

University of Miami Law School
University of Miami School of Law Institutional Repository

Articles

Faculty and Deans

2018

Real "Fake News" and Fake "Fake News"

Lili Levi

University of Miami School of Law, llevi@law.miami.edu

Follow this and additional works at: https://repository.law.miami.edu/fac_articles



Part of the [Communications Law Commons](#), and the [First Amendment Commons](#)

Recommended Citation

Lili Levi, *Real "Fake News" and Fake "Fake News"*, 16 *First Amend. L. Rev.* 232 (2018).

This Article is brought to you for free and open access by the Faculty and Deans at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

REAL “FAKE NEWS” AND FAKE “FAKE NEWS”

Lili Levi*

Introduction.....	233
I. “Fake News” and the Press in the Age of Trump... A. Taxonomies of “Fake News”..... B. The Weaponization of Fabricated “Fake News”..... C. Trump’s Relentless Critique of the Mainstream Press As “Fake News”..... D. The Threat of “Fake News” Beyond Politics.....	244 245 248 257 262
II. Increased Instability in Formal and Informal Press Protections..... A. A Press-Skeptical Legal Turn..... B. Reductions in Customary Privileges..... C. Harassment and Danger..... D. Press Self-Censorship.....	265 268 279 280 282
III. Solutions to the Problem of “Fake News”?..... A. Platforms: Technological and Disclosure-Based Self-Regulatory “Fixes”..... 1. Current Self-Regulatory Initiatives by Facebook..... 2. Assessing Platform Self-Regulation..... a. Effectiveness..... b. Desirability..... c. The Honest Ads Act and Other Regulatory Possibilities..... B. Audience Empowerment—Information Literacy and Improving the Effectiveness of Corrections.....	284 285 286 290 290 298 302 309
IV. A Counterintuitive Option? Empowering the Press to Enhance Public Trust..... A. Press Preferences..... B. Revised Press Practices.....	316 317 321

* Professor of Law, University of Miami School of Law. I owe many thanks to Caroline Bradley, Drew Dawson, Lyrissa Lidsky, Helen Norton, Anne Louise Oates, Andres Sawicki, Melissa Serna, Steve Schnably, Ralph Shalom, and Sylvia Shapiro for helpful comments, and to Jim Nichol for source references. Rick Hasen deserves gratitude for his title revision suggestion. Thanks also to RonNell Andersen Jones for her comments on an early version of these ideas (presented at the August 2017 SEALS Workshop on Trump and the First Amendment), and to participants in the First Amendment Law Review Symposium at UNC in October 2017. I am grateful to Blayne DeGiovanni, Samantha Finkel, and Corey Graber for able research assistance, and to Justin Stern for volunteering extraordinary help at the last minute. All remaining errors are my own.

Conclusion.....	325
-----------------	-----

INTRODUCTION

“Fake news” has become the central inflammatory charge in media discourse in the United States since the 2016 presidential contest.¹ The phrase has numerous meanings, and the phenomenon presents a spectrum of dangers.² In the political realm, both intentionally fabricated information³ and

¹ A search of the *New York Times* database on September 26, 2017, showed almost 1500 articles mentioning “fake news.” See *N.Y. Times: Search*, <https://query.nytimes.com/search/sitesearch/?action=click&contentCollection®ion=TopBar&WT.nav=searchWidget&module=SearchSubmit&pgtype=Homepage#/22fake%20news%22> (last visited Sept. 26, 2017).

In keeping with the centrality of “fake news,” the Oxford English Dictionaries dubbed “post-truth” the word of the year for 2016. See *Word of the Year of 2016 is . . .*, <https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016> (last visited Mar. 14, 2018) (defining post-truth as “an adjective defined as ‘relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief’”).

² See *infra* Section I. The distinction between “real” fake news and “fake” fake news in the title of this piece is a crude attempt to capture the spectrum of what is meant by the various uses of the term. At one end of the spectrum is “real” fake news—meaning intentionally fabricated misinformation. This kind of “fake news” consists of the dissemination of falsity, in whole or in part—whether for economic or political reasons. (This Article distinguishes this kind of intentionally fabricated falsity from mainstream press errors, inaccuracies, incompleteness and even slanted presentation of news and information.) At the other end of the spectrum is the use of the “fake news” phrase as a strategic tool to cast doubt on the truthfulness and credibility of standard mainstream news reporting organizations. Of course, the deployment of each type of “fake news” can undermine public trust in the truth of what is reported.

³ The 2016 election season saw the viral distribution of numerous factually inaccurate claims regarding political figures or events. For example, false reports circulated that Pope Francis endorsed the candidacy of Donald Trump, see Sydney Schaadel, *Did the Pope Endorse Trump?*, FACTCHECK.ORG (Oct. 24, 2016), <http://www.factcheck.org/2016/10/did-the-pope-endorse-trump/>; that Hillary Clinton was involved in a child trafficking ring operating out of a popular DC pizza parlor, see, e.g., Cecilia Kang & Adam Goldman, *In Washington Pizzeria Attack, Fake News Brought Real Guns*, N.Y. TIMES (Dec. 5, 5, 2016), <https://www.nytimes.com/2016/12/05/business/media/comet-ping-pong-pizza-shooting-fake-news-consequences.html>; that Russian operatives had hacked the US power grid, see Kalev Leetaru, *'Fake News' And How The Washington Post Rewrote Its Story On Russian Hacking Of The Power Grid*, FORBES (Jan. 1, 2017, 2:31 PM), <https://www.forbes.com/sites/kalevleetaru/2017/01/01/fake-news-and-how-the-washington-post-rewrote-its-story-on-russian-hacking-of-the-power-grid/#f1d38377ad51>; and that Democrats had killed a DNC staffer in order to prevent him from testifying against Hillary Clinton in an FBI investigation into her use of a private email server, see Kim LaCapria, *Seth Rich Homicide: A Conspiracy Site Latched Onto the Tragic Murder of Young DNC Staffer Seth Rich to Spread False Information About His Killing*, SNOPES, <http://www.snopes.com/seth-conrad-rich> (last updated Aug. 10, 2016). Some of the fabricated news was motivated by the economic desire to generate income from clickbait, see Samantha Subramanian, *Inside the Macedonian Fake-News Complex*, WIRED (Feb. 15, 2017), <https://www.wired.com/2017/02/veles-macedonia-fake-news/>, while some was generated to advance ideological and/or political aims, see, e.g., Scott Shane, *The Fake Americans Russia Created to Influence the Election*, N.Y. TIMES (Sept. 7, 2017),

the “fake news” defense by politicians confronted with negative press reports⁴ can potentially influence public beliefs and possibly even skew electoral results.⁵ Perhaps even more insidiously, the “fake news” accusation can serve as a power-shifting governance mechanism to delegitimize the institutional press as a whole.⁶ In that spirit, President Trump has deployed the “fake news” trope to demonize and dismiss the traditional press as the “enemy of the American people.”⁷ Both these strategic uses of “fake news”—to achieve specific political results⁸ and to destabilize the press as an institution—are self-

<https://www.nytimes.com/2017/09/07/us/politics/russia-facebook-twitter-election.html>.

⁴ For example, both during the electoral campaign and after his election, Donald Trump consistently responded to negative press coverage by characterizing unfavorable reports as “fake news.” See, e.g., Donald Trump (@realDonaldTrump), Twitter (Oct. 4, 2017, 7:47 AM), <https://twitter.com/realdonaldtrump/status/915589297096536065?lang=en>; Donald Trump (@realDonaldTrump), TWITTER (Dec. 24, 2017, 5:48 AM), <https://twitter.com/realdonaldtrump/status/952301373479104512?lang=en>; Donald Trump (@realDonaldTrump), TWITTER (Jan. 13, 2018, 2:08 PM), <https://twitter.com/realdonaldtrump/status/952301373479104512?lang=en>.

This emboldened other public figures to do the same. See, e.g., Brian Resnick, *Exclusive: Roy Moore Campaign Distributes “Primer” On How To Discredit Accusers, “Fake News”*, VOX (Dec. 11, 2017, 11:00 AM), <https://www.vox.com/policy-and-politics/2017/12/8/16754470/roy-moore-campaign-talking-points-debunk-sexual-allegations> (discussing the campaign position of controversial Senate candidate Roy Moore with respect to news reports of sexual molestation of teenage girls).

⁵ See *infra* note 13 and accompanying text.

⁶ By traditional institutional press, I refer to national, regional, and local print news organizations such as *The New York Times*, *The Washington Post*, *The Wall Street Journal*, *The Chicago Tribune*, *The Miami Herald*, etc. The electronic institutional press would include entities such as the broadcast networks (ABC, CBS, NBC), CNN, MSNBC, and CSPAN.

The Trump approach now is not just to dispute the accuracy of particular stories or accounts of factual events, but to label “real news” as “fake” simply if it does not support the executive’s version of events. See *supra* note 4. This indicates “a comprehensive, categorical labeling rather than a narrower critique of particular coverage” RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 AZ. ST. L. J. 1301, 1314 (2018). Of course, in addition to the broadside “fake news” attack on the press as an institution, President Trump also continues to use the phrase to challenge the accuracy of specific news stories about him. See, e.g., Billy Bush, *Yes, Donald Trump, You Said That*, N.Y. TIMES (Dec. 3, 2017), https://www.nytimes.com/2017/12/03/opinion/billy-bush-trump-access-hollywood-tape.html?_r=0 (responding to President Trump’s recent suggestion that an unflattering recording in which he admits to sexual misconduct was faked).

⁷ Michael M. Grynbaum, *Trump Calls the News Media the ‘Enemy of the American People’*, N.Y. TIMES (Feb. 17, 2017), <https://www.nytimes.com/2017/02/17/business/trump-calls-the-news-media-the-enemy-of-the-people.html>; see also Andrew Higgins, *Trump Embraces ‘Enemy of the People,’ A Phrase With A Fraught History*, N.Y. TIMES (Feb. 26, 2017), <https://www.nytimes.com/2017/02/26/world/europe/trump-enemy-of-the-people-stalin.html> (describing use of phrase by Stalin and Mao, among other authoritarian leaders).

⁸ The strategic dissemination of fake information is also infecting the processes of regulatory rule-making today. See, e.g., Paul Hitlin, Kenneth Olmstead & Skye Toor, *Public Comments to the Federal Communications Commission About Net Neutrality Contain*

evidently very dangerous for democracy.⁹ If the press is to help ensure government accountability by serving as democracy's watchdog, it cannot simultaneously be perceived as democracy's enemy. If public discourse is flooded with false information, at a minimum, voters will not know what to believe. Incompetence, demagoguery, and corruption¹⁰ in the public realm are a likely result. Moreover, as if this were not a sufficient threat to the democratic order, "fake news" is also a threat, *inter alia*, to the stability of the financial markets as well, with the ability to disrupt markets "on an unprecedented scale."¹¹ Whether for competitive advantage, terror, or geopolitical gamesmanship, the deployment of market-affecting fabricated information is a looming danger ahead. Simply put, therefore, "fake news" presents profound—and likely increasing—challenges for both the public *and* private spheres today.

Of course, intentionally false news (variously referred to as propaganda, misinformation, and disinformation) is hardly a new phenomenon, either in politics or in commerce.¹² And government officials preceding Donald Trump have certainly indulged in press-bashing.¹³ But circumstances are importantly

Many Inaccuracies and Duplicates, PEW RESEARCH CTR. (Nov. 29, 2017), <http://www.pewinternet.org/2017/11/29/public-comments-to-the-federal-communications-commission-about-net-neutrality-contain-many-inaccuracies-and-duplicates/> (reporting what appeared to be strategic use of bot-generated comments, many apparently using fake identifying information, in comments filed with the Federal Communications Commission's proceeding on the rollback of net neutrality rules).

⁹ For a view that enemy construction of the press should be seen through a Schmittian lens as an invitation to the destabilization of other institutions beyond the press as well, see Jones & Sun, *supra* note 6; *see also* Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 NYU L. REV. (forthcoming 2018) (identifying "new forces at work that should make us concerned that the same disease plaguing today's political dialogue will infect (or further infect) the judiciary").

¹⁰ See Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 209–211 (2018) (suggesting that local and regional corruption is likely to result from a decline in robust local and regional media covering statehouses).

¹¹ Tom C. W. Lin, *The New Market Manipulation*, 66 EMORY L.J. 1253, 1292–94 (2017) (describing, *inter alia*, threats of mass misinformation); *see also infra* Section III.B.

¹² From Octavian's false claims about Mark Anthony's last will to George Orwell's War of the Worlds broadcast, history is rife with notable examples of fabricated news. *See, e.g.*, Lionel Barber, *Fake News In The Post-Factual Age*, FIN. TIMES (Sept. 16, 2017), <https://www.ft.com/content/c8c749e0-996d-11e7-b83c-9588e51488a0>; *see generally* Michael C. Dorf & Sidney G. Tarrow, *Stings and Scams: 'Fake News,' the First Amendment, and the New Activist Journalism*, 20 J. CONST. L. 1 (2017) 1 (describing the growth in volume and intensity of "fake news" on the Internet for several years prior to the 2016 US presidential election).

¹³ How can one forget that Vice President Agnew, speaking William Safire's words, famously characterized the press as "nattering nabobs of negativism" during the

different today. We now find ourselves in an informational environment where technology enables psychometric targeting, information floods, and filter bubbles;¹⁴ a political environment typified by escalating polarization, extremism, and distrust; a commercial environment in which financial markets depend on high-speed trading by bots; and a journalistic environment marked by economic pressure, declining shared norms, a resurgent partisan media, harassment of journalists, and increasing uncertainty about the degree of remaining legal and non-legal protection for the press.

Thus, the various flavors of “fake news” today present a powerful threat because of enhanced technology, political polarization, and reduced public trust in increasingly precarious traditional accountability institutions. The dark side of “cheap speech”¹⁵ is that technology enables the increasingly effective weaponization of fabricated information and facilitates the global implementation of speech control strategies by governments and others in pretended response to public concern over “fake news.” The sitting President’s relentless critique of the mainstream press, when joined with technologically weaponized “fake news” being disseminated to a politically polarized public, undermines already-fragile public trust in the press.¹⁶ The issue is particularly complex because of the party asymmetry in views about “fake news”¹⁷ and the asymmetric polarization of media.¹⁸ And the traditional press’s

Nixon Administration? See David Remnick, *Nattering Nabobs*, NEW YORKER (July 10, 2006), <https://www.newyorker.com/magazine/2006/07/10/nattering-nabobs>.

¹⁴ See, e.g., Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMEND. INST. (September 2017), <https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete> (describing noxious characteristics of the current information environment). The term “filter bubble,” coined by Eli Pariser, refers to the tendency of personalization on the web to offer users only news consistent with their world views and preferences. See ELI PARISER, THE FILTER BUBBLE: HOW THE NEW PERSONALIZED WEB IS CHANGING WHAT WE READ AND HOW WE THINK (2011).

¹⁵ This refers to Professor Eugene Volokh’s early-in-the-history-of-the-Internet-Age article, *Cheap Speech and What It Can Do*. See Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995) (discussing the likely effects of virtually costless opportunities for speech on the Internet).

¹⁶ See *infra* note 23 and accompanying text.

¹⁷ See David Lazer et al., *Combating Fake News: An Agenda For Research and Action*, SHORENSTEIN CTR. (2017), <https://shorensteincenter.org/combating-fake-news-agenda-for-research/> (“[M]isinformation is currently predominantly a pathology of the right”). The left also appears credulous, however. See, e.g., Ken Bensinger, Jason Leopold & Craig Silverman, *The 1.6 Billion Dollar Hoax*, BUZZFEED (Mar. 15, 2017, 6:24 AM), https://www.buzzfeed.com/kenbensinger/how-donald-trumps-enemies-fell-for-a-billion-dollar-hoax?utm_term=.nn8O6Zn4v#.taEBQYgVy (describing “[a]n elaborate hoax based on forged documents escalates the phenomenon of “fake news” and reveals an audience on the left that seems willing to believe virtually any claim that could damage Trump”).

¹⁸ See Rob Faris et al., *Partisanship, Propaganda, and Disinformation: Online Media and the 2016 U.S. Presidential Election*, HARVARD UNIV. BERKMAN KLEIN CTR. (Aug. 16,

ability to counteract “fake news” and act as watchdog over government activity and private power is diluted by a variety of increasing constraints.¹⁹ Such threats come not only from the press’s financial woes, but from a judicial turn away from press protection and a decline in customary press privileges.²⁰

The nature of the hazards posed by the phenomenon of “fake news” can best be understood against the background of these developments. They reveal that no single—or simple—tactic can address the variety of challenges posed by the multi-headed phenomenon of “fake news.” Nor should it. Because the issue of the relationship between the press, the government, and the public is so profoundly important and difficult; because “fake news” is such a multi-faceted and evolving phenomenon; and because today’s information environment is so complicated, proposing remedies to address the problem requires great care and restraint.

In that spirit, this Article suggests beginning with a three-pronged approach—focusing on platform self-regulation, audience information literacy, and empowerment of the press itself.²¹ The recommendations relating to platforms and

2017), <https://cyber.harvard.edu/publications/2017/08/mediacloud>; *see also* Michael Barthel & Amy Mitchell, *Americans’ Attitudes About the News Media Deeply Divided Along Partisan Lines*, PEW RESEARCH CTR. (May 10, 2017), http://assets.pewresearch.org/wp-content/uploads/sites/13/2017/05/09144304/PJ_2017.05.10_Media-Attitudes_FINAL.pdf; *see also* Vidya Narayanan et al, *Polarization, Partisanship and Junk News Consumption over Social Media in the US*, UNIV. OXFORD: COMPUTATIONAL PROPAGANDA PROJECT (Feb. 6, 2018), <http://comprop.ox.ac.uk/wp-content/uploads/sites/93/2018/02/2018-1.pdf>. (finding that the distribution of fake and other “junk” news is “unevenly spread across the ideological spectrum” and that a network of “extreme hard right pages—distinct from Republican pages—share the widest range” on Facebook).

¹⁹ For an argument that the construction of the press as an enemy by the Trump Administration has undermined not only the ability of the press to serve as watchdog of government, but also the press’s function as educator and public proxy, see Jones & Sun, *supra* note 6.

²⁰ For another article noting the decline in customary privileges for the press, see RonNell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. ONLINE 47 (2017), http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1251&context=nulr_online.

²¹ There is little consensus, studies tell us, on whether the many suggested solutions for “fake news” are likely to be successful. *See* Janna Anderson & Lee Rainie, *Internet and Technology, The Future of Truth and Misinformation Online*, PEW RESEARCH CTR. (Oct. 19, 2017), <http://www.pewinternet.org/2017/10/19/the-future-of-truth-and-misinformation-online/>; *see also* Laura Hazard Owen, *There Is ‘Nothing Resembling Consensus’ About Whether the Online Misinformation Problem Can Actually be Solved*, NIEMANLAB (Oct. 19, 2017), <http://www.niemanlab.org/2017/10/there-is-nothing-resembling-consensus-about-whether-the-online-misinformation-problem-can-actually-be-solved/> (describing split among experts as revealed by recent Pew report). That there is no assurance, however, does not mean that a multi-valent approach to amelioration is not worth exploring.

audiences are designed principally to address the problem of fabricated stories. The recommendation with respect to the press is designed to redress the costs to institutional legitimacy of calling the mainstream media as a whole “fake news.” The goal is to try to achieve a virtuous circle, with each prong reinforcing the others in order to reduce harms attributable to both types of “fake news” charges. The Article does not recommend express governmental attempts to prohibit or limit “fake news” directly.²² It does, however, recommend legislative and judicial expansion of affirmative rights for the press. Demonized by the right, the mainstream press today seems poised to be swept into the left’s recent attempts to desacralize the First Amendment on the ground of its “ideological drift”²³ to the right. The Article suggests that progressive scholars’ critiques of recent libertarian doctrinal developments with respect to the freedom of *speech*²⁴ should in no way impede the enhancement, recommended here, of the First Amendment’s protections for a free and independent *press*.

The Article’s first recommendation focuses on self-regulation by major information intermediaries.²⁵ Data suggests

²² Instead of attempting to mandate prohibitions on “fake news,” the Article first seeks to explore the possibilities of self-regulatory approaches because of concerns about official censorship. See *Joint Declaration on Freedom of Expression and “Fake News,” Disinformation and Propaganda*, OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS (Mar. 3, 2017), http://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Issues/Expression/JointDeclaration3March2017.doc&action=default&DefaultItemOpen=1 [hereinafter *Joint Declaration*] (joint declaration by UN Special Rapporteur for Freedom of Expression and others, recognizing threat of fake news but warning against censorship in regulation). The Article assumes that voluntarily-adopted counter-measures are preferable to mandated prohibitions, and asserts that framing the issue correctly could lead to fruitful self-regulatory efforts—particularly when information intermediaries and other commercial market participants come to see the self-regulation of “fake news” as in their long-term economic self-interest. This Article *does* see a place for government rules—not in prohibiting “fake news,” but in mandating enhanced press rights so that the press can effectively serve its watchdog function and begin to rebuild public trust. *See infra* Section IV.

²³ Professor Jack Balkin coined the phrase “ideological drift” to describe shifts in constitutional interpretation in which radical or liberal ideas become mainstream orthodoxy and are then appropriated by conservatives. *See* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383 (1990) (noting that ideological drift can move from right to left or left to right, but is more commonly reflected in “comparatively liberal principles that later serve to buttress comparatively conservative interests.”); *see also* J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869 (1993).

²⁴ *See supra* note 14 and accompanying text.

