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Recommended Citation

Jessica Stone-Erdman, *Just the (Alternative) Facts, Ma'am: The Status of Fake News Under the First Amendment*, 16 FIRST AMEND. L. REV. 410 (2017).
Available at: https://scholarship.law.unc.edu/falr/vol16/iss2/11

JUST THE (ALTERNATIVE) FACTS, MA'AM: THE STATUS OF FAKE NEWS UNDER THE FIRST AMENDMENT

Jessica Stone-Erdman[*]

"The First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."[1]

INTRODUCTION

In the 2016 U.S. presidential election, Republican nominee Donald Trump won the popular vote by a landslide.[2] More groundbreaking was the unprecedented political endorsement he received from Pope Francis.[3] Then, shortly before leaving office, President Obama, per executive order, enacted a nationwide ban on reciting the Pledge of Allegiance in schools.[4] And according to Vice President Mike Pence, "Michelle Obama is the most vulgar first lady we've ever had."[5]

Faster than content could be read and facts could be checked, these news articles were liked and shared hundreds of thousands of times on social media giant Facebook, with some stories having well over one million views.[6] Characterized by sensational titles and highly charged discussions of political figures, these news stories share one undeniable trait: they are all fake.

Although Mike Pence disagreed with Michelle Obama's criticism of his GOP running mate, he never called her vulgar

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[1] United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

[2] Hannah Roberts, *This is What Fake News Actually Looks Like—We Ranked 11 Election Stories That Went Viral on Facebook*, BUS. INSIDER (Nov. 17, 2016, 11:10 AM), http://www.businessinsider.com/fake-presidential-election-news-viral-facebook-trump-clinton-2016-11.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.* The story about President Obama, for example, was seen over two million times. *Id.* A recent study found that "59 percent of links shared on social media have never actually been clicked: In other words, most people appear to retweet news without ever reading it." Caitlin Dewey, *6 in 10 of You Will Share This Link Without Reading It, A New, Depressing Study Says*, WASH. POST (June 16, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/06/16/six-in-10-of-you-will-share-this-link-without-reading-it-according-to-a-new-and-depressing-study/?utm_term=.bcfa87d8e65e.

and in fact stated that he has "a lot of respect for the first lady."[7] President Obama's elimination of the Pledge of Allegiance was nothing more than a "recycled hoax promulgated by a malware-spreading fake news site."[8] Donald Trump was never endorsed by Pope Francis,[9] who actually expressed strong disagreement with some of the candidate's political stances.[10] And in the 2016 presidential election, the landslide popular vote victory went to Democratic nominee Hillary Clinton, who won it by nearly three million votes.[11]

Election years in the United States are marked by several things: voter registration drives, pamphlets arguing for or against proposed legislation, and, perhaps the biggest hallmark, an abundance of political advertisements. Beginning several months before that critical Tuesday in November, television viewers can expect to be bombarded with political segments come every commercial break. By either highlighting one's accomplishments or emphasizing another's questionable behavior, these ads attempt to persuade viewers to vote for a particular candidate or, in the very least, to abstain from voting for their opponent.

In 2016, however, political "advertising" seemed to take on an entirely new meaning, particularly in the realm of the Internet and social media. Unlike traditional advertisements, which are arguably based in some measure of truth, this emerging phenomenon known as "fake news" seemed to come entirely from the imaginative minds of faceless strangers— individuals hiding behind both the anonymity of the Internet and the appearance of a seemingly legitimate news outlet. These stories, having no factual basis, made outlandish claims about presidential candidates and were shared repeatedly across

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[7] Reena Flores, *Mike Pence: "I Don't Understand" Michelle Obama's Critique of Trump*, CBS NEWS (Oct. 14, 2016, 8:11 AM), http://www.cbsnews.com/news/mike-pence-i-dont-understand-michelle-obamas-critique-of-trump/. Pence's debunked comment was portrayed as a response to the first lady's voiced concern over a presidential candidate bragging about sexually assaulting women. *Id.* In the actual interview from which this comment allegedly came, the word "vulgar" is never mentioned at all. *Id.* In fact, despite appearing in the headline, the quote is found nowhere in the fake news article itself. Arturo Garcia, *A "Vulgar" Lie*, SNOPES (Oct. 15, 2016), http://www.snopes.com/mike-pence-calls-michelle-obama-vulgar/#.

[8] *Executive Disorder*, SNOPES (Aug. 16, 2016), http://www.snopes.com/pledge-of-allegiance-ban/.

[9] Sydney Schaedel, *Did the Pope Endorse Trump?*, FACTCHECK.ORG (Oct. 24, 2016), http://www.factcheck.org/2016/10/did-the-pope-endorse-trump/.

[10] Roberts, *supra* note 2.

[11] Sarah Begley, *Hillary Clinton Leads by 2.8 Million in Final Popular Vote Count*, TIME (Dec. 20, 2016), http://time.com/4608555/hillary-clinton-popular-vote-final/; *Presidential Results*, CNN, http://www.cnn.com/election/results/president (last visited Jan. 28, 2018).

a multitude of social media platforms, most notably Facebook.[12]

While fake news has existed in some form or another for decades,[13] it recently became a hot topic following the 2016 presidential election.[14] The phenomenon garnered so much attention that Oxford Dictionary has declared one of fake news's synonyms, "post-truth," as its 2016 Word of the Year.[15] The term "fake news" found regular usage in the lexicon of journalists and citizens alike when, during his first press conference as President-elect, Donald Trump pointed at CNN's Jim Acosta while refusing to listen to his question and exclaimed, "You are fake news!"[16] Since taking office, Trump has repeatedly called mainstream media outlets "fake news,"[17]

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[12] *See, e.g.*, Olivia Solon, *Facebook's Failure: Did Fake News and Polarized Politics Get Trump Elected?*, THE GUARDIAN (Nov. 10, 2016, 5:59 PM), https://www.theguardian.com/technology/2016/nov/10/facebook-fake-news-election-conspiracy-theories.

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

[14] *See, e.g.*, *Statistics & Facts About Fake News*, STATISTA, https://www.statista.com/topics/3251/fake-news/ (last visited Mar. 16, 2018) ("Fake news was one of the most hotly-debated topics in 2016 and 2017.").

[15] Amy B. Wang, *'Post-Truth' Named 2016 Word of the Year by Oxford Dictionaries*, WASH. POST (Nov. 16, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/11/16/post-truth-named-2016-word-of-the-year-by-oxford-dictionaries/?utm_term=.8204ef0cf466.

[16] Donovan Slack, *Trump to CNN: 'You Are Fake News'*, USA TODAY (Jan. 12, 2017, 11:41 AM), https://www.usatoday.com/story/news/politics/onpolitics/2017/01/11/trump-cnn-press-conference/96447880/.

[17] *See e.g.*, Donald Trump (@realDonaldTrump), TWITTER (Jan. 12, 2017, 6:22 AM), https://twitter.com/realdonaldtrump/status/819550083742109696?lang=en [https://perma.cc/N44C-AD24] ("@CNN is in a total meltdown with their FAKE NEWS because their ratings are tanking since election and their credibility will soon be gone!"); Donald Trump (@realDonaldTrump), TWITTER (Jan. 29, 2017, 5:00 AM), https://twitter.com/realdonaldtrump/status/825690087857995776?lang=en [https://perma.cc/GN6F-7HN8] ("Somebody with aptitude and conviction should buy the FAKE NEWS and failing @nytimes and either run it correctly or let it fold with dignity!"); Donald Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 1:48 PM), https://twitter.com/realdonaldtrump/status/832708293516632065?lang=en [https://perma.cc/6BBK-46UW] ("The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American people!"). Recently, Trump announced via Twitter the winners of his "long-promised 'Fake News Awards,' an anti-media project that had alarmed advocates of press freedom and heartened his political base." Matt Flegenheimer & Michael M. Grynbaum, *Trump Hands Out 'Fake News Awards,' Sans the Red Carpet*, N.Y. Times (Jan. 17, 2018), https://www.nytimes.com/2018/01/17/business/media/fake-news-awards.html. For the list itself, see *The Highly Anticipated 2017 Fake News Awards*, REPUBLICAN NAT'L COMM. (Jan. 17, 2018), https://www.gop.com/the-highly-anticipated-2017-fake-news-awards/ [https://perma.cc/AG99-CSBP].

and since the November, 2016, election, the number of Google searches for "fake news" increased noticeably.[18]

Concerns that fake news had materially and negatively impacted the 2016 presidential election began growing almost immediately after the results were announced.[19] Outgoing President Barack Obama emphasized the threat that fake news presents to America's political system: "If we are not serious about facts and what's true and what's not, if we can't discriminate between serious arguments and propaganda, then we have problems."[20] Hillary Clinton similarly advised: "It's now clear that so-called fake news can have real-world consequences . . . It's imperative that leaders in both the private sector and the public sector step up to protect our democracy and innocent lives."[21] And it is not just politicians who share this concern: According to a recent study conducted by the Pew Research Center, 64% of U.S. citizens believe that "fabricated news stories cause a great deal of confusion about the basic facts of current issues and events."[22] This sentiment varies little across gender, race, age, education level, income, and partisan lines.[23]

Social media platforms were heavily criticized for promulgating fake news articles.[24] Facebook in particular "received heated criticism for its role in spreading a deluge of political misinformation."[25] Indeed, although 84% of

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[18] *See e.g.*, *Fake News*, GOOGLE TRENDS, https://trends.google.com/trends/ (search in search bar for "fake news"; then click on "Past 12 months"; then click on "Custom time range"; then change the "From" date to "01/01/2016"; then click "OK") (last visited Mar. 15 2018). From the beginning of January, 2016, for example, the number of times that "fake news" was searched on Google per week was low at around five or six times. *See id.* Beginning in November, 2016, the number of weekly searches for the term increased to average in the fifties or sixties. *See id.* Indeed, since the election of Donald Trump, the weekly number of searches for "fake news," though fluctuating slightly, has remained noticeably higher than since before the election. *See id.*

[19] *See* Solon, *supra* note 12.

