanding the American government investigate an unfounded Internet rumor.<sup>5</sup> The same rumor, which claimed the existence of a child-sex ring in a local pizza parlor and connected high-level Democratic political figures, including Hillary Clinton, led an armed North Carolina man to storm the Comet Ping Pong Pizzeria in December 2016, in an insane quest for evidence of child sex abuse.<sup>6</sup> Now known as “Pizzagate,” the rumor stemmed from articles boasting fake information about the Clinton campaign and the D.C. pizza joint.<sup>7</sup> When alt-right political pundits, such as Infowars founder Alex Jones, caught wind of the story, it went viral and led to the incident that occurred during the December 2016 and the 2017 protests. Despite an apology from Jones for his role in spreading the now-proven-false rumor, protestors still gathered in the American capital insisting that the story was legitimate.<sup>8</sup>

Given the interconnectedness of our Global Village,<sup>9</sup> fake news has the ability to spread quickly and have lasting impact. During recent elections in France, fake news caught the attention of voters and candidates alike, with President Emmanuel Macron vowing to take action.<sup>10</sup> Macron isn't alone; noting the potential impact of fake news, numerous world leaders have voiced their concerns, including the UK's Theresa May, Germany's Angela Merkel, and Israel's Benjamin Netanyahu.<sup>11</sup> United States President Donald Trump repeatedly lashes out at what he has dubbed the “fake news media.”<sup>12</sup>

---

<sup>5</sup> Michael E. Miller, *Protesters Outside White House Demand 'Pizzagate' Investigation*, WASH. POST (Mar. 25, 2017), <https://www.washingtonpost.com/news/local/wp/2017/03/25/protesters-outside-white-house-demand-pizzagate-investigation>.

<sup>6</sup> Faiz Siddiqui & Susan Svlruga, *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/news/local/wp/2016/12/04/d-c-police-respond-to-report-of-a-man-with-a-gun-at-comet-ping-pong-restaurant>.

<sup>7</sup> Cecilia Kang, *Fake News Onslaught Targets Pizzeria as Nest of Child-Trafficking*, N.Y. TIMES (Nov. 21, 2016), <https://www.nytimes.com/2016/11/21/technology/fact-check-this-pizzeria-is-not-a-child-trafficking-site.html>.

<sup>8</sup> Miller, *supra* note 5.

<sup>9</sup> MARSHALL McLuhan, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* (Gingko Press dig. ed. 2013).

<sup>10</sup> Scott Neuman, *France's Macron Says He Wants Law to Combat Fake News*, NPR (Jan. 4, 2018), <https://www.npr.org/sections/thetwo-way/2018/01/04/575580790/frances-macron-says-he-wants-law-to-combat-fake-news>.

<sup>11</sup> Joe Concha, *Netanyahu Attacks US Media as 'Fake News'*, HILL (May 8, 2017), <http://thehill.com/homenews/media/332340-netanyahu-attacks-us-media-as-fake-news>.

<sup>12</sup> Rebecca Morin, *Trump Accuses 'Fake News' Media of Making Up Sources*, POLITICO (May 28, 2017), <https://www.politico.com/story/2017/05/28/trump-fake-news-media-238894>.

But what is the answer to combatting the spread of misinformation? And who should decide whether something is truthful?

To begin, it is important to understand the origins of fake news itself, including its motivations. Many commenters have suggested that social media has led to the rise of the Fake News movement.<sup>13</sup> However, such a view ignores much of fake news' history. A 2017 article in Politico Magazine traces the roots of fake news back to Gutenberg's invention of the printing press, relaying fictitious stories of Jews drinking the blood of Christian children in the late 1400s.<sup>14</sup> In fact, history has given a name to the various types of fake news for centuries.<sup>15</sup> As newspapers grew in popularity, so did the circulation and platform for fake news. Examples of similar fake news movements were seen in Italy in 1522<sup>16</sup> and in seventeenth-century France.<sup>17</sup> Still, it has continually been the audience's job to decipher truth from hyperbole. As Robert Darnton noted: "Although news of this sort could whip up public opinion, sophisticates knew better than to take it literally. Most of it was fake, sometimes openly so. A footnote to a scandalous item in *Le Gazetier cuirasse* read: 'Half of this article is true.' It was up to the reader to decide which half."<sup>18</sup>

In his article for *The Economist*, Tom Standage relays the story of how the *New York Sun*'s circulation more than doubled after it printed the story of a renowned British astronomer having witnessed "giant man-bats."<sup>19</sup> The deception, concocted by the editor, ensured the increase in readership and as a result, revenue as well. To this day, economic motivation is one of the chief drivers of the creation of fake news. The BBC recently published the story of a Macedonian teen who earned 1800 Euros off fake news content the first

---

<sup>13</sup> Claire Wardle & Hossein Derakhshan, *How Did the News Go 'Fake'?* *When the Media Went Social*, GUARDIAN (Nov. 10, 2017), <https://www.theguardian.com/commentisfree/2017/nov/10/fake-news-social-media-current-affairs-approval>; Benedict Carey, *How Fiction Becomes Fact on Social Media*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/health/social-media-fake-news.html>.

<sup>14</sup> 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>.

<sup>15</sup> Robert Darnton, *The True History of Fake News*, N.Y. REVIEW OF BOOKS (Feb. 13, 2017), <http://www.nybooks.com/daily/2017/02/13/the-true-history-of-fake-news>.

<sup>16</sup> In 1522, the Italian "*pasquinde*" emerged after Pietro Aretino attempted to sway the outcome of a pontifical election by posting scurrilous writings about candidates in Rome's Piazza Navona. *Id.*

<sup>17</sup> During the seventeenth century, the French "*canard*" ruled the roost by poking fun at Marie Antoinette and others through political propaganda. *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Tom Standage, *The True History of Fake News*, ECONOMIST (June/July 2017), <https://www.1843magazine.com/technology/rewind/the-true-history-of-fake-news>.

month he started producing it.<sup>20</sup> The young entrepreneur shared tales of friends making thousands per day creating and sharing fake news.<sup>21</sup>

A second primary motivation behind the creation and sharing of fake news can be found in the actions of Pietro Aretino, whose goal was to peddle influence.<sup>22</sup> Like the InfoWars story on “Pizzagate,” Aretino’s pasquinades were designed to affect the outcome of an election. It is this motivation—more than a publisher’s desire for economic prosperity – that is driving the world’s leaders and influential players to propose the regulation of fake news. This desire to upend political and social stability around the world surely calls into question the role of fake news in a democratic society.

Thus, there has never truly been a shortage of false information. Whether it is to impact politics—insixteenth-century Italy or twenty-first-century America—or to make money—by Yellow Journalists Hearst and Pulitzer in the 1890s<sup>23</sup> or 2017’s Macedonian teenagers,<sup>24</sup> fake news has been a constant companion to truthful information in our society. But history—along with Thomas Jefferson’s writings—suggests that the public has readily discerned the truth despite an onslaught of falsities. What has changed, then, in our modern era that inhibits our ability to distinguish between fact and fiction? And, furthermore, what can be done about it?

This Article examines recent legal and regulatory actions aimed at stemming the tide of fake news around the world. It argues that government regulation of fake news runs contrary to the principles of freedom of expression enshrined within democratic values. As an alternative, it encourages regulation from within the industry in combination with a greater emphasis on media literacy around the world.

## II. GLOBAL ATTEMPTS TO REGULATE FAKE NEWS

As the tide of anger-inspiring websites continues to churn out false reports en masse, sending shockwaves through the Internet, political leaders around the globe are debating the development of policies and practices aimed at curbing the spread of sensationalist and often made-up “fake news” stories that are influencing their citizens.

---

<sup>20</sup> Emma Jane Kirby, *The City Getting Rich from Fake News*, BBC (Dec. 5, 2016), <http://www.bbc.com/news/magazine-38168281>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Yellow Journalism*, PBS, [http://www.pbs.org/crucible/frames/\\_journalism.html](http://www.pbs.org/crucible/frames/_journalism.html).

<sup>24</sup> Samantha Subramanian, *Inside the Macedonian Fake-News Complex*, WIRED (Feb. 15, 2017), <https://www.wired.com/2017/02/veles-macedonia-fake-news>.

Countries have adopted various approaches in the battle against what some have called the “fake news epidemic,”<sup>25</sup> all of which tend to fall into three main categories. Under the first approach, a number of countries are calling for, or funding, private sector initiatives to more carefully scrutinize content on the Internet. Similarly, other nations have developed initiatives that authorize government agencies to scrutinize and report fake news content. Finally, some countries have opted to regulate fake news through legislative means by enacting or enforcing laws that impose fines or jail time on parties who are responsible for the creation or dissemination of fake news.