²⁵ *See infra* Section III.A. As Jack Balkin has persuasively argued, these intermediaries are now the central factors in the private governance of free speech. *See, e.g.*, Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 52 U.C. DAVIS L. REV. (forthcoming 2018). I use the term “self-regulation” here not to deny that reality, but to distinguish their regulatory decisions from those mandated by legislatures or courts.

that much fabricated news has been circulated virally through the predominant social media platforms. Thus, the first step in addressing the problem would be to focus on those platforms and look to ways to dis-incentivize the generation and dissemination of factually false stories.²⁶ Powerful news intermediaries like Facebook and Google have already begun their own self-regulatory exercises, variously relying on algorithmic identification of problematic content, fact-check disclosure approaches, and attempts to prioritize high quality news content.²⁷ The platforms' interests in reputation and customer satisfaction are likely to exert non-legal pressure on, and provide alternative incentives for, such self-regulatory efforts. The principal questions here will concern the effectiveness of the platforms' private solutions in light of their own economic incentives in the advertising marketplace, and the appropriateness of turning powerful intermediaries such as Google and Facebook into private censors.

In addition to technological solutions²⁸ with which the platforms are experimenting, the Article recommends that information intermediaries adopt expanded sponsorship disclosure obligations in connection with their ad sales. If targeted psychometric marketing of "fake news" in order to exploit people's weaknesses can be disrupted (at least to some degree) via disclosures, then the perfect storm of "fake news" and the "AI propaganda machine"²⁹ might be more easily deflected. Promises of this sort have already been made by Facebook founder Mark Zuckerberg³⁰ in the shadow of pending legislation;³¹ remaining issues include Facebook's follow-through and the position of other major platforms.

²⁶ This Article's recommendations with respect to platform regulation and audience self-help are geared principally to constraining the fabricated content type of "fake news." The recommendations with regard to the press itself are geared to the use of the "fake news" label as a press-delegitimizing governance and discipline tactic.

²⁷ See *infra* Section III.

²⁸ Technology-based "fake news solutions" beyond the platforms's current initiatives are developing as well. Perhaps the most innovative such suggestion is a proposal for blockchain-enabled decentralized journalism. Civil, the first journalism marketplace of this sort, is a proselytizer for how blockchain will reputedly eliminate all fake news. See CIVIL, <https://joincivil.com/>; see also *infra* Section III.

²⁹ Berit Anderson & Brett Horvath, *The Rise of the Weaponized AI Propaganda Machine*, SCOUT (Feb. 9, 2017), <https://scout.ai/story/the-rise-of-the-weaponized-ai-propaganda-machine>.

³⁰ See, e.g., Hamza Shaban & Matea Gold, *Facebook, Google and Twitter Face Proposed Bill Targeting Shadowy Political Ads*, WASH. POST (Sept. 22, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/09/22/facebook-google-and-twitter-could-face-a-new-law-targeting-shadowy-political-ads/?utm_term=.a164babf66e4.

³¹ See *infra* Section III.A.2.c (discussing the pending Honest Ads Act).

Virtually all of the scholarly discussions of “fake news”—including this Article—focus principally on the need to solve the problem because of the political threat it poses to elections and democracy. Yet framing the issue as primarily a political matter misses the fact that *both* politics and commerce are threatened by the proliferation of “fake news.” Recognition of that reality would align the incentives of those concerned about market integrity with those concerned about elections and democracy. More widespread and sincere commitment to the exploration of effective “fake news” counter-responses could emerge as a result. Corporate entities today are all aware (many from experience) that they are potential victims of hacks and data breaches, and now increasingly interpret cybersecurity as a corporate responsibility (although admittedly with varying degrees of success). Framing the “fake news” problem in a way that analogizes it to cybersecurity is likely to trigger commercial entities’ “buy-in” to the project of reducing “fake news.” This is not to minimize the importance of “fake news” to democracy, nor is it to assume that the solutions to the “fake news” threats to financial markets are necessarily the same as the solutions to the threats in the political context. Rather, it is to recognize that self-regulation efforts are more likely to succeed if they enlist the practical and sincere commitment of participants in both the political and commercial domains.

Still, a focus on technological solutions and platform self-regulation alone is unlikely to be either sufficient or unambiguously desirable. Thus, a second recommendation for dealing with “fake news” would be to address how to empower audiences in their ability to distinguish “fake news.” Calls for critical media literacy have been around for many years.³² But if today’s barrage of Internet-spread “fake news” can really influence political and commercial outcomes, then it is important to examine at a granular level what kinds of interventions could actually succeed in helping the public distinguish true from false information better than they currently do. The challenge here is to create more successful tools by incorporating the insights of political science and modern cognitive psychology concerning the effectiveness of corrections in light of cognitive biases and in contexts in which people operate within political echo chambers.³³

³² See, e.g., Douglas Kellner & Jeff Share, *Critical Media Literacy Is Not An Option*, 1 LEARNING INQUIRY 59 (2007) (arguing that critical media literacy is an imperative for participatory democracy in the 21st Century).

³³ See, e.g., S.I. Strong, *Alternative Facts and the Post-Truth Society: Meeting the Challenge*, 165 U. PA. L. REV. ONLINE 137 145–46 (2017),

Research has begun to emerge addressing this issue, and various cognitive biases have been identified correlating with people's susceptibility to "fake news."³⁴ Empirical data to date do not appear to have reached full consensus on the impact of those biases or what corrective information designs might neutralize them effectively. Still, some research suggests that people are likely to change their beliefs when they are challenged by surprising validators, and that their beliefs can be influenced by the choice of style, format, and context-recognition in factual corrections. Further research will be needed so that "the new media literacy" approach can properly drive policy.

In addition to effectiveness, the principal issue with respect to this aspect of the Article's recommendations is likely to be whether the proposed new approach to information literacy might itself present a legitimacy trap. In other words, structuring media literacy with a view to avoiding cognitive biases which lead to the viral spread of falsity can itself end up replicating the very kind of manipulation that it is designed to combat. That is an important risk to avoid.

Abstracting out from the correction of false stories, the Article's third set of recommendations focuses on ways to push back against the delegitimizing effects of the "fake news" charge when it is used as an overall institutional attack on the press. The goal here is to generate a counter-narrative of press function to re-legitimate the press and promote audience trust. The current informationscape ironically represents the very moment when the press can come into its own. It can do so by engaging in excellent investigation and reporting and rebuilding public trust. But how?

First, the tools. Scholars have highlighted the disparity in First Amendment protections of publication and newsgathering and decried the extensive constitutional protection of false speech as opposed to the minimal protection of truth-seeking newsgathering.³⁵ Even before the Trump Administration, during the Obama years, both doctrine and practice had begun to scale back protections for journalistic activity.³⁶ In addition to continuing—and even enhancing—

http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1193&context=penn_law_review_online; *see also infra* Section III.B.

³⁴ *See infra* Section III.B.

³⁵ *See* Dorf & Tarrow, *supra* note 12.

³⁶ *See, e.g.*, James Risen, *If Trump Targets Journalists, Thank Obama*, N.Y. TIMES (Dec. 30, 2016), <https://www.nytimes.com/2016/12/30/opinion/sunday/if-donald-trump-targets-journalists-thank-obama.html> (discussing Obama Administration's approach to the press); *see also infra* Section II.A.

those developments, the Trump Administration has notably diminished customary, informal press-privileging practices.³⁷ And modern court practice—even with respect to publication—appears to be taking a less press-protective turn. The principal doctrinal recommendation on this front—perhaps counter-intuitively—is to reverse those trends and *increase* press protection, especially for newsgathering, protection from leak prosecutions, and balancing newsworthiness with other values. The recommendation to reverse current doctrine and practice is grounded on the bet that the modern context of “fake news” provides an opportunity for the press to shine in its watchdog role. The law should give the press more access to the information it needs to cover the “real” (and not the distracting) news in greater depth and more accurately.

Then the ethics and practice. If granted these enhanced protections, the press, in turn, must live up to them. It must address its journalism standards, engage in serious journalism and investigative work enabled by the expanded press protections recommended here, focus on reporting rather than opinion (perhaps eliminating the op-ed page, for example), be more transparent with the public about its norms and processes, resist having its agenda respond to that of the partisan media ecosystem,³⁸ and work “to avoid being drawn into alignment with either of the parties.”³⁹

The results will surely be imperfect, but the alternative is worse: a neutered and supine press operating merely to entertain the fragmented and polarized audience in an increasingly authoritarian global political environment.

The Article proceeds as follows. Section I describes the phenomenon of “fake news,” addresses various taxonomies of “fake news,” and situates the two ways in which “fake news” is

³⁷ See generally Jones & West, *supra* note 20 (describing some such diminutions); Carol Pauli, *Enemy of the People: Negotiating News at the White House* (Texas A&M Univ. Sch. of Law Legal Studies Research Paper No. 17–49, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007970 (same); see also *infra* Section II.B.

³⁸ See Yochai Benkler et al., *Study: Breitbart-Led Right-Wing Media Ecosystem Altered Broader Media Agenda*, COLUM. J. REV. (Mar. 3, 2017), <https://www.cjr.org/analysis/breitbart-media-trump-harvard-study.php> (noting how “a right-wing media network anchored around Breitbart developed as a distinct and insulated media system” that set the agenda for both the conservative media and “strongly influenced the broader media agenda.”)

³⁹ Andrew Guess, Brendan Nyhan & Jason Reifler, “*You’re Fake News!*” *The 2017 Poynter Media Trust Survey*, POYNTER (Nov. 29, 2017), <https://poyntercdn.blob.core.windows.net/files/PoynterMediaTrustSurvey2017.pdf>. This is particularly important because of the distrust fomented by despite the increasingly politicized media landscape fostered by Democratic support for the press and unrelenting attacks on the media from the White House. *See id.*

deployed in the news media's relationship to government in the age of Trump. Section I.A describes various taxonomies of "fake news." Section I.B explains the ways in which fabricated news has been weaponized by artificial intelligence ("AI"), social media dissemination, and public skepticism about the press and other authoritative social institutions. Section I.C lays out the impact on public trust of relentless presidential critique of the press. Finally, Section I.D notes the threats posed by the various types of previously discussed "fake news" outside the context of politics—and specifically with respect to the financial markets. Then, Section II describes the instability in—and indeed extensive reduction of—press privilege that has been occurring in judicial and administrative decisions, legislative action, customary accommodations, and the treatment of journalists. It also describes the complexity of the current media landscape against which these changes are taking place. The Section maintains that these developments are encouraged and given cover by the ubiquitous "fake news" charge. It then argues that these developments are having a particularly pernicious chilling effect on modern journalism. Next, Section III begins the discussion of possible solutions to the "fake news" problem, specifically addressing the viability and desirability of self-regulatory solutions by platforms in Section III.A. The Section also sketches possible regulatory approaches, and raises the question of the extent to which the "fake news" phenomenon can be used as a cover for demagogic speech control at a moment when progressive arguments seek to desacralize the First Amendment. Section III.B focuses on arguments for enhanced information literacy and de-biasing strategies. It sketches the interdisciplinary work that, as it proceeds, might help ground literacy strategies in cognitive and political science in order to be more effective. Finally, Section IV turns its attention to the delegitimizing effect on public trust in journalism of the "fake news" attack on the mainstream press as an institution. It argues that the growing phenomenon of "fake news" is—perhaps counterintuitively—the very reason justifying press preferences with respect to both newsgathering and publication today. It begins the conversation both about what kinds of press privileges would best help journalism today, and what kinds of changed press practices might help reduce the potential abuse of the expanded press protections that the Article recommends.

I. “FAKE NEWS” AND THE PRESS IN THE AGE OF TRUMP

The numerous instances of fabricated political information that have gone viral since 2016 have led the public to believe in factually inaccurate information, possibly influenced the presidential election in the United States, and, at a minimum, “triggered a precipitous decline in public confidence in election integrity . . .”⁴⁰ Recent revelations indicate widespread use on social media of targeted false information by Russian interests attempting to influence American politics during the 2016 election season.⁴¹ In addition, the Trump Administration’s demonization of mainstream news organizations cannot help but undermine the public’s view of the press. That has surely been the goal of the Trump Administration in seeking to use “fake news” as a tool of governance. These two uses of “fake news” amplify one another. To the extent that the “fake news” concerns politics, the combined effect of these developments is one that fundamentally challenges American democracy. The potential impact of “fake news” goes even further, however—extending to commerce and markets, education, and virtually every other social activity. The mass circulation of deliberate falsehoods, when joined with public distrust in infrastructural institutions, paints a terrifyingly dystopian potential future.

This Section describes how technology and the new media environment weaponize “fake news,” and how the President’s delegitimizing attacks on the mainstream media (amplified by the alt-right media itself) affect public trust in the truth of the news they receive. The Section then addresses the threats posed by fabricated information in contexts outside politics—principally in the commercial world.

⁴⁰ Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POL’Y 57, 59 (2017).

⁴¹ See, e.g., Matt Apuzzo & Sharon LaFraniere, *13 Russians Indicted as Mueller Reveals Effort to Aid Trump Campaign*, NY TIMES (Feb. 16, 2018), <https://www.nytimes.com/2018/02/16/us/politics/russians-indicted-mueller-election-interference.html>; Mike Isaac & Scott Shane, *Facebook’s Russia-linked Ads Came in Many Disguises*, N.Y. TIMES (Oct. 2, 2017), <https://www.nytimes.com/2017/10/02/technology/facebook-russia-ads-.html>; Tom McCarthy, *Facebook, Google and Twitter Grilled by Congress Over Russian Meddling—As It Happened*, THE GUARDIAN (Oct. 31, 2017, 5:40 PM), <https://www.theguardian.com/technology/live/2017/oct/31/facebook-google-twitter-congress-russian-election-meddling-live>.

A. Taxonomies of “Fake News”

The term “fake news” has no single definition because it refers to a wide variety of things.⁴² Still, the phrase is an umbrella term referring to “real threats to meaningful public debate on the Internet[]”⁴³ and is therefore worth mapping. A number of taxonomies have been proposed to define “fake news,” some focusing on the content of the material disseminated, some focusing on the intent behind the dissemination, and some on both.⁴⁴

Most agree that the phrase refers to the intentional dissemination of false information. We can imagine “fake news” as representing a spectrum—both with regard to truth and with regard to disseminators’ intent.⁴⁵ Some “fake news”

⁴² See, e.g., Mark Verstraete, Derek E. Bambauer, & Jane R. Bambauer, *Identifying and Countering Fake News*, UNIV. OF ARIZ. 1, 4, https://law.arizona.edu/sites/default/files/asset/document/fakenewsfinal_0.pdf (last visited Mar. 14, 2018) (“The term has been used to refer to so many things that it seems to have lost its power to denote at all; as a result, several media critics have recommended abandoning it entirely.”).

⁴³ *Id.*

⁴⁴ See, e.g., *id.*; see also *Faking News: Fraudulent News and the Fight for Truth*, PEN AM. 1, 23 (Oct. 12, 2017), <https://pen.org/wp-content/uploads/2017/11/2017-Faking-News-11.2.pdf> [hereinafter *Faking News*]; see also Fabio Giglietto et al., *Fake News and the Election: A New Taxonomy for the Study of Misleading Information within the Hybrid Media System* (Univ. of Urbino, Italy, Working Paper No. 15–17, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2878774 (describing process-centered rather than actor-centered approach to the dissemination of false information online).

⁴⁵ Verstraete, Bambauer, and Bambauer propose the following taxonomy: “[w]e define satire as a news story that has purposefully false content, is financially motivated, and is not intended by its author to deceive readers”; “[a] hoax is a news story that has purposefully false content, is financially motivated and is intended by its author to deceive readers”; “[p]ropaganda is news or information that has purposefully biased or false content, is motivated by an attempt to promote a political cause or point of view, and is intended by its author to deceive the reader”; “[t]rolling is presenting news or information that has biased or fake content, is motivated by an attempt to get personal humor value (the lulz), and is intended by its author to deceive the reader.” Verstraete, Bambauer, & Bambauer, *supra* note 42, at 5–7. The Verstraete report then offers “a new way of organizing different types of fake news according to their distinctive attributes. The two defining characteristics used to identify species of fake news are (1) whether the author intends to deceive readers and (2) whether the payoff from fake news is motivated by financial interests or not.” *Id.* at 8. The report recognizes mixed intent, mixed motives, and mixed information as problems in crafting its typology. *See id.* at 9–12.

Another approach describes seven types of problematic content: satire or parody, misleading content, imposter content, fabricated content, false connections, false context, and manipulated content. *See* Claire Wardle, *Fake News. It’s Complicated*, FIRST DRAFT (Feb. 16, 2017), <https://firstdraftnews.com/fake-news-complicated/> (defining satire or parody as information having no intention to cause harm but the potential to fool; misleading content as “misleading use of information to frame an issue or individual”; imposter content as “when genuine sources are impersonated”; fabricated content as “100% false [new content], designed to deceive and do harm”; false connections as “when headlines, visuals or captions don’t support the content”; false context as “when genuine content is shared with false

consists of wholly fabricated stories, often developed and disseminated as “clickbait”—to generate advertising revenue.⁴⁶ Other instances of wholly fabricated “fake news” are designed to achieve political ends of persuasion.⁴⁷ Another type of “fake news” is political satire (and even some entertainment “news”).⁴⁸ There are also conspiracy theorists and ideologues making up stories on social media. Some stories contain kernels of true information, but also falsity or incorrect inferences from true facts.

The “fake news” charge is also a generalized assertion that news organizations consistently lie or distort the truth in their reporting, and are thus illegitimate sources of information generally. This kind of “fake news” charge can be seen as a claim that such news organizations operate pursuant to what might be called ideological “fake newsworthiness” norms.⁴⁹ Those who make the blunderbuss “fake news” charge against mainstream news organizations—like President Trump and various organs of the alt-right and alt-lite media—rely on news organizations’ publication of unverified material⁵⁰ or

contextual information”; and manipulated content as “when genuine information or imagery is manipulated to deceive”).

⁴⁶ Hundreds of Macedonian teenagers gained notoriety for their successful generation and dissemination of pro-Trump, anti-Clinton stories whose content was completely false and fabricated. *See Subramanian, supra note 3.*

⁴⁷ Recently, Facebook has admitted that thousands of fake advertisements were placed on the social media site by shadowy entities with connections to the Russian government. *See, e.g., Isaac & Shane, supra note 41.*

⁴⁸ The Onion is the paradigmatic example. The online magazine does not say anywhere on its front page that it is a satirical outlet and that none of its reporting is true. *See Verstraete, Bambauer, & Bambauer, supra note 42* (discussing *The Onion*).

⁴⁹ I am indebted to RonNell Andersen Jones for the phrase.

⁵⁰ For example, in early 2017, BuzzFeed published an unverified “dossier” alleging deep ties between Trump and the Russian government and Trump-compromising material in Russian hands. Ken Bensinger, Miriam Elder, & Mark Schoofs, *These Reports Allege Trump Has Deep Ties to Russia*, BUZZFEED (Jan. 10, 2017, 9:09PM), https://www.buzzfeed.com/kenbensinger/these-reports-allege-trump-has-deep-ties-to-russia?utm_term=.pf1Eer9aq#.bwQdZeEqK.

I refer to the alt-right and alt-lite media to distinguish them more traditional conservatively-inclined mainstream media outlets (such as the Wall Street Journal, for example). While the term “alt-right” is often used to refer to elements of the white supremacist movement in the US, “alt-lite” refers to “right-wing activists who refuse[] to publicly embrace white supremacist ideology.” *From Alt Right to Alt Lite: Naming the Hate*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/resources/backgrounder/from-alt-right-to-alt-lite-naming-the-hate>; *see also* Justin Wm. Moyer & Perry Stein, ‘Alt-right’ and ‘Alt-lite’? *Conservatives Plan Dueling Conservative Rallies Sunday in D.C.*, WASH. POST (Jun. 23, 2017), https://www.washingtonpost.com/local/alt-right-and-alt-lite-conservatives-plan-dueling-conservative-rallies-sunday-in-dc/2017/06/22/242d8de2-56bd-11e7-9fb4-fa6b3df7bb8a_story.html?utm_term=.4a042f4c1d3a (describing the split). For a description of the alt-lite blogger ecosystem, see Tyler Bridges, “Alt-Lite” Bloggers and the Conservative Ecosystem, SHORENSTEIN CTR. (Feb. 20, 2018, 9:30 AM), <https://shorensteincenter.org/alt-lite-bloggers-conservative-ecosystem/> (examining “the important role that ‘alt-lite’ bloggers play in promoting, amplifying, and

journalistic errors as evidence of liberal media bias.⁵¹ This Article does not focus on unintentionally erroneous news reports, regardless of their partisan origin in conservative- or liberal-leaning media, in the range of “fake news” it addresses.

fortifying Donald Trump’s anti-establishment message to his conservative supporters.”)

⁵¹ With respect to BuzzFeed’s publication of the Russian dossier, *see, e.g.*, David French, *The Russia Dossier Story: A Perfect Storm of Clinton Deception, Media Irresponsibility, and Democratic Moral Blindness*, NAT’L REVIEW (Oct. 25, 2017, 3:00 PM), <http://www.nationalreview.com/article/453104/russian-dossier-hillary-clintons-lies-reveal-media-bias> (criticizing the story as a partisan liberal lie). BuzzFeed’s publication was controversial in mainstream media circles as well. *See, e.g.*, Rory Carroll, *Buzzfeed Publishes Unsubstantiated Trump Report, Raising Ethics Questions*, THE GUARDIAN (Jan. 11, 2017, 6:35 PM), <https://www.theguardian.com/media/2017/jan/10/buzzfeed-publishes-donald-trump-russia-documents-ethics-questions>). In addition, conservative and alt-right media have fastened on any journalistic error in mainstream media reports as proof of bias. *See, e.g.*, John Nolte, *Fake News Firehose: Science Proves Media Are Not Making ‘Honest Mistakes’ About Trump*, BREITBART (Dec. 12, 2017), <http://www.breitbart.com/big-journalism/2017/12/12/science-history-prove-media-not-making-honest-mistakes-trump/>.