[20] Olivia Solon, *Barack Obama on Fake News: 'We Have Problems' If We Can't Tell the Difference*, THE GUARDIAN (Nov. 17, 2016), https://www.theguardian.com/media/2016/nov/17/barack-obama-fake-news-facebook-social-media.

[21] Callum Borchers, *How Hillary Clinton Might Have Inspired Trump's 'Fake News' Attacks*, Wash. Post (Jan. 3, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/01/03/how-hillary-clinton-might-have-inspired-trumps-fake-news-attacks/?utm_term=.881204a44f58.

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

[23] *Id.*

[24] *See* Fox, *infra* note 49; Levin, *infra* note 49.

[25] Alex Heath, *Facebook is Going to Use Snopes and Other Fact Checkers to Combat Fake News (FB)*, BUS. INSIDER: MKTS. INSIDER (Dec. 15, 2016, 1:52 PM),

Americans reported some level of confidence in their ability to spot fake news, calls for reform and accountability emerged: 42% of Americans felt that social networking sites and search engines should be responsible for stopping the spread of fake news; 45% believed that it was a job for the government, politicians, and elected officials; and 43% felt that members of the public bore that burden.[26] Fifteen percent of citizens felt that all three groups bore great responsibility, but 58% assigned it to only one or two of the groups.[27]

With the recent emergence of fake news, the data presented above, and the fact that around 74% of Americans believe that fake news should not receive constitutional protection,[28] an interesting question arises in First Amendment jurisprudence: Where does fake news stand under the free speech doctrine, and should (or can) it be regulated?

Several countries have already enacted measures to combat fake news, especially around election times.[29] Moreover, in the United States, shortly after the election, a California lawmaker introduced a bill that would criminalize an individual who "knowingly and willingly" contributed to the online creation and sharing of fake news regarding both issues and candidates on which citizens will vote.[30] Around the same time at the federal level, in response to the incoming administration's unique take on fake news and hostile attitude toward news media outlets, Democrats in the House of Representatives proposed a resolution subtitled "Opposing fake news and alternative facts."[31] Among other things, the resolution urged that (1) "the President must immediately acknowledge his support of the First Amendment," (2) "White House spokespersons should not issue fake news," and (3) "White House spokespersons who offer alternative or inaccurate facts should retract their statements immediately."[32]

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http://markets.businessinsider.com/news/stocks/Facebook-is-going-to-use-Snopes-and-other-fact-checkers-to-combat-fake-news-FB-1001608146.

[26] Barthel, Mitchell, & Holcomb, *supra* note 22. Regarding the ability to identify fake news, 39% reported feeling very confident that they could spot it, and 45% reported feeling somewhat confident. *Id.*

[27] *Id.*

[28] *The State of the First Amendment*, NEWSEUM INST. 1, 5–18 (May 2017), http://www.newseuminstitute.org/wp-content/uploads/2017/06/FAC_SOFA17_report.pdf.

[29] *See infra* Part III.

[30] Dave Maass, *California Bill to Ban "Fake News" Would be Disastrous for Political Speech*, ELEC. FRONTIER FOUND. (Mar. 28, 2017), https://www.eff.org/deeplinks/2017/03/california-bill-ban-fake-news-would-be-disastrous-political-speech.

[31] H. R. Res. 191, 115th Cong. (2017).

[32] *Id.*

At first glance, one can perhaps see the benefit in having the government step in to regulate fake news. With a vast supply of financial and human capital at its disposal, the federal government seems to be in a good position to confront and control this phenomenon. Moreover, having a central authority monitor and implement laws and policies designed to stamp out fake news seems efficient. Further, the authority to impose fines or criminal punishment for the intentional dissemination of false information is a powerful tool that ought to ensure suppression of news deemed to be fake.

It is in part because of that last sentence, however, that the government should be kept out of fake news regulation. The power to decide what constitutes truthful speech and what constitutes false speech presents too much potential for abuse. Allowing political leaders to suppress speech with which they disagree on the grounds that it is fake news invites a dystopian society reminiscent of Orwell's Oceania from *1984*.[33]

This Note argues that under First Amendment jurisprudence, government regulation of any kind is likely not possible, and attempts to regulate would likely fail judicial review.[34] If any official regulation were to occur, it should come from those who are best suited to deal with it: the social media platforms on which fake news proliferates. Private corporations like Facebook are better suited to undertake speech-controlling measures without offending the First Amendment than if the government were to take similar measures. Moreover, Facebook has already undergone regulatory measures, showing that counterspeech—a First Amendment principle positing that

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[33] For an interesting analysis of this comparison, see Michiko Kakutani, *Why '1984' is a 2017 Must-Read*, N.Y. TIMES (Jan. 26, 2017), https://www.nytimes.com/2017/01/26/books/why-1984-is-a-2017-must-read.html.
[34] At the time this Note was written, reports on possible foreign interference with the U.S. political process via fake news articles on social media platforms had not yet emerged. For information on the investigation, see Press Release, U.S. Dep't of Justice, Grand Jury Indicts Thirteen Russian Individuals and Three Russian Companies for Scheme to Interfere in the United States Political System (Feb. 16, 2018), https://www.justice.gov/opa/pr/grand-jury-indicts-thirteen-russian-individuals-and-three-russian-companies-scheme-interfere; Dustin Volz, *Facebook: Russian Agents Created 129 U.S. Election Events*, REUTERS (Jan. 25, 2018, 5:55 PM), https://www.reuters.com/article/us-usa-trump-russia-facebook/facebook-russian-agents-created-129-u-s-election-events-idUSKBN1FE37M. This Note, therefore, focuses exclusively on the question of whether the government may regulate fake news as it is created and disseminated by ordinary U.S. citizens. *See, e.g.*, Caitlin Dewey, *Facebook Fake-News Writer: 'I Think Donald Trump is in the White House Because of Me'*, WASH. POST (Nov. 17, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/11/17/facebook-fake-news-writer-i-think-donald-trump-is-in-the-white-house-because-of-me/?utm_term=.152ee33099f2 (interviewing American writer Paul Horner, an "impresario of a Facebook fake-news empire" who "has made his living off viral news hoaxes for several years"). Discussion of whether the government may similarly regulate fake news in the context of foreign interference is beyond the scope of this Note.

truth rather than censorship is the answer to false speech[35]—is a real, potential alternative to government intervention.

Citizens, too, are in a position to combat the spread of fake news. By using critical thinking skills and carefully evaluating the trustworthiness of the news source, social media users and other netizens[36] can engage in their own form of counterspeech, such as posting truth where there is falsity.

Analysis of the relationship between fake news and the First Amendment proceeds in three parts. Part I responds to the confusion surrounding the exact meaning of the term "fake news," prompted by its seemingly different uses depending on the context, and sets forth a definition that narrowly defines the term as it is most commonly understood and accepted. Part II explores whether fake news is entitled to any First Amendment protection, noting that a recent Supreme Court opinion likely suggests that it is, though there may be room for distinction. Finally, Part III discusses the likelihood of success of regulation by both the government and social media platforms. Part III discusses regulatory efforts that social media platforms, specifically Facebook, have already undertaken as well.

I. THE POST-TRUTH ZONE: DEFINING AND DISTINGUISHING THE FAKE NEWS MARKET

Despite its seemingly recent eruption, the concept of fake news is far from novel. One notable example derives from an October 30, 1938, radio broadcast, when millions of U.S. citizens were briefly consumed by fear as they listened to the frighteningly realistic, carefully detailed account of a real-time Martian invasion, finding relief only later when they discovered that it was nothing more than an oral rendition of a science-fiction novel.[37] On a less extreme note, programs like *The Daily*

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[35] *See* Whitney v. California, 274 U.S. 357, 377 (1927), (Brandeis, J., concurring) (introducing the concept of counterspeech), *overruled on other grounds by* Brandenburg v. Ohio, 395 U.S. 444 (1969); *see also* United States v. Alvarez, 567 U.S. 709, 727 (2012) (plurality opinion) (citing and applying *Whitney* to modern speech issues).

[36] "Netizen" refers to "an active participant in the online community of the Internet." *Netizen*, MERRIAM WEBSTER (Nov. 28, 2017), https://www.merriam-webster.com/dictionary/netizen.

[37] *Welles Scares Nation*, HISTORY (last visited Oct. 13, 2017), http://www.history.com/this-day-in-history/welles-scares-nation. Due to a competing program airing at a conflicting time, many listeners tuned into the radio broadcast after it had begun; they did not hear the initial disclaimer that the program they were listening to was an adaption of H.G. Welles' *War of the Worlds*, presented by Orson Welles and the Mercury Theater Company. *Id.* By the time Welles learned of the misunderstanding and came on air to once again disclose that the account was fictitious, it appeared to have been too late. *Id.* ("Perhaps as many as a million radio listeners believed that a real Martian invasion was underway. Panic broke out across the country. In New Jersey, terrified civilians jammed highways seeking to escape the alien marauders. People begged police for gas masks to save them from the toxic

Show and *Last Week Tonight*, as well as publications like *The Onion*, dish out political satire and commentary on a regular basis. Fake news has existed in one form or another for centuries[38] and, given the profitability of comedy and sensationalism,[39] it will likely continue to proliferate in the future.

Not all fake news is created equal, however, and some forms appear to be potentially more concerning than others. This is especially true in an age where many U.S. citizens read their news online via social media websites,[40] platforms in which anyone can write up a story and label it breaking news, no matter the truth or falsity of its contents. In addition to the various forms that fake news may take, the term is often interpreted differently, depending on who is using it.[41] It is therefore useful to identify and carefully define fake news as it is used in this Note.