Although the focus of this Article centers on the legislative means of regulating fake news, often the most extreme and controversial approach, the other two approaches must also be addressed. Not surprisingly, all three regulatory schemes have been met with resistance from law professors, civil society, and others’ concerns about the impact of such a crackdown on freedom of expression.<sup>26</sup>

#### A. Private Sector Efforts

The most prominent private sector attempts at regulation have come from social media platforms—i.e., Ground Zero for the spread of fake news today. U.S. companies Facebook and Twitter have garnered the most headlines for their attempts to regulate fake news content on their sites.<sup>27</sup> With more than two billion monthly active users,<sup>28</sup> Facebook, along with many other social media platforms, has changed how the public consumes information—including fake news and other content.<sup>29</sup> Through a combination of careless news consumption and the remarkable speed of post sharing, social media’s low cost and wide reach provides an unbeatable platform for the spread of fake news. As a result, Americans witnessed the manipulation of public opinion through the dissemination of fake news via

---

<sup>25</sup> *Hillary Clinton Warns of ‘Fake News Epidemic’*, BBC (Dec. 9, 2016), <http://www.bbc.com/news/world-us-canada-38258967>.

<sup>26</sup> *French Opposition, Twitter Users Slam Macron’s Anti-Fake-News Plans*, REUTERS (Jan. 5, 2018), <https://www.reuters.com/article/us-france-macron-fakenews/french-opposition-twitter-users-slam-macrons-anti-fake-news-plans-idUSKBN1EU161>.

<sup>27</sup> Alex Hern, *Twitter May Introduce Feature to Let Users Flag ‘Fake News,’* GUARDIAN (June 30, 2017), <https://www.theguardian.com/technology/2017/jun/30/twitter-could-introduce-feature-to-let-users-flag-fake-news>.

<sup>28</sup> As of the third quarter of 2017.

<sup>29</sup> 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](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).

social media during the 2016 U.S. Presidential election.<sup>30</sup> One example was the widespread circulation of an article from the fake website denverguardian.com with the headline, “FBI agent suspected in Hillary email leaks found dead in apparent murder-suicide.”<sup>31</sup> Facebook, one of the world’s largest companies by market capitalization,<sup>32</sup> eventually joined the fight against fake news after its platform drew significant scrutiny even though founder Mark Zuckerberg initially rebuffed claims that his company must take responsibility for the site’s content.<sup>33</sup>

Since the United States election, Facebook has experimented with multiple approaches to combat fake news, with most efforts ultimately having little impact. Zuckerberg’s company took action shortly after allegations arose linking the spread of fake news on Facebook with the outcome of the presidential election.<sup>34</sup> Kicking off a series of initiatives, Facebook targeted 30,000 fake accounts in the lead-up to the French election in an effort to debunk false claims. It ran full-page ads in French newspapers, offering guidance to French voters on spotting fake news the weeks preceding the election.<sup>35</sup>

Other efforts by Facebook were greeted with more critical responses, including efforts aimed at helping users identify fake content on its own platform. Facebook experimented with various methods of promoting

---

<sup>30</sup> For example, one of the most popular fake news posts that circulated online was an article from the fake website denverguardian.com, which presented the headline, “FBI agent suspected in Hillary email leaks found dead in apparent murder-suicide.” Election coverage also saw the resurgence of a 2014 fake headline from the “conservative, libertarian, free market and pro-family” blog WesternJournalism.com that claimed Florida democrats voted to enact Sharia law, <http://www.politifact.com/florida/statements/2014/may/08/blog-posting/florida-democrats-just-voted-impose-sharia-law-wom>. More examples of fake news stories from the 2016 can be found in a discussion on *PolitiFact* at <http://www.politifact.com/truth-o-meter/article/2016/dec/13/2016-lie-year-fake-news>. See also Hunt Allcott & Matthew Gentzkow, *Social Media & Fake News in the 2016 Election*, 31 J. ECON. PERSPECTIVES 211-36 (2017), [https://www.aeaweb.org/full\\_issue.php?doi=10.1257/jep.31.2](https://www.aeaweb.org/full_issue.php?doi=10.1257/jep.31.2).

<sup>31</sup> Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSPECTIVES 211-36 (2017), [https://www.aeaweb.org/full\\_issue.php?doi=10.1257/jep.31.2](https://www.aeaweb.org/full_issue.php?doi=10.1257/jep.31.2).

<sup>32</sup> Sean Illing, *Why “Fake News” is an Antitrust Problem*, VOX (Sept. 23, 2017), <https://www.vox.com/technology/2017/9/22/16330008/facebook-google-amazon-monopoly-antitrust-regulation>.

<sup>33</sup> Kurt Wagner, *Mark Zuckerberg Admits He Should Have Taken Facebook Fake News and The Election More Seriously: ‘Calling That Crazy Was Dismissive and I Regret It,’* RECODE (Sept. 27, 2017), <https://www.recode.net/2017/9/27/16376502/mark-zuckerberg-facebook-donald-trump-fake-news>.

<sup>34</sup> Mike Isaac, *Facebook Considering Ways to Combat Fake News, Mark Zuckerberg Says*, N.Y. TIMES (Nov. 19, 2016), <https://www.nytimes.com/2016/11/20/business/medim/facebook-considering-ways-to-combat-fake-news-mark-zuckerberg-says.html>.

<sup>35</sup> Seth Fiegerman, *Facebook’s global fight against fake news*, CNN (May 9, 2017, 10:35 AM), <http://money.cnn.com/2017/05/09/technology/facebook-fake-news/index.html>.

content created by fact-checking organizations and groups who followed the principles outlined by the International Fact Checking Network, including giving these stories special placement in its News Feed.<sup>36</sup> Another initiative was aimed at optimizing algorithms to promote comments containing the word “fake” to prominent positions under the Shared News feature.<sup>37</sup> Other changes included providing publisher information to the users,<sup>38</sup> and employing “trust indicators,” which were used by more than 75 news organizations to display an icon showing how a story was reported and the credentials of the reporters.<sup>39</sup>

But the “Disputed” flag was perhaps the most controversial of Facebook’s changes. Designed to flag certain stories identified as fake and provide users with links to articles giving additional facts or context to explain why the original article was questionable, the “Disputed” flag drew significant criticism.<sup>40</sup> In December 2017, Facebook announced it was ending the program.<sup>41</sup> Rather than encouraging media literacy and critical consumption, data suggests the program suffered from a number of shortcomings. The process of tagging articles was time-consuming, resulting in the continued sharing of many fictitious articles before they were properly tagged.<sup>42</sup> In some instances, properly tagged fake news articles went viral as a reaction to the perception that Facebook was attempting to silence certain groups or views.<sup>43</sup> Concerns also arose about Facebook’s potential bias, with some claiming the social media platform was targeting stories that did not agree with certain ideologies. In one instance, Facebook was accused of

---

<sup>36</sup> Craig Silverman, *Facebook Is Turning To Fact-Checkers To Fight Fake News*, BUZZFEED (Dec. 15, 2016, 9:59 AM), <https://www.buzzfeed.com/craigsilverman/facebook-and-fact-checkers-fight-fake-news>.

<sup>37</sup> Jane Wakefield, *Facebook's fake news experiment backfires*, BBC (Nov. 7, 2017), <http://www.bbc.com/news/technology-41900877>.

<sup>38</sup> Tom Huddleston Jr., *Facebook's Latest Attempt at Fighting Fake News Is to Provide Publisher Info*, FORTUNE (Oct. 5, 2017), <http://fortune.com/2017/10/05/facebook-test-more-info-button-fake-news>.

<sup>39</sup> Mike Snider, *Facebook, Google, Twitter and media outlets fight fake news with "trust indicators,"* USA TODAY (Nov. 16, 2017), <https://www.usatoday.com/story/tech/news/2017/11/16/facebook-google-twitter-and-media-outlets-fight-fake-news-trust-indicators/869200001>.

<sup>40</sup> *Id.*

<sup>41</sup> Thuy Ong, *Facebook Found a Better Way to Fight Fake News*, VERGE (Dec. 21, 2017), <https://www.theverge.com/2017/12/21/16804912/facebook-disputed-flags-misinformation-newsfeed-fake-news>.

<sup>42</sup> Sam Levin, *Facebook Promised to Tackle Fake News. But the Evidence Shows It's Not Working,* GUARDIAN (May 16, 2017), <https://www.theguardian.com/technology/2017/may/16/facebook-fake-news-tools-not-working>.