Recently, both ABC and CNN aired noteworthy false reports. *See, e.g.*, Amy B. Wang, *ABC News Apologizes for ‘Serious Error’ in Trump Report and Suspends Brian Ross for Four Weeks*, WASH. POST (Dec. 3, 2017), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/12/03/abc-news-apologizes-for-serious-error-in-trump-report-suspends-brian-ross-for-four-weeks/?utm_term=.d6d71a57f345 (“Ross had incorrectly reported Friday that during the 2016 presidential campaign, Trump had directed Michael Flynn to make contact with Russian officials before the election.”); Callum Borchers, *CNN Armed Trump With New Ammunition. Sure Enough, He Launched Another ‘Fake News’ Attack*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/12/08/cnn-just-armed-trump-with-new-ammunition-to-launch-another-fake-news-attack/?utm_term=.886e84fle695 (erroneously reporting that Donald Trump, Jr. received an email granting access to WikiLeaks documents concerning the Democratic National Committee hack on September 4 rather than September 14).

While both ABC and CNN admitted fault and corrected their stories, some damage had already been done; not only had the ABC story apparently caused a slip in the stock market, but the fact that the news organizations made the unintentional errors to begin with gave ammunition to those who wished to perpetuate the narrative of the mainstream media as engaged, willfully, in “fake news” dissemination. *See, e.g.*, Wang, *supra* note 51.

Still, there is a significant difference between intentional dissemination of known falsity and unintentional error which is corrected immediately after discovery. Error is inevitable. The inference that ABC and CNN were engaging in a pattern of “fake news” dissemination in order to undermine the President is unwarranted from the facts in these two instances. At best, both evidence a journalistic tendency to look for a scoop on a scandal and act too quickly. Even if a journalistic tendency to seek scandal could make a journalist more prone to accept the truth of asserted evidence of scandal, that is a far cry from intentionally blanketing the conversation with knowing and targeted falsehoods. And the discovery of two erroneous news stories—immediately retracted—cannot reasonably be said to prove that the entire output of the mainstream media should be considered illegitimate. The critical issue is whether journalistic standards are used both to reduce the occurrence of error and to mitigate the impact of errors that do get through, as they inevitably sometimes will. It is for these reasons that this Article does not focus on unintentionally erroneous reporting in its analysis of “fake news.”

The breadth and complexity of the reference to “fake news” is used by some as a reason to reject the phrase itself.⁵² Others argue that the umbrella term presents a range of dangers to public discourse and that different forms may be susceptible to different sorts of responses.⁵³ At one extreme, platform-based advertising initiatives could provide concrete ways to disincentivize the dissemination of fabrications designed to generate click revenue. At the other end of the spectrum, concrete attempts to deter fabricated information will not defang “fake news” broadsides like President Trump’s attempts to sow doubt over mainstream news organizations’ overall political coverage.

The next section addresses what is particularly worrisome about fabricated false information. The succeeding sections address the dangers of the “fake news” charge as a sword designed to cut down the credibility of the press.

B. The Weaponization of Fabricated “Fake News”

Technology can all too easily weaponize false speech for maximum believability and impact. This is not only because the architecture of social media enables viral spreading of information, but because AI can increase the efficiency and effectiveness of distributed content through targeting and automation. A flood of targeted emotional manipulation, Facebook dark posts, and ubiquitous bots automatically peddling⁵⁴ real “fake news”⁵⁵ can stealthily influence public

⁵² See, e.g., Hossein Derakhshan & Claire Wardle, *Ban the Term ‘Fake News’*, CNN (Nov. 27, 2017, 3:12 PM), <http://www.cnn.com/2017/11/26/opinions/fake-news-and-disinformation-opinion-wardle-derakhshan/index.html>; see also Margaret Sullivan, *It’s Time to Retire the Tainted Term ‘Fake News’*, WASH. POST. (Jan. 8, 2017), https://www.washingtonpost.com/lifestyle/style/its-time-to-retire-the-tainted-term-fake-news/2017/01/06/a5a7516c-d375-11e6-945a%2076f69a399dd5_story.html?utm_term=.861076611a76.

⁵³ By their taxonomies, some scholars seek to find ways to control the harmful type of fake news while protecting democratically-desirable political satire. See, e.g., Verstraete, Bambauer, & Bambauer, *supra* note 42 (making this point explicitly). But see generally Jeremy Littau & Daxton R. Stewart, “*Truthiness*” and Second-Level Agenda Setting: Satire News and Its Influence on Perceptions of Television News Credibility, 9 ELECTRONIC NEWS 122 (2015) (observing that satire shows undermine cable and television news credibility).

⁵⁴ See, e.g., Chengcheng Shao et al., *The Spread of Fake News by Social Bots*, Cornell Univ. Library, <https://arxiv.org/pdf/1707.07592.pdf> (last visited Mar. 14, 2018) (finding evidence, in an analysis of Twitter, that social bots play a key role in the spread of fake news).

⁵⁵ In this Article, I use the phrase “real ‘fake news’” to refer to fabricated stories designed to achieve particular ends, whether of political strategy or financial gain or both. By contrast, the Article uses the phrase “fake ‘real news’” to refer principally to the political strategy of delegitimizing the mainstream media by characterizing real journalism as ‘fake’ when news organizations challenge government’s characterization of events. (The phrase could of course also be read to refer to

opinion and behavior.⁵⁶ Voice-mimicking and video-simulating technology invites the fabrication of news that is very difficult to debunk.⁵⁷ While the possible threats posed by such amplified “fake news” are clear in the context of politics, manipulated information flows can have much broader harmful effects as well—in markets far beyond politics.⁵⁸ The structure of the information ecosystem—built around powerful platforms that act as information intermediaries—augments the effectiveness and therefore magnifies the dangers of strategic deployment of “fake news,” for political, regulatory, and commercial purposes.⁵⁹

Fabricated political information has been virally disseminated to an astonishing degree since 2016, much of it on social media.⁶⁰ Recent reports suggest that American voters

inaccurate or ideologically biased reporting, which is how President Trump characterizes the mainstream media’s political output.).

⁵⁶ I am aware of the fraught character of any claim of “manipulation.” I mean here only to point to systemic attempts, enhanced by use of artificial intelligence, to influence people’s behaviors by appealing to their weaknesses as identified through data analytics.

⁵⁷ See, e.g., Denise Clifton, *Fake News on Twitter Flooded Swing States That Helped Trump Win*, MOTHER JONES (Sept. 28, 2017, 1:00 AM), <http://www.motherjones.com/politics/2017/09/fake-news-including-from-russian-sources-saturated-battleground-states-trump-barely-won/>; Adam Clark Estes, *Insanely Accurate Lip Syncing Tech Could Turn Fake News Videos Into a Real Problem*, GIZMODO (July 12, 2017, 12:55 PM), <https://gizmodo.com/insanely-accurate-lip-syncing-tech-could-turn-fake-new-1796843610>; *Fake News: You Ain’t Seen Nothing Yet*, THE ECONOMIST (July 1, 2017), <https://www.economist.com/news/science-and-technology/21724370-generating-convincing-audio-and-video-fake-events-fake-news-you-aint-seen>; Olivia Solon, *The Future of Fake News: Don’t Believe Everything You Read, See or Hear*, THE GUARDIAN (July 26, 2017, 1:00 PM), <https://www.theguardian.com/technology/2017/jul/26/fake-news-obama-video-trump-face2face-doctored-content>. The recent rise of “deepfakes”—“AI-assisted face-swap porn, often featuring a celebrity’s face mapped onto a porn star’s body”—indicates the increasing technological sophistication of video manipulation techniques. See Louise Matsakis, *Artificial Intelligence is Now Fighting Fake Porn*, WIRED (Feb. 14, 2018, 4:46 PM), <https://www.wired.com/story/gfycat-artificial-intelligence-deepfakes/>(describing the phenomenon and AI-focused methods of fighting it).

⁵⁸ See, e.g., Chris Flood, *Fake News Infiltrates Financial Markets*, FIN. TIMES (May 5, 2017), <https://www.ft.com/content/a37e4874-2c2a-11e7-bc4b-5528796fe35c>; see also Larry Greenmeier, *Could AI Be the Future of Fake News and Product Reviews?*, SCI. AM. (Oct. 16, 2017), <https://www.scientificamerican.com/article/could-ai-be-the-future-of-fake-news-and-product-reviews/>; Renae Merle, *Why Fake News is a Problem for Wall Street*, WASH. POST (Oct. 12, 2017), https://www.washingtonpost.com/news/business/wp/2017/10/12/why-fake-news-is-a-problem-for-wall-street/?utm_term=.2321471f4a20.

⁵⁹ For a recent description of what is new in today’s information economy and how the change finds no adequate space in traditional First Amendment theory, see Nabiha Syed, *Real Talk About Fake News: Towards a Better Theory for Platform Governance*, 127 YALE L.J.F. 337, 338 (2017), (discussing how online platforms, as the prime producers of fake news, reveal gaps in existing First Amendment theories).

⁶⁰ See, e.g., Gaughan, *supra* note 40, at 66 (addressing the presence of fabricated stories during the 2016 election and identifying fake news as a product of media

were exposed to more “fake news” than accurate political information on Twitter during the 2016 election contest⁶¹ and that “some of the most widely shared stories on social media were fake.”⁶² One study suggests that the volume of shared news from dubious sources was comparable to the news from individual mainstream news sources (e.g., the New York Times).⁶³ Although the conclusion is of course contested,⁶⁴ many still question whether “fake news” played a role in the outcome of the 2016 presidential election.⁶⁵ Research reveals

fragmentation); Lazer et al., *supra* note 17, at 5; see also Andrew Guess, Brendan Nyhan & Jason Reifler, *Selective Exposure to Misinformation: Evidence From the Consumption of Fake News During the 2016 U.S. Presidential Campaign*, DARTMOUTH 1, 7 (January 9, 2018), <https://www.dartmouth.edu/~nyhan/fake-news-2016.pdf> (estimating that 25% of Americans visited a fake news website during the last presidential campaign).

⁶¹ See, e.g., Philip Howard & Bence Kolanyi, *Social Media Companies Must Respond to the Sinister Reality Behind Fake News*, THE GUARDIAN (Sept. 30, 2017, 7:03 PM), <https://www.theguardian.com/media/2017/sep/30/social-media-companies-fake-news-us-election> (discussing the unequal distribution of fake news across the country during the 2016 election). A study by BuzzFeed of the last three months of the 2016 campaign showed that the top 20 fake election news stories on Facebook reached over 8.7 million readers, compared to the 7.3 million readers who received real election news stories on Facebook. See Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook*, BUZZFEED (Nov. 16, 2016, 5:15 PM), https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm_term=.ctvjNY0R2#.iq36M0VPq (displaying graphical depictions of the viral fake election news stories). Admittedly, the BuzzFeed study undercounted the amount of real news to which Facebook users were exposed because it apparently excluded Reuters, AP, and small newspaper stories. Gaughan, *supra* note 40, at 66. Even so, the comparative numbers are staggering. See generally Hasen, *supra* note 10 (describing the vast amount of “fake news” before and after the inclusion of all news sources).

⁶² See, e.g., Lazer et al., *supra* note 17 (and source cited therein).

⁶³ *Id.* at 4.

⁶⁴ See, e.g., Brian Flood, *Real News Did More Damage Than Fake News On Election Day*, FOX NEWS (Sept. 28, 2017), <http://www.foxnews.com/politics/2017/09/28/real-news-did-more-damage-than-fake-news-on-election-day.html> (asserting a lack of evidence proving that fake news influenced the 2016 election); Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 232 (2017); see also Guess, Nyhan, & Reifler, *supra* note 60, at 12 (concluding that while fake news “is unlikely to have changed the outcome of the 2016 election . . . , exposure to it or similarly dubious and inflammatory content can still undermine the quality of public debate, promote misperceptions, foster greater hostility toward political opponents, and corrode trust in government and journalism.”); Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63 (2017) (providing an overview of the role of social media in the 2016 presidential election).

⁶⁵ See, e.g., Clay Calvert & Austin Vining, *Filtering Fake News Through a Lens of Supreme Court Observations and Adages*, 16 FIRST AMEND. L. REV. 153 (2018); 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=.592469fb964b (interviewing a news writer who thinks articles like theirs that included “fake news” contributed to Trump becoming elected); see also Michael Barthel, Amy Mitchell, & Jesse Holcombe, *Journalism & Media, Most Americans Believe Fake News Is Sowing Confusion*, PEW

that “false information didn’t flow evenly across social networks [with more spreading on the right than the left]” and that “[a]verage levels of misinformation were higher in swing states than in uncontested states,” prior to the 2016 U.S. presidential election.⁶⁶

RESEARCH CTR. (Dec. 15, 2016), <http://www.journalism.org/2016/12/15/many-americans-believe-fake-news-is-sowing-confusion/> (indicating public belief that fake news is having an impact); Hasen, *supra* note 10, at 208 (“[T]he potential for fake news to influence future election outcomes is manifest . . .”).

Many opponents of President Trump believe that he won the election because voters were misled by such “fake news” harmful to Hillary Clinton. Although the empirical evidence of the electoral effect is not conclusive, studies do show extensive propagation of fabricated anti-Clinton messages in swing states. For studies and discussions of the issue, see Allcott & Gentzkow, *supra* note 64 (presenting results from a survey that used web browsing data, fact-checking websites, and results from an online survey to show empirical data about the impact of fact news on the 2016 election) and Clifton, *supra* note 57 (discussing a current study about the effect of “fake news” in the 2016 election on voters). See also Philip N. Howard et al., *Social Media, News and Political Information during the US Election: Was Polarizing Content Concentrated in Swing States?*”, UNIV. OXFORD: COMPUTATIONAL PROPAGANDA PROJECT (2017), <http://comprop.ox.ac.uk/wp-content/uploads/sites/89/2017/09/Polarizing-Content-and-Swing-States.pdf> (presenting results analyzing the effect of computational propaganda from the 2016 election on public life). Recent revelations of extensive Russian disinformation on Twitter and Facebook indicate sophisticated attempts to interfere in the American presidential election. See Issie Lapowsky, *What We Know—and Don’t Know—About Facebook, Trump, and Russia*, WIRED (Sept. 26, 2017, 7:00 AM), <https://www.wired.com/story/what-we-know-and-dont-know-about-facebook-trump-and-russia/> (describing the prevalence of Russian advertisements on Facebook that were “fake news” and reached users). The actual electoral impact of such misinformation is much harder to assess. See Apuzzo & LaFraniere, *supra* note 41 (“American intelligence officials have said they have no way of calculating the effect of the Russian influence.”). A recent New York Times op-ed by Brendan Nyhan, one of the preeminent researchers of the impact of fake news argues that “people should not assume . . . huge [electoral] effects” from electoral “fake news.” Brendan Nyhan, *Fake News and Bots May Be Worrisome, but Their Political Power is Overblown*, N.Y. TIMES (Feb. 13, 2018), <https://www.nytimes.com/2018/02/13/upshot/fake-news-and-bots-may-be-worrisome-but-their-political-power-is-overblown.html>. By contrast, a post-election survey undertaken by the Comparative National Elections Project concludes that “fake news most likely did have a substantial impact on the voting decisions of a strategically important set of voters.” Richard Gunther, Erik C. Nisbet, & Paul Beck, *Trump May Owe his 2016 Victory to ‘Fake News,’ New Study Suggests*, THE CONVERSATION (Feb. 15, 2018 10:59 AM), <https://theconversation.com/trump-may-owe-his-2016-victory-to-fake-news-new-study-suggests-91538>; Richard Gunther, Paul A. Beck, & Erik C. Nisbet, *Fake News Did Have a Significant Impact on the Vote in the 2016 Election: Original Fill-Length Version with Methodological Appendix 1–5* (unpublished manuscript), available at <https://u.osu.edu/cnep/files/2015/03/Fake-News-Piece-for-The-Conversation-with-methodological-appendix-11d0ni9.pdf> (last visited Mar. 14, 2018). In any event, what is less contested is a negative effect of “fake news” on public discourse. See, e.g., Nyhan, *supra* (“None of these findings indicate that fake news and bots aren’t worrisome signs for American democracy. They can mislead and polarize citizens, undermine trust in the media, and distort the content of public debate.”).

⁶⁶ Howard & Kolanyi, *supra* note 61. A recent study found that fake news consumption was heavily concentrated during the election season among the 10% of people with the most conservative online information diets. Guess, Nyhan, & Reifler *supra* note 60, at 5. Still, the study also suggested that more direct study of

The composition of today’s information ecosystem enables, and even encourages, the viral distribution of “fake news” on social media. This is important because a large segment of the American population gets its news online and specifically on social media.⁶⁷ The ease of sharing online can ensure those who generate “fake news” that it will be widely disseminated. Social media platforms are said to provide a “megaphone” to small numbers of actors who, “armed with technical, social or political know-how[,]” distribute large volumes of “fake news.”⁶⁸ The multiplicity, density, and clustering of homogeneous echo chambers (enabled by social influence and the ease of unfriending) also means that each user is likely to be bombarded by the same message from numerous sources.⁶⁹ To the extent that such platforms, like Facebook, reach massive numbers of people, it may be that the fake or ideologically slanted news they disseminate may have the greatest effects on less politically astute or ideologically partisan consumers.⁷⁰ These realities create “ideal conditions for selective exposure and confirmation bias.”⁷¹ Information overload and attention scarcity limit the ability of social networks to distinguish among shared messages with respect to quality.⁷² The spread of “fake news” is also greatly enhanced by the use of bots.⁷³ “Fake news” is said to become viral not because it is shared over long information cascades among a large number of average social media users, but because it is spread by celebrities and media sources.⁷⁴ Studies indicate that the biggest indicator of whether a social media user will forward “fake news” is the amount of news shared by that

selective exposure to fake news was needed, as “small groups can . . . propel fabricated claims from their echo chambers to widespread visibility, potentially intensifying polarization and negative affect toward opposing candidates.” *Id.*

⁶⁷ See, e.g., Elisa Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms*, PEW RESEARCH CTR. (Sept. 7, 2017), <http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/> (reporting that “as of August 2017, two-thirds (67%) of Americans report that they get at least some of their news on social media—with two-in-ten doing so often”).

⁶⁸ Lazer et al., *supra* note 17, at 5.

⁶⁹ *Id.* at 7 (and sources cited therein).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* On Twitter, fake news can be widely disseminated by active “cyborg” users who automatically share news from particular sets of sources. *Id.*; see also *First Evidence That Social Bots Play a Major Role in Spreading Fake News*, MIT TECH. REVIEW (Aug. 7, 2017), <https://www.technologyreview.com/s/608561/first-evidence-that-social-bots-play-a-major-role-in-spreading-fake-news/> (reporting on study that suggests bot-operated accounts are significantly more likely to spread fake news on social media than those run by humans).

⁷⁴ Lazer et al., *supra* note 17, at 8.

person: the more news s/he shares, the more likely s/he is to share some “fake news.”⁷⁵ Moreover, profiles of those likely to share “fake news” indicate older people and those who are more extreme on the political spectrum.⁷⁶ Studies have shown that people find it difficult to distinguish between real and “fake news” on the Internet.⁷⁷

The difficulty of distinguishing between true and false information on social media is likely to be further exacerbated by recent technological developments. Significant strides have been made in technology that would allow the generation and proliferation of increasingly seamless and practically undetectable fabricated events and statements.⁷⁸ Reports herald “a new breed of video and audio manipulation tools, made possible by advances in artificial intelligence and computer graphics, that will allow for the creation of realistic looking footage of public figures appearing to say, well, anything.”⁷⁹

Real “fake news”—fabricated stories designed to achieve a particular end—is particularly pernicious when disseminated as part of a complex political strategy that mines big data to hyper-target audiences susceptible to its messages. One important element in the dangerous mosaic implicated by “fake news” in the digital environment is the ability to target individual voters or desired groups of voters. This allows the speaker to tailor political disinformation to particular voters’ or groups’ emotional and/or cognitive biases and weaknesses—and therefore, presumably, manipulate their behavior.

The sophistication of the disinformation campaigns varies. Research indicates that sophisticated players use data analytics and artificial intelligence to enhance the efficiency of their propaganda.⁸⁰ For example, Cambridge Analytica, which

⁷⁵ *Id.*

⁷⁶ *Id.*; see also Guess, Nyhan, & Reifler, *supra* note 60, at 5.

⁷⁷ See, e.g., Gaughan, *supra* note 40, at 32 (and sources cited therein).

⁷⁸ See, e.g., Solon, *supra* note 57 (discussing the impact on fake news of evolving AI technology that will enable the production of close-to-undetectable fake video and audio clips of public figures); see also Noah Smith, *The Robots Will Make the Best Fake News*, BLOOMBERG (Jul. 17, 2017), <https://www.bloomberg.com/view/articles/2017-07-17/the-robots-will-make-the-best-fake-news> (same); Karen Hao, *Researchers Have Figured Out How to Fake News Video With AI*, QUARTZ (July 19, 2017), <https://qz.com/1031624/researchers-have-figured-out-how-to-fake-news-video-with-ai/> (same).

⁷⁹ Solon, *supra* note 57; see also Mona Kasra, Cuihua Shen, & James O’Brien, *Seeing Is Believing: Do People Fail to Identify Fake Images on the Web?*, Paper Presented at the 17th Annual Conference of the Association of Internet Researchers 4 (October 2016), <http://graphics.berkeley.edu/papers/Kasra-SIB-2016-10/> (explaining how people are not good at distinguishing real news from fake news even if they are looking for cues of uncredibility).