To begin, despite apparent similarities and potential overlap, fake news as discussed in this context does not include parody or satire, two forms of speech long recognized as having First Amendment protection.[42] There are two key distinctions: the nature of the work and the intent of the author. Satire is

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gas and asked electric companies to turn off the power so that the Martians wouldn't see their lights.").

[38] *See generally* Soll, *supra* note 13.

[39] *See* Baharat N. Anand, *The U.S. Media's Problems Are Much Bigger Than Fake News and Filter Bubbles*, HARV. BUS. REV. (Jan. 5, 2017), https://hbr.org/2017/01/the-u-s-medias-problems-are-much-bigger-than-fake-news-and-filter-bubbles; Tobias Rose-Stockwell, *This is How Your Fear and Outrage Are Being Sold for Profit*, MEDIUM (July 4, 2017), https://medium.com/the-mission/the-enemy-in-our-feeds-e86511488de (noting that companies such as Facebook, Twitter, and CNN "saw massive traffic and revenue spikes thanks to the sensationalized news propagated on their platforms and the attention they captured"); Atul Singh, *Media Should Not Make Money*, HUFFPOST: THE BLOG (June 7, 2013, 2:46 PM), https://www.huffingtonpost.com/atul-singh/nonprofit-media_b_3404410.html (arguing that "[i]t is an irrefutable fact that sensationalism and partisanship sell better than analysis and objectivity").

[40] Elisa Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms 2017*, PEW RESEARCH CTR. 1, 2 (Sept. 6, 2017), http://assets.pewresearch.org/wp-content/uploads/sites/13/2017/09/13163032/PJ_17.08.23_socialMediaUpdate_FINAL.pdf.

[41] Forty-fifth President of the United States Donald Trump, for example, frequently labels mainstream media organizations with whom he disagrees, such as CNN, the New York Times, and NBC, fake news. *See, e.g.*, Christopher Rosen, *All the Times Donald Trump Has Called the Media 'Fake News' on Twitter*, ENTM'T WEEKLY (June 27, 2017, 11:11 AM), http://ew.com/tv/2017/06/27/donald-trump-fake-news-twitter/. Others, such as Harvard Professor Jonathan Zittrain, define fake news as information "that the person saying or repeating knows to be untrue or is indifferent to whether it is true or false." Clea Simon, *Fake News Is Giving Reality a Run for Its Money*, HARV. GAZETTE (Mar. 27, 2017), http://news.harvard.edu/gazette/story/2017/03/harvard-panelists-discuss-future-of-journalism-in-fake-news-world/.

[42] *See, e.g.*, Campbell v. Acuff-Rose Music, Inc. 510 U.S. 569, 579 (1994); Hustler Magazine v. Falwell, 485 U.S. 46, 57 (1988).

defined as "a literary work holding up human vices and follies to ridicule or scorn[,]"[43] while parody is defined as "a literary or musical work in which the style of an author or work is closely imitated for comic effect or in ridicule." [44] Works of this nature draw from real life. They are transformative, taking something that already exists (such as a pop-rock song about a pretty woman) and turning it into something new (such as a rap song about a perhaps less-than-pretty woman).[45] Satire and parody serve to critique the source from which they came.[46] *The Onion* and *Saturday Night Live* are two examples of fake news that may properly be classified as satire. Rather than purporting to provide real news reporting, these parodies poke fun at current events. Their aim is not to convince viewers that what they are seeing should be taken as truth; rather, their goal is to provide comic relief. They exaggerate political figures not for the purpose of deceiving the public through dissemination of false information, but to instead provide social commentary on matters of public interest and concern.

By contrast, fake news, as applied here, is quite limited in scope and content. Known also as post-truths and alternative facts, fake news refers to unequivocal falsehoods that are intentionally and deliberately passed off as accurate, legitimate news.[47] Fake news overwhelmingly appeals to emotions and passion rather than to objective facts.[48] And, in the age of the Internet and social media, which have been asserted as contributing to the widespread dissemination of fake news,[49] these stories garner attention through the use of eye-catching, clickbait titles.[50] The phrases that make up the headlines,

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[43] *Satire*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/satire (last updated Mar. 8, 2018).

[44] *Parody*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/parody (last updated Mar. 5, 2018).

[45] *See Campbell*, 510 U.S. at 579.

[46] *See Falwell*, 485 U.S. at 51.

[47] *See, e.g.*, Nick Gaffney, *Top 10 Lessons From the Rise of "Fake News"*, L. J. NEWSL. (Feb. 2017), http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/02/01/media-communicationtop-10-lessons-from-the-rise-of-fake-news/?slreturn=20170913155621 ("The term 'fake news' refers to fictitious content that attempts to (and all too often does) appear as factual . . .").

[39] *Id.* ("Emotional appeal can be more influential than facts.").

[49] *See, e.g.*, Maggie Fox, *Fake News: Lies Spread Faster on Social Media Than Truth Does*, NBC NEWS (Mar. 8, 2018, 2:05 PM), https://www.nbcnews.com/health/health-news/fake-news-lies-spread-faster-social-media-truth-does-n854896; Sam Levin, *Mark Zuckerberg: I Regret Ridiculing Fears Over Facebook's Effect on Election*, THE GUARDIAN (Sept. 27, 2017, 7:51 PM), https://www.theguardian.com/technology/2017/sep/27/mark-zuckerberg-facebook-2016-election-fake-news.

[50] "Clickbait" refers to "something (such as a headline) designed to make readers want to click on a hyperlink especially when the link leads to content of dubious value or interest." *Clickbait*, MERRIAM-WEBSTER, https://www.merriam-

however, are either (a) not actually mentioned in the articles themselves, or (b) changed so that the implied meaning from the headline subtly shifts.[51]

Legitimate news and news sources, on the other hand, write to inform and educate. Ideally, reporters from legitimate news sources have studied their craft and abide by the Code of Ethics maintained by the Society of Professional Journalists.[52] Legitimate news sources should also have a track record of presenting reliable information and should report the news in an unbiased manner.[53] However, modern media giants such as MSNBC and Fox News, who are largely left-leaning and right-leaning, respectively,[54] show that this is not necessarily a determinative requirement for legitimacy. The key to legitimacy is presenting accurate, verifiable information that has been thoroughly researched, and offering retractions when something is misreported.

Fake news does not meet any of those requirements, yet it proliferates. This success may be attributed to a number of factors. Perhaps most influential is how trustworthy and convincing fake news websites appear, making it difficult to distinguish between fake and legitimate news sources. The most dangerous fake news sites are those that, upon first glance, can deceive even the most critical eye because of how closely they mimic real media outlets.[55] For example, the article claiming that President Obama eliminated the Pledge of Allegiance appears on a website whose URL is "abcnews.com.co"; the site's banner contains a black and white logo that is nearly identical to the one on ABC News's website; and the author is attributed as writing for ABC News, with the article marked as a contribution to the Associated Press.[56] The website, however,

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webster.com/dictionary/clickbait (last updated Nov. 28, 2017); *see also Clickbait*, OXFORD ENGLISH LIVING DICTIONARIES,

https://en.oxforddictionaries.com/definition/us/clickbait (last visited Jan. 1, 2018) (defining clickbait as "(on the Internet) content whose main purpose is to attract attention and encourage visitors to click on a link to a particular web page").

[51] *See* Ben Frampton, *Clickbait: The Changing Face of Online Journalism*, BBC NEWS (Sept. 14, 2015), http://www.bbc.com/news/uk-wales-34213693.

[52] *See SPJ Code of Ethics*, SOC'Y OF PROF'L JOURNALISTS (Sep. 6, 2014, 4:49 PM), http://www.spj.org/ethicscode.asp.

[53] *See id.*

[54] *See, e.g.*, Aaron Blake, *Ranking the Media From Liberal to Conservative, Based on Their Audiences*, WASH. POST (Oct. 21, 2014),

https://www.washingtonpost.com/news/the-fix/wp/2014/10/21/lets-rank-the-media-from-liberal-to-conservative-based-on-their-audiences/?utm_term=.51196bea7980.

[55] *See generally*, Soll *supra* note 13.

[56] The URL to the website is as follows: http://abcnews.com.co/obama-executive-order-bans-pledge-of-allegiance-in-schools/. As of July 2, 2017, the article has been removed from abcnews.com.co's website, where it originally appeared. Similarly, the same article previously appeared on another fake news website; this one resembled

does not belong to ABC, whose official URL is "abcnews.go.com."[57]

Another factor contributing to the success of fake news is America's growing mistrust of mainstream media.[58] A 2016 Gallup Poll found that only 32% of Americans express either a "great deal" or "fair amount" of trust in "mass media—such as newspapers, TV and radio—when it comes to reporting the news fully, accurately, and fairly."[59] That level of trust has been in a subtle yet steady decline since 2003, at which point the reported trust was at 54%.[60] The year 2003 also marks the last time in which more than a majority of Americans expressed a great deal or fair amount of trust in the media, and the most recent study marks the lowest level of such trust reported since the poll began in 1972.[61] Additionally, in 2016, more Americans reported having a "great deal" or "quite a lot" of confidence in the presidency (36%) than they had in newspapers (20%).[62] This is particularly troubling given the press's vital role as the Fourth Estate and additional check on government power.[63]

Finally, it is important to note that although fake news largely targets political figures,[64] it can have devastating collateral effects on private figures as well. One of the most

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CNN, was authored by who appeared to be a CNN reporter, and was designated as a contribution by the Associated Press. *See* Jimmy Rustling, *Obama Signs Executive Order Banning the Pledge of Allegiance In Schools Nationwide*, http://cnn.com.de/news/obama-signs-executive-order-banning-pledge-allegiance-schools-nationwide/ (last visited July 2, 2017). The URL for this website (cnn.com.de) however, differs from the real CNN's URL (cnn.com). The "author" of the piece was likely fake as well. *See* Glenn Kessler, *The Fact Checker's Guide for Detecting Fake News*, WASH. POST (Nov. 22, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/11/22/the-fact-checkers-guide-for-detecting-fake-news/?utm_term=.d58448ff619f (discussing "clues" suggesting that "Jimmy Rustling" is not real).