<sup>43</sup> *Id.*

ignoring fake news that had an anti-abortion slant.<sup>44</sup> Further, the “Disputed” flags were appended to individual articles, which failed to prevent users from spreading other versions of the same fake news article.<sup>45</sup>

Even after a “Disputed” flag was placed on a story, there was no guarantee that readers would take the time to look for truthful information. A 2016 study conducted by Yale University showed that news tagging on social media does not correct misinformation conveyed by fake news headlines or the temper impact that such misinformation has on readers.<sup>46</sup> Despite some of these best efforts, the task of reducing fake news through social media has proved to be a difficult—arguably unwinnable—task. As Facebook itself concluded, there is no “silver bullet” approach to fake news.<sup>47</sup>

In response to concerns about fake news, Twitter—along with Facebook and Google—announced in November 2017 it would employ “trust indicators” to assist users in evaluating content on its site.<sup>48</sup> However, it provided no additional information beyond the generic agreement to participate. Even the Trust Project’s own website failed to mention Twitter’s subsequent involvement, noting that 10 sites – none of which include major social media platforms—have displayed and tested the “Trust indicators.”<sup>49</sup>

Private sector organizations and individuals, like the International Fact Checking Network, have also stepped up to voluntarily participate in the battle against fake news. In Ukraine, a group of lecturers, graduates and students from Kyiv’s Mohyla Journalism School operate the highly respected Stopfake.org, a fact-checking website focused on denouncing dubious claims made by Russian-backed media organizations.<sup>50</sup> These include false claims

---

<sup>44</sup> Rossalyn Warren, *Facebook Is Ignoring Anti-Abortion Fake News*, N.Y. TIMES (Nov. 10, 2017), <https://www.nytimes.com/2017/11/10/opinion/facebook-fake-news-abortion.html>.

<sup>45</sup> Sam Levin, *Facebook Promised to Tackle Fake News. But the Evidence Shows It’s Not Working*, GUARDIAN (May 16, 2017), <https://www.theguardian.com/technology/2017/may/16/facebook-fake-news-tools-not-working>.

<sup>46</sup> Gordon Pennycook and David G. Rand, *The Implied Truth Effect: Attaching Warnings to A Subset of Fake News Stories Increases Perceived Accuracy of Stories Without Warnings*, Yale University Research Paper, 2016; see also Jason Schwartz, *Tagging fake news on Facebook doesn’t work, study says*, POLITICO (Sept. 12, 2017), <https://www.politico.eu/article/tagging-fake-news-on-facebook-doesnt-work-study-says>.

<sup>47</sup> *Is Facebook Losing the Battle Against Fake News? Facebook Has Hired Fact Checkers, But Critics Say this is Not Enough*, HUFFINGTON POST, (Oct. 31, 2017), [http://www.huffingtonpost.co.za/2017/10/31/is-facebook-losing-the-battle-against-fake-news\\_a\\_23261493](http://www.huffingtonpost.co.za/2017/10/31/is-facebook-losing-the-battle-against-fake-news_a_23261493).

<sup>48</sup> Seth Fiegerman, *Facebook, Google, Twitter to Fight Fake News with ‘Trust Indicators’*, CNN (Nov. 16, 2017), <http://money.cnn.com/2017/11/16/technology/tech-trust-indicators/index.html>.

<sup>49</sup> The Trust Project, <https://thetrustproject.org> (last visited May 25, 2020).

<sup>50</sup> Scott Roxborough, *How Europe is Fighting Back Against Fake News*, HOLLYWOOD REPORTER (Aug. 21, 2017), <http://www.hollywoodreporter.com/news/how-europe-is-fighting-back-fake-news-1030837>.



that the Ukrainian government is run by neo-Nazis, for example. Elsewhere, websites such as Snopes.com—perhaps the web’s premier fact-checking site—have continued to debunk rumors and other misinformation circulating on the Internet.<sup>51</sup> Snopes certainly is not alone; The Tampa Bay Times operates Politifact, and the Annenberg Public Policy Center at the University of Pennsylvania runs FactCheck.org. Launched in September 2015, the Poynter Institute’s International Fact Checking Network takes the form of a coalition, enlisting the help of fact checkers worldwide.<sup>52</sup> Ultimately, though, it seems these piece-meal, private efforts are no match for the large-scale fake news industry well-versed in taking advantage of the speed and reach of social media.

### *B. Non-Legislative Efforts by Governments*

In addition to private-sector efforts to stem the tide of fake news, many European countries are taking more official actions. Often aimed at concerns about the political impact of fake news, these efforts have taken two primary forms: legislative and non-legislative mandates. Non-legislative mandates, the topic of this section, include government initiatives that use the coercive powers of the state—absent the legislative deliberative process—to police the creation and spread of fake news.

Several governments have created special units within their auspices that are designed to investigate fake news. Often, these agencies are intended to address the undue influence posed by fictitious content in the months and weeks leading up to election cycles.<sup>53</sup> One of the most influential efforts started in the Czech Republic, where officials expressed concern about potential interference with the 2017 parliamentary and presidential elections.<sup>54</sup> There, the “alternative news business” has thrived, with populist-inspired sites working to stir general discontent among voters.<sup>55</sup> “It seems to me that the overall effort is more to foment mistrust in institutions, in traditional parties, in sort of traditional institutional sources of authority. It doesn’t seem to me that there would be a unified or orchestrated effort

---

<sup>51</sup> Michelle Dean, *Snopes and the Search for Facts in a Post-Fact World*, WIRED (Sept. 20, 2017), <https://www.wired.com/story/snopes-and-the-search-for-facts-in-a-post-fact-world>.

<sup>52</sup> *Fact-Checking*, POYNTER INSTITUTE, <https://www.poynter.org/channels/fact-checking>.

<sup>53</sup> Anisah Shukry, *Malaysia Gears Up for Election as Najib Targets ‘Fake News,’* BLOOMBERG (Jan. 5, 2018), <https://www.bloomberg.com/news/articles/2018-01-05/malaysia-gears-up-for-election-as-najib-targets-fake-news>.

<sup>54</sup> Rob Cameron, *Fake news: Czechs Try to Tackle Spread of False Stories*, BBC (Feb. 2, 2017), <http://www.bbc.com/news/world-europe-38808501>.

<sup>55</sup> Emily Schultheis, *The Czech Republic’s Fake News Problem*, ATLANTIC (Oct. 21, 2017), <https://www.theatlantic.com/international/archive/2017/10/fake-news-in-the-czech-republic/543591>.

[among the sites] to support this or that political party or movement.”<sup>56</sup> Nonetheless, political leaders openly expressed concern.<sup>57</sup> In response to concerns raised in a national security audit, the Interior Minister established the Centrum Proti Terorismu a Hybridnim Hrozbam (Centre Against Terrorism and Hybrid Threats), which began operations in early 2017.<sup>58</sup> Interestingly, the government asserts it was not created as a law enforcement agency or intelligence service.<sup>59</sup> Instead, its stated mission is to “inform about serious cases of disinformation and . . . provide expert opinions for the public and government institutions.”<sup>60</sup>

Finland announced plans in early 2017 to build a similar center, in partnership with nine EU countries,<sup>61</sup> including the United States and NATO.<sup>62</sup> The European Centre of Excellence for Countering Hybrid Threats, was designed to unify efforts to fight disinformation and fake news by consolidating expertise and resources.<sup>63</sup> Like the Czech Republic, many of the countries involved “have been particularly concerned over what they say are Russia’s aggressive disinformation campaigns and systematic spreading of false news on their countries.”<sup>64</sup> Envisioned more as a strategic hub to centralize efforts to combat fake news and cyber hacks, the center’s mission does not formally include law enforcement or surveillance mandates.<sup>65</sup>

---

<sup>56</sup> *Id.*

<sup>57</sup> James Shotter, *Czechs Fear Russian Fake News in Presidential Election*, FINANCIAL TIMES (Jan. 8, 2018), <https://www.ft.com/content/c2b36cf0-e715-11e7-8b99-0191e45377ec>.

<sup>58</sup> CENTRE AGAINST TERRORISM & HYBRID THREATS, <http://www.mvcr.cz/cthh/clanek/centre-against-terrorism-and-hybrid-threats.aspx> (last visited May 15, 2020).

<sup>59</sup> “Given the competencies of the Ministry of the Interior, the Centre will monitor threats directly related to internal security, which implies a broad array of threats and potential incidents relative to terrorism, soft target attacks, security aspects of migration, extremism, public gatherings, violation of public order and different crimes, but also disinformation campaigns related to internal security. Based on its monitoring work, the Centre will evaluate detected challenges and come up with proposals for substantive and legislative solutions that it will also implement where possible. It will also disseminate information and spread awareness about the given issues among the general and professional public.” *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> The countries include Britain, Finland, France, Germany, Latvia, Lithuania, Poland and Sweden, along with the United States. See Jari Tanner, *New Center to Combat Disinformation to be Built in Finland*, ASSOCIATED PRESS (Apr. 11, 2017), <https://www.apnews.com/d5b1763ae5ad463ba8bc4ff5fa23816>.