⁸⁰ Anderson & Horvath, *supra* note 29; see also Dipayan Ghosh & Ben Scott, #Digitaldeceit: *The Technologies Behind Precision Propaganda on the Internet*,

mines data in order to engage in strategic political communication, boasts that in the U.S. alone, it has “played a pivotal role in winning presidential races as well as congressional and state elections.”⁸¹ Reports assert that the company is owned by conservative parties, features Breitbart’s Steve Bannon on its board, and has reportedly declined to work on Democratic campaigns.⁸² It allegedly leverages data analytics to engage in microtargeting by using its algorithmically derived predictive personality profile to deliver “personalized, adaptive, and ultimately addictive propaganda.”⁸³ The point is not only to gauge a voter’s likely behavior correctly, but, when necessary, to seek to change it by exploiting his or her emotions.⁸⁴ Some analysts are concerned that, at least to some degree, psychometric approaches can sway people’s political opinions and votes.⁸⁵

SHORENSTEIN CTR. (Jan. 2018), <https://na-production.s3.amazonaws.com/documents/digital-deceit-final-v3.pdf> (describing variety of ways in which “fake news” is weaponized online).

⁸¹ CAMBRIDGE ANALYTICA, https://ca-political.com/?_hstc=163013475.732b9ad50fa76e9cea2d511cf3dd2727.150688513112.1506885131112.1506885131112.1&_hssc=163013475.1.1506885131112&_hsfp=3969316057 (last visited Mar. 14, 2018) (proclaiming, in part, “We find your voters and move them to action. CA Political has redefined the relationship between data and campaigns. By knowing your electorate better, you can achieve greater influence while lowering overall costs.”); *see also* Anderson & Horvath, *supra* note 29 (“By leveraging automated emotional manipulation alongside swarms of bots, Facebook dark posts, A/B testing, and fake news networks, a company called Cambridge Analytica has activated an invisible machine that preys on the personalities of individual voters to create large shifts in public opinion.”).

⁸² See Anderson & Horvath, *supra* note 29; *see also* Nina Burleigh, *How Big Data Mines Personal Info to Craft Fake News and Manipulate Voters*, NEWSWEEK (June 8, 2017, 1:01 PM), <http://www.newsweek.com/2017/06/16/big-data-mines-personal-info-manipulate-voters-623131.html>.

⁸³ See Anderson & Horvath, *supra* note 29. Using a variety of data derived from people’s offline and online activities (including Facebook and Twitter posts), the company’s algorithm is said to have created personality profiles with 5000 data points for each adult American. *See id.*

⁸⁴ See Anderson & Horvath, *supra* note 29 (“Using those dossiers, or psychographic profiles as Analytica calls them, Cambridge Analytica not only identifies which voters are most likely to swing for their causes or candidates; they use that information to predict and then change their future behavior.”); *see generally* Vian Bakir & Andrew McStay, *Fake News and the Economy of Emotions*, 6 DIGITAL JOURNALISM 154 (July 20, 2017), <http://www.tandfonline.com/doi/abs/10.1080/21670811.2017.1345645> (explaining how “empathetic media” has evolved to help optimize the spread of fake news).

⁸⁵ See, e.g., S.A. Mathieson, *Trump, Brexit, and Cambridge Analytica—Not Quite the Dystopia You’re Looking For*, THE REGISTER (Mar. 7, 2017, 11:22 AM), https://www.theregister.co.uk/2017/03/07/cambridge_analytica_dystopianism/ (discussing studies that provide support for the role psychometrics might have played in the 2016 election). There are of course those who question the effectiveness of such psychometric targeting, and whether the concerns about weaponized AI-reliant political manipulation are overstated.

Recent reports of attempted state interference in foreign elections, with revelations by Facebook and Twitter that Russian interests attempted to influence the 2016 American presidential election in Donald Trump's favor through the deployment of powerful disinformation techniques,⁸⁶ also suggest the use of very targeted, sophisticated manipulation techniques. Specifically, Russian entities with ties to the Kremlin purchased Facebook ads (including "fake news" ads and ads designed to trigger emotional partisan responses in targeted voters), effectively used automated bots to viralize their messages, and unleashed troll armies to harass and intimidate opposition speakers.⁸⁷

This reminds us that "fake news" can also be weaponized as an invitation to and justification for the deployment of a variety of public and private informational censorship tools in response. For example, as Professor Tim Wu has recently described, the "fake news" trope can be used to mobilize troll armies and unleash terrorizing chilling effects in order to suppress contrary speech.⁸⁸

Moreover, what happens on the Internet also influences mainstream media coverage, of course. This means that items

⁸⁶ See, e.g., Apuzzo & LaFraniere, *supra* note 41 (describing DOJ indictment of Russian disinformation operatives); Jackson Hudgins & Alyssa Newcomb, *Google, Facebook, Twitter and Russia: A Timeline on the '16 Election*, NBC NEWS (Nov. 1, 2017, 12:01 PM), <https://www.nbcnews.com/news/us-news/google-facebook-twitter-russia-timeline-16-election-n816036> (portraying via timeline the extent to which the Kremlin influenced the 2016 election through social media); Kurt Wagner, *These Are Some of the Tweets and Facebook Ads Russia Used to Try and Influence the 2016 Presidential Election*, RECODE (Oct. 31, 2017, 8:05 PM), <https://www.recode.net/2017/10/31/16587174/fake-ads-news-propaganda-congress-facebook-twitter-google-tech-hearing> (providing examples of Russian ad purchases designed to spread fake news in Trump's favor throughout the 2016 election).

⁸⁷ See, e.g., Samuel Earle, *Trolls, Bots and Fake News: The Mysterious World of Social Media Manipulation*, NEWSWEEK (Oct. 14, 2017, 8:40 AM), <http://www.newsweek.com/trolls-bots-and-fake-news-dark-and-mysterious-world-social-media-manipulation-682155> (describing bandwagon effect engendered by bots); Mary Papenfuss, *Russian Trolls Linked Clinton To 'Satanic Ritual' In Fake News Campaign Push: Report*, HUFFPOST (Dec. 1, 2017, 12:01 AM), https://www.huffingtonpost.com/entry/russian-trolls-fake-news-hillary-clinton_us_5a20c8afe4b03c44072c6b86 (providing examples of fake news stories created and disseminated by online Russian bots and trolls); Scott Shane, *The Fake Americans Russia Created to Influence the Election*, N.Y. TIMES (Sept. 7, 2017), <https://www.nytimes.com/2017/09/07/us/politics/russia-facebook-twitter-election.html>; (describing the prevalence of fake Facebook and other social media profiles created by Russian operators to spread fake news in the 2016 election). Reports of the Justice Department's recent indictment of 13 Russians for a "multipronged, well financed and relentless" disinformation operation indicate that the indictment provides details of a "sophisticated network designed to subvert the 2016 election and to support the Trump campaign." Apuzzo & LaFraniere, *supra* note 41.

⁸⁸ Wu, *supra* note 14.

of “fake news”—particularly if they have spread virally online—can also be further amplified by recirculation through trusted media non-social media sources. This can happen when the information is not debunked through the press’s fact-checking systems.⁸⁹ When the press environment itself is fragmented and ideologically polarized, and when many people (particularly Republicans) think that the mainstream media intentionally lies or misleads, then any such errors on the part of any given press outlet will be characterized not as simple error, but as evidence of ideologically motivated strategic lying.⁹⁰

What is the impact of such weaponized false information?⁹¹ A December 2016 survey by Pew Research Center reflects that “most Americans suspect that made-up news is having an impact.”⁹² Almost 65% of U.S. adults in that survey—regardless of income, education level, or party affiliation—said that fabricated news stories “cause a great deal of confusion about the basic facts of current issues and

⁸⁹ For example, CNN falsely reported the existence of an investigation into an alleged pre-inauguration meeting between Trump ally and former communications director Anthony Scaramucci and Russian interests, and subsequently retracted the story. See, e.g., Sydney Ember & Michael Grynbaum, *At CNN, Retracted Story Leaves an Elite Reporting Team Bruised*, N.Y. Times (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/business/media/cnn-retraction-trump-scaramucci.html?mcubz=1> (describing CNN retraction and subsequent investigative team restructuring); see also Michael M. Grynbaum, *A Costly Retraction for CNN and an Opening for Trump*, N.Y. TIMES (June 27, 2017), https://www.nytimes.com/2017/06/27/business/media/cnn-retracted-story-on-trump.html?mcubz=1&_r=0 (detailing failure of CNN’s fact checking system that led to release of an inaccurate story).

⁹⁰ See, e.g., Grynbaum, *supra* note 89 (identifying such CNN critics); Sean Hannity, *Trump, Viewers, Hold CNN Accountable for ‘Fake News’*, FOX NEWS (June 28, 2017), <http://www.foxnews.com/opinion/2017/06/28/sean-hannity-trump-viewers-hold-cnn-accountable-for-fake-news.html> (criticizing legitimacy of CNN reporting in light of false stories).

⁹¹ Allcott and Gentzkow identify four major social costs of fake news:

First, consumers who mistake a fake outlet for a legitimate one have less-accurate beliefs and are worse off for that reason. Second, these less-accurate beliefs may reduce positive social externalities, undermining the ability of the democratic process to select high-quality candidates. Third, consumers may also become more skeptical of legitimate news producers, to the extent that they become hard to distinguish from fake news producers. Fourth, these effects may be reinforced in equilibrium by supply-side responses: a reduced demand for high-precision, low-bias reporting will reduce the incentives to invest in accurate reporting and truthfully report signals. These negative effects trade off against any welfare gain that arises from consumers who enjoy reading fake news reports that are consistent with their priors.

Allcott & Gentzkow, *supra* note 64, at 219.

⁹² Barthel, Mitchell, & Holcombe, *supra* note 65.

events.”⁹³ Responses to the survey indicated that 23% of the participants admitted to sharing fabricated news stories themselves.⁹⁴ “Fake news” appears to figure in political polarization, whether for reasons of selective exposure or filter bubbles.⁹⁵ Perhaps reflecting a cognitive bias, 84% of the respondents expressed “a fair amount of confidence in their own ability to detect fake news . . .”⁹⁶ Unfortunately, subsequent surveys suggest that this confidence is in fact misplaced.⁹⁷ Analysts argue that such “fake news” exacerbate polarization (due to the echo chambers and filter bubbles created by people’s tendencies to follow those who share their world-view) and stand in the way of shared reality.⁹⁸ This, in turn, can lead to scapegoating, reification of prejudices, enhancing “us versus them” mentalities, and even violence.⁹⁹ If fabricated stories are believed by the voting public, they could affect voters’ views of candidates and sway choices at the voting booth. Such misinformation can also infect the long-term cultural and political discourse. Even if any particular item of “fake news” is not thought credible by the public, the fact that the information ecosystem is awash in fabricated content is likely to lead to confusion and generalized distrust—as people increasingly do not know how to tell true from false.

C. Trump’s Relentless Critique of the Mainstream Press as “Fake News”

In addition to characterizing individual stories as “fake news” to shift electoral results, politicians now use the “fake news” charge as a way of casting doubt on mainstream news

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ For a description of the two major explanations for political polarization, see Dominic Spohr, *Fake News and Ideological Polarization: Filter Bubbles and Selective Exposure on Social Media*, 34 BUS. INFO. REV. 150, 157 (2017) (articulating the potential role that filter bubbles and selective exposure play in the public’s exposure to fake news); *see also* Guess, Nyhan, & Reifler, *supra* note 60, at 1 (asserting view that the extent of echo chambers is overstated).

⁹⁶ Barthel, Mitchell, & Holcombe, *supra* note 65 (“Americans express a fair amount of confidence in their own ability to detect fake news, with about four-in-ten (39%) feeling very confident that they can recognize news that is fabricated and another 45% feeling somewhat confident.” This may reflect the third party effect.).

⁹⁷ A recent study by scientists at Stanford showed that even tech-savvy young people are “easily . . . duped” by fake news. *See* Brooke Donald, *Stanford Researchers Find Students Have Trouble Judging the Credibility of Information Online*, STANFORD GRADUATE SCH. OF EDUC.: NEWS CTR. (Nov. 22, 2016), <https://ed.stanford.edu/news/stanford-researchers-find-students-have-trouble-judging-credibility-information-online>.

⁹⁸ *See* Lazer et al., *supra* note 17, at 5; *see also* Guess, Nyhan, & Reifler *supra* note 60, at 1.

⁹⁹ *See* Lazer et al., *supra* note 17, at 5.

organizations’ journalistic coverage as a whole. President Trump, for example, has consistently demonized the mainstream press, claiming that particular news organizations are themselves organs of “fake news” and “enemies of the American people.”¹⁰⁰ This kind of claim goes beyond characterizing a single story as factually inaccurate. It goes to the whole journalistic enterprise of the criticized entities—indeed, of all major media.¹⁰¹ It is a way of signaling to the public that whatever stories are published by the targeted outlets should be presumed false because the organization itself is partisan and consistently engaged in a knowing dissemination of untruth. In this sense, the Trump attack constitutes calling “real news” fake.¹⁰² It is a governance technique designed to identify Trump as the only authoritative source of information and to delegitimate any critical source of news.¹⁰³

Obviously, Trump is not the first president to dislike the press.¹⁰⁴ But he is the first president who has felt free to attack the press as consistently and viciously,¹⁰⁵ to target particular reporters and news organizations by name,¹⁰⁶ to threaten

¹⁰⁰ See Grynbaum, *supra* note 89.

¹⁰¹ Jones & Sun, *supra* note 6, at 14 (characterizing Trump’s rhetoric as “feed[ing] a narrative that the media as a whole, or at least in vey large part, ought to be thought of as an enemy”).

¹⁰² This is not to say that such “real news” is not sometimes erroneous, overstated, or misleading. See *supra* text accompanying notes 89–90. Conservatives claim that the mainstream media is a liberal machine fundamentally constrained by its coastal ideology and liberal bias. On the other side, liberal critics of mainstream news reporting challenge the “he said-she said” character of much modern reporting as fundamentally mistaken. See, e.g., Chris Edelson, *Lies, Damned Lies, and Journalism: Why Journalists Are Failing to Vindicate First Amendment Values and How a New Definition of “The Press” Can Help*, 91 Or. L. Rev. 527, 530 (2012) (describing journalistic comfort with he said-she said journalism as resulting from a desire not to look biased). Without expressing approval for the operations of the modern press (which I have myself criticized in prior scholarship), I still believe that Trump’s blunderbuss characterization of the mainstream press’ news coverage as virtually all fake (particularly in ironic contrast to his inaccurate Twitter statements) is both undeserved and very dangerous to the standing of the press.

¹⁰³ For a powerful analysis of government speech as a tool to manufacture doubt and thereby resist oversight, see Helen Norton, *The Government’s Manufacture of Doubt*, 16 FIRST AMEND. L. REV. 342 (2018).

¹⁰⁴ See, e.g., Jones & Sun, *supra* note 6,, at 21–25 (describing prior press-president tensions); Jon Marshall, *Nixon Is Gone but His Media Strategy Lives On*, THE ATLANTIC (Aug. 4, 2014), <https://www.theatlantic.com/politics/archive/2014/08/nixons-revenge-his-media-strategy-triumphs-40-years-after-resignation/375274/> (describing subsequent uses of Nixonian anti-press tactics).

¹⁰⁵ Jones & Sun, *supra* note 6, at 25–28 (distinguishing between presidential characterizations of the press as “legitimate-but-bothersome” and Trump’s blunderbuss attack on the press as illegitimate).

¹⁰⁶ *Id.* at 8–10; Jones & West, *supra* note 20, at 68–69.

retaliation openly and directly,¹⁰⁷ and to roll back customary norms of press access.¹⁰⁸ His demeaning characterizations of the press—as a “pile of garbage” and “among the most dishonest human beings on earth,”¹⁰⁹—are not just crude, but “violate[] existing customs of publicly treating the press with respect[.]”¹¹⁰

Trump’s choice to declare war on the mainstream press is not attributable solely to his combative personality, however. Instead, there are structural factors at play that have empowered his broadside attacks. First, the press of today is far more fragmented and far less powerful—economically and otherwise—than the press bedeviling presidents such as Richard Nixon.¹¹¹ The identity of the press is fundamentally contested; its economic future uncertain; its reputation in question; its attitude largely defensive. Second, the press is no longer the sole intermediary able to package and disseminate the words of politicians to the public. As Trump has shown with his use of Twitter, presidents today can communicate directly with the public—without any need for press intermediation. Third, demonizing the mainstream press is not likely to lead to as many negative consequences for a politician today—and might even serve as a unifying focus for his base.¹¹² This is at least in part because public trust in the institutional press, while increasing slightly among Democrats, appears to be at an all-time low.¹¹³ Non-stop attacks with charges of “fake news” and the criticism lobbed at the mainstream media by conservative talk radio since the 1990s¹¹⁴ surely have some impact on public trust.

¹⁰⁷ See, e.g., Chris Cillizza, *Donald Trump Just Issued A Direct Threat to the Free And Independent Media*, CNN: THE POINT (Oct. 12, 2017, 8:51 AM), <http://www.cnn.com/2017/10/11/politics/donald-trump-media-tweet/index.html> (reporting Trump threat of license non-renewal in retaliation for network’s criticisms).

¹⁰⁸ See *infra* Section II.B; see also Jones & West, *supra* note 20, at 64–72 (describing Trump’s use of access as a way to “punish or control press coverage”).

¹⁰⁹ Jones & West, *supra* note 20, at 68.

¹¹⁰ *Id.* at 68 (“In stark contrast to past administrations, he has failed to model respect for the institution of the press and for its importance to American democracy.”).

¹¹¹ Gaughan, *supra* note 40, at 64 (describing how the 2016 American election highlighted that the press is more fragmented today in contrast to the 1970s).

¹¹² See Jones & Sun, *supra* note 6, at 38 (“Trump appears to be employing the press-enemy rhetoric to consolidate support among his base and to reinforce his narrative that only he can be trusted to tell the real story The more people come to view the mainstream press as the enemy, the more Trump can control the narrative.”).

¹¹³ Art Swift, *In U.S., Confidence in Newspapers Still Low But Rising*, GALLUP (June 28, 2017), <http://news.gallup.com/poll/212852/confidence-newspapers-low-rising.aspx>.

¹¹⁴ See, e.g., NICOLE HEMMER, MESSENGERS OF THE RIGHT: CONSERVATIVE MEDIA AND THE TRANSFORMATION OF AMERICAN POLITICS 46–47 (2016) (describing conservative talk radio); Issie Lapowsky, *Old-School Talk Radio is Still Big Enough to Break Candidates*, WIRED (Apr. 13, 2016, 7:00 AM),

President Trump’s incessant refrain of mainstream news organizations as organs of “fake news” seeking to dupe and mislead the public has made it acceptable for people to think of the press as the enemy—and to treat journalists as such. Professors Andersen Jones and Sun have recently explained that the powerful delegitimizing effect of casting the press as an outsider, rather than as a legitimate (if sometimes wrong) participant in public debate.¹¹⁵ This move not only defuses the power of the press and brings it under the thumb of executive authority, but it also encourages the process of undermining other social and governmental institutions that might serve as counterweights to authoritarian executives.¹¹⁶

The press itself is far from monolithic now; there was doubtless little surprise when President Obama identified a “balkanized” media as contributing to “partisan rancor and political polarization.”¹¹⁷ President Trump’s technique for undermining the mainstream press depends in part on exploiting fissures within the press itself and relying on the drumbeat of distrust that right-wing talk radio has generated in mainstream media.¹¹⁸ His war against the press takes advantage of a public already primed to believe the worst of at least some parts of the media marketplace. Studies show increasing levels of distrust in the press since the glory days of Watergate.¹¹⁹

<https://www.wired.com/2016/04/conservative-talk-radio-survived-social-media-age/> (same).

¹¹⁵ Jones & Sun, *supra* note 6, at 8 (“Trump is consistently and unrelentingly delineating the press as an enemy—an ‘other’ that threatens the political unity of the state and that ought to be distrusted, countered, and perhaps ultimately stripped of ordinarily observed rights and liberties because of this exceptional status.”).

¹¹⁶ See *id.* (considering impact of enemy construction of the press on other democratic institutions).

¹¹⁷ David Nakamura, *Media Critic Obama is Worried That ‘Balkanized’ Media is Feeding Partisanship*, WASH. POST (Mar. 27, 2016), https://www.washingtonpost.com/politics/media-critic-obama-is-worried-that-balkanized-media-are-feeding-partisanship/2016/03/27/8c72b408-f1e3-11e5-89c3-a647fcce95e0_story.html?utm_term=.aa3269fe08ca.

¹¹⁸ See, e.g., Ken Miller, *As Hyper-Conservative Media Surged, Republicans’ Trust in News Cratered*, TECHCRUNCH (Mar. 19, 2017), <https://techcrunch.com/2017/03/19/as-hyper-conservative-media-surged-republicans-trust-in-news-cratered/> (attributing increasing distrust of the media by Republicans in part to the influence of conservative talk radio).

¹¹⁹ Jones & Sun, *supra* note 6, at 30. For studies on public attitudes toward news media, see Swift, *supra* note 113 (referencing trend of declining public trust in the media, which hit a historic low in 2016); see also Art Swift, *Democrats’ Confidence in Mass Media Rises Sharply From 2016*, GALLUP (Sept. 21, 2017), http://news.gallup.com/poll/219824/democrats-confidence-mass-media-rises-sharply-2016.aspx?g_source=MEDIA&g_medium=topic&g_campaign=tiles [hereinafter Swift, *Democrats’ Confidence*] (illustrating rise of Democratic confidence in the media since 2016 and the overall higher levels trust in media from Democrats than Republicans); Art Swift, *Americans’ Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), <http://news.gallup.com/poll/195542/americans-trust-in-mass-media-sinks-new-low.aspx>.