[57] ABC NEWS, http://abcnews.go.com/ (last visited Mar. 17, 2018).

[58] Gaffney, *supra* note 47.

[59] Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), http://www.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx. To break this down even further, only 8% of respondents reported having a great deal of confidence in mass media, leaving 24% expressing only a fair amount. *Trust in Government*, GALLUP, http://news.gallup.com/poll/5392/trust-government.aspx (last visited Mar. 16, 2018).

[60] *Trust in Government*, *supra* note 59.

[61] Swift, *supra* note 59.

[62] *Confidence in Institutions*, GALLUP, http://www.gallup.com/poll/1597/confidence-institutions.aspx (last visited Mar. 16, 2018). It would be interesting, however, to see if these numbers have shifted since 2017, when a new president took office.

[63] For a discussion on the media as the Fourth Estate, see Matthew Gentzkow, Edward L. Glaeser,& Claudia Goldin, *The Rise of the Fourth Estate: How Newspapers Became Informative and Why It Mattered*, *in* CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 187, 230 (Glaeser & Goldin eds., 2006).

[64] *See, e.g.*, *Fake News*, SNOPES, https://www.snopes.com/fact-check/category/fake-news/ (last visited Mar. 17, 2018) (archiving a list of fake news stories appearing on the Internet, many of which are about public figures).

notorious examples of this is the conspiracy known as "Pizzagate." In late 2016, Edgar Maddison Welch traveled more than 300 miles to investigate a Washington, D.C. pizzeria after reading several fake news stories claiming that the restaurant was "part of a child-abuse ring led by Hillary Clinton."[65] Accompanying Welch was a military-style assault rifle, which he began firing shortly after his arrival.[66] Stories promoting the conspiracy began making their rounds on various social media sites right before the election in October, 2016.[67] Reports by *The New York Times*, *The Washington Post*, and Snopes debunking the theory only fueled the Pizzagate believers.[68] The fake news continued:

> Within hours of the publication of one of the debunking articles, a post on Twitter by Representative Steven Smith of the 15th District of Georgia—not a real lawmaker and not a real district—warned that what was fake news was the information being peddled by the mainstream media. It was retweeted dozens of times.[69]

Real individuals, such as Michael Flynn, Jr., whose father served briefly as Donald Trump's national security advisor, also encouraged the theory.[70] Flyann, Jr. expressed his support via Twitter: "Until #Pizzagate proven to be false, it'll remain a story. The left seems to forget #PodestaEmails and the many 'coincidences' tied to it."[71] Since the conspiracy's

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[65] Cecilia Kang & Adam Goldman, *In Washington Pizzeria Attack, Fake News Brought Real Guns*, N.Y. TIMES (Dec. 5, 2016), https://www.nytimes.com/2016/12/05/business/media/comet-ping-pong-pizza-shooting-fake-news-consequences.html?action=click&contentCollection=U.S.&module=RelatedCoverage&region=Marginalia&pgtype=article.

[66] *Id.* Fortunately no one was hurt, and Welch was arrested. *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Incoming National Security Adviser's Son Spreads Fake News About D.C. Pizza Shop*, POLITICO (Dec. 4, 2016, 11:53 PM), http://www.politico.com/story/2016/12/incoming-national-security-advisers-son-spreads-fake-news-about-dc-pizza-shop-232181.

[71] *Id.* The reference to Podesta e-mails is how the "Pizzagate" conspiracy began: members of the social media forum site Reddit created a thread in which they purported to deconstruct the leaked e-mails of John Podesta, campaign chairman for Hillary Clinton. Gregor Aisch, Jon Huang, & Cecilia Kang, *Dissecting the #PizzaGate Conspiracy Theories*, N.Y. TIMES (Dec. 10, 2016), https://www.nytimes.com/interactive/2016/12/10/business/media/pizzagate.htm

emergence, the pizza restaurant, as well as neighboring businesses, have suffered: not only have individuals falsely accused the businesses of harboring the trafficking ring, but the owners have received threatening phone calls as well.[72]

Fake news is not a small problem, nor is it, in some circumstances, particularly harmless. With the situations presented above, it is easy to empathize with those calling for the end of fake news. However, as will be discussed next, fake news may not be so easy to regulate, nor is regulation necessarily desirable, depending on who is tasked with the job. In fact, despite its seemingly little value to the exchange of ideas, fake news may nonetheless be protected under the First Amendment.

II. TO PROTECT OR NOT TO PROTECT: WHERE DOES FAKE NEWS STAND UNDER THE FIRST AMENDMENT?

There is perhaps no other right held in such high esteem by the United States Supreme Court as the freedom of speech. This sentiment is reflected in the very limited list of speech that is categorically excluded from First Amendment protection, such as obscenity,[73] fighting words,[74] true threats,[75] and child pornography.[76] It is also reflected in the Court's staunch reluctance to expand this exclusionary list further, refusing, for example, to automatically deny protection to such controversial topics as the creation of virtual child pornography[77] and intentional infliction of emotional distress claims brought by private individuals against other private individuals.[78]

Prior to 2012, the question of whether fake news deserves any protection under the First Amendment would seem to have a rather obvious answer: No, it does not. After all, fake news constitutes nothing more than demonstrable falsehoods, and the Supreme Court has, in several instances, appeared to dismiss the notion that false statements were protected under the Free Speech Clause.[79] In fact, earlier

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l. Some of the e-mails contained correspondence between Podesta and the pizzeria owner regarding a fundraising event, and Reddit users claimed that food-related words, such as "cheese pizza", "ice cream", and "walnut" were code words for common child pornography phrases. *Id.*

[72] Kang & Goldman, *supra* note 65.

[73] Miller v. California, 413 U.S. 15, 36 (1973).

[74] Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

[75] Watts v. United States, 394 U.S. 705, 707 (1969).

[76] New York v. Ferber, 458 U.S. 747, 763 (1982). For a more complete list of unprotected speech, see United States v. Alvarez, 567 U.S. 709, 717 (2012).

[77] Ashcroft v. Free Speech Coal., 535 U.S. 234, 245 (2002).

[78] Snyder v. Phelps, 562 U.S. 443, 458 (2011).

[79] *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas,

opinions emphasized that providing such protection ran counter to—and indeed impeded—the ideals promoted by the First Amendment, particularly the constant search for truth among a marketplace of competing ideas.[80] With so much judicial language seemingly stacked against the creation and distribution of fake news, one was seemingly hard-pressed to argue that it is a form of protected speech.

But in 2012, the Supreme Court—in a plurality opinion—decided *United States v. Alvarez*,[81] and the notion that lies were not protected under the First Amendment was no longer so firmly decided. The respondent in *Alvarez* was charged with violating section 704(b) of the Stolen Valor Act,[82] which criminalized "[f]raudulent [r]epresentations [a]bout [r]eceipt of [m]ilitary [d]ecorations or [m]edals."[83] Rejecting arguments by the government that the law was no different from existing, permissible regulations on such acts as perjury, lying to a government official, and impersonating a government official or representative,[84] a plurality of the Court held that this particular section of the Stolen Valor Act was invalid because it punished speech solely for its falsity, rather than for, *e.g.*, its obstruction to the legal process or connection to fraudulent activity.[85] In sum, whereas criminalizing perjury and impersonating a government official are acceptable ways of maintaining the integrity of the justice system, criminalizing lying about receiving a government medal serves no similar, compelling end.

In reaching its decision, the plurality clarified that "falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless

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and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' . . . Hence the knowingly false statement and the false statement made with reckless disregard of truth, do not enjoy constitutional protection." (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942))); Brown v. Hartlage, 456 U.S. 45, 60 (1982) ("Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements." (citing Gertz v. Robert Welch, Inc. 418 U.S. 323, 340 (1974))); BE & K Constr. Co. v. N.L.R.B., 536 U.S. 516, 531 (2002) ("[F]alse statements may be unprotected for their own sake . . .").
[80] *See* Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective.").
[81] 567 U.S. 709 (2012) (plurality opinion).
[82] *Id.* at 713.
[83] 18 U.S.C. § 704(b) (2012).
[84] *Alvarez*, 567 U.S. at 720–22.
[85] *Id.* at 724; *see also id.* at 722–23 ("The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain.").

falsehood."[86] More significantly, the lie must be made for the purpose of gaining some material benefit, such as "to effect a fraud or secure moneys or other valuable considerations, say offers of employment."[87] In those instances, "it is well established that the government may restrict speech without affronting the First Amendment."[88] But the proposition that speech may be punished merely because it is untrue and where, as here, the speaker incurs no benefit other than a boost to his own self-esteem, is not supported by case law.[89] Such regulation, the plurality warned, would substantially subdue the First Amendment:

> Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.[90]

The plurality did not come to its conclusion unsupported. *Alvarez* is inundated with references to case law in which the Court held that, while false speech may not necessarily be protected to the same extent as truthful speech, it has never been held that false speech is completely unprotected.[91] After all, "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression [that] the First Amendment seeks to guarantee."[92] Moreover, "it is sometimes

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[86] *Id.* at 719.

[87] *Id.* at 723.

[88] *Id.* (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 (1976)).

[89] *See generally id.*

[90] *Id.* at 723.

[91] *See generally id.*; *see also id.* at 719 ("The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection.").