<sup>62</sup> *Id.*

<sup>63</sup> Hilary Lamb, *‘Hybrid Threat’ Centre to be Built in Finland to Counter Fake News*, ENGINEERING & TECH. (Apr. 12, 2017), <https://eandt.theiet.org/content/articles/2017/04/hybrid-threat-centre-to-be-built-in-finland-to-counter-fake-news>.

<sup>64</sup> See Tanner, *supra* note 61.

<sup>65</sup> The functions of Hybrid CoE include the following: “to encourage strategic-level dialogue and consulting between and among Participants, the EU and NATO; to conduct research and analysis into hybrid threats and methods to counter such threats; to develop doctrine, conduct training and arrange exercises aimed at enhancing the Participants’ individual capabilities, as well

Although the center officially launched operations in September 2017 with three additional countries participating, few accounts of its efforts or successes have been publicized.

### *C. Legislative Efforts by Governments*

The third—and arguably most troubling—approach to the regulation of fake news involves legislative efforts by governments around the world. Throughout Europe and Asia, governments have enacted or begun to enforce laws penalizing—and often criminalizing—the creation and distribution of fake news. The legislative proposals, some of which have recently taken effect as law, have drawn harsh criticism from attorneys, legal scholars and other civil society groups because of the chilling effect they are likely to have on freedom of expression.

Germany’s enactment of a law aimed at penalizing social media platforms who fail to stop the spread of fake news has garnered significant attention worldwide. The law, titled *Netzwerkdurchsetzungsgesetz* and known as NetzDG, was passed in 2017, and Germany began enforcing it January 1, 2018.<sup>66</sup> The law authorizes fines of up to 50 million Euros against social media platforms who fail to remove “obviously illegal” content, including hate speech and fake news within 24 hours of being notified.<sup>67</sup> Content that is not obviously illegal must be removed within 7 days of notification. Additionally, individuals responsible for removing content could be held liable for up to five million Euros in penalties under the new regime.<sup>68</sup> Although the law was designed to target Facebook, Twitter and YouTube, it could also impact Reddit, Tumblr, Vimeo, Flickr and Russian platform VK, all of which are popular in Germany.<sup>69</sup> Companies will be

---

as interoperability between and among Participants, the EU and NATO for countering hybrid threats; to engage with and invite dialogue with governmental and non-governmental experts from a wide range of professional sectors and disciplines; and to involve, or cooperate with, communities of interest (COI) focusing on specific activities that may constitute hybrid threats, on methodologies for understanding these activities, and on ways to adjust organizations to better address such threats effectively.” *Memorandum of Understanding: On the European Centre of Excellence for Countering Hybrid Threats*, HYBRID COE, 2 (Dec. 6, 2016), <https://www.hybridcoe.fi/wp-content/uploads/2017/08/Hybrid-CoE-final-Mou-110417-1.pdf>. (last visited May 26, 2020)

<sup>66</sup> *Germany Starts Enforcing Hate Speech Law*, BBC (Jan. 1, 2018), <http://www.bbc.com/news/technology-42510868>.

<sup>67</sup> *Id.*

<sup>68</sup> *Germany Approves Plans to Fine Social Media Firms Up to €50M*, GUARDIAN (June 30, 2017), <https://www.theguardian.com/media/2017/jun/30/germany-approves-plans-to-fine-social-media-firms-up-to-50m>.

<sup>69</sup> *Id.*

required to publish biannual reports outlining reported complaints and their resolution.<sup>70</sup>

Although Germany's new law is by far the "boldest step" taken by a Western democracy, other countries, such as the Philippines, Ireland and France, have undertaken similar legislative moves. In June 2017, Filipino senator Joel Villanueva filed a bill aimed at curtailing fake news.<sup>71</sup> The bill titled "Penalizing Malicious Distribution of False News and Other Related Violations" cites the German law in support of the effort in the Philippines. The act defines fake news as content that would intend "to cause panic, division, chaos, violence, and hate, or those which exhibit a propaganda to blacken or discredit one's reputation."<sup>72</sup> The bill established penalties of 5 million Pesos (approximately \$100,000USD) and up to 5 years in prison for private citizens while fines and jail sentences for public officials found guilty are increased two-fold.<sup>73</sup> Media platforms would face up to 20 million Peso fines or 10 years in prison for failing to remove fake news.<sup>74</sup> In a surprising announcement, Philippine President Rodrigo Duterte condemned the proposed law, saying the measure amounted to censorship.<sup>75</sup> Duterte objected to fake news laws citing that they violate the freedom of expression.

French President Emmanuel Macron became the latest Western leader to take on fake news when he called for additional regulation. French politicians, like those in many European countries, have expressed concern about political manipulation through fake news or advertisement on social media. During Macron's new year speech to journalists, he promised a new law to impose tougher rules on social media companies and place limits on political ads in an effort to limit undue political influence.<sup>76</sup> Short on specifics, Macron emphasized the need for transparency in sources of

---

<sup>70</sup> *Id.*

<sup>71</sup> Eimor P. Santos, *Bill Filed vs. Fake News: Up to P10M Fine, 10-Year Jail Time for Erring Public Officials*, CNN PHILIPPINES (June 22, 2017, 7:30 PM), <http://cnnphilippines.com/news/2017/06/22/senate-bill-fake-news-fines-government-officials.html>.

<sup>72</sup> Senate of the Philippines, [https://www.senate.gov.ph/lis/bill\\_res.aspx?congress=17&q=SBN-1492](https://www.senate.gov.ph/lis/bill_res.aspx?congress=17&q=SBN-1492) (last visited May 15, 2020).

<sup>73</sup> Santos, *supra* note 71.

<sup>74</sup> Stanley Cabigas, *Philippine Senator Moves to Criminalize 'Fake News' — Could this Lead to Censorship?*, GLOBAL VOICES (July 7, 2017, 3:57 PM), <https://advox.globalvoices.org/2017/07/07/philippine-senator-moves-to-criminalize-fake-news-could-this-lead-to-censorship>.

<sup>75</sup> Pia Gutierrez, *Duterte Says Proposed Law vs. 'Fake News' Won't Pass*, ABS-CBN NEWS (Oct. 4, 2017), <http://news.abs-cbn.com/news/10/04/17/duterte-says-proposed-law-vs-fake-news-wont-pass>.

<sup>76</sup> Yasmeen Serhan, *Macron's War on 'Fake News'*, ATLANTIC (Jan. 6, 2018), <https://www.theatlantic.com/international/archive/2018/01/macrons-war-on-fake-news/549788>.

apparent news content.<sup>77</sup> He also expressed support for placing limits on the amount spent on political ads during elections.<sup>78</sup> Macron emphasized the need to protect democracy:

“Thousands of propaganda accounts on social networks are spreading all over the world, in all languages, lies invented to tarnish political officials, personalities, public figures, journalists. If we want to protect liberal democracies, we must have strong legislation.”<sup>79</sup> He went further in addressing the impetus for his proposed change, citing “destabilization attempts by television channels controlled or influenced by foreign states.”<sup>80</sup> Initially, however, it seemed his proposal would be more limited in scope than Germany’s sweeping law. As a candidate, Macron who was affected by fake news during the election cycle, so it should not be surprising that he emphasizes the time period leading up to voting.<sup>81</sup> One of the boldest measures he proposed included “an emergency legal action,” which would allow authorities to remove fake news content or even block a website from publishing during election seasons. Macron’s plan quickly received critical responses, including from opposition leader Marine Le Pen who questioned: “Who will decide if a piece of news is fake? Judges? The government?”<sup>82</sup>

Just a month earlier, the Irish Republican Party, known as Fianna Fáil, introduced a groundbreaking bill to regulate fake news in Ireland’s parliament, known as the Dáil.<sup>83</sup> It introduced the bill despite earlier warnings from the country’s information minister that there was no legal way to restrict fake news.<sup>84</sup> The bill targets individuals who use bots to spread false political information via social media, declaring the act punishable by five years in prison or fines of up to 10,000EUR.<sup>85</sup> The “Online Advertising and Social

---

<sup>77</sup> Emmanuel Macron: *French President Announces ‘Fake News’ Law*, BBC (Jan. 3, 2018), <http://www.bbc.com/news/world-europe-42560688>.