Whether because of right-wing radio's refrain that the mainstream media has a strongly liberal bias,¹²⁰ and/or because of negative views of television news on news satire programs such as Jon Stewart's *The Daily Show* or Steve Colbert's *Colbert Report*,¹²¹ many Americans do not believe that the mainstream media will report the truth without fear or favor. There is some asymmetry with respect to this view, with more Republicans than Democrats convinced of liberal media bias.¹²²

Empirical data in this connection are worrisome. Public opinion surveys show a widening partisan gap in perceptions of the media,¹²³ particularly in connection with "fake news." Trust and confidence in the media "varies dramatically by party identification and approval of President Trump's job performance."¹²⁴ Forty-four percent—almost half—of Americans (and 74% of Republicans) believe that the news media fabricate stories about Trump.¹²⁵ A substantial minority—31%—in a recent survey indicate agreement with Trump's tweet that the media are the "enemy" and "keep political leaders from doing their jobs."¹²⁶ The survey also shows that "one in four Americans (25%) endorses draconian limitations on press freedom."¹²⁷

Obviously, this is just one survey and even it does not indicate a belief by the majority of Americans that the press is the enemy of the public. Even if many incorrectly believe that one or another story is false or unfairly biased against the president, they will not all necessarily generalize from that to a conclusion that all the mainstream news media are illegitimate. Furthermore, it is possible that the constant refrain will itself backfire, with people beginning to doubt whether every criticism of the Trump Administration could possibly be "fake news." A recent poll indicates that 83% of Americans think the tension between the White House and the news media is

mass-media-sinks-new-low.aspx?g_source=MEDIA&g_medium=topic&g_campaign=tiles [hereinafter Swift, *Americans' Trust*] (describing 2016 study diagnosing public distrust of the media as at its highest point).

¹²⁰ See Jones & Sun, *supra* note 6, at 32 (describing "sustained attack by conservative media—particularly talk radio—on the credibility and trustworthiness of the mainstream media").

¹²¹ See Littau & Stewart, *supra* note 53.

¹²² Andrew Dugan & Zac Auter, *Republicans', Democrats' Views of Media Accuracy Diverge*, GALLUP (Aug. 25, 2017), <http://news.gallup.com/poll/216320/republicans-democrats-views-media-accuracy-diverge.aspx>.

¹²³ Guess, Nyhan, & Reifler, *supra* note 39, at 2.

¹²⁴ *Id.*

¹²⁵ See *id.*

¹²⁶ *Id.* at 5.

¹²⁷ *Id.*

unhealthy, and 73% say that these tensions impede their access to important national political news and information.¹²⁸ Still, the combination of “real ‘fake news’” and President Trump’s use of the “fake news” slogan to engage in scorched earth institutional delegitimation both undermine the press and potentially manipulate individual political beliefs and/or behavior.¹²⁹ The Administration’s rhetoric about the press, when combined with public concern about massive circulation of false information online, suggests at a minimum that Americans will feel increasingly confused about what is true in politics and commerce and increasingly uncertain about where to turn to find out. Any information market participants who understand both the limited attention of audiences and the character of the public’s appetite for emotion-triggering information will understand that they can use the distraction of “fake news,” drama, personal attacks, and labeling the press as the enemy as ways of distracting coverage from the “real” news in politics.¹³⁰

D. The Threat of “Fake News” Beyond Politics

Virtually all of the public discussion about “fake news” has focused on the electoral and political context in which its various guises have become a problem. But we have already begun to see instances in which “fake news” has been used to manipulate commercial markets and the dissemination of false information in attempts to influence regulatory policy.

On the commercial front, for example, the SEC has already acted to shut down several “fake news” websites dedicated to spreading false commercial information¹³¹—but it

¹²⁸ See Michael Barthel, Jeffrey Gottfried & Amy Mitchell, *Most Say Tensions Between Trump Administration and News Media Hinder Access to Political News*, PEW RESEARCH CTR. (Apr. 4, 2017), <http://www.journalism.org/2017/04/04/most-say-tensions-between-trump-administration-and-news-media-hinder-access-to-political-news/>.

¹²⁹ The technique is one of throwing doubt on any mainstream news narrative. See James Warren, *Right-wing Media is Losing its Mind Over Las Vegas, A Reflexive Drive to Poke Holes in the Mainstream Narrative Has “Opened The Floodgates” to Unhinged Conspiracy Theorizing*, VANITY FAIR (Oct. 5, 2017, 10:30 AM), <https://www.vanityfair.com/news/2017/10/right-wing-media-is-losing-its-mind-over-las-vegas> (quoting the view that “It doesn’t matter if the audience believes any of it, per se. What’s important is to make the situation so muddled that the average person, already primed over years to distrust the traditional media, can shrug their shoulders about what ‘the real truth’ is and move on.”).

¹³⁰ Indeed, the Trump Administration has been accused of using such distraction methods to avoid coverage and discussion of its substantive policy moves. See, e.g., Charles Blow, *Attacking Media as Distraction*, N.Y. TIMES (Oct. 9, 2017), https://www.nytimes.com/2017/10/09/opinion/trump-attacks-twitter-media.html?_r=0.

¹³¹ See, e.g., Wailin Wong, *The FTC Just Shut Down All Those Fake News Websites Hawking Diet Products*, BUS. INSIDER (Mar. 21, 2012, 7:42 PM)

stands to reason that there are many more. As for the financial markets,¹³² there are a few notable examples. For example, the intentional dissemination of a hoax statement about the asserted death of Ethereum's chief executive reportedly led to a \$4 billion market value drop for the company.¹³³ Forbes reports that “[i]n 2013, \$130 billion in stock value was wiped out in a matter of minutes following an AP tweet about an “explosion” that injured Barack Obama.”¹³⁴ This was one example of how misinformation on social media “can be manipulated to impact high-frequency trading algorithms that rely on text to make investment calls.”¹³⁵ Such manipulation, unlike the political kind, is likely to have extensive individual economic repercussions.¹³⁶

In light of the apparently easy availability of “fake news” tools on the dark web,¹³⁷ and the immense amount of

<http://www.businessinsider.com/the-ftc-just-shut-down-all-those-fake-news-websites-hawking-diet-products-2012-3>; Press Release, Fed. Trade Comm'n, FTC Permanently Stops Fake News Website Operator that Allegedly Deceived Consumers about Acai Berry Weight-Loss Products (Feb. 7, 2013), <https://www.ftc.gov/news-events/press-releases/2013/02/ftc-permanently-stops-fake-news-website-operator-allegedly>; *see also* Renae Merle, *Allegations of 'Fake News' Stretch Beyond Politics*, WASH. POST (July 4, 2017), https://www.washingtonpost.com/business/economy/company-moved-market-with-fake-news-stories-sec-alleges/2017/07/04/419a3bd4-54f9-11e7-b38e-35fd8e0c288f_story.html?utm_term=.dcd81003fca9.

¹³² See Merle, *supra* note 58; *see also* Kenneth Rapoza, *Can "Fake News" Impact The Stock Market?*, FORBES (Feb. 26, 2017, 9:05 AM), <https://www.forbes.com/sites/kenrapoza/2017/02/26/can-fake-news-impact-the-stock-market/#4d7a180c2fac>; Chris Versace, *"Fake News" Has Not Spared the Financial Markets*, BUS. INSIDER (Jan. 1, 2017, 9:08 AM), <http://www.businessinsider.com/fake-news-impact-on-financial-markets-2016-12>.

¹³³ See Anderson & Rainie, *supra* note 21; Jeff John Roberts, *Hoax Over "Dead" Ethereum Founder Spurs \$4 Billion Wipe Out*, FORTUNE (June 26, 2017), <http://fortune.com/2017/06/26/vitalik-death/>. Similarly, a false claim that Gary Cohn, the White House economic adviser, was resigning led to stock drops and market unease over the summer. *See, e.g.*, Bob Bryan, *False Rumors that Gary Cohn is Leaving the White House Just Spooked Wall Street—For Good Reason*, BUS. INSIDER (Aug. 17, 2017, 11:46 AM), <http://www.businessinsider.com/gary-cohn-false-tweet-leaving-trump-white-house-stock-market-reaction-2017-8>. Notably, a momentary Dow Jones Newswire headline falsely claiming that Google planned to buy Apple led to an uptick in Apple's stock price and, more importantly, demonstrated that the bots responsible for executing 90% of daily trading on the stock markets could easily be fooled by false information into “mov[ing] markets significantly.” Merle, *supra* note 58 (quoting Professor Tom Lin); *see also* Lin, *supra* note 11, at 1292–94.

¹³⁴ Rapoza, *supra* note 132.

¹³⁵ *Id.* Such trading systems often use algorithms to analyze news, social media and tweet activity to assess market sentiment. *See id.*

¹³⁶ See Barry Ritholtz, *Why Fake News Is So Harmful to Investors*, BLOOMBERG (Oct. 23, 2017, 10:59 AM), <https://www.bloomberg.com/view/articles/2017-10-23/why-fake-news-is-so-harmful-to-investors>.

¹³⁷ *See, e.g.*, Lion Gu, Vladimir Kropotov, and Fyodor Yarochkin, *Fake News and Cyber Propaganda: The Use and Abuse of Social Media*, TREND MICRO (June 13, 2017), <https://www.trendmicro.com/vinfo/us/security/news/cybercrime-and-digital-threats/fake-news-cyber-propaganda-the-abuse-of-social-media>.

hyper-personalized data for psychometric purposes that is available in auction markets, economic “fake news” might become an attractive second front to political “fake news” for a variety of market participants. Indeed, it is not hard to imagine exponential growth in market-focused “fake news” under such circumstances. Market-affecting “fake news” could be deployed both for financially-motivated reasons (by competitors and/or criminals),¹³⁸ for politically-motivated ends (by partisans and/or governments), and as weapons of terror. Some strategic actors could easily wield combinations of directly electoral and public policy-oriented “fake news” and directly market-affecting “fake news” to achieve maximal disruption.

Concerns about the market threats posed by the phenomenon of “fake news” will doubtless become increasingly common in American boardrooms. Just as cybersecurity has become a central board matter in response to widespread hacking of corporate databases, issues regarding market impacts of disinformation are likely to rise in salience for corporate management. Shareholders have already filed proposals with Facebook, Alphabet (Google’s parent), and Twitter requesting “in depth reports” about Russian use of their platforms during the 2016 election and what they are doing with respect to the dissemination of “fake news.”¹³⁹ Commercial entities have already begun to develop detection algorithms that could provide users with reliability odds as to the accuracy of the disseminated content.¹⁴⁰ Of course, investment algorithms “use machine learning to try and weed out unreliable sources, but the systems are not perfect and can still fall victim to the same misinformation as humans.”¹⁴¹

The strategic use of inaccurate factual information for policy advantage has also recently come to light in connection with regulatory processes. For example, the Federal Communications Commission’s recent review of the net neutrality rules generated the submission of 21.7 million public

¹³⁸ See Rapoza, *supra* note 132 (“If you can lower the price of a stock by one percent by purposefully manipulating the news flow by producing content and if you have the right trading mechanism in place, you can capitalize on that,” says Gordon. “Imagine if you can recognize that the story is not the least bit credible and you know the stock will recover, you can really capitalize on that knowledge.”).

¹³⁹ See, e.g., Emily Chasan, *Shareholders Press Twitter, Facebook and Google on Fake News*, BLOOMBERG (Oct. 30, 2017, 5:16 PM), [https://www.bloomberg.com/news/articles/2017-10-30/shareholders-press-twitter-facebook-and-google-on-fake-news; see also 'Fake News, ' Hate Speech & Free Expression: Corporate Responsibility in an Age of Alternative Facts, OPENMIC \(May 2017\), http://fakenews.openmic.org/OpenMIC-Fake-News.pdf.](https://www.bloomberg.com/news/articles/2017-10-30/shareholders-press-twitter-facebook-and-google-on-fake-news; see also 'Fake News, ' Hate Speech & Free Expression: Corporate Responsibility in an Age of Alternative Facts, OPENMIC (May 2017), http://fakenews.openmic.org/OpenMIC-Fake-News.pdf.)

¹⁴⁰ Rapoza, *supra* note 132.

¹⁴¹ *Id.*

comments on the Commission’s website.¹⁴² One Commissioner publicly expressed concern that a majority of the public comments—which expressed opposition to net neutrality—were “fake.”¹⁴³ A subsequently released Pew Research Center report¹⁴⁴ confirms that many submissions “seemed to include false or misleading personal information” and “some share . . . may have been submitted in bulk using automated processes, such as bot campaigns.”¹⁴⁵ This manipulation of the public comment process during regulatory agency rulemaking is not unique,¹⁴⁶ but presents another instance of the potentially disruptive effect of false information outside the explicitly political context.

These developments show that “fake news” presents viable threats not only to political life, but to markets and governmental administration—indeed, to the entire spectrum of human enterprise.

II. INCREASED INSTABILITY IN FORMAL AND INFORMAL PRESS PROTECTIONS

The distrust engendered by press-delegitimizing “fake news” charges worsens the many already-existing challenges to press functions today. The “fake news” crisis has been a major challenge for the press—which has faced a double whammy. On the one hand is the extensive flow of “fake news” with which the mainstream media cannot adequately keep up with correctives. On the other hand is the apparently increasing public distrust engendered by the “fake news” charge. The

¹⁴² See, e.g., Hitlin, Olmstead, & Toor, *supra* note 8; Aaron Mak, *Study Finds Most Public Comments to the FCC on Net Neutrality Were Duplicates*, SLATE (Nov. 29, 2017, 10:00 AM), http://www.slate.com/blogs/future_tense/2017/11/29/net_neutrality_public_comments_to_fcc_contain_millions_of_duplicates_inaccurate.html.

¹⁴³ April Glaser, *Trump’s FCC Is About to Destroy Net Neutrality, and a Democratic Commissioner is Calling Foul*, SLATE (Nov. 17, 2017, 6:29 PM), http://www.slate.com/blogs/future_tense/2017/11/17/trump_s_fcc_is_about_to_destroy_net_neutrality.html.

¹⁴⁴ Hitlin, Olmstead, & Toor, *supra* note 8.

¹⁴⁵ *Id.*

¹⁴⁶ The comments filed in response to the FCC’s notice and comment proceedings relating to broadcast indecency are a notable prior example of the strategic capture of public commenting by ideological groups using new technology to inflate the appearance of public consensus on the regulatory policy. See, e.g., Lili Levi, *First Reports: The FCC’s Regulation of Indecency*, FIRST AMEND. CTR. 28–29 (2008), http://www.newseuminstiute.org/wp-content/uploads/2016/10/FirstReport.Indecency.Levi_.final_.pdf (describing the influence of Parents Television Council’s form letters on the FCC’s stated rationale for tightening its indecency rules).

press’s ability to serve as a check on “fake news” has been compromised by media’s own behavior and economic circumstances, by the rise of an aggressive new right-wing press,¹⁴⁷ and by a reduction in press protections in the United States.

Scholars identify a decline in protections for journalistic activities both in courts and in the political sphere.¹⁴⁸ President Trump’s viral tweets¹⁴⁹ provide ammunition for a public already showing distrust of the media.¹⁵⁰ Although the press is at present under attack principally from the right, the left too is increasingly adding its critical voice.¹⁵¹ The economic pressures facing American journalism have received too much ink to warrant further description here.¹⁵² These pressures have already led modern news organizations to problematic commitments to native advertising,¹⁵³ increasing

¹⁴⁷ In addition to conservative-leaning mainstream news outlets like Fox News and right-wing talk radio, a “distinct right-wing media network . . . made up of relatively new outlets” has grown since the 2008 election. See Emily Bell & Taylor Owen, *The Platform Press: How Silicon Valley Reengineered Journalism*, TOW CTR, FOR DIGITAL JOURNALISM (Mar. 29, 2017), <https://towcenter.org/research/the-platform-press-how-silicon-valley-reengineered-journalism/>. Included in the agenda of right-wing media was discrediting the mainstream media and develop an alternative narrative, using Facebook to distribute their stories. *Id.*; see also Alice Marwick & Rebecca Lewis, *Media Manipulation and Disinformation Online*, DATA & SOC’Y 1, 26, 44 (May 15, 2017), https://datasociety.net/pubs/oh/DataAndSociety_MediaManipulationAndDisinformationOnline.pdf.

¹⁴⁸ See, e.g., Amy Gajda, *The Present of Newsworthiness*, 50 NEW ENG. L. REV. 145 (2016); see also Jones & West, *supra* note 20, at 49 (“[O]ur free press sits atop an increasingly fragile edifice. This edifice is supported by a number of legal and nonlegal pillars, such as the institutional media’s relative financial strength, the goodwill of the public, a mutually dependent relationship with government officials, and the backing of sympathetic judges. Each of these supports, however, has weakened substantially in recent years”).

¹⁴⁹ On how President Trump uses Twitter to engage directly with his base, end-running intermediaries, and how bashing the media as “fake news” is a common thread in his tweets, see Tony Lee, *Bannon Praises Trump’s Twitter Use: POTUS ‘Disintermediates Media,’ Speaks Directly to Voters*, BREITBART (Sept. 10, 2017), <http://www.breitbart.com/big-government/2017/09/10/bannon-praises-trump-twitter-use-potus-disintermediates-media-speaks-directly-to-voters/>; Barthel & Mitchell, *supra* note 18.

¹⁵⁰ See, e.g., Jonathan Easly, *Poll: Majority Says Mainstream Media Publishes Fake News*, THE HILL (May 24, 2017, 10:10 AM), <http://thehill.com/homenews/campaign/334897-poll-majority-says-mainstream-media-publishes-fake-news>; see also Swift, *Americans’ Trust*, *supra* note 119; *Faking News*, *supra* note 44; see also Jones & Sun, *supra* note 6, at 30.

¹⁵¹ See, e.g., Glenn Greenwald, *WashPost Is Richly Rewarded for False News About Russia Threat While Public Is Deceived*, THE INTERCEPT (Jan. 4, 2017, 9:28 AM), <https://theintercept.com/2017/01/04/washpost-is-richly-rewarded-for-false-news-about-russia-threat-while-public-is-deceived/>.

¹⁵² For recent articles describing the terrain, see Jones & West, *supra* note 20, at 55–58; see also Jones & Sun, *supra* note 6, at 29–31.

¹⁵³ See, e.g., Tamara R. Piety, *Killing the Golden Goose: Will Blended Advertising and Editorial Content Diminish the Value of Both?*, Paper Presented at Yale Law

sensationalism,¹⁵⁴ abandonment of important beats,¹⁵⁵ and simple distraction. The media sector itself reflects internal conflicts as to news values.¹⁵⁶ At a minimum, the viral distribution of “fake news” encourages and provides cover for increasing reductions in press rights and privileges. In turn, the press’s increasingly endangered position diminishes its ability to promote accountability—by both government actors and powerful private intermediaries. When the press is paralyzed in its ability to respond effectively, the environment presents opportunities for corruption, unchecked authoritarianism, and a profoundly diminished version of democracy.¹⁵⁷

At the same time as the “fake news” developments, the press has been facing reduced or at least increasingly unstable protections for its journalistic work. This is particularly evident in the newsgathering context. This development did not emerge from the Trump Administration, of course. Journalists have characterized the Obama Administration’s approach to press protection as lukewarm at best.¹⁵⁸ Courts as well have undergone a shift.¹⁵⁹ At a minimum, there has been a significant

School Information Society Conference Commercial Speech II: Creeping Commercial Speech and Its Impact (2017) (transcript available at https://law.yale.edu/system/files/area/center/isp/documents/killng_the_golden_goose_2016_last.pdf); Lili Levi, “*A Faustian Pact?* Native Advertising and the Future of the Press, 57 ARIZ. L. REV. 647 (2015).

¹⁵⁴ See, e.g., AMY GAJDA, THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS (2015) (criticizing the modern press for its sensationalism and diagnosing judicial push-back as a result).

¹⁵⁵ On the print press’ reduction of local and state-side news coverage, see Joyce Dehli, *Rebuilding Local Journalism as an Essential Democratic Force*, NEIMAN: REPORTS (Nov. 15, 2016), <http://niemanreports.org/articles/rebuilding-local-journalism-as-an-essential-democratic-force/>.

¹⁵⁶ See, e.g., Bill Keller, *Is Glenn Greenwald the Future of News?*, N.Y. TIMES (Oct. 27, 2013), <http://www.nytimes.com/2013/10/28/opinion/a-conversation-in-lieu-of-a-column.html>.

¹⁵⁷ Skeptics might contend that President Trump’s attacks on the mainstream press have ironically revived a dying industry. After all, the Washington Post has been hiring reporters. See, e.g., Ken Doctor, ‘Profitable’ Washington Post Adding More Than Five Dozen Journalists, POLITICO (Dec. 27, 2016, 11:13 AM), <http://www.politico.com/media/story/2016/12/the-profitable-washington-post-adding-more-than-five-dozen-journalists-004900>. Moreover, subscriptions are up significantly for the New York Times since the presidential election. See, e.g., Joe Concha, *NY Times Subscriptions Doubled in 2016*, THE HILL (Feb. 2, 2017, 11:09 AM), <http://thehill.com/media/317531-ny-times-subscriptions-doubled-in-2016>. Yet this flurry of support by liberal critics of the Trump Administration cannot eliminate the overall negative impact of both the epidemic of false news stories and the consistent political attacks on the institutions of the press.

¹⁵⁸ See, e.g., Hadas Gold, *Risen: Obama Administration is Greatest Enemy of Press Freedom*, POLITICO (Feb. 17, 2015, 11:36 PM), <https://www.politico.com/blogs/media/2015/02/risen-obama-administration-is-greatest-enemy-of-press-freedom-202707>.