[92] *Id.* at 718 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964)).

necessary to extend a measure of strategic protection to these statements in order to ensure sufficient 'breathing space' for protected speech."[93] An example of such "breathing space" is the requirement of malice or reckless disregard for the falsity of one's statement in cases of libel and defamation; this stringent mental state requirement allows for the uninhibited exchange of ideas about public figures and other issues of public significance without excessive fear of legal repercussion for unwittingly made false statements.[94] In other words, to ensure that protected speech is not improperly suppressed, it may be crucial to permit lies in certain circumstances.

Alvarez and the Stolen Valor Act are not the first times the U.S. government has tried to control the production and spread of misinformation. In 1798, Congress passed the Sedition Act, which made it a crime to "write, print, utter, or publish [or assist in such] . . . any false, scandalous and malicious writing against the Government."[95] The Act was largely "enforced in a partisan way and was used to suppress opinions with which the Government disagreed."[96] Several newspaper editors belonging to the opposing political party were punished under the Act.[97] Because judicial review had not yet been established, the Supreme Court was unable to evaluate the constitutionality of the law.[98] And though expiration of the law two years after enactment prevented it from ever reaching the Court, "[t]he invalidity of the Act has . . . been assumed by Justices of [the] Court," reflecting a "broad consensus that the Act, because of the restraint it imposed upon criticism of Government and public officials, was inconsistent with the First Amendment."[99]

Therefore, as U.S. advocates, scholars, and courts wade further into the murky depths of fake news in First Amendment jurisprudence, *Alvarez* and its predecessors should stand at the forefront of analysis, for they will no doubt serve as important guidance on this issue.[100]

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[93] *Id.* at 750 (Alito, J., dissenting) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974)) (internal quotation marks and alterations omitted).

[94] *See, e.g.*, *id.* at 732 (Breyer, J., concurring).

[95] *19e. The Alien and Sedition Acts*, U.S. HISTORY, http://www.ushistory.org/us/19e.asp (last visited March 16, 2018).

[96] Eugene Volokh, *Fake News and the Law, From 1798 to Now*, WASH. POST (Dec. 9, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/09/fake-news-and-the-law-from-1798-to-now/?utm_term=.814c7ae9c178.

[97] *See 19e. The Alien and Sedition Acts*, *supra* note 95.

[98] *Id.*; *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) (noting that the Act was "never tested" in the Supreme Court).

[99] *Sullivan*, 376 U.S. at 276.

[100] Interestingly, courts may soon have an opportunity to address fake news directly. For example, a Colorado newspaper has accused a state senator of defamation after

III. CREATING A MINISTRY OF TRUTH: CAN (AND SHOULD) FAKE NEWS BE REGULATED?

The United States is not the only country grappling with what some may consider a fake news epidemic.[101] In Indonesia, Africa, Germany, Spain, Italy, and the Philippines, fake news about political figures proliferates, aided by popular social media sites such as Facebook.[102] Citizens in developing countries especially tend to believe fake news, and some of these countries have responded by shutting down fake news sites or temporarily banning the use of certain social media platforms right before elections.[103]

Although similar shutdowns may be viewed positively by some groups in the United States,[104] any effort to do so by the government will be viewed with "exacting scrutiny" by courts[105] and, based on First Amendment principles, will likely fail. However, even if governmental action was found to be constitutional, such action should be the least welcoming response, particularly for advocates of free speech. Permitting the government to regulate what it itself deems "fake news" would allow a political leader to silence not only his critics, but also those with whom he merely disagrees, creating an opposite form of government than that envisioned by the Framers.[106] Therefore, lest the United States become a nation of censorship, any regulation of fake news should come from the social media sites that provide a platform for fake news. More importantly, though, regulation should come from the users who provide an audience.

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the senator called the outlet "fake news." Bente Birkeland, *When a Politician Says 'Fake News' and a Newspaper Threatens to Sue Back*, NPR (Feb. 17, 2017, 12:36 PM), http://www.npr.org/2017/02/17/515760101/when-a-politician-says-fake-news-and-a-newspaper-threatens-to-sue-back.

[101] *See generally* Paul Mozur & Mark Scott, *Fake News in U.S. Election? Elsewhere, That's Nothing New*, N.Y. TIMES (Nov. 17, 2016), https://www.nytimes.com/2016/11/18/technology/fake-news-on-facebook-in-foreign-elections-thats-not-new.html.

[102] *Id.*

[103] *Id.*

[104] *See supra* note 27 and accompanying text.

[105] *See* United States v. Alvarez, 567 U.S. 709, 715 (2012) (plurality opinion) ("When content-based speech regulation is in question, however, exacting scrutiny is required.").

[106] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 274 (1964) (citing 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 553–54 (1876)).

A. *Precluding Big Brother: Why the Government Cannot and Should Not Regulate Fake News*

  United States v. Alvarez stands for the proposition that lying is not necessarily excluded from First Amendment protection, and the government may not infringe upon that type of speech merely because it is false.[107] The *Alvarez* opinion, however, leaves room to possibly distinguish fake news from lies about receiving a military award. As Justice Kennedy—writing for the plurality—pointed out, the respondent in *Alvarez* lied about his status as a medal recipient not for the purpose of monetary or other gain, but rather, for his own inflation of self-worth.[108] Creators of fake news, by contrast, often possess a financial motive. During the 2016 U.S. presidential election, for example, a small town in Macedonia became a notorious hotbed of incessant fake news publications as hundreds of teenagers promulgated false stories disguised as real news.[109] Most of these stories were about Republican nominee Donald Trump, but there were also several negative stories about Democratic candidate Hillary Clinton as well.[110] Not caring whether the statements conveyed were true or false, these teens grew their business by paying "Facebook to share [them] with a target [U.S.] audience hungry for Trump news."[111] One teen described how, with the help of "catchy new headline[s], . . . Americans clicked on his stories and began to like and share them" on Facebook, allowing him to earn thousands of dollars of revenue from advertisements on his website.[112]

  Even where a financial motive is not so explicit, one could be presumed given the relationship between fake news and social media. For instance, many fake news websites contain "recommended content ads" that employ eye-catching headlines and intriguing photographs to entice website visitors to click on them.[113] As more people click on the ads, fake news

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[107] *Alvarez*, 567 U.S. at 719 ("[T]he Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood.").

[108] *See id.* at 714.

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

[110] *Id.*

[111] *Id.*

[112] *Id.* Similar success has been found elsewhere as well. *See, e.g.*, Joshua Gillin, *The More Outrageous, the Better: How Clickbait Ads Make Money for Fake News Sites*, POLITIFACT: PUNDITFACT (Oct. 4, 2017, 11:34 AM), http://www.politifact.com/punditfact/article/2017/oct/04/more-outrageous-better-how-clickbait-ads-make-mone/; Nathan McAlone, *This Fake-News Writer Says He Makes Over $10,000 a Month, and He Thinks He Helped Get Trump Elected*, BUS. INSIDER (Nov. 17, 2016, 10:01 AM), http://www.businessinsider.com/fake-news-writer-paul-horner-thinks-he-got-trump-elected-2016-11.

[113] *See* Craig Silverman, Jeremy Singer-Vine, & Lam Thuy Vo, *In Spite of the Crackdown, Fake News Publishers Are Still Earning Money From Major Ad Networks*,

authors and publishers gain more revenue.[114] Therefore, the presence of advertisements and the number of ads on fake news websites could be one indicator of a financial motive.

Considering that fake news has an advertising and financial incentive, one potential avenue that the government may pursue is to delegate regulatory authority to the Federal Trade Commission ("FTC"), which is in part charged with regulating fraud.[115] According to MSNBC Chief Legal Correspondent Ari Melber, "fake news is essentially a scheme to trick the consumer—a fraud."[116] Thus, relabeling "fake news" as "fraud news" could potentially bring it under the FTC's jurisdiction.

Unfortunately, this approach is not so easy. A full discussion on the ability of the FTC to regulate fake news is beyond the scope of this Note,[117] but a few key points can be made. First, the government's interests in regulating fraud are different than the interests in regulating fake news. Melber asserts that the government has an interest in controlling fraudulent information (*i.e.*, fake news) because it "offer[s] virtually no benefit to society" and "can influence elections and impact public safety."[118] Fraud regulation, however, is typically concerned with consumer protectionism.[119] The government has a stronger interest in preventing its citizens from purchasing dangerous products than it does in preventing its citizens from reading fake news. The harm is greater, more direct, and more concrete.

BUZZFEED (Apr. 4, 2017, 9:05 AM), https://www.buzzfeed.com/craigsilverman/fake-news-real-ads?utm_term=.esyNX9ALJ#.qi5Qb8Dpk.

[114] *See* Abby Ohlheiser, *This is How Facebook's Fake-News Writers Make Money*, WASH. POST (Nov. 18, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/11/18/this-is-how-the-internets-fake-news-writers-make-money/?utm_term=.ff5f53fa9628.

[115] *See Enforcement*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement (last visited Mar. 16, 2018).

[116] Ari Melber, *Capitol Report: Regulating Fraud News*, N.J.L.J. (Jan. 30, 2017, 12:07 AM), http://www.njlawjournal.com/id=1202777960120.

[117] Exploration of this avenue should perhaps begin with *FTC v. LeadClick Media, LLC.*, 838 F.3d 158 (2d Cir. 2016), which held that "under [15 U.S.C. § 45(a)(1) and (a)(2)], a defendant may be held liable for engaging in deceptive practices or acts if, with knowledge of the deception, it either directly participates in a deceptive scheme or has the authority to control the deceptive content at issue," *id.* at 168.

[118] Melber, *supra* note 116. The public safety concern may refer to the Pizzagate incident discussed *supra* Part I, as well as similar incidents that may arise in response to fake news stories.