<sup>78</sup> Melanie Ehrenkranz, *France’s President Macron Wants to Block Websites During Elections to Fight ‘Fake News’*, GIZMODO (Jan. 3, 2018, 11:13 AM), <https://gizmodo.com/frances-president-macron-wants-to-block-websites-during-1821770692>.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Sebastian Shukla & Melissa Bell, *France to Crack Down on ‘Fake News’*, CNN (Jan. 3, 2018), <http://edition.cnn.com/2018/01/03/europe/macron-france-fake-news-law/index.html>.

<sup>82</sup> Charles Bremmer, *Macron’s War on Fake News From Russia Angers Le Pen*, TIMES (Jan. 5, 2018), <https://www.thetimes.co.uk/article/macrons-war-on-fake-news-from-russia-angers-le-pen-0s8tg0kqv>.

<sup>83</sup> *Irish Parliament to Debate Bill Proposing Jail Time for Spreading Fake News*, RUSSIA TODAY (Dec. 4, 2017), <https://www.rt.com/news/411910-irish-politician-fake-news-law>.

<sup>84</sup> *Id.*

<sup>85</sup> Daniel Funke, *In Ireland, Lawmakers Are Trying to Criminalize the Use of Bots To Spread Political Misinformation*, POYNTER INST. (Dec. 8, 2017), <https://www.poynter.org/fact-checking/2017/in-ireland-lawmakers-are-trying-to-criminalize-the-use-of-bots-to-spread-political-misinformation>.

Media (Transparency) Bill 2017,” outlaws the use of bots to create 25 or more online presences in an attempt to sway political debate.<sup>86</sup> In addition, to increase transparency, the bill mandates the identification of publishers and sponsors of political advertising online.<sup>87</sup>

The bill was proposed based on concerns of the use of bots to spread fake news—similar to incidents surrounding Brexit and the 2016 U.S. presidential election—could impact the Irish political climate.<sup>88</sup> Although Fianna Fáil and James Lawless, who authored the bill, acknowledge that Irish politics have not been heavily affected by fake news, he cautioned that Ireland should be aware of the “new form of hybrid information warfare which is underway on social media.”<sup>89</sup>

Ireland is not the only country whose battle against fake news has been justified on the basis of transparency in political advertising. Fianna Fáil’s proposal in Ireland largely mirrored the Honest Ads Act, a bill aimed to increase transparency in online political advertising in the United States. Similar versions of the bill, with bipartisan support, were introduced in both houses of Congress in October 2017. The proposed law would apply to any site with at least 50 million unique monthly visitors in the previous 12 months.<sup>90</sup> As a result, it would primarily impact Facebook and Twitter, though they are not named in the bill. The Honest Ads Act would require companies to keep copies of political ads and make them publicly available as well as maintain records of media buyers and rates charged for ads for no less than four years.<sup>91</sup> It would apply to anyone who spends \$500 or more on political ads. Like the Irish bill and other attempts to regulate fake news, the Honest Ads Act was introduced in response to Facebook’s Russia-linked ads scandal, where millions of Americans saw politically divisive Russian-

---

<sup>86</sup> Online Advertising and Social Media (Transparency) Bill 2017 (Act No. 150/ 2017) (Ir.) <http://www.oireachtas.ie/documents/bills28/bills/2017/15017/b15017d.pdf>.

<sup>87</sup> *New Bill Will Help Make Political Advertising on Social Media More Transparent - Fianna Fail*, EVENING ECHO (June 6, 2017, 7:09 PM), <http://www.eveningecho.ie/oneaday/New-bill-will-help-make-political-advertising-on-social-media-more-transparent-Fianna-Fail-e17403a9-afd8-4273-9365-266b65be3d85-ds>.

<sup>88</sup> Frances Mulraney, *Sharing “Fake News” in Ireland Could Soon be Illegal, with \$10k Fine Attached*, IRISH CENTRAL (Dec. 17, 2017), <https://www.irishcentral.com/news/politics/fake-news-ireland>.

<sup>89</sup> Kevin Doyle, *Five Years in Jail for Spreading 'Fake News' Under FF Proposal*, INDEPENDENT (Jan. 8, 2018, 2:30 AM), <https://www.independent.ie/irish-news/politics/five-years-in-jail-for-spreading-fake-news-under-ff-proposal-36375745.html>.

<sup>90</sup> Luis Gomez, *What is the Honest Ads Act and Can it Stop Fake Political Ads on Social Media?*, SAN DIEGO UNION-TRIBUNE (Oct. 31, 2017, 6:06 PM), <http://www.sandiegouniontribune.com/opinion/the-conversation/sd-what-is-honest-ads-act-can-it-stop-fake-political-ads-twitter-facebook-20171031-htmlstory.html>.

<sup>91</sup> Colin Lecher, *Senators announce new bill that would regulate online political ads*, VERGE (Oct. 19, 2017, 1:31 PM), <https://www.theverge.com/2017/10/19/16502946/facebook-twitter-russia-honest-ads-act>.

purchased ads on Facebook.<sup>92</sup> Unlike the Irish proposal, the Honest Ads Act does not contain criminal penalties.

Aside from the Honest Ads Act, legislative movements to punish and regulate fake news<sup>93</sup> have gained little traction in the United States because of the significant constitutional hurdles presented by the First Amendment.<sup>94</sup> However, one state law targeting fake news appeared to have been quietly enacted. In March 2017, a California lawmaker introduced legislation targeting fake news, but abruptly canceled scheduled hearings.<sup>95</sup> The proposed bill, called the California Political Cyberfraud Abatement Act, would have made it “unlawful for a person to knowingly and willingly make, publish or circulate on an Internet Web site . . . a false or deceptive statement designed to influence the vote.”<sup>96</sup> The bill was tabled without a public hearing shortly after the Electronic Frontier Foundation publicly criticized it.<sup>97</sup> Although it subsequently received no media attention, the California Legislative Information site recorded an amended version of the bill as being passed 40-0 in the California Assembly on September 11, 2017, and approved by California Governor Jerry Brown on October 12, 2017.<sup>98</sup> The amended bill broadens the definitions of political cyber-fraud and political Web site to arguably proscribe legal freedom of expression protected by the First Amendment. Based on the EFF critique, the new law would likely face significant legal hurdles if challenged in court. As recently as 2012, the U.S. Supreme Court reiterated First Amendment protection for false speech in

---

<sup>92</sup> David Ingram, *Facebook says 10 million U.S. users saw Russia-linked ads*, REUTERS (Oct. 2, 2017, 8:06 AM), <https://www.reuters.com/article/us-facebook-advertising/facebook-says-10-million-u-s-users-saw-russia-linked-ads-idUSKCN1C71YM>.

<sup>93</sup> Jason Silverstein, *TV viewers keep asking the FCC to punish CNN for Trump coverage even though it can't*, N.Y. DAILY NEWS (Sept. 13, 2017), <http://www.nydailynews.com/news/politics/tv-viewers-fcc-punish-cnn-trump-coverage-article-1.3493595>.

<sup>94</sup> Andrew Blake, *California 'fake news' bill falters amid free speech concerns*, WASH. TIMES (Mar. 29, 2017), <http://www.washingtontimes.com/news/2017/mar/29/california-fake-news-bill-falters-amid-free-speech>.

<sup>95</sup> *Cyber Fraud Bill Would Make 'Fake News' Against the Law*, CBS L.A. (Mar. 31, 2017, 10:46 AM), <http://losangeles.cbslocal.com/2017/03/31/cyber-fraud-bill-would-make-political-fake-news-against-the-law>.

<sup>96</sup> Anthony L. Fisher, *Fake news is bad. Attempts to ban it are worse*, VOX (July 5, 2017, 10:24 AM), <https://www.vox.com/the-big-idea/2017/7/5/15906382/fake-news-free-speech-facebook-google>.

<sup>97</sup> Dave Maas, *Cal. Bill to Ban Fake News Would be Disastrous for Political Speech*, ELECTRONIC FRONTIER FOUNDATION (Mar. 28, 2017), <https://www.eff.org/deeplinks/2017/03/california-bill-ban-fake-news-would-be-disastrous-political-speech>.

<sup>98</sup>A.B. 1104, 2017-2018 Leg. Reg. Sess. (Cal. 2017), Legislative Info., [https://leginfo.ca.gov/faces/billVersionsCompareClient.xhtml?bill\\_id=201720180AB1104](https://leginfo.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201720180AB1104).