¹⁵⁹ See, e.g., GAJDA, *supra* note 154; Jones & Sun, *supra* note 6; Jones & West, *supra* note 20.

doctrinal recognition of counter-interests to newsworthiness, such as privacy, in news-related lawsuits. “Fake news” is the newly added ingredient to this increasingly press-constraining mix. Donald Trump’s deployment of the “fake news” trope, which challenges both individual stories and also the legitimacy of the journalistic project as a whole, has served the Trump Administration as an articulated justification—or at least a cover or support—for reduced press protections. Long-term customs promoting press access have been disrupted. This has doubtless increased the press’s reliance on leaks, which in turn has placed the press in government’s bulls-eye. The Trump Administration’s anti-press rhetoric also appears to have emboldened other actors to threaten journalists and put roadblocks in the way of their operations.

A. A Press-Skeptical Legal Turn

Many claim that the First Amendment has not been interpreted to provide any special protections for journalists.¹⁶⁰ The Supreme Court, for all its dicta lauding the constitutional and democratic centrality of the press, has not established a robust press-protective jurisprudence under the First Amendment Press Clause.¹⁶¹ Indeed, recently, the Court has moved from “largely favorable and praising depictions of the press to largely distrusting and dismissive ones.”¹⁶² It has asserted that media corporations are not different from any other type of corporation with respect to constitutional speech rights.¹⁶³

Moreover, scholars have noted a long-established disparity between the constitutional protection afforded to publication and the far-less-robust protection recognized by the courts with respect to the press’s newsgathering activities.¹⁶⁴

¹⁶⁰ See, e.g., Dorf & Tarrow, *supra* note 12.

¹⁶¹ See, e.g., Jones & West, *supra* note 20, at 52.

¹⁶² RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253, 255 (2014); see also Jones & West, *supra* note 20, at 58–59 (cataloguing evidence for the conclusion that the Court “has also grown less interested in press protections”).

¹⁶³ See *Citizens United v. FEC*, 558 U.S. 310 (2010).

¹⁶⁴ See, e.g., Dorf & Tarrow, *supra* note 12 (“Taken as a whole, First Amendment doctrine produces a startling juxtaposition. Stings—defined here to mean efforts to uncover hidden information that the public has an interest in knowing—are legally vulnerable, while scams—the propagation of opinions and purported statements of fact that rest on false information—are generally protected.”); Jones & West, *supra* note 20, at 53 (“Despite recognizing in dicta that news gathering is not without its First Amendment protections and noting that ‘without some protection for seeking out the news, freedom of the press would be eviscerated, the Court has almost never actually protected the process of gathering information.’”) (internal quotation marks omitted); see also Lyrissa Barnett Lidsky, *Prying, Spying and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TULANE L. REV. 173 (1998).

Although anonymous sources have been central to journalistic revelations of government criminality, the Supreme Court rejected a First Amendment-based journalist privilege in *Branzburg v. Hayes*.¹⁶⁵ Admittedly, there appeared to be a subsequent lower court consensus reading Justice Powell's "enigmatic"¹⁶⁶ concurrence in the case to reflect judicial recognition of a constitutionally grounded journalists' privilege.¹⁶⁷ Recent cases, however, suggest a turn away from that stance, featuring courts less disposed toward constitutional claims by journalists seeking to protect sources.¹⁶⁸ Current scholarship as well purports to undermine, through analysis of the *Branzburg* Justices' papers, the theory used by lower courts to read *Branzburg* broadly and more press-protectively than Justice White's opinion does on its face.¹⁶⁹ Moreover, sometimes reporters claim the need to engage in newsgathering by subterfuge, undercover reporting, attack video—sometimes known as "the dark arts."¹⁷⁰ At this time, there is very little protection for journalists who are caught engaging in these activities.¹⁷¹ Some courts have even gone so far as to find that

¹⁶⁵ 408 U.S. 665 (1972).

¹⁶⁶ *Id.* at 725 (Stewart, J. dissenting).

¹⁶⁷ See, e.g., William E. Lee, *A Revisionist View of Journalist's Privilege: Justice Powell, Branzburg and the "Proper Balance"*, 34 CARDozo ARTS & ENT. L.J. 113, 116, nn. 17, 18, 19 (2016) and cases cited therein.

¹⁶⁸ The most famous of such recent cases involved New York Times reporter James Risen's refusal to name his source for his revelation, in his book *State of War*, of a secret CIA plan to foil Iran's nuclear program. See *United States v. Sterling*, 724 F. 3d 482 (4th Cir. 2013) (rejecting Risen's assertion of First Amendment reporter's privilege). See also *infra* text accompanying note 199.

¹⁶⁹ See, e.g., Lee, *supra* note 167.

¹⁷⁰ These are, of course, not universally accepted as ethical practices, and many journalism best practices codes frown on them as a rule. See, e.g., BROOKE KROEGER, UNDERCOVER REPORTING: THE TRUTH ABOUT DECEPTION (2012). In England, the tabloid press' phone hacking practices led to a massive scandal, an independent inquiry, and a new type of press regulation. See, e.g., Lili Levi, *Journalism Standards and "the Dark Arts": The U.K.'s Leveson Inquiry and the U.S. Media in the Age of Surveillance*, 48 GA. L. REV. 907 (2014). Still, undercover reporting has a long history and has led to numerous revelations in the public interest. See e.g., Alan K. Chen & Justin F. Marceau, *High Value Lies, Ugly Truths, and the First Amendment* 19–25 (Univ. Denver Sturm College of Law, Working Paper No. 15-07, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2585089 (describing the "long tradition of using deception as a means of gaining access to knowledge that would otherwise be obscured from public view."); see also Dorf & Tarrow, *supra* note 12 (on the legal dangers to activists of engaging in investigative newsgathering).

¹⁷¹ See Dorf & Tarrow, *supra* note 12, at 9 ("[T]he case law generally permits the application of laws governing property, contract, and other matters to be used to keep journalists and activists away from their targets."); Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist's Privilege*, 14 WM. & MARY BILL RTS. J. 1063, 1076–77, 1079–80 (2006). Numerous laws—such as trespass laws, invasion of privacy, limits on secret recordings, the new spate of "ag-gag" laws, business torts—all make undercover reporting more chancy. See Chen & Marceau, *supra* note 170, at 29–33.

journalists engaging in undercover reporting by, for example, accepting employment from the subjects of their undercover reporting implicates not only the usual tort and privacy claims, but also breach of fiduciary duty.¹⁷² Similarly, the variation in laws regarding phone taping¹⁷³ makes it difficult for news organizations to engage lawfully in surreptitious recording. And although the Court in *Bartnicki v. Vopper*¹⁷⁴ found that a radio station’s publication of a cellphone conversation that had likely been illegally obtained was protected by the First Amendment, it did not offer broad newsgathering protection.¹⁷⁵

Even as to publication, some recent lower court developments indicate that courts are increasingly crediting plaintiffs’ privacy claims in order to justify constriction of press speech.¹⁷⁶ Similarly, at least some recent cases indicate that courts are becoming less deferential than in the past to journalists’ assertions about what should be considered newsworthy.¹⁷⁷ Losses for news media in defamation cases are more likely and more expensive than in the past.¹⁷⁸

It is important not to exaggerate. There are, of course, still many press protections in the law,¹⁷⁹ so the legal turn is far

¹⁷² See, e.g., *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F. 3d 505 (4th Cir. 1999).

¹⁷³ For a reference guide to such laws by journalists for journalists, see *The Legal Limits Of Recording Conduct And Conversations*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/legal-limits-recording-conduct-and-conver> (last visited Mar. 14, 2018).

¹⁷⁴ 532 U.S. 514 (2001).

¹⁷⁵ Plus, *Bartnicki*’s impact in the lower courts “has been virtually nonexistent.”

Howard M. Wasserman, *Bartnicki as Lochner: Some Thoughts on First Amendment Lochnerism*, 33 N. KY. L. REV. 421, 453 (2006).

¹⁷⁶ Professor Amy Gajda has documented this development in her book, *THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS* (2015), and in a more recent article. See Gajda, *supra* note 148; see also RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253, 255 (2014) (on Supreme Court’s shift from “largely favorable and praising depictions of the press to largely distrusting and dismissive ones”).

¹⁷⁷ See Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CAL. L. REV. 1039, 1041 (2009); see also Brian Murchison et al., *Sullivan’s Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 7, 11–12 (1994) (making a similar argument in the defamation context).

¹⁷⁸ The massive Hulk Hogan verdict is one example. See Lili Levi, *The Weaponized Lawsuit Against the Media: Litigation Funding as a New Threat to Journalism*, 66 AM. U. L. REV. 761 (2017); see also Jones & West, *supra* note 20, at 58 (noting that the press has only prevailed in 39% of the libel and privacy cases that have gone to trial since 2010, by contrast to its 52% win rate a decade earlier).

¹⁷⁹ There are, of course, legal contexts in which the press has received significant protection. Most states have reporter privilege statutes and there are both federal and state documentary access protections. Although some courts have analyzed newsworthiness claims more rigorously and have taken privacy concerns more into account, other courts have continued to grant the press a presumption of newsworthiness for published material. Attempts to legislate to limit journalistic access—such as “ag-gag” laws—have faced daunting constitutional challenges. The

from complete. Still, such protections (and protective interpretations) are not writ in stone, and practices of government forbearance can just as easily be reversed.¹⁸⁰ Many existing press protections incorporate exceptions for extraordinary circumstances.¹⁸¹ If courts are convinced by combinations of national security and privacy arguments that press activity poses a threat to the public interest, those protections could be whittled, at least in application in particular cases. Thus, at a minimum, journalists and news organizations can no longer assume the degree of legal protection for the press on which they could have reasonably relied during the judicial “golden age” of press law.¹⁸²

In addition, President Trump and his Administration have very clearly set out to reduce the press’s legal protections. For example, during his campaign, Trump insisted that, if elected, he would “open up” libel law (and thereby reduce protections for the press).¹⁸³ Even though, as president, he cannot overrule the constitutionally grounded limits on defamation law recognized in *New York Times v. Sullivan*,¹⁸⁴ he could use his bully pulpit to influence both the filing of defamation actions and the attitude of juries deciding state defamation cases. He could also potentially reshape the Supreme Court in a way that might lead to a shift away from the protections of *New York Times v. Sullivan*, either doctrinally or in attitude.¹⁸⁵ Ideological third-party litigation funders can

Daily Mail principle is very helpful to news organizations when they choose to publish true information that they did not themselves collect illegally. Lower courts applying these principles have on numerous occasions chosen to apply the principle protectively even when journalists have had reason to know that the material that they are publishing was probably obtained illegally. And the government has engaged in forbearance vis-à-vis journalists even when they have arguably violated the law.

¹⁸⁰ See, e.g., Jones & Sun, *supra* note 6, at 44.

¹⁸¹ *Id.*

¹⁸² See Lyrissa Lidsky, *Not a Free Press Court?*, 2012 BYU L. REV. 1819 (2012) (describing the “golden age”); see also Gajda, *supra* note 177 (arguing that news media lawyers’ assumptions about the press-protective character of the First Amendment are unrealistic and dangerous for the press in the current moment).

¹⁸³ See, e.g., Adam Liptak, *Can Trump Change Libel Laws?*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/us/politics/can-trump-change-libel-laws.html?mcubz=1>.

¹⁸⁴ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (constitutionalizing state defamation law and requiring public officials to prove actual malice by the press in defamation actions).

¹⁸⁵ But see Dorf & Tarrow, *supra* note 12, at 23 (“[A]s president there is little he can do to accomplish this goal [of ‘opening up’ libel law]”).

also reasonably interpret such signals as invitations to forge ahead.¹⁸⁶

Recently, President Trump publicly threatened to revoke NBC’s broadcast licenses over the network’s report that he had called for a tenfold increase in the U.S. nuclear arsenal.¹⁸⁷ Although the executive does not have the power to order the revocation of broadcast licenses (which are granted and renewed by the independent Federal Communications Commission), these threats were eerily reminiscent of then-President Nixon’s desire to use the FCC’s licensing process to threaten the Washington Post, which held broadcast licenses.¹⁸⁸ The license revocation threats have generated concerns about a chilling effect on the networks, especially if they are seen as a “dog whistle” for Trump supporters to file challenges to license renewals.¹⁸⁹

¹⁸⁶ For a an exploration of the potential chilling effects of third party litigation funding in press contexts through discussion of the Hulk Hogan invasion of privacy case against Gawker, see Levi, *supra* note 178.

¹⁸⁷ See, e.g., Peter Baker & Cecilia Kang, *Trump Threatens NBC Over Nuclear Weapons Report*, N.Y. TIMES (Oct. 11, 2017), https://www.nytimes.com/2017/10/11/us/politics/trump-nbc-fcc-broadcast-license.html?_r=0. In another example of threatening a press organ, Trump promised during the campaign that Amazon—Washington Post owner Jeff Bezos’ business empire—would “have such problems” if he became president. Tim Stenovec, *Donald Trump Just Said if He’s Elected President Amazon Will Have Problems*, BUS. INSIDER (Feb. 26, 2016, 5:14 PM), <http://www.businessinsider.com/donald-trump-says-amazon-will-have-such-problems-2016-2>. Since the election, President Trump is reported to have “repeatedly suggested that Congress should look into Amazon’s taxes.” Jones & West, *supra* note 20, at 71.

President Trump has also threatened lawsuits against the press on numerous occasions. Jones & West, *supra* note 20, at 70–71 (listing the news entities he threatened with legal action during the campaign). His threats of legal action were taken seriously at least by the American Bar Association, which “spiked” a planned article about Trump’s history of meritless lawsuits. The article was slated to appear in an ABA publication but was removed because of “the risk of the ABA being sued by Mr. Trump.” Jonathan Peters, *What Trump Could (and Couldn’t) Do to Restrict Press Freedom if Elected*, COLUM. J. REV. (Oct. 27, 2016), https://www.cjr.org/united_states_project/donald_trump_lawsuits_press_freedom.php.

¹⁸⁸ See, e.g., James Warren, *Trump’s Threat to Yank TV Licenses Looks a Lot Like a Nixon Move. Here’s Why.*, POYNTER (Oct. 11, 2017), <https://www.poynter.org/news/trumps-threat-yank-tv-licenses-looks-lot-nixon-move-heres-why>; Thomas W. Hazlett & David W. Sosa, *“Chilling” the Internet? Lessons from FCC Regulation of Radio Broadcasting*, 4 MICH. TELECOMM. & TECH. L. REV. 35, 47–50 (1998).

¹⁸⁹ See Baker & King, *supra* note 187 (quoting former FCC Chairman). Only one FCC Commissioner so far has explicitly criticized President Trump’s comments. See Andrew Rafferty, *First Amendment Advocates Push Back on Trump’s Licensing Threat*, NBC NEWS (Oct. 12, 2017, 12:32 AM), <https://www.nbcnews.com/politics/politics-news/first-amendment-advocates-push-back-trump-s-licensing-threat-n809941> (reproducing FCC Commissioner Rosenworcel’s tweet on the subject).

The signaling effect of Trump’s statements in this regard is clear in his statement that “[i]t[] is frankly disgusting the way the press is able to write whatever

The Trump Administration has also been very vocal about its intention to “stem leaks” to the press from government.¹⁹⁰ As has been frequently noted, governments often govern by leak¹⁹¹ and are sometimes rendered accountable by leak.¹⁹² This Administration has announced a war on leaks—not only of classified information, but of “controlled unclassified” material.¹⁹³ Attorney General Sessions was reported to recommend polygraph testing of government

they want to write . . . [a]nd people should look into it.” David Nakamura, *Trump Escalates Threats Against Press, Calls News Coverage ‘Frankly Disgusting’*, WASH. POST (Oct. 11, 2017), https://www.washingtonpost.com/politics/trump-escalates-threats-against-press-calls-news-coverage-frankly-disgusting/2017/10/11/32996dba-ae9c-11e7-9e58-e6288544af98_story.html?utm_term=.c118e2865f8b.

¹⁹⁰ See, e.g., Helen Murillo, *Trump Is Going After Legal Protection for Journalists*, FOREIGN POLICY (Aug. 10, 2017, 11:36 AM), <http://foreignpolicy.com/2017/08/10/trump-is-going-after-legal-protections-for-journalists/>; Charlie Savage & Eileen Sullivan, *Leak Investigations Triple Under Trump, Sessions Says*, N.Y. TIMES (Aug. 4, 2017), https://www.nytimes.com/2017/08/04/us/politics/jeff-sessions-trump-leaks-attorney-general.html?_r=0; Joe Pompeo, *In the Trenches of Trump’s Leak War*, VANITY FAIR (Aug. 29, 2017, 10:30 AM), <https://www.vanityfair.com/news/2017/08/donald-trump-leak-war-reporter-fearl>; see also Majority Staff Report, *State Secrets: How an Avalanche of Media Leaks is Harming National Security*, COMM. ON HOMELAND SECURITY & GOVERNMENTAL AFFAIRS, U.S. SENATE (July 6, 2017), <http://www.hsgac.senate.gov/download/state-secrets-how-an-avalanche-of-media-leaks-is-harming-national-security> [http://perma.cc/6T6T-94N7].

¹⁹¹ See generally David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosure of Information*, 127 HARV. L. REV. 513 (2013).

¹⁹² President Trump habitually lambasts leaks and leakers now. See, e.g., Shannon Pettypiece, Margaret Talev & Chris Strohm, *Trump’s Focus on Leaks and Loyalty Puts Sessions in Crosshairs*, BLOOMBERG (July 26, 2017, 12:11 PM), <https://www.bloomberg.com/news/articles/2017-07-26/trump-s-focus-on-leaks-and-loyalty-puts-sessions-in-cross-hairs>; Trevor Timm, *Beware of the Trump Administration’s Coming Crackdown on Leaks—and Journalism*, FREEDOM OF THE PRESS FOUND. (Aug. 3, 2017), <https://freedom.press/news/trump-administrations-coming-crackdown-leaks-and-journalism/>. However, Trump’s administration—like all preceding executives—surreptitiously offers information to the press. See, e.g., Matthew Yglesias, *The Trump Administration’s New Anti-Leak Memo Leaked Last Night*, VOX (Sept. 14, 2017, 10:00 AM), <https://www.vox.com/policy-and-politics/2017/9/14/16305384/mcmaster-memo-leaks> (“[I]n the Trump administration everything leaks); Michael Grynbaum & John Koblin, *After Reality Winner’s Arrest, Media Asks: Did ‘Intercept’ Expose a Source?*, N.Y. TIMES (June 6, 2017), <https://www.nytimes.com/2017/06/06/business/media/intercept-reality-winner-russia-trump-leak.html> (“Journalism in the Trump era has featured a staggering number of leaks from sources across the federal government, providing bombshell revelations”). Ironically, however, President Trump often praised WikiLeaks during his campaign. See, e.g., David Choi, *5 Times Trump Praised WikiLeaks During His 2016 Election Campaign*, BUS. INSIDER (Nov. 13, 2017, 10:41 PM), <http://www.businessinsider.com/trump-wikileaks-campaign-speeches-julian-assange-2017-11>.

¹⁹³ See Yglesias, *supra* note 192 (quoting McMaster anti-leak memo); see also Chris Geidner, *Trump Administration Launches Broad New Anti-Leak Program*, BUZZFEED (Sept. 13, 2017, 9:00 PM), https://www.buzzfeed.com/chrisgeidner/trump-administration-launches-broad-new-anti-leak-program?utm_term=.mlomLyGqx#.ayDNp85X4.

employees to identify leakers.¹⁹⁴ Recently, National Security Advisor McMaster reportedly circulated a memo asking the heads of all federal agencies to engage in an “organization-wide event to engage their workforce in a discussion on the importance of protecting classified and controlled unclassified information, and measures to prevent and detect unauthorized disclosures.”¹⁹⁵ Trump’s signing of an executive order establishing new whistleblower protections at the Office of Veterans Affairs signals that it is *leaking information to the media* with which his Administration is most concerned.¹⁹⁶ To the extent that the Trump Administration’s efforts to eliminate government leaks are successful, the press will be denied access to important information that would enable it to do its job. This is particularly the case now because other avenues of access to information by the press are being intentionally constrained.¹⁹⁷

Will the current Administration continue the traditional practice of not prosecuting the press under espionage laws over the publication of leaked national security material and information? Reports that President Trump, in a private meeting with former FBI director James Comey, recommended that the agency consider jailing journalists who publish classified information¹⁹⁸ suggests not. The uptick in the number of prosecutions of leakers of national security information under the Obama Administration, as well as that Administration’s focus on the reporters to whom the leakers

¹⁹⁴ See Geidner, *supra* note 193 (citing to Axios report).

¹⁹⁵ *Id.* (quoting McMaster memo). Ironically, the memo was leaked to BuzzFeed. See Geidner, *supra* note 193.

¹⁹⁶ This is not to say that leakers outside the federal government will be protected under the current Administration. For example, NSA contractor Reality Winner is currently being prosecuted under the Espionage Act for revealing classified information. *See, e.g.*, Charlie Savage, *Intelligence Contractor is Charged in First Leak Case Under Trump*, N.Y. TIMES (June 5, 2017), <https://www.nytimes.com/2017/06/05/us/politics/reality-winner-contractor-leaking-russia-nsa.html>. Nor is it to suggest that the whistleblower-protective rhetoric is actually matched in practice. For a skeptical account, see Joe Davidson, *Victims Say VA Whistleblower Retaliation is Growing Under Trump, Despite Rhetoric*, WASH. POST (Oct. 30, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/10/30/victims-say-va-whistleblower-retaliation-is-growing-under-trump-despite-rhetoric/?utm_term=.950723e15cc1.

¹⁹⁷ *See supra* note 130 and accompanying text; *see also infra* Section II.B. Government efforts to stop leaks also doubtless have parallels in the private context. Many potential leakers in private companies whose businesses affect public life are doubtless afraid of liability under broadly worded non-compete and confidentiality agreements.