[119] *See Protecting Consumers*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/media-resources/truth-advertising/protecting-consumers (last visited Mar. 17, 2018) ("As the nation's consumer protection agency, the Federal Trade Commission has a broad mandate to protect consumers from fraud and deception in the marketplace.").

Another argument in support of FTC regulation is that, with its commercial element and financial incentive, fake news may be likened to commercial speech, which is afforded less First Amendment protection than private speech.[120] The problem, however, is that recent FTC enforcement typically involves the subject "post[ing] misinformation about a product, [and] then [selling] the product. In fraud news, however, the political misinformation *is* the product. And, it's free."[121] Consumers of fake news have not purchased the content they are reading. Creators of fake news, while making money off of advertising on their websites, are not selling anything to their audiences. They are providing ideas, however false, and ideas—even controversial ones—are protected under the First Amendment.[122]

The government may also attempt to control the dissemination of fake news by passing legislation that targets the stories directly. Such regulation may range from something as extreme as censorship (*i.e.*, removing fake news sources entirely from the Internet) to something less, such as imposing fines on its creators or website hosts. It may also involve placing some kind of label onto fake news articles and websites designating that they are false or that the truth of their stories is contested.

First Amendment case law, however, overwhelmingly suggests that the government does not possess this type of authority. Enforcers of any law seeking to prohibit or otherwise regulate the dissemination of fake news stories would necessarily need to know the substance of such stories; after all, how could the government determine that something is fake without reading and evaluating the information contained therein? This places a severe handicap on the government, for such content-based regulations are presumptively invalid, and the government must prove that such laws do in fact comply with the Constitution.[123] To do this in the context of false speech, as *Alvarez* points out, the government must satisfy "exacting scrutiny."[124] Not only must it have a compelling interest in regulating fake news, but it must also utilize means

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[120] Melber, *supra* note 116 ("[T]he general rationale has been that words used on behalf of a business are less important than words used on behalf of actual people to express ideas or participate in democracy.").

[121] *Id.* (emphasis added).

[122] Of course, if the ideas presented crossed the line into unprotected speech, then the speaker's constitutional protection wanes and the government's interest becomes controlling. In addition, if the disseminators of fake news are ultimately likened to the defendants in *LeadClick Media*, discussed *supra* note 117, then the argument for enforcement strengthens.

[123] Ashcroft v. ACLU, 542 U.S. 656, 660 (2004).

[124] United States v. Alvarez, 567 U.S. 709, 715 (2012) (plurality opinion).

that are "actually necessary to achieve its interest."[125] These means "must be 'the least restrictive means among available, effective alternatives.'"[126] Finally, "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented."[127]

In the context of regulating fake news, it is unlikely that these requirements will be met. The first issue is discerning whether the government has a compelling interest in such regulation. The government could possibly argue that it has an interest in ensuring a fair and honest electoral process. After all, if the key to a successful democracy is an informed citizenry,[128] then certainly the government has an interest in controlling false information that would poison the process. Another possible interest is ensuring that the integrity of the legitimate press is not tarnished. Just as Congress in *Alvarez* was concerned with defending the honor of the military and the Congressional Medal, so too might the government have a compelling interest in upholding the integrity of the press. This is certainly a worthy goal that courts should consider, particularly given how fundamentally vital a free, independent, and trustworthy press is as an additional check on governmental power. But assuming that a court were to accept these or other interests that the government may offer, it is still not certain that regulation would be necessary to achieve those interests.

After all, a firm cornerstone of the First Amendment is the idea of counterspeech: "[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth."[129] Where counterspeech is present and effective, state-sponsored censorship need not, and should not, occur. In *Alvarez*, the plurality found that the government failed to show, "why counterspeech would not suffice to achieve its interests."[130] In fact, the circumstances surrounding Alvarez's lie actually seemed to disprove the government's argument that the Stolen Valor Act was necessary to protect the integrity of the military, because "[e]ven before the FBI began investigating

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[125] *Id.* at 725 (citing Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799 (2011)).

[126] *Id.* at 729 (citing Ashcroft v. ACLU, 542 U.S. 656, 666 (2004)).

[127] *Id.* at 725.

[128] *See, e.g.*, Jennifer L. Hochschild, *If Democracies Need Informed Voters, How Can They Thrive While Expanding Enfranchisement?*, 9 ELECTION L.J. 111, 111 (2010) (commenting that "[p]olitical scientists concur that a knowledgeable citizenry is necessary for effective and gratifying democratic governance").

[129] *Alvarez*, 567 U.S. at 727 (citing Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

[130] *Id.* at 726.

him for his false statements Alvarez was perceived as a phony."[131] Without the need for government intervention, counterspeech was already working to correct the falsehood that entered the market. Similarly, in the context of fake news, counterspeech can—and in fact does—play a crucial role in combatting the false statements coming from both social media and political figures themselves. Journalists and netizens alike continuously call out lies, challenge false or questionable statements purported to be the truth, and make corrections where needed. *The Washington Post* in particular has taken an active leadership position in the fight against fake news,[132] and fact-checking websites like Snopes, FactCheck.Org, and PolitiFact continuously research and debunk fake news stories on a regular basis.[133]

Finally, moving to the third requirement for speech regulation, the Government will find it difficult to show "a direct causal link between the restriction imposed and the injury to be prevented."[134] The primary conceivable injury caused by fake news, which some have already put forth, is that the dissemination and consumption of fake news negatively affects the election process in a material way.[135] This argument is premised on the theory that because individuals read damaging but false information about political candidates—information that is intended to appeal to emotions, partisanship, and the like—their status as an informed voter is compromised. Rather than basing political decisions on critical analysis and a true understanding of the issues, readers of fake news will vote out of inflamed passion and misperceptions.

But proof that fake news influences an election in any material way may be difficult to show. For example, whether or not the most recent presidential election was in any way compromised remains highly contested. While one study

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[131] *Id.*

[132] *See* Washington Post (@wapofactchecker), *Fact Checker, from the Washington Post*, FACEBOOK, https://www.facebook.com/wapofactchecker/) (last visited Mar. 16, 2018) (providing short video clips fact-checking statements made by various politicians).

[133] Politifact and FactCheck.org are devoted specifically to investigation and evaluating the accuracy of claims related to the political process. *See* Angie Drobnic Holan, *The Principles of the Truth-O-Meter: Politifact's Methodology for Independent Fact-Checking*, POLITIFACT (Feb. 12, 2018, 12:00 PM), http://www.politifact.com/truth-o-meter/article/2018/feb/12/principles-truth-o-meter-politifacts-methodology-i/ ("From the beginning, Politifact focused on looking at specific statements made by politicians and rating them for accuracy."); *Our Mission*, FACTCHECK.ORG, https://www.factcheck.org/about/our-mission/ (last visited Mar. 16, 2018) ("We are a nonpartisan, nonprofit 'consumer advocate' for voters that aims to reduce the level of deception and confusion in U.S. politics. We monitor the factual accuracy of what is said by major U.S. political players . . .").

[134] *Alvarez*, 567 U.S. at 725.

[135] *See* Solon, *supra* note 12.

conducted recently by the Pew Research Center found that a majority of Americans receive their news online from social media sites like Facebook and Twitter,[136] and another study conducted by Buzzfeed revealed that fake news stories received far more engagement on social media platforms than stories from legitimate news outlets,[137] economists Matthew Gentzkow of Stanford University and Hunt Alcott of New York University found that "social media played a much smaller role in the election than some might think."[138] According to Gentzkow's and Alcott's analysis, "[f]or fake news to have changed the outcome of the [2016 presidential] election, a single fake news story would need to have convinced about 0.7 percent of Clinton voters and non-voters who saw it to shift their votes to Trump, a persuasion rate equivalent to seeing 36 television campaign ads."[139] This would require, in part, that readers of fake news actually believe what they are reading; mere exposure is not enough.[140] Their study suggested that respondents did not remember the fake news articles that they read on social media enough to meet this calculation.[141]

The trend in Americans' views toward the media may also present a challenge to government regulation. In striking down part of the Stolen Valor Act in *Alvarez*, Justice Kennedy stated that "in order to show that public refutation [or counterspeech] is not an adequate alternative, the Government must demonstrate that unchallenged claims [*i.e.*, claims *not* refuted by counterspeech] undermine the public's perception of

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[136] Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, PEW RESEARCH CTR. (May 26, 2016), http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016/.

[137] Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook*, BUZZFEED (Nov. 16, 2016, 4:15 PM), https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook. Engagement refers to the number of times a story was liked, shared, and commented on by a Facebook user. *See Post Engagement*, FACEBOOK: BUS., https://www.facebook.com/business/help/735720159834389 (last visited Mar. 16, 2018).

[138] Krysten Crawford, *Stanford Study Examines Fake News and the 2016 Presidential Election*, STAN. NEWS (Jan. 18, 2017), http://news.stanford.edu/2017/01/18/stanford-study-examines-fake-news-2016-presidential-election/.

[139] *Id.*

[140] Hunt Alcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 228 (2017).