*United States v. Alvarez*, a case involving false claims about being awarded a military medal.<sup>99</sup>

In contrast, legislative efforts to punish fake news in China were among the first worldwide, with the country revising its criminal laws in October 2015. But the crackdown on rumor-mongering started even earlier, with the nation detaining bloggers in 2013 as part of its effort to maintain control over public opinion.<sup>100</sup> More recently, in November 2017, Chinese President Xi Jinping authorized the military's launch of a website where members of the public can report fake news.<sup>101</sup> Unsurprisingly, these moves were met with little public resistance and hardly attracted attention domestically and internationally. The government revised Article 291 of China's Criminal Law to address particular types of fake news, but the language used was noticeably vague. The new provision targets anyone who "fabricates or deliberately spreads on media, including on the Internet, false information regarding dangerous situations, the spread of diseases, disasters and police information, and who seriously disturb social order."<sup>102</sup> Although further regulation of fake news garnered criticism from human rights organizations as restricting free speech, the amendments to China's Criminal Law did not sound alarm among Chinese citizens living in an environment largely hostile to free speech. Similar to other countries discussed, China's rationale for the regulation was geared toward ensuring internal stability within its borders.

### III. FREEDOM OF EXPRESSION AS A DEMOCRATIC VALUE IN MODERN SOCIETY

The importance of information in modern society is undisputed; as the Internet continues to connect the modern world in ways previously only dreamed of, existing societies have morphed into information states that rely on the collection and use of information.<sup>103</sup> Thriving democracies need information to survive; democracy requires that its electorate be well-

---

<sup>99</sup> *United States v. Alvarez*, 567 U.S. 709 (2012) (striking down the Stolen Valor Act, which criminalized false statements about being awarded military medals).

<sup>100</sup> Chris Buckley, *Crackdown on Bloggers is Mounted by China*, N.Y. TIMES (Sept. 10, 2013), <http://www.nytimes.com/2013/09/11/world/asia/china-cracks-down-on-online-opinion-makers.html>.

<sup>101</sup> *Chinese Military Sets Up Website to Report Leaks, Fake News*, HINDU (Nov. 19, 2017, 11:31 AM), <http://www.thehindu.com/news/international/china-military-sets-up-website-to-report-leaks-fake-news/article20555153.ece>.

<sup>102</sup> *China: New Ban on 'Spreading Rumors' About Disasters*, HUMAN RIGHTS WATCH (Nov. 2, 2015), <https://www.hrw.org/news/2015/11/02/china-new-ban-spreading-rumors-about-disasters>.

<sup>103</sup> Jack Balkin, *The First Amendment is an Information Policy*, 41 HOFSTRA L. REV. 1, 4 (2012).



informed,<sup>104</sup> and the “right to know” has become a standard that furthers the goals of governmental accountability and democratic self-governance.<sup>105</sup> As Justice Hugo Black noted, “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, [and] that a free press is a condition of a free society.”<sup>106</sup> After all, a democratic government derives its legitimacy from the consent of the governed. For that consent to be meaningful, citizens must be informed not only about what their government is doing, but also about newsworthy events that may affect their daily lives, the behavior of individuals whom they may elect into political office, and the activity of nations around the world.

However, control over the flow information must exist in a delicate balance. On one hand, democratic regimes must be careful to ensure that the fear of sensationalism, terrorism, or similar threats do not lead to overly-authoritative regulation that frustrates the principles of free expression.<sup>107</sup> On the other hand, these same governments have a vested interest<sup>108</sup> against the dissemination of information that may lead citizens down a disastrous path or pose a threat to national security.<sup>109</sup> The freedom of expression (and with it the rights encapsulated in the First Amendment of the United States Constitution)<sup>110</sup> is then caught in a battle over infrastructure and contrasting interests: there is a constant question of whether regulation is necessary and who, exactly, should be permitted to determine or apply any regulation.<sup>111</sup>

The dawn of Internet speech has only complicated the matter. Where previously issues of speech and press existed on newsstands and at street protests, social media’s emergence as a formidable platform for speech has changed how the world communicates. It has also caused attorneys and legislators alike to question how existing law should apply to emerging media. Tech companies have considered this, too; because the First Amendment, in practice, covers a host of values that serve as the foundation

---

<sup>104</sup> Thomas Jefferson, Letter to Richard Price, Jan. 8, 1789, <http://www.loc.gov/exhibits/jefferson/60.html>.

<sup>105</sup> Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People’s Elusive ‘Right to Know’*, 72 MD. L. REV. 1, 9 (2012).

<sup>106</sup> *Associated Press v. United States*, 361 U.S. 1, 20 (1945).

<sup>107</sup> Balkin, *supra* note 103, at 5.

<sup>108</sup> *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 593 (1980) (Rehnquist, J., dissenting).

<sup>109</sup> In *Associated Press v. United States*, Justice Black noted that “[i]t would be strange . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom.” *Associated Press*, 361 U.S. at 20.

<sup>110</sup> The First Amendment guarantees the right of free speech, press, petition, assembly, and religion. U.S. CONST. AMEND. I.

<sup>111</sup> Balkin, *supra* note 103, at 7.

for the social practices regarding free speech,<sup>112</sup> American-based platforms—such as Google and Facebook—have allowed First Amendment principles to permeate their content policies and regulatory approaches.<sup>113</sup> At first blush, one might scoff at this, resting on the fact that private companies are exempt from much of First Amendment doctrine. However, when the vastness of Internet speech is considered, we see that the power to issue threats in favor of—or against—censorship in our modern information society rests not only in the hands of the government, but also—if not more so—in the hands of social media companies.<sup>114</sup>

Before addressing those questions, though, the “why” of the matter must be determined: Why do we (or should we) be wary of such regulation—especially when we have seen multiple instances where online speech, including fake news, has wrought havoc on elections,<sup>115</sup> individuals,<sup>116</sup> and companies<sup>117</sup> alike? The answer is simple: freedom of expression—be it online, in print, or spoken word—is a fundamental democratic principle that we cannot risk eroding.

In this section, we will examine the current democratic values through which we view the freedom of speech and expression, the “marketplace of ideas” theory and the concept of autonomy and democratic self-governance. Ultimately, we argue that the current models for fake news regulation are incompatible with these doctrines.

### A. Marketplace Theory

Arguably one of the most well-known theories on free expression, the “marketplace of ideas” was first introduced into the First Amendment canon

---

<sup>112</sup> Nabihya Syed, *Real Talk About Fake News: Towards a Better Theory of Platform Governance*, 127 YALE L.J. FORUM 337, 338 (2017).

<sup>113</sup> Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 26 (2018).

<sup>114</sup> See Syed, *supra* note 112, at 356; Balkin, *supra* note 103, at 5.

<sup>115</sup> See Hunt Allcott and Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSPECTIVES 211 (2017).

<sup>116</sup> Dainel Funke, *A satirical fake news site apologized for making a story too real*, POYNTER (Nov. 30, 2017), <https://www.poynter.org/news/satirical-fake-news-site-apologized-making-story-too-real>; see *What is Cyberbullying*, CYBERBULLYING RESEARCH CENTER, <https://cyberbullying.org/what-is-cyberbullying>; see also Lyrissa Lidsky and Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying*, 77 MO. L. REV. 693 (2012)

<sup>117</sup> Online reviews from social media-based platforms, such as Yelp, have caused businesses to gain and lose business—and engage in ferocious litigation. See Michael Luca & Georgios Zervas, *Fake It Till You Make It: Reputation, Competition, and Yelp Review Fraud*, <http://people.hbs.edu/mluca/FakeItTillYouMakeIt.pdf>; Patricia Clark, *Yelp's Newest Weapon Against Fake Reviews: Lawsuits*, BLOOMBERG BUSINESS WEEK (Sept. 9, 2013), <http://www.businessweek.com/articles/2013-09-09/yelps-newest-weapon-against-fake-reviews-lawsuits>.

in 1919.<sup>118</sup> Stemming from the work of John Milton and John Stuart Mill,<sup>119</sup> the marketplace theory asserts that the answer to “bad” speech is “more speech”;<sup>120</sup> specifically, the marketplace theory posits that through societal engagement with a number of ideas, the best and most truthful statements rise to the forefront and prevail over false or misleading speech. Thus, the marketplace thrives when multiple, competing opinions are expressed freely for broad audiences.<sup>121</sup> This theory, supported by Justice Holmes’ famous dissent in *Abrams v. United States*,<sup>122</sup> lifts the freedom of expression to that of a fundamental right based on its ability to lead us to the discovery of truth.<sup>123</sup>

However, the marketplace theory is often critiqued as flawed for several reasons.<sup>124</sup> First, in some instances, the oversimplification of information can lead to a gross misunderstanding (or understatement) of the issue at hand. In other instances, truth becomes one of many factors or social values that go into the debate; a powerful argument can persuade the masses over a truthful one where it best suits the popular argument. Another critique of the marketplace centers on desirability and agreement. The marketplace can allow truth to be determined by a consensus; where many voices are permitted to chime in, consensus over agreeable statements (i.e., those which support a particular viewpoint) may triumph over facts.