¹⁹⁸ *See, e.g.*, Michael M. Grynbaum, Sydney Ember & Charlie Savage, *Trump’s Urging That Comey Jail Reporters Denounced as an ‘Act of Intimidation’*, N.Y. TIMES (May 17, 2017), <https://www.nytimes.com/2017/05/17/business/media/trumps-urging-that-comey-jail-reporters-denounced-as-an-act-of-intimidation.html>.

provided their information,¹⁹⁹ lead to worries that the Obama Administration has “handed [Trump] a road map”²⁰⁰ for increasingly aggressive use of the Espionage Act to keep reporters in check.²⁰¹ Even if the journalists to whom whistleblowers leak their information are not themselves prosecuted—at least in notable numbers—it is nevertheless likely that the Trump Administration will continue the Obama Administration’s expanded use of media subpoenas and surveillance under cover of concerns about national security.²⁰²

Prosecutorial discretion, when coupled with less-protective internal government guidelines and a brash rhetoric delegitimizing the press, is likely to expand “as applied” threats to the press. Federal policy about subpoenaing reporters to testify as to their sources is determined by the guidelines of the Department of Justice. Those guidelines were significantly revised during the Obama Administration to be more press-protective in response to controversies over a seizure of Associated Press’s telephone records and a search warrant for a

¹⁹⁹ Jones & Sun, *supra* note 6, at 46–47. The Obama Administration deployed the Espionage Act against reporters on two occasions. In one instance, the government attempted to use the Espionage Act prosecution in order to force New York Times reporter James Risen to reveal a source. *See, e.g.*, Matt Apuzzo, *Times Reporter Will Not Be Called to Testify in Leak Case*, N.Y. TIMES (Jan. 12, 2015), <https://www.nytimes.com/2015/01/13/us/times-reporter-james-risen-will-not-be-called-to-testify-in-leak-case-lawyers-say.html>. In the other instance, the government identified Fox News reporter James Rosen as an unindicted co-conspirator in an Espionage Act prosecution of a government advisor for leaking national security materials, and searched his personal emails. *See, e.g.*, Brian Stelter & Michael D. Shear, *Justice Dept. Investigated Fox Reporter Over Leak*, N.Y. TIMES (May 30, 2013), <http://www.nytimes.com/2013/05/21/us/politics/white-house-defends-tracking-fox-reporter.html>. In these kinds of situations, the press is used as a cat’s paw in order to achieve other goals. To the extent that the press’ sources are not in government—and not even in jurisdictions where the US can exercise jurisdiction—pressuring the press can provide benefits in multiple ways. Even if the actual provider of the information can’t be prosecuted, the next-best alternative is public pressure on the press, which can aid the government’s own propaganda effort.

²⁰⁰ *See, e.g.*, Jones & Sun, *supra* note 6, at 47; *see also* James Risen, *If Donald Trump Targets Journalists, Thank Obama*, N.Y. TIMES (Dec. 30, 2016), <https://www.nytimes.com/2016/12/30/opinion/sunday/if-donald-trump-targets-journalists-thank-obama.html>.

²⁰¹ *See, e.g.*, Apuzzo, *supra* note 199.

²⁰² In addition to prosecution or the threat of prosecution under the Espionage Act, the Obama Administration monitored journalists and obtained journalists’ records using secret subpoenas. *See, e.g., id.* For a report about the Obama Administration’s treatment of the press, see Leonard Downie & Sara Rafsky, *The Obama Administration and the Press*, COMM. TO PROTECT JOURNALISTS (Oct. 10, 2013), <https://cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php>. There is little reason to believe that the Trump Administration, with its declared war on leakers, will not amplify those practices in the attempt to identify leakers through journalists’ records and communications.

Fox News reporter’s emails.²⁰³ In August 2017, however, assertedly in response to concerns about leaks of classified information, Attorney General Jeff Sessions (a presidential appointee who serves at the President’s will)²⁰⁴ announced that the DOJ would be reviewing the guidelines with respect to news organizations and media subpoenas in such cases.²⁰⁵

There is currently no federal shield law, although press organizations have called for one. Proposed legislation of that kind almost passed a few years ago,²⁰⁶ and a current bill has been introduced.²⁰⁷ To the extent that prior federal shield legislation was scuppered by massive leaks,²⁰⁸ recent floods of leaked confidential data such as the Paradise Papers raise questions about the likely passage of current proposed legislation. That leaves journalists at the mercy of state law. Although most states have reporter shield laws in place,²⁰⁹ they differ in their scope of protection and coverage.²¹⁰ There will be increased ambiguity in journalistic protections under such legislation as both the nature of reporting and the identity of reporters further changes. For example, how will courts interpreting these state statutes deal with journalism practiced algorithmically, by robots? How will they deal with journalism produced in teams with members of many news organizations

²⁰³ For links to the relevant documents, see *Amending the Department of Justice Subpoena Guidelines*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/attorney-general-guidelines> (last visited Mar. 14, 2018).

²⁰⁴ See Jones & Sun, *supra* note 6, at 46 (on reporter subpoena protections as a matter of custom subject to change under Attorneys General who serve at the pleasure of the President).

²⁰⁵ Federal policy on reporter subpoenas can be found in the Department of Justice’s guidelines. Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 28 CFR § 50.10 (2015). The Attorney General, who is appointed by and serves at the pleasure of the President, has control over those guidelines. See Jones & Sun, *supra* note 6, at 46. Over the summer, Attorney General Sessions stated that the DOJ was reviewing policies regarding journalist subpoenas, and announced Administration efforts to battle what he called a “staggering number of leaks undermining the ability of our government to protect this country.” Julia Edwards Ainsley, *Trump Administration Goes on Attack Against Leakers, Journalists*, REUTERS, (Aug. 4, 2017, 11:24 AM), <https://www.reuters.com/article/us-usa-trump-sessions-leaks/trump-administration-goes-on-attack-against-leakers-journalists-idUSKBN1AK1UR>.

²⁰⁶ See Dorf & Tallow, *supra* note 12.

²⁰⁷ See, e.g., Paul Fletcher, *Sessions’ Testimony Prompts New Federal Shield Law Bill Protecting Journalists*, FORBES (Nov. 29, 2017, 8:45 AM), <https://www.forbes.com/sites/paulfletcher/2017/11/29/sessions-testimony-prompts-new-federal-shield-law-bill-protecting-journalists/#4f555a374912>.

²⁰⁸ See, e.g., William E. Lee, *The Demise of the Federal Shield Law*, 30 CARDOZO ARTS & ENT. L.J. 27, 34 (2012) (noting that support for a federal shield law “evaporated” in 2010 when WikiLeaks “began posting a trove of classified documents”).

²⁰⁹ See Dorf & Tallow, *supra* note 12 and sources cited therein.

²¹⁰ See Jones & West, *supra* note 20, at 55 and sources cited therein.

across state lines? In any event, state shield laws typically provide qualified rather than absolute protection.²¹¹

In addition to uncertainty about the degree of protection provided by the patchwork of state reporter's privilege laws, other non-legal factors also have a likely impact on source protection. There is evidence that governments engage in surveillance of journalistic activity (often in order to promote other policy goals, such as fighting terror).²¹² Many reporters believe that they are constantly under surveillance. Technology now provides tools that will permit governments and/or private intermediaries to use reporters' electronic activities to reveal information about their sources. Still, this does not make law irrelevant, and does not eliminate the dangers for newsgathering posed by the lack of legal protection. Technology deflecting surveillance exists as well. May journalists use encryption, tradecraft, burner phones, and other anti-surveillance behavior in order to avoid unintentionally revealing their sources or areas of investigative focus?²¹³ Indeed, many mainstream news organizations have begun to solicit anonymous material and provide technological protection to sources.²¹⁴

The Washington Post's new slogan is *Democracy Dies in Darkness*.²¹⁵ What casts light is access to information, documents, and persons. Currently, news organizations have some amount of access to government information under both state and federal law. Some states have extensive sunshine laws

²¹¹ See Dorf & Tallow, *supra* note 12, at 15–16 and sources cited therein.

²¹² See, e.g., *With Liberty to Monitor All: How Large-Scale US Surveillance is Harming Journalism, Law, and American Democracy*, HUMAN RIGHTS WATCH (July 28, 2014), <https://www.hrw.org/report/2014/07/28/liberty-monitor-all/how-large-scale-us-surveillance-harming-journalism-law-and>; see also Trevor Timm, *Lawsuit Aims to Uncover How Government Surveils Journalists*, COLUM. J. REV. (Nov. 29, 2017), <https://www.cjr.org/watchdog/government-surveillance-journalists.php>.

²¹³ See, e.g., Carl Fridh Freberg, *The Death of Source Protection? Protecting Journalists' Sources in a Post-Snowden Age*, LONDON SCH. ECON. & POLITICS (Aug. 2015), http://eprints.lse.ac.uk/63140/1/_lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content_POLIS_Death%20of%20source%20protection_Kleberg_Death%20of%20source%20protection_2015.pdf; Julie Posetti, *The Eroding State of Source Protection*, GLOBAL INVESTIGATIVE JOURNALISM NETWORK (May 29, 2017), <https://gijn.org/2017/05/29/the-eroding-state-of-source-protection/>.

²¹⁴ The front page of the New York Times now asks: "Got a confidential news tip?" and provides a variety of secure ways to contact the paper. See N.Y. TIMES, <https://www.nytimes.com/newsgraphics/2016/newstips/?WT.nav=topnews&action=click&clickSource=story-heading&hp&module=first-column-region&pgtype=Homepage®ion=top-news> (last visited Dec. 19, 2017).

²¹⁵ See Paul Farhi, *The Washington Post's New Slogan Turns Out to Be an Old Saying*, WASH. POST (Feb. 24, 2017), https://www.washingtonpost.com/lifestyle/style/the-washington-posts-new-slogan-turns-out-to-be-an-old-saying/2017/02/23/cb199cda-fa02-11e6-be05-1a3817ac21a5_story.html?utm_term=.ca75811f8de7.

for government activity, while others are much more limited.²¹⁶ As for the federal Freedom of Information Act (FOIA), that legislation has significant limits—both in its wording and its application.²¹⁷ Reduction of press protections can be seen in the administrative context as well, particularly in the interpretation of exceptions and statutory implementation. For years, journalists have complained of delays in compliance with FOIA requests.²¹⁸ Stories also reveal incompleteness and increased costs in government responses to documentary access.²¹⁹ And this is in prior years, when presidents paid at least lip service to the value of government transparency. What impact might a changed approach have at the Department of Justice’s Office of Information Policy, which oversees agency compliance with the FOIA?²²⁰ In addition to reducing public access to government data, scholars also note the Trump Administration’s reduced information-collecting (so that there is less information for journalists and analysts to parse).²²¹ Further problems are posed by journalist access to some but not all documents or information when documentation is produced by and/or held in a variety of hands. All this becomes particularly problematic as technology presents opportunities for news organizations to analyze data sets in order to reveal new types of explanatory journalism. Access to data becomes increasingly important in an environment where stories are based in data, and where news organizations will increasingly seek to support their reporting by making the underlying data available to readers should they wish to see it. Finally, to the

²¹⁶ For links, see <https://www.nfoic.org/coalitions/state-foi-resources/state-freedom-of-information-laws>.

²¹⁷ The statute contains 9 important exceptions that government agencies can use to withhold document access or provide partial access. For prominent criticisms of the FOIA regime, see Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L. J. 1361, 1361–1437 (2016); David E. McCraw, *The “Freedom From Information” Act: A Look Back at Nader, FOIA, and What Went Wrong*, YALE L.J.F. (Nov. 21, 2016), <https://www.yalelawjournal.org/forum/the-freedom-from-information-act-a-look-back>; David Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. Pa. L. Rev. 1097 (2017).

²¹⁸ See, e.g., *Delayed, Denied, Dismissed: Failures on the FOIA Front*, PROPUBLICA (July 21, 2016, 8:01 AM), <https://www.propublica.org/article/delayed-denied-dismissed-failures-on-the-foia-front>. Public records have also been denied by state government officials. See Chad G. Marzen, *Public Records Denials*, N.Y.U. J.L. & LIBERTY (forthcoming 2018) (arguing for increased penalties).

²¹⁹ See, e.g., *Delayed, Denied, Dismissed: Failures on the FOIA Front*, *supra* note 218; see also Josh Gerstein, *Obama Administration in FOIA Fees Fight*, POLITICO (May 28, 2015, 7:51 AM), <https://www.politico.com/blogs/under-the-radar/2015/05/obama-administration-in-foia-fees-fight-207810>.

²²⁰ See Peters, *supra* note 187.

²²¹ See, e.g., Norton, *supra* note 103. The flip side of that strategy is to enhance “infoglut.” See Julie Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369, 382–89 (2016).

extent that newspapers have in the past spearheaded not only freedom of information requests, but also litigation to effectuate informational access rights, the financial conditions of newspapers and the reduction in reporters necessarily undermine those practices.²²²

In sum, with respect to legal rights, an overview of the environment suggests—at best—greater instability for the press today.

B. Reductions in Customary Privileges

In addition to legal rights as such, the press has in the past benefited from access privileges based on custom.²²³ President Trump and his Administration have significantly reduced such customs and traditional safeguards. This has been particularly notable in the area of access. For example, during the campaign, Trump revoked the press credentials of some press organizations,²²⁴ blacklisted particular reporters and news organizations on the basis of their coverage of Trump,²²⁵ and made it difficult for reporters to cover him in numerous practical ways.²²⁶ Both Trump and his campaign staff refused to talk to certain reporters, whether on or off the record, and declined to abide by traditional norms for designated press pools.²²⁷

Once in office, the Trump White House greatly upended customs previously expected by the press. For example, the White House specifically excluded disfavored journalists from press briefings.²²⁸ President Trump did not permit the American press to attend some important diplomatic meetings attended by the foreign press.²²⁹ He changed the traditions pursuant to which press routinely traveled with the president and were informed of presidential plans to go out in public.²³⁰ President

²²² See RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557 (2011) (describing the role of newspapers in information-forcing legislation and litigation).

²²³ On the press' non-legal safeguards, see RonNell Andersen Jones & Sonja R. West, *Don't Expect the First Amendment to Protect the Media*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/opinion/dont-expect-the-first-amendment-to-protect-the-media.html>; see also Jones & West, *supra* note 20.

²²⁴ See, e.g., Jones & Sun, *supra* note 6, at 15.

²²⁵ See, e.g., Jones & West, *supra* note 20, at 64.

²²⁶ See *id.* (cataloguing transactions costs).

²²⁷ See *id.*

²²⁸ See, e.g., Callum Borchers, *White House Blocks CNN, New York Times from Press Briefing Hours After Trump Slams Media*, WASH. POST (Feb. 24, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/24/white-house-blocks-cnn-new-york-times-from-press-briefing-hours-after-trump-slams-media/?utm_term=.15d804058c83.

²²⁹ Jones & West, *supra* note 20, at 65–6.

²³⁰ *Id.*

Trump has also held few press conferences himself, breaking with long-standing presidential tradition.²³¹ He has consistently refused to take questions from reporters he saw as hostile or employed by news organizations he dislikes.²³² When he has met with the press in such conferences where he or his aides expect tough questions, Trump has called on “sycophantic news outlets” instead.²³³ Trump and his Administration have retaliated against news organizations seen as reporting negatively on him.²³⁴ Recently, it was reported that the White House Press Secretary had threatened a CNN reporter with exclusion if he asked any questions during a recent presidential bill-signing ceremony.²³⁵

In addition to reducing the press’s access to the President and his Administration, these kinds of reversals to custom send a clear message both to the public and to elites who might otherwise be wary of crossing the press that the mainstream institutional press is now an enemy to be resisted and not feared.²³⁶

C. Harassment and Danger

Journalism in the U.S. has become more physically dangerous. Beginning during the presidential campaign, Trump “encouraged supporters to join him in taunts and jeers directed at the press corps.”²³⁷ The extreme rhetoric—a clear departure from norms observed even by candidates and prior presidents who disliked the press²³⁸—sent a clear signal. The drumbeat of press criticism by the Trump Administration appears to have emboldened people to attack journalists doing their jobs.²³⁹ The

²³¹ *Id.* at 67.

²³² Jones & Sun, *supra* note 6, at 15 (noting Trump’s belittling of journalists and their employers and refusing to take their questions at his first post-election press conference).

²³³ Jonathan Peters, *Trump and Trickle-down Press Persecution*, COLUM. J. REV. (2017), https://www.cjr.org/local_news/trump-and-trickle-down-press-persecution.php (quoting journalism professor).

²³⁴ Jones & West, *supra* note 20, at 70.

²³⁵ *CNN’s Jim Acosta Complains of White House Threat*, DENV. POST (Dec. 12, 2017, 5:01 PM), <http://www.denverpost.com/2017/12/12/cnns-acosta-complains-white-house-threat/>.

²³⁶ Agreeing with that conclusion, Professors Jones and West catalogue the ways in which the Trump Administration has violated previously-established norms of respect with which prior presidents treated the press. *See* Jones & West, *supra* note 20, at 68–70.

²³⁷ Jones & Sun, *supra* note 6, at 8–9 (“Mocking, criticizing, and verbally attacking individual reporters and media executives became a staple of Trump’s presentations.”); *see also* *Faking News*, *supra* note 44, at 11.

²³⁸ *See* Jones & Sun, *supra* note 6, at 10.

²³⁹ *See, e.g.*, Martin Pengelly & Joanna Walters, *Trump Accused of Encouraging Attacks on Journalists with CNN Body-Slam Tweet*, The GUARDIAN (July 2, 2017, 2:21 PM),

attitude toward the press of both the public and government officials influences the way in which reporters are treated. Recently, a reporter asking a question of a state political candidate was “body slammed” and physically hurt by the candidate; surprisingly, the candidate’s assault was minimized and the reporter’s attitude criticized by a troublesome number of people.²⁴⁰ When officials cannot tell the difference between activists and journalists covering protests, they respond by strong-arming the journalists as well.²⁴¹ This extends beyond political venues to academia as well; numerous stories recount the degree to which student journalists are harassed and excluded when covering campus protests.²⁴² To be sure, reporting in the United States is still significantly safer as a physical matter than in many places in the world—in which journalists are subject to threats, violence, physical harm, and death.²⁴³ Still, reports of physical altercations between government officials and journalists are deeply troubling.²⁴⁴

Beyond physical attacks, technology now permits the mobilization of human or bot mobs directing verbal attacks and threats at disfavored journalists.²⁴⁵ This is another example of increasingly effective harassment in response to speech, and it raises significant questions about a chilling effect on the press’s activity.

<https://www.theguardian.com/us-news/2017/jul/02/trump-body-slam-cnn-tweet-violence-reporters-wrestlemania>.

²⁴⁰ See, e.g., Michael Grynbaum, *A Journalist Was Body Slammed, but Some Conservatives Want the News Media to Apologize*, N.Y. TIMES (May 25, 2017), <https://www.nytimes.com/2017/05/25/us/journalist-body-slammed-republicans-apology-media.html>.

²⁴¹ See Jonathan Peters, *Journalists Arrested in DC Inauguration Protests Have Law On Their Side*, COLUM. J. REV. (Jan. 26, 2017), https://www.cjr.org/watchdog/journalist_arrested_ovation_protest_felony.php.

²⁴² See Austin Huguelet & Daniel Victor, *‘I Need Some Muscle’: Missouri Activists Block Journalists*, N.Y. TIMES (Nov. 9, 2015), <https://www.nytimes.com/2015/11/10/us/university-missouri-protesters-block-journalists-press-freedom.html>.

²⁴³ The Committee to Protect Journalists compiles attacks on the press. See *Attacks on the Press: 2017 Edition*, COMM. TO PROTECT JOURNALISTS <https://cpj.org/2017/04/attacks-on-the-press.php> (last visited Mar. 14, 2018); Elana Beiser, *Record Number of Journalists Jailed as Turkey, China, Egypt Pay Scant Price for Repression*, COMM. TO PROTECT JOURNALISTS (Dec. 13, 2017).

²⁴⁴ This is reminiscent of relations between government and journalists in countries with more authoritarian governments. Last summer, for example, persons in the employ of President Erdogan of Turkey beat up protesters picketing in front of a venue in Washington DC in which Erdogan was speaking.

²⁴⁵ See, e.g., Emma Green, *The Tide of Hate Directed at Jewish Journalists*, THE ATLANTIC (Oct. 19, 2016), <https://www.theatlantic.com/politics/archive/2016/10/what-its-like-to-be-a-jewish-journalist-in-the-age-of-trump/504635/> (describing anti-semitic tweet attacks).

D. Press Self-Censorship

It is doubtless the case that many journalists see this moment—when the press is under unprecedeted attack by a sitting president—as an emboldening one. Indeed, it is precisely the cultivation of this attitude that this Article celebrates and recommends. At the same time, it would be naïve to believe that an economically burdened press, pressured by oligopolistic platforms on the one hand and unceasing threats by government officials on the other hand, would not step very gingerly into political quagmires. It is unsurprising, for example, that after a CNN story on Russian connections to Anthony Scaramucci was debunked as inaccurate, it was not enough for the three responsible reporters to tender their resignations.²⁴⁶ The rest of the team was purportedly taken off stories on potential ties between the Trump Administration and Russia.²⁴⁷ To be sure, a few examples like this do not unassailably reflect chill. Various national newspapers, like the *New York Times* and the *Washington Post*, have continued to report critically on the Trump Administration—indeed, to a degree that makes Trump supporters agree with the President that the Russia inquiry is no more than a “witch hunt.”²⁴⁸

Outside the strictly political and electoral contexts, there appears to be evidence that “the Gawker Effect”²⁴⁹ is leading to increased timorousness by news organizations regarding the publication of investigative stories.²⁵⁰ It was subsequently revealed that Hulk Hogan’s breach of privacy action against Gawker was bankrolled by Silicon Valley conservative billionaire Peter Thiel.²⁵¹ The \$140 million damage award in the case led to the bankruptcy and shuttering of Gawker.²⁵² Since that case, journalists report a significant increase in legal oversight of their investigative stories, and ultimate decisions to

²⁴⁶ See Ember & Grynbaum, *supra* note 89.