[141] *Id.* at 230, 232. *But see* Morten Bay, *News Coverage Says a Study Claimed Fake News on Facebook Didn't Effect the Election, But News Coverage is Wrong*, SLATE (Feb. 1, 2018, 9:04 AM), https://slate.com/technology/2018/02/no-a-study-did-not-claim-that-fake-news-on-facebook-didnt-affect-the-election.html (noting that the study is flawed because "it looked only at Facebook users who actually *clicked* on one of the fake news links" and failed to consider other ways in which fake news may have affected the election results, such as when stories were shared but not read).

the military and the integrity of its awards system."[142] The government failed to make that showing.[143] It is possible that the government would fail in the context of fake news as well, given that the public's perception of mainstream media has been in decline for more than a decade,[144] long before the uprising of fake news. Thus, without something more direct, it may be difficult to show that the devaluation of the media is due to a lack of counterspeech responding to fake news. In other words, if the American public's trust in media was already on a steady decline prior to the onset of abundant fake news, then how can one say that undisputed fake news stories undermined the public's perception of the media? One counterargument to this, though, is that prior to 2015, the public's mistrust declined rather steadily. Aside from a large decline in 2004, the public's trust has typically fallen by a few percentage points.[145] From 2015 to 2016, however, the drop was much larger, falling from 40% trust in the mainstream media to 32%.[146] This sudden, more pronounced decline may serve as an indicator of the impact that fake news had on Americans' trust in the media, but one instance will likely be insufficient to support such an argument in court. Moreover, to counter that point, the decline in trust may be due to factors other than fake news, such as individuals buying into a president's incessant attempts to delegitimize the mainstream media.[147]

Even if the government were able to satisfy the requirements set forth in *Alvarez*, allowing the government to regulate fake news is disconcerting, particularly when the country is in the hands of leader that continuously labels well-established, legitimate news organizations such as the *New York Times*, CNN, NBC, ABC, and CBS fake news and "the enemy

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[142] United States v. Alvarez, 567 U.S. 709, 728 (2012) (plurality opinion).

[143] *Id.*

[144] *See* Swift, *supra* note 59 and accompanying text.

[145] *Id.*

[146] *Id.*

[147] *See, e.g.*, Chris Wallace, Opinion, *The Media is Giving Up Its Place in Our Democracy*, WASH. POST (Nov. 17, 2017), https://www.washingtonpost.com/opinions/trump-is-assaulting-our-free-press-but-he-also-has-a-point/2017/11/17/b3b8ec24-c8b2-11e7-b0cf-7689a9f2d84e_story.html?utm_term=.328744224743 ("President Trump is engaged in the most direct, sustained assault on the free press in our history. Since early in the campaign, he has done everything he could to delegitimize the media—attacking us institutionally and individually."); Craig Silverman, *Trump is Causing Democrats to Trust Media More, While Republicans Are Endorsing More Extreme Views, Says a New Study*, POYNTER (Dec. 4, 2017), https://www.poynter.org/news/trump-causing-democrats-trust-media-more-while-republicans-are-endorsing-more-extreme-views (quoting Dartmouth College political science professor Brendan Nyhan as saying, "Trump's negative approach to the press could be causing 'the strongest relationship between presidential approval and media attitudes that has been observed to date'").

of the American people."[148] Allowing the government to determine what is truth and what is not, to place a stamp of approval on sources with which it agrees and a stamp of disapproval on all others, sounds dangerously close to propaganda and creates a very harrowing precedent that the First Amendment was enacted to prevent. As Justice Alito's dissent in *Alvarez* points out, in "matters of public concern . . . it is perilous to permit the state to be the arbiter of truth" and "[a]llowing the state to proscribe false statements in these areas also opens the door for the state to use its power for political ends."[149]

B. Enlisting Counterspeech: Encouraging Social Media Sites to Address the Problem

If any institutions are to be tasked with regulating fake news, it should be those that provide the platform: social media giants such as Facebook and Twitter. Not only are these private actors better able to identify and manage fake news articles, but their voluntary action in doing so does not create the same concerns as state-sponsored censorship, nor does it implicate First Amendment principles.[150] Facebook in particular has taken an active role in eliminating the proliferation of fake news on its platform. Though not perfect, the methods by which Facebook is attempting to address fake news provide a practical, potentially effective example of the Supreme Court's preferred method of combatting false words: counterspeech.

Shortly after the 2016 presidential election, Facebook CEO Mark Zuckerberg dismissed claims that his platform and the fake news circulating therein had any effect on the election's outcome.[151] However, he has recently recanted his dismissal[152] and has begun to implement methods of monitoring and

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[148] Aaron Blake, *Donald Trump's Fake Case Against the 'Fake News Media'*, WASH. POST (Feb. 24 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/24/donald-trumps-fake-case-against-the-fake-news-media/?utm_term=.605a675428ae.

[149] United States v. Alvarez, 567 U.S. 709, 751–52 (2012) (Alito, J., dissenting).

[150] *See, e.g.*, Kay v. N.H. Democratic Party, 821 F.2d 31, 33 (4th Cir. 1987) (noting "the general rule that the First Amendment does not protect against private action"); Buckley v. Am. Fed'n of Television & Radio Artists, 496 F.2d 305, 309 (1st Cir. 1974) ("It is elementary constitutional doctrine that the first amendment [sic] only restrains action undertaken by the Government." (citing Ry. Emps.' Dep't v. Hanson, 351 U.S. 225 (1956))).

[151] Jessica Guynn, *Mark Zuckerberg: Facebook Fake News Didn't Sway Election*, USA TODAY (Nov. 11, 2016, 9:15 AM), http://www.usatoday.com/story/tech/news/2016/11/10/mark-zuckerberg-facebook-fake-news-didnt-sway-election/93622620/.

[152] Mark Zuckerberg Facebook Post, FACEBOOK (Sept. 27, 2017, 5:38 PM), https://www.facebook.com/zuck/posts/10104067130714241?pnref=story.

counterbalancing fake and misleading stories that appear on users' news feeds.[153]

The monitoring of fake news on Facebook relies primarily on Facebook users themselves. In a pilot program, users were originally given the option of flagging stories they believed to be suspect.[154] The story was then routed to third-party, nonpartisan fact-checkers who would review the story and determine its authenticity.[155] Fact checkers were chosen from various news organizations committed to the fact-checking code of ethics created by the Poynter Institute for Media Studies,[156] a "global leader in journalism" that strives to teach and promote ethical, credible news reporting.[157]

For this plan, Facebook enlisted the aid of four of those organizations—Snopes, Factcheck.org, ABC News, and PolitiFact—and has also partnered with the Associated Press.[158] If one of these organizations determined that the flagged news story was indeed fake, it would be appropriately labeled in order to alert Facebook users.[159] If users attempted to share the fake news article, they were presented with a warning that read: "Before you share this story, you might want to know that independent fact-checkers disputed its accuracy."[160] Similarly, fake news stories were accompanied by a red warning label and a message proclaiming that the story is "Disputed by Third-Party Fact-Checkers."[161] Users would have been able to click the warning label to read why the story's accuracy was called into question.[162]

Around a year later, however, Facebook abandoned its "Disputed Flags" method of designating news as false and unveiled a new plan.[163] Users still take an active role in helping

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[153] *See How is Facebook Addressing False News Through Third-Party Fact-Checkers?* Facebook: HELP CTR., https://www.facebook.com/help/1952307158131536 (last visited Mar. 16, 2018) [hereinafter *How is Facebook Addressing False News*].

[154] Alex Heath, *Facebook is Going to Use Snopes and Other Fact-Checkers to Combat and Bury 'Fake News'*, BUS. INSIDER (Dec. 15, 2016, 1:00 PM), http://www.businessinsider.com/facebook-will-fact-check-label-fake-news-in-news-feed-2016-12.

[155] *Id.*

[156] *Id.*

[157] *A Brief History of the Poynter Institute*, POYNTER INST., http://about.poynter.org/about-us/mission-history (last visited Mar. 16, 2018).

[158] Heath, *supra* note 154.

[159] *Id.*

[160] *Id.*

[161] Alex Heath, *Mark Zuckerberg: Facebook Will 'Proceed Carefully' With Fighting Fake News and Won't Block 'Opinions'*, BUS. INSIDER (Dec. 16, 2016, 11:29 AM), http://www.businessinsider.com/mark-zuckerberg-on-how-facebook-will-fight-fake-news-2016-12.

[162] *Id.*

[163] Thuy Ong, *Facebook Found a Better Way to Fight Fake News*, THE VERGE (Dec. 21, 2017, 5:26 AM), https://www.theverge.com/2017/12/21/16804912/facebook-disputed-flags-misinformation-newsfeed-fake-news. Reasons for abandonment

identify fake news; however, the way Facebook handles such information has changed slightly. Users are still able to "flag" potential fake news by using Facebook's reporting feature.[164] But, as of 2018, users may also receive a survey asking (1) whether they recognize the news source and (2) how trustworthy they believe the source to be, rated on a scale from "entirely" to "not at all."[165] This feedback, combined with algorithms already in use, brings potentially false news stories to Facebook's attention.[166] The suspicious stories are sent to "independent third-party fact-checkers certified through a non-partisan International Fact-Checking Network" for review.[167] Stories determined to be false are placed lower in users' news feeds, underneath stories that fact checkers have rated as true.[168] Facebook believes that this lower visibility on the platform will significantly reduce the number of times such stories are viewed and shared, thus stopping—or at least severely inhibiting—the fake news from spreading.[169]

False stories that do appear in users' news feeds will be addressed by Facebook's Related Articles feature (though this feature applies to non-questionable articles as well).[170] Under this feature, whenever users click on a news story, a list of articles from other sources covering the same or similar topic is displayed underneath the original story.[171] Where the original story has been designated as false, fact-checked stories debunking the fake news will appear under Related Articles.[172]

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included slow processing time (accuracy ratings took around three days to produce) and potential counter-productivity ("the company found that Disputed Flags inadvertently buried critical information that explained the inaccuracies, and could backfire by entrenching a person's false beliefs"). *Id.*

[164] *How Do I Mark a News Story as False?*, FACEBOOK: HELP CTR., https://www.facebook.com/help/572838089565953?helpref=faq_content (last visited Mar. 16, 2018).

[165] Mark Zuckerberg Facebook Post, FACEBOOK (Jan. 19, 2018, 3:36 PM), https://www.facebook.com/zuck/posts/10104445245963251?pnref=story; Alex Kantrowitz, *This is Facebook's News Survey*, BUZZFEED (Jan. 23, 2018, 4:16 PM), https://www.buzzfeed.com/alexkantrowitz/this-is-facebooks-news-survey?utm_term=.pdwKvzaVY#.lxkmPz6xL.