When considering the marketplace theory in the fake news debate, it is easy to dismiss its importance because of these critiques. In fact, it can be argued that when it comes to online speech—such as fake news—the marketplace provides an excellent foundation for the right to free expression with little instruction on how to adapt it for the changing forms of speech.<sup>125</sup>

---

<sup>118</sup> In *Abrams v. United States*, Justice Oliver Wendell Holmes stated in his dissent that, “[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .” *Abrams v. United States*, 250 U.S. 656, 630 (1919). Since then, the phrase and concept of the marketplace has frequently been used in U.S. Supreme Court jurisprudence. See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981); *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 592 (1980); *Red Lion Broadcasting, Co. v. FCC*, 395 U.S. 367, 390 (1969).

<sup>119</sup> See John Milton, *AREOPAGITICA; A SPEECH OF MR. JOHN MILTON FOR THE LIBERTY OF UNLICENSED PRINTING* (1644); John Stuart Mill, *ON LIBERTY* (1859).

<sup>120</sup> 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.”).

<sup>121</sup> Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U.L. REV. 54, 68, 69 (1989).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Syed, *supra* note 112, at 340-42.

<sup>125</sup> See Syed, *supra* note 112, at 341.

When the marketplace theory was developed, there were far fewer individual voices contributing to the conversation. In a society in which allegiance to political belief may trump fact, how can the marketplace theory thrive if truth can be determined by consensus?

The answer ultimately comes from the marketplace itself. As the effects of fake news are felt worldwide, people are springing into action to combat it by using their own speech. As discussed in Section II, *supra*, private organizations and individuals have volunteered time and energy to provide information and platforms that combat fake news in the marketplace.<sup>126</sup> In the same vein, major players in the legacy media—along with reputable emerging media sources—have launched their own fact-checking platforms that help readers decipher certain statements in real time, closing a gap that fake sources often rush to fill.<sup>127</sup> Social media users, too, are prone to call out “fake news” through comments on the shared fake news content of other users or by providing factual information to correct the posted falsity. Although this method is not always successful, the truth is reiterated in the marketplace, allowing it to gain traction. These steps toward truth help clarify the ever-blurry line between fact and opinion, reiterating that the public can, in fact, be trusted with the “discrimination between truth and falsehood” as Thomas Jefferson once put it.<sup>128</sup> Even on the smallest of scales, the marketplace tends to correct itself—even when the odds are against it.

### B. *Democratic Self-Governance*

Another popular theory on free expression, democratic self-governance takes the focus away from the cacophony of the masses and draws focus to the individual’s personal views of his or her role in society. Under this theory, the freedom of speech serves as a necessary part of democracy in that it allows citizens to engage in and consume speech that helps shape their personal ideologies and actions. The self-governance theory was famously championed by American scholar and philosopher Alexander Meiklejohn, whose 1948 text on the theory remains a bulwark for the freedom of expression. The self-governance theory maintains that citizens must have access to all information deemed pertinent to their decision-making, including access to data, opinion, records, criticisms, or similar.<sup>129</sup> The theory posits that because citizens of a democracy are, indeed, its rulers, then

---

<sup>126</sup> *Supra* notes 44-47.

<sup>127</sup> See *Politics: Fact Checker*, NPR, <https://www.npr.org/sections/politics-fact-check> (last visited May 25, 2020); see also Glenn Kessler, *Fact Checker: The Truth Behind The Rhetoric*, WASH. POST, <https://www.washingtonpost.com/news/fact-checker/> (last visited May 25, 2020).

<sup>128</sup> Jefferson, *supra* note 1.

<sup>129</sup> See *supra* notes 9-11.

nothing should inhibit the free-flow of information; rather, channels for expression should be open to all views in order for citizens to hear and understand all sides of any given issue so that they may “vote intelligently.”<sup>130</sup>

In a fiery concurrence, Justice Louis Brandeis launched this theory headlong into First Amendment doctrine in 1927.<sup>131</sup> Noting that the freedom of speech serves as the ultimate bedrock of democracy, Brandeis stated:

[T]he 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; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty[.]<sup>132</sup>

Thus, Brandeis reiterated that the “intensely individualist” role of speech is a necessity for a healthy citizenry.<sup>133</sup>

Because the freedom to speak is an “indispensable means” of the discovery of political truth, it follows that the self-governance theory affords the greatest protections for political speech.<sup>134</sup> It also provides broad protection for speech concerning government officials, primarily because the criticism and election of public officials is perhaps the “most common form” and effective method of political activity and self-awareness.<sup>135</sup> Because the government responds to the will of the people, Robert Post argued that “individuals from diverse traditions and communities must attempt to communicate with each other if they wish to participate in that dialogue

---

<sup>130</sup> Ashutoush Bhagwat, *Free Speech Without Democracy*, 49 U.C. DAVIS L. REV. 59, 108 (2015).

<sup>131</sup> See *Whitney v. California*, 274 U.S. 357, 377 (1927). The importance of this concurrence cannot be understated for the imposition of the self-governance theory on First Amendment doctrine. See Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 682 (1988).

<sup>132</sup> *Id.*

<sup>133</sup> Brian C. Murchison, *Speech and the Self-Governance Value*, 14 WM. & MARY BILL RTS. J. 1251, 1261 (2006). While the theory of self-governance appears to apply solely to democracies at first blush, it has been argued that this theory is applicable to autocracies or other non-democratic nations. Consider that approximately 95% of existing constitutions have provisions that provide at least a small measure of protection for free expression. Thus, even non-democratic regimes find value in the idea of a “well-informed citizenry”—even where the motives behind informative actions may serve to benefit the State. See Bhagwat, *supra* note 130, at 63-64.

<sup>134</sup> Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961).

<sup>135</sup> Solum, *supra* note 121.

which will ultimately direct the actions of the entire nation.”<sup>136</sup> Considering this, the self-governance theory of free expression seemingly bolsters the argument against the regulation of speech and content—even fake news content.

A major point in the argument against fake news stems from the fact that it plays a proven role in the political process.<sup>137</sup> However, those who share questionable news content from fake news sites do so frequently as a method of promoting a specific factual view. For example, referring back to the “Pizzagate scandal” from Section I, *supra*, the fake news story that ultimately started the rumor stemmed from a group of citizens who opposed the democratic presidential platform based on personal political beliefs.<sup>138</sup> Although the outcome (and rumor) are decidedly farfetched and volatile, the rush to share and post the story on social media can be attributed to the political effect of the story rather than then source. Because reports of this nature affect the citizenry’s understanding of the political climate (and actions or motives of certain political factions), censoring this sort of content hinders the doctrine of self-governance in free expression. Rather than jump to a regulation of questionable speech, we must first allow this principle to work. For an individual to embark on the “discovery of truth,” he or she must be afforded the chance to see and hear all potential arguments, opinions, facts, and thoughts on a significant matter.<sup>139</sup> Only after one has had the chance to sift through the available information—no matter how bizarre—can one determine what is pertinent and true so that he or she may “vote intelligently.”<sup>140</sup>

Attempts to enact legislation or regulations that curtail the flow of free information frustrate this theory of self-governance. Regulation inevitably stifles certain opinions, regardless of their truth or falsity, hindering the political conversation. It also opens the door to further regulation that may affect other forms of speech; because the “fake news” label has expanded to encompass numerous types of undesirable, or “fake” content,<sup>141</sup> and because so much of the fake news debate rests on the opinions and beliefs of readers—which are, in many cases, immoveable—regulation risks subsuming content that citizens need to properly form their own personal views. To maintain the

---

<sup>136</sup> Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 635-36 (1990).

<sup>137</sup> *Id.*

<sup>138</sup> *See supra* notes 9-11.

<sup>139</sup> *Id.*

<sup>140</sup> Bhagwat, *supra* note 130.

<sup>141</sup> Angie Drobnic Holan, “*The Media’s Definition of Fake News vs. Donald Trump’s*,” PolitiFact (Oct. 18, 2017), <http://www.politifact.com/truth-o-meter/article/2017/oct/18/deciding-whats-fake-medias-definition-fake-news-vs>.

crucial idea of self-governance, we must seek methods that bolster the citizenry's ability to digest information rather than eliminate a channel of expression. The risks of regulation are simply too great; rather than place limitations on the political and expressive content available to citizens, we should consider arming them with the skills to hone their ability to engage in democratic self-governance.<sup>142</sup>

#### IV. EDUCATION VS. REGULATION: THE IMPORTANCE OF A LEARNED CITIZENRY

More than ever, challenges to freedom of expression increasingly threaten the fabric of our societies. As part of the Knight First Amendment Institute's Emerging Threats series, law professor Tim Wu recently argued that changes in the expressive environment have decreased the scarcity of speech and placed greater emphasis on attracting the attention of the audience.<sup>143</sup> As a result, he argued, the emerging threats are the ones that target listeners directly while undermining speech indirectly. Wu correctly identified variants of fake news as being chief among these emerging threats. Like Wu, we argue that the First Amendment alone cannot protect our democracy from these emerging threats. In fact, as the pace of technological change quickens, our legal system's ability to legislate meaningful change only lessens. Instead, we believe education—rather than regulation—to be the key weapon in the war against fake news. We are not alone; a number of the proposed solutions emanating out of Yale University's Fighting Fake News workshop favor various aspects of education over regulation.

As the workshop drew to a close, nearly all participants agreed on one overarching conclusion: that reestablishing trust in the basic institutions of a democratic society is critical to combat the systematic efforts being made to devalue truth. In addition to thinking about how to fight different kinds of "fake news," we need to think broadly about how to bolster respect for facts.<sup>144</sup>

At the outset, this education must include both content consumers and creators. Although media literacy is key to helping audiences evaluate the content they consume, better education of content creators—at all levels of

---

<sup>142</sup> *Id.*

<sup>143</sup> Tim Wu, *Is the First Amendment Obsolete?* (Nov. 1, 2017), <https://ssrn.com/abstract=3096337>.

<sup>144</sup> *Fighting Fake News Workshop Report*, Information Society Project & Floyd Abrams Institute for Freedom of Expression (Mar. 7, 2017), [https://law.yale.edu/system/files/area/center/isp/documents/fighting\\_fake\\_news\\_-\\_workshop\\_report.pdf](https://law.yale.edu/system/files/area/center/isp/documents/fighting_fake_news_-_workshop_report.pdf).

schooling—is also essential to the role of truthful content in a democratic society.

Certainly, we do not believe these concepts to be novel in their nature – educators have, for years, called for greater curricular emphasis in both areas. More recently, though, it seems that society believes our “digital natives” arrive on the scene fully equipped with the skills they need to navigate the information-rich world in which we live.<sup>145</sup> Unfortunately, nothing could be further from the truth.<sup>146</sup> Anecdotal evidence from teachers’ organizations,<sup>147</sup> librarians’ associations,<sup>148</sup> and scholarly research from various corners of the world<sup>149</sup> suggests our young people are in need of media literacy just as their parents’ and grandparents’ generations did. These warnings correlate with Danah Boyd’s 2014 book, *It’s Complicated: The Secret Lives of Networked Teens*, where she argues we falsely assume that digital natives understand the influences of technology on their lives and identity development.<sup>150</sup> But where do we start? And what kinds of lessons will help stem the tide of fake news?

A 2016 study by researchers at Stanford University found that students—ranging in age from middle school to university, enrolled in poorly funded public inner-city schools and posh suburban private schools, having matriculated to large land-grant public universities or selective almost-Ivies—“are easily duped” online.<sup>151</sup> The study, which collected more than 7,000 responses, asked students to undertake a series of age-appropriate online tasks aimed at evaluating their media literacy, such as distinguishing an ad from a news story, understanding that a chart contained information from an advocacy organization or evaluating the source of a website that presents only one side of a controversial issue. Their findings were troubling: More

---

<sup>145</sup> Marie Puybaraud, *Digital Natives: A Tech-Savvy Generation Enters the Workplace*, WORK DESIGN MAGAZINE (Feb. 1, 2012), <https://workdesign.com/2012/02/digital-natives-a-tech-savvy-generation-enters-the-workplace>.

<sup>146</sup> Alia Young, *Digital Natives, Yet Strangers to the Web*, ATLANTIC (Apr. 21, 2015), <https://www.theatlantic.com/education/archive/2015/04/digital-natives-yet-strangers-to-the-web/390990>.

<sup>147</sup> MacKenzie Masten, *15 Resources for Teaching Media Literacy*, ASCD IN SERVICE (Sept. 27, 2017), <http://inservice.ascd.org/15-resources-for-teaching-media-literacy/>.

<sup>148</sup> Marcus Banks, *Fighting Fake News: How Libraries Can Lead the Way on Media Literacy*, AMERICAN LIBRARIES (Dec. 27, 2016), <https://americanlibrariesmagazine.org/2016/12/27/fighting-fake-news>.

<sup>149</sup> Charlie Beckett, *Digital Natives and Media Literacy: New Report*, POLIS: JOURNALISM AND SOCIETY AT THE LSE (Feb. 27, 2010), <http://eprints.lse.ac.uk/77723>.

<sup>150</sup> DANAH BOYD, *IT’S COMPLICATED: THE SECRET LIVES OF NETWORKED TEENS* (Yale Univ. Press 2014).

<sup>151</sup> *Evaluating Information: The Cornerstone of Civic Online Reasoning*, Stanford History Education Group (Nov. 2016), <https://stacks.stanford.edu/file/druid:fv751yt5934/SHEG%20Evaluating%20Information%20Online.pdf>.



than 80 percent of the middle school students could not distinguish the ads from the news stories online. Forty percent of the high school students believed an unlabeled photo of deformed daisies on a photo-sharing platform supported a headline claiming to have evidence of toxic conditions near the Fukushima nuclear plant in Japan. Nearly all of the results suggest the same conclusion—digital natives do not have the skills necessary to evaluate information and separate fact from fiction.

A recent opinion piece in *The Hindu* came to similar conclusions, asserting the global need for media literacy in schools. It noted the lack of media literacy programs in schools: “Unfortunately, media education has been the concern of only some NGOs and not educational institutions. In the past few decades, media education training programs were conducted only by some social action groups that were involved in creating awareness among the general public about media.”<sup>152</sup>

Moreover, many organizations now include both the creation of media content as well as the consumption of media content as a fundamental aspect of media literacy. The National Association for Media Literacy in Education concludes that media literacy includes “the ability to access, analyze, evaluate, create and act using all forms of communication.”<sup>153</sup> Similarly, Common Sense Media suggests citizens must know how to “think critically,” be a “smart consumer of products and information,” identify “point of view,” “create media responsibly,” understand the “role of media in our culture” and identify an “author’s goal.”<sup>154</sup>

Professional groups, including the Alliance for a Media Literate America and the Association for Media Literacy, emphasize the need for continued media literacy education to develop informed and responsible citizens. Many media literacy educators agree on a core set of principles—advanced by researchers in the field—that citizens must understand to function effectively in a democratic society. Among them:

- Media are constructions
- Media representations construct reality.
- Media have commercial purposes.
- Audiences negotiate meaning.

---

<sup>152</sup> Albert P. Rayan, *A Case for Media Literacy in School*, HINDU (Jan. 6, 2018), <http://www.thehindu.com/education/making-a-case-for-media-literacy-in-school/article22382765.ece>.

<sup>153</sup> *Media Literacy*, NATIONAL ASSOCIATION OF MEDIA LITERACY, <https://namle.net/publications/media-literacy-definitions> (last visited May 15, 2020).

<sup>154</sup> *What Is Media Literacy and Why Is It Important?*, COMMON SENSE MEDIA, <https://www.commonsensemedia.org/news-and-media-literacy/what-is-media-literacy-and-why-is-it-important> (last visited May 15, 2020).

- Each medium has its own forms, conventions, and language.
- Media contain values and ideologies.
- Media messages may have social consequences or effects.<sup>155</sup>

These principles focus not only on the informed consumption of content—a citizen's role as an audience member—but also on the responsible creation of content—the digital citizen's role as a member of the media.

## V. CONCLUSION

The passage of time has not eradicated the production of fake news in our society, and it is equally unlikely that the passage of laws regulating fake news will either. History suggests that citizens were once able to adequately separate fact from fiction—clearly recognizing that it was unlikely a renowned astronomer has spotted giant “man-bats.” Instead of attempting to legislate against fake news—a daunting task in the face of rapid technological change—society's greatest efforts must be focused on educating citizens so they can identify it. Doing so will uphold the principles of free expression, prevent the spread of fictitious content, and could even encourage more citizens to undertake some of the private sector efforts discussed above to combat fake news—either by identifying and alerting others to its existence, participating in fact-checking efforts or even responsibly creating their own content to add to the discussion. As Justice Louis Brandeis said, “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.”<sup>156</sup> In the battle against fake news, we have to overcome falsity with fact—not turn to censorship and regulation.

---

<sup>155</sup> GAIL E. HALEY & DAVID M. CONSIDINE, *VISUAL MESSAGES: INTEGRATING IMAGERY INTO INSTRUCTION* (2ded. 1999).

<sup>156</sup> *Whitney*, 274 U.S. 357, at 377.