[166] *How is Facebook Addressing False News*, *supra* note 153.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.*; Sara Su, *News Feed FYI: New Test With Related Articles*, FACEBOOK: NEWSROOM (Apr. 25, 2017), https://newsroom.fb.com/news/2017/04/news-feed-fyi-new-test-with-related-articles/. Launched in 2013, Related Articles was originally designed "to help people discover new articles they may find interesting about the same topic." Su, *supra*.

[171] Varun Kacholia & Minwen Ji, *News Feed FYI: Helping You Find More News to Talk About*, FACEBOOK: NEWSROOM (Dec. 2, 2013), https://newsroom.fb.com/news/2013/12/news-feed-fyi-helping-you-find-more-news-to-talk-about/.

[172] *How is Facebook Addressing False News*, *supra* note 153. The stories appearing under Related Articles will be identified as having been fact-checked and by whom. *Id.*

Overall, Facebook intends that these supplemental articles will "provide . . . additional perspectives and information" and therefore aid in correcting "misinformation" and "reduce misperceptions."[173]

Finally, Facebook has also made it more difficult for creators and distributors of fake news to reap financial rewards from their activities. Specifically, Facebook prohibits advertisers from "run[ning] ads that link to stories that have been marked false" by its fact checkers.[174] In addition, Pages (i.e., professional accounts for businesses, organizations, brands, etc. rather than personal accounts)[175] that "repeatedly share stories marked as false . . . will lose the ability to advertise on Facebook."[176] These Pages, "masquerading as legitimate news publishers," post fake news stories in the hopes that people will click on them and be directed to their websites, "which are often mostly ads."[177] As more individuals click the fake news stories, ad revenue increases,[178] turning the fake news market into a lucrative venture.

Though still in its beginning phases, Facebook's approach to countering fake news appears promising. The company smartly recognizes that many fake news creators are financially motivated.[179] By restricting creators' ability to run advertisements on its platform, Facebook makes fake news less profitable. This, in turn, may reduce the number of individuals creating fake news. In addition, by presenting additional, fact-checked articles alongside false ones, Facebook has begun to foster an environment in which its users are exposed to various accounts of a particular issue. Equipping users with multiple sources encourages them to undertake their own research, think critically about the stories presented, and evaluate for themselves what is accurate and what is not. Finally, by reducing the visibility of news articles and publishers that users have rated as untrustworthy, Facebook seemingly exemplifies the theory of the marketplace of ideas—that truth competes with, and ultimately overcomes, falsity.

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[173] Ong, *supra* note 163.

[174] Satwik Shukla & Tessa Lyons, *Blocking Ads from Pages that Repeatedly Share False News*, FACEBOOK: NEWSROOM (Aug. 28, 2017), https://newsroom.fb.com/news/2017/08/blocking-ads-from-pages-that-repeatedly-share-false-news/.

[175] *See Create a Page*, FACEBOOK, https://www.facebook.com/pages/create.php (last visited Mar. 17, 2018).

[176] Shukla & Lyons, *supra* note 174. Pages may earn the privilege of running ads again if they stop sharing fake news. *Id.*

[177] *How Facebook is Addressing False News*, *supra* note 153.

[178] *See id.*

[179] *See supra* notes 112–114 and accompanying text.

Facebook's approach, however, is not entirely flawless. One potential problem with Facebook's approach is that it may result in under-inclusive enforcement, leaving it less efficient than it could be. Zuckerberg has emphasized that his "focus [is] on fighting spam, not flagging opinions."[180] He explained, "For example, we're focused on obvious hoaxes with headlines like 'Michael Phelps just died of a heart attack' designed to get people to click on the stories and see ads."[181] Creators of fake news may then respond by changing titles in a manner that sounds less sensational but is still enticing enough to encourage viewers to click on them. Creators may also qualify their titles with such words as "opinion" or "editorial," which may impede Facebook's efforts to drive these creators from the marketplace.

Perhaps a larger concern, however, lies in the platform's heavy reliance on and deference to its users to detect fake news. The convincing appearance of some fake news outlets may make it difficult for users to correctly identify them as fake. This may result in fewer articles being reported to Facebook as false stories, which in turn decreases the chance that the stories will be investigated by fact checkers. Additionally, although Zuckerberg believes that "hav[ing] the [Facebook] community determine which sources are broadly trusted would be the most objective,"[182] Facebook users are often exposed to news and other stories that conform to their own beliefs and ideology.[183] Therefore, when asked whether a particular source is trustworthy or untrustworthy, users may be inclined to rate the source favorably, as rating it negatively may seem counterintuitive and antagonistic to their viewpoints. Alternatively, users may rate as untrustworthy a source with which they disagree, even if the story is factual and presented by an established institution. Facebook's attempts to place untrustworthy sources (*i.e.*, fake news) at the bottom of users' news feeds and trustworthy sources (*i.e.*, legitimate news) at the top, then, is compromised and potentially inaccurate. To counteract the role that user bias may play in selecting trustworthy news sources, Facebook should focus on strengthening its use of fact checkers, providing them a more

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[180] Heath, *supra* note 161.

[181] *Id.*

[182] Mark Zuckerberg Facebook Post, *supra* note 165.

[183] *See* Regina Mack, *Assessing the Negative Effects of Fake News*, IND. DAILY STUDENT (Nov. 17, 2016, 7:49 PM), http://www.idsnews.com/article/2016/11/assessing-the-negative-effects-of-fake-news ("Social media tends to personalize what we are interested in . . . This creates what are called echo chambers, where people are exposed to information that tends to confirm what they already believe and isolates them from ideologically different opinions and news.").

active role in seeking out fake news articles and publishers rather than relying primarily on users' reports.

These concerns are minor, though, when compared to the alternative of allowing the government to regulate fake news. It is unrealistic to believe that all fake news can be eliminated from the Internet; as it is driven away from one platform, it will only move on to another. As a general matter, though, Facebook's plans seem promising, and tweaks may be made as they progress. Perhaps as Facebook becomes more comfortable in its role as fact-checker, and partners with more fact-checking organizations, it can expand its approach to fake news in a manner that relies less on user reporting and more on neutral, third-party institutions.

Individual monitoring and reporting from users is still undeniably important. Citizens should actively question, criticize, and check their government and political leaders. Doing so is a necessary element of democracy, a form of government on which the United States prides itself. However, if the fake news problem is as concerning as some individuals make it out to be, then individuals must engage in their own form of counterspeech and fact-checking; they must continuously call out fake news, either through some labeling and reporting system (such as the one used by Facebook) or through words of their own.

The most important element of social media regulation is that it remain truly independent from the government. For example, the government should not offer financial or other incentives to social media websites to encourage them to adopt regulatory measures. While this may make such regulation more enticing, there exists a danger that social media sites will bow to partisan funds, completely undermining the purpose of the regulation. To be successful, Facebook and similar domains must be truly free from federal or state oversight. Nonpartisan, ethical journalists and fact-checkers—and not the government—must remain the driving force behind regulating fake news.

CONCLUSION

Fake news is a centuries-old phenomenon[184] that experienced a recent resurgence beginning around the 2016 U.S. presidential election. The term and its analogues are thrown out by politicians, journalists, and ordinary citizens alike, each of whom has his own interpretation of what "fake

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[184] Soll, *supra* note 13.

news" means.[185] This has led to some confusion about the true definition of fake news. However, there appears to be a consensus that it ultimately refers to deliberately false or misleading information, disguised as legitimate news, meant solely to deceive the public, perhaps in part for financial gain. It feeds off of emotions and sensationalism, while facts and objectivity are left behind. It has the potential to affect well-known public figures, but can bring collateral harm to private citizens as well.

In an age where (1) public mistrust of mainstream media appears to be increasing,[186] (2) social media has become a primary source from which to find and share news,[187] (3) there is growing concern that fake news negatively and materially impacts the political process,[188] and (4) a majority of Americans believe that fake news should not be protected under the First Amendment,[189] one can perhaps understand the calls for regulation. Fake news has no apparent social value and arguably does more harm than good.

Any regulation, however, must not come from the government. Allowing the government to control any form of speech, no matter how undesirable the speech may be, presents chilling concerns of state-sponsored censorship and propaganda, particularly when elected officials have differing opinions as to what constitutes fake news. Moreover, *United States v. Alvarez* makes it clear that criminalization of false statements merely because they are false will not receive the same deferment that other pieces of legislation may.[190] Such laws implicate a core principle of the Constitution—the freedom of speech—and the government must satisfy exacting scrutiny in order for its law to stand. In *Alvarez*, the government failed to do this. In the realm of fake news, the government may fail again.

Instead, social media websites, which in large part account for the spread of fake news, should lead the charge in regulating the production of fake news. Ideally, this would allow for genuinely neutral, third-party fact-checkers to serve as monitors of news. Indeed, websites such as Facebook and Google have already taken steps in this direction, exemplifying the existence of counterspeech that may prohibit the need for government intervention.

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[185] *See supra* text accompanying note 41.
[186] *Supra* notes 58–62 and accompanying text.
[187] Gottfried & Shearer, *supra* note 136.
[188] Solon, *supra* note 12.
[189] *The State of the First Amendment, supra* note 28.
[190] *See supra* Part II.

Ultimately, however, the monitoring of fake news must come from individual citizens themselves, aided perhaps by courses that encourage the use of critical thinking, instruct on media literacy, and provide techniques on how to identify fake news. These skills are necessary to a free democracy. The lack of such skills creates room for the government to step in and decide which speech is true and which is false, leaving the First Amendment compromised. This is undesirable, and contrary to what the Founders envisioned. After all, "suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates."[191]

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[191] United States v. Alvarez, 567 U.S. 709, 728 (2012) (plurality opinion).