²⁴⁷ *Id.*

²⁴⁸ See, e.g., Mark Landler, *Trump, Citing a ‘Witch Hunt,’ Denies Any Collusion With Russia*, N.Y. TIMES (May 18, 2017), <https://www.nytimes.com/2017/05/18/us/politics/trump-back-on-twitter-complains-of-witch-hunt.html?mcubz=1>.

²⁴⁹ The “Gawker Effect” refers to the privacy lawsuit brought against Gawker Media by pro wrestler and entertainment personality Hulk Hogan over Gawker’s posting of a surreptitious sex video in which he appeared. See Levi, *supra* note 178; see also Margaret Sullivan, *That R. Kelly ‘Cult’ Story Almost Never Ran. Thank Hulk Hogan for That.*, WASH. POST (Jul. 30, 2017), https://www.washingtonpost.com/lifestyle/style/that-r-kelly-cult-story-almost-never-ran-thank-hulk-hogan-for-that/2017/07/30/19e1f8ea-72c5-11e7-8839-ec48ec4cae25_story.html?utm_term=.97013bc1bebe.

²⁵⁰ See Sullivan, *supra* note 249.

²⁵¹ See Levi, *supra* note 178.

²⁵² *Id.*

back away from stories of sexual misconduct in the music and entertainment industries.²⁵³ The possibility of ideologically motivated third party funding of lawsuits against the press must be perceived by news organizations as particularly threatening in an environment in which judges, juries and the public assess their processes with a jaundiced eye.²⁵⁴

Another worrisome aspect of the legal context concerns newspapers as litigation plaintiffs and law enforcers. Scholars have noted that current economic circumstances will likely significantly reduce newspapers' ability to serve as constitutional litigators and legal enforcers.²⁵⁵ The "new media" online are unlikely to step into the newspapers' historical role

²⁵³ See Sullivan, *supra* note 249 (quoting BuzzFeed's assistant general counsel as saying that "[t]here's a lot of uncertainty and fear out there, post-Gawker"); *see also* Kim Masters, *Fighting 'the Gawker Effect' in the Wake of Weinstein*, COLUM. J. REV. (Oct 13, 2017), https://www.cjr.org/first_person/amazon-roy-price.php (describing the numerous mainstream media organizations that refused to publish Masters' article on allegations of sexual impropriety involving Roy Price, the powerful head of Amazon Studios). Masters warned that

[i]n the wake of Hulk Hogan's successful lawsuit against Gawker, a case that essentially bankrupted the company, we seem to be at a point when the wealthy feel emboldened to try to silence reporters by threatening litigation even if they stand virtually no chance of winning. Some of the lawyers vetting my story expressed fears that even the weakest of legal claims could wind up being heard by a dangerously hostile judge or jury. Their usual caution seemed to have turned into very real fear.

Id. Masters' story was rejected by mainstream outlets and ultimately posted by the tech website The Information. *Id.* Unlike the R. Kelly story published by BuzzFeed, the Masters story on Roy Price at various points relied on unnamed sources. This suggests an increased risk-aversity with respect to publication of stories without sources willing to go on the record with their claims. This kind of attitude is likely to lead to particularly conservative reporting in the political context.

²⁵⁴ Charles Harder, the lawyer who represented Hulk Hogan in the lawsuit bankrolled by Peter Thiel, has threatened to sue the paper on behalf of Harvey Weinstein. *See* Masters, *supra* note 253. That the New York Times does not appear to have censored its coverage of Harvey Weinstein after it broke the story of the many sexual harassment assertions about him does not mean that the Gawker Effect does not lead to self-censorship by news organizations—and perhaps even by the New York Times in other contexts.

In addition to the likely chill portended by third party funding in press contexts, we can also predict a chilling effect on the press from aggressive litigation postures or boundary-pushing prosecutorial choices by government lawyers as well.

²⁵⁵ *See* Jones, *supra* note 222, at 559 ("For the past 100 years, newspapers and traditional media companies have played a critical role as legal instigators and enforcers." *see also* Jones & West, *supra* note 21, at 57. Jones and West note that "[s]truggling news organizations are . . . less able to afford to defend press freedoms in the courts or to lobby for favorable legislation." *Id. see also* Eric Newton, *A News Industry 'Less Able' to Defend Freedom*, KNIGHT FOUND. (Apr. 21, 2016), <https://knightfoundation.org/articles/news-industry-less-able-defend-freedom> ("Nearly two-thirds (65 percent) of the editors who responded rated the news industry as 'less able' to pursue legal activity around First Amendment-related issues than it was 10 years ago. A majority (53 percent) agreed with the statement, 'News organizations are no longer prepared to go to court to preserve First Amendment freedoms.'").

as litigant.²⁵⁶ The likely reduction in public interest First Amendment litigation undertaken by newspapers is principally attributable to the difficult financial circumstances in which newspapers find themselves. But increased risk-aversity toward litigation is doubtless also influenced by the increasing uncertainty of achieving press-protective results in litigation.

Ironically, press protection is at a low ebb doctrinally and in practice at the very moment that journalists need every tool in their arsenal to debunk “fake news” and revive their constitutional role. In fact, the insistence by the executive branch that the mainstream media should not be believed worsens the threat posed by “fake news.” By generating a narrative that delegitimizes real news and its purveyors as fake, and presiding over increasing instability in press protections, the Trump Administration adopts an approach that sacrifices not only the press, but also the public that is duped by real “fake news.”

III. SOLUTIONS TO THE PROBLEM OF “FAKE NEWS”?

The public discourse about how to deal with “fake news” generally seems to recommend technological solutions, audience empowerment solutions, and legal solutions. This Article as well follows that three-pronged convention, although it focuses in this Section specifically on platform technological experiments and audience media literacy suggestions. With respect to platforms, this Article calls for a reframing of the “fake news” problem to enhance the likely robustness of their self-regulatory efforts. With respect to audiences, it recommends granular engagement with empirical research in political science and cognitive psychology in order to enhance the likely effectiveness of information literacy programs.

With respect to legal solutions to the “fake news” problem, proponents domestically focus principally on regulating online intermediaries.²⁵⁷ This Article does not recommend mandatory regulations seeking to prohibit “fake news.” This is because there are reasons to suspect that self-regulation could lead to relatively equivalent results. Even if not required to do so, platforms are likely to adopt at least some of the kinds of technological and disclosure-focused solutions that would likely pass constitutional muster if adopted legislatively. Nor is legislation to prevent “fake news” beyond that likely to

²⁵⁶ Jones, *supra* note 222, at 561, 611–24.

²⁵⁷ See *infra* Section III.A.2.c.

be effective. Instead, the Article argues that affirmative legal intervention should be saved for something else. As is described in Section IV below, the Article argues that the adoption of legal and customary rules to privilege the press is more likely to stem the tide of the most dangerous type of “fake news” discourse than regulatory obligations potentially vulnerable to constitutional attack.

A. Platforms: Technological and Disclosure-Based Self-Regulatory “Fixes”

The major information platforms—such as Facebook and Google—are now engaged in attempts to curtail “fake news” technologically.²⁵⁸ With regard to technological fixes, this Article does not propose to second-guess the details of the various approaches being explored by Facebook’s software engineers. It does, however, recommend that, in addition to their recent “fake news”-curbing initiatives, social media platforms add sponsorship disclosure requirements to their ad sales contracts.²⁵⁹

In addition to platform technological initiatives, there is also scholarly experimentation with respect to developing computational methods and algorithmic tools to help in the identification and control of “fake news,”²⁶⁰ at least some in response to the Fake News Challenge competition.²⁶¹ The

²⁵⁸ See Balkin, *supra* note 25 (explaining the pressures put on such companies, by both governments (what he calls “new school” speech regulation) and end-users (what he calls “a feature of community governance”) to solve the problem of fake news).

²⁵⁹ Here I speak about sponsorship disclosure so that end-users can learn who has paid for the information they consume. But Balkin makes a broader point about transparency in this environment—that in today’s context of private speech governance, “due process becomes an increasingly important value.” *Id.*

²⁶⁰ See, e.g., Sebastian Tschiatschek et al., *Fake News Detection in Social Networks via Crowd Signals*, ARXIV (Nov. 24, 2017), <https://arxiv.org/pdf/1711.09025.pdf>; Jooyeon Kim, Behzad Tbibian et al., *Leveraging the Crowd to Detect and Reduce the Spread of Fake News and Misinformation*, ARXIV (Nov. 27, 2017), <https://arxiv.org/abs/1711.09918>.

For a collection of cites to initiatives attempting to tackle fake news, see Fergus Bell, *A Global Guide to Initiatives Tackling “Fake News”*, GLOBAL INVESTIGATIVE JOURNALISM NETWORK (May 8, 2018), <https://gijn.org/2017/05/08/a-global-guide-to-initiatives-tackling-fake-news/>.

²⁶¹ The Fake News Challenge describes itself as a “grassroots effort of over 100 volunteers and 71 teams from academia and industry around the world. Our goal is to address the problem of fake news by organizing a competition to foster development of tools to help human fact checkers identify hoaxes and deliberate misinformation in news stories using machine learning, natural language processing and artificial intelligence.” FAKE NEWS CHALLENGE, <http://www.fakenewschallenge.org/> (last visited Mar. 15, 2018) (“The goal of the Fake News Challenge is to explore how artificial intelligence technologies, particularly machine learning and natural language processing, might be leveraged to combat the fake news problem. We believe that these AI technologies hold promise

technology-focused approach has also now generated Civil, a fledgling experiment in blockchain-based journalism as a way to eliminate “fake news.”²⁶² For practical reasons having to do with the reach and power of the major communications platforms, the following Section principally focuses on Facebook.

1. Current Self-Regulatory Initiatives by Facebook

The code-based self-regulatory effort by the major platforms has various aspects and is evolving. Even though studies suggest that the largest volume of fabricated news during the 2016 election season was disseminated via Facebook, the company’s CEO Mark Zuckerberg initially denied both the extent of political misinformation distributed by Facebook and its likely impact on the election, calling the latter “a pretty crazy idea.”²⁶³ Zuckerberg also vehemently disputed the claim that Facebook was a media organization, consistently characterizing it as a technology company.²⁶⁴ This meant that Facebook saw itself simply as transmitting others’ speech, and not as having any kind of editorial or curatorial

for significantly automating parts of the procedure human fact checkers use today to determine if a story is real or a hoax.”).

²⁶² Civil, <https://joincivil.com/#who-are-you> (last visited Mar. 15, 2018); Ricardo Bilton, *Civil, The Blockchain-Based Journalism Marketplace is Building its First Batch of Publications*, NEIMAN: LAB (Oct. 25, 2017), <http://www.niemanlab.org/2017/10/civil-the-blockchain-based-journalism-marketplace-is-building-its-first-batch-of-publications/>.

It is beyond the scope of this Article to engage the argument that blockchain would, in one fell swoop, reverse the modern press’ woes with respect to both financing and “fake news.” Suffice it to say that the controversies over Bitcoin have shown that blockchain technology is still very early in its infancy, despite the hype, and that we are not yet in a position to address the issue with sufficient information. Moreover, even if the approach would be an economically effective alternative for advertising support for the press, its radically decentralized format raises questions about the downsides of eliminating the editorial and curatorial function in favor of individual contracting between readers and reporters. The institutional press has an important democratic value, and it is unclear how that would be leveraged in a blockchain journalism world.

²⁶³ See, e.g., Aarti Shahani, *Zuckerberg Denies Fake News on Facebook Had Impact on The Election*, NPR: ALL TECH CONSIDERED (Nov. 11, 2016), <http://www.npr.org/sections/alltechconsidered/2016/11/11/501743684/zuckerberg-denies-fake-news-on-facebook-had-impact-on-the-election> (quoting Zuckerberg); see also Dorf & Tarrow, *supra* note 12. For an extensive exploration of Zuckerberg’s initial and developing reactions to the issue, see Nicholas Thompson & Fred Vogelstein, *Inside the Two Years That Shook Facebook—and the World*, WIRED, Feb. 12, 2018 07:00 AM, <https://www.wired.com/story/inside-facebook-mark-zuckerberg-2-years-of-hell/>.

²⁶⁴ See, e.g., Jeff John Roberts, *Why Facebook Won’t Admit It’s a Media Company*, FORTUNE (Nov. 14, 2016), <http://fortune.com/2016/11/14/facebook-zuckerberg-media/>; Thompson & Vogelstein, *supra* note 263.

responsibility with respect to the information transmitted.²⁶⁵ Facebook took the position that it did not wish to be a censor or the arbiter of truth for society.²⁶⁶

Thereafter, under pressure as evidence of Russian election meddling via social media came increasingly to light, Facebook revised its approach toward “fake news.” The company became more active in attempting to reduce misinformation in three areas: disrupting economic incentives in the advertising space; calling out “fake news” in users’ news feeds; and helping provide tools for information literacy.²⁶⁷ With regard to advertising, Facebook announced steps to diminish the economic incentives for traffickers of misinformation, and decided to prohibit repeat offenders from advertising on the platform.²⁶⁸ Facebook has recently hired 1,000 additional employees to review and remove ads.²⁶⁹ In addition, to the extent that only a few sources generate much of the viral “fake news,” identifying those sources and engaging in a platform-based attempt to reduce promotion of information from those sources could reduce the distribution of “fake

²⁶⁵ See, e.g., Thompson & Vogelstein, *supra* note 263 (describing the history of Facebook’s self-perception as a platform and not a publisher).

²⁶⁶ Mark Zuckerberg Facebook Post, FACEBOOK (Nov. 12, 2016), <https://www.facebook.com/zuck/posts/10103253901916271>.

²⁶⁷ See Adam Mosseri, *A New Educational Tool Against Misinformation*, FACEBOOK: NEWSROOM (Apr. 6, 2017), <https://newsroom.fb.com/news/2017/04/a-new-educational-tool-against-misinformation/> (“At Facebook we have been focusing on three key areas: disrupting economic incentives because most false news is financially motivated; building new products to curb the spread of false news; and helping people make more informed decisions when they encounter false news.”) *see also* *Faking News*, *supra* note 44, at 29–40.

²⁶⁸ See Adam Mosseri, *Working to Stop Misinformation and False News*, FACEBOOK: NEWSROOM (Apr. 6, 2017), <https://newsroom.fb.com/news/2017/04/working-to-stop-misinformation-and-false-news/> (“When it comes to fighting false news, one of the most effective approaches is removing the economic incentives for traffickers of misinformation. We’ve found that a lot of fake news is financially motivated. These spammers make money by masquerading as legitimate news publishers and posting hoaxes that get people to visit their sites, which are often mostly ads. Some of the steps we’re taking include: Better identifying false news through our community and third-party fact-checking organizations so that we can limit its spread, which, in turn, makes it uneconomical . . . Making it as difficult as possible for people posting false news to buy ads on our platform through strict enforcement of our policies . . . Applying machine learning to assist our response teams in detecting fraud and enforcing our policies against inauthentic spam accounts . . . Updating our detection of fake accounts on Facebook, which makes spamming at scale much harder . . . [Making] updates so people see fewer posts and ads in News Feed that link to low-quality web page experiences . . . [Making] updates to address cloaking so that what people see after clicking an ad or post matches their expectations . . . [Making] an update in which repeat offenders that repeatedly share stories marked as false will no longer be allowed to advertise on Facebook.”).

²⁶⁹ Kurt Wagner, *Facebook is Hiring Another 1,000 People to Review and Remove Ads*, RECODE (Oct. 2, 2017, 11:00 AM), <https://www.recode.net/2017/10/2/16395342/facebook-mark-zuckerberg-advertising-policies-russia-investigation-election-moderators>.

news.”²⁷⁰ With regard to “helping people make more informed decisions,”²⁷¹ Facebook developed and disseminated educational tools for information literacy, inaugurated the Facebook Journalism Project to collaborate with news organizations in developing products to help journalists and citizens “make smart choices about what they read;”²⁷² and joined the News Integrity Initiative, “a global consortium focused on helping people make informed judgments about the news they read and share online.”²⁷³ In order to curb the spread of “fake news,” Facebook entered into partnerships with third-party fact-checking organizations—such as Snopes, PolitiFact, the Associated Press, and FactCheck.org—in order to fact-check shared news stories.²⁷⁴ The company announced, as part of a News Feed Update, that it would begin testing a “more info” button that users could click to obtain additional context about articles in their news feeds.²⁷⁵ Facebook has also promised to make available information to users indicating whether or not they followed Russian bot-generated “fake

²⁷⁰ See, e.g., Lazer et al., *supra* note 17.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*; see also *Faking News*, *supra* note 44, at 64–69. Originally, Facebook sought to identify fact checker-identified false stories with a “disputed” label. In December 2017, however, Facebook announced that it would stop using the “disputed” tag on stories in light of its conclusion that the red “disputed” flag was actually counterproductive. See Catherine Shu, *Facebook Will Ditch Disputed Flags on Fake News and Display Links to Trustworthy Articles Instead*, TECHCRUNCH (Dec. 20, 2017), <https://techcrunch.com/2017/12/20/facebook-will-ditch-disputed-flags-on-fake-news-and-display-links-to-trustworthy-articles-instead/>; Sara Fischer, *Facebook Stops Putting “Disputed Flags” on Fake News Because it Doesn’t Work*, AXIOS (Dec. 27, 2017), <https://wwwaxios.com/facebook-drops-fake-news-flags-because-they-had-reverse-effect-2520310212.html>. Instead, Facebook said it would use “Related Articles” to provide context for fake news on the ground that this new strategy is likely to lead to fewer shares of fake news than the “disputed” flag. Fischer, *supra* (noting also that the company is “starting a new initiative to better understand how people decide what’s accurate based on the news sources they [d]epend upon,’ or likely follow and engage with on Facebook.”); see also Shu, *supra* (on Facebook decision to show “Related Articles” or link to content from reputable publishers).

²⁷⁵ Andrew Anker, Sara Su & Jeff Smith, *News Feed FYI: New Test to Provide Context About Articles*, FACEBOOK: NEWSROOM (Oct. 5, 2017), <https://newsroom.fb.com/news/2017/10/news-feed-fyi-new-test-to-provide-context-about-articles/> (“For links to articles shared in News Feed, we are testing a button that people can tap to easily access additional information without needing to go elsewhere. The additional contextual information is pulled from across Facebook and other sources, such as information from the publisher’s Wikipedia entry, a button to follow their Page, trending articles or related articles about the topic, and information about how the article is being shared by people on Facebook. In some cases, if that information is unavailable, we will let people know, which can also be helpful context . . . Helping people access this important contextual information can help them evaluate if articles are from a publisher they trust, and if the story itself is credible. This is just the beginning of the test.”).

news” during the election period.²⁷⁶ More recently, the company announced that it would prioritize posts from friends and family (as opposed to media posts or posts from brands) in its News Feed.²⁷⁷ To mitigate possible increases in shared misinformation, Facebook also announced that it would ask users to identify trusted news sites and introduce “high quality” news into feeds.²⁷⁸

Other major information intermediaries have also announced their self-regulatory responses to the spread of disinformation online.²⁷⁹ And scholars have been generating a

²⁷⁶ See, e.g., Alex Hern, *Facebook to Tell Users if They Interacted with Russia’s ‘Troll Army’*, THE GUARDIAN (Nov. 23, 2017, 4:45 PM), <https://www.theguardian.com/technology/2017/nov/23/facebook-to-tell-users-if-they-interacted-with-russia-troll-army>.

²⁷⁷ Zuckerberg said that the point of the change was to shift back from passive consumption to engagement with personal posts that generate discussion. Mark Zuckerberg Facebook Post, FACEBOOK (Jan. 11, 2018), <https://www.facebook.com/zuck/posts/10104413015393571>.

²⁷⁸ Mark Zuckerberg Facebook Post, FACEBOOK (Jan. 19, 2018), <https://www.facebook.com/zuck/posts/10104445245963251>.

²⁷⁹ For example, Google, the predominant search engine, has announced changes to its search algorithm and the ways in which it presents results in order to combat “fake news.” Ben Gomes, *Our Latest Quality Improvements for Search*, GOOGLE: THE KEYWORD (Apr. 25, 2017), <https://www.blog.google/products/search/our-latest-quality-improvements-search/>; see also *Faking News*, *supra* note 44, at 40–48. Google representatives described the search engine update as blocking access to “offensive” sites and foregrounding more “authoritative content.” *Id.*; see also Alex Hern, *Google Acts Against Fake News on Search Engine*, THE GUARDIAN (Apr. 25, 2017, 10:00 AM), <https://www.theguardian.com/technology/2017/apr/25/google-launches-major-offensive-against-fake-news>; Danae Metaxa-Kakavouli & Nicolas Torres-Echeverry, *Google’s Role in Spreading Fake News and Misinformation*, STANFORD LAW SCH.: LAW & POL’Y LAB (Oct. 2017), <https://www-cdn.law.stanford.edu/wp-content/uploads/2017/11/SSRN-id3062984.pdf>. Google has also partnered with fact-checking groups to include links to their posts in Google News’ story clusters and fact check labels in Google News articles. Frederic Lardinois, *Google’s Fact Check Feature Goes Global and Comes to Google Search*, TECHCRUNCH (Apr. 7, 2017), <https://techcrunch.com/2017/04/07/fact-check-the-world-is-flat/>; see also Sheldon Burshtein, *The True Story on Fake News*, 29 INTELL. PROP. J. 397, 408–10 (2017); see also Heather Timmons, *Google Executives are Floating a Plan to Fight Fake News on Facebook and Twitter*, QUARTZ (Feb. 8, 2018), <https://qz.com/1195872/google-facebook-twitter-fake-news-chrome/> (describing possible notification system via Google’s Chrome browser extension).

In addition to Google and Facebook, Twitter too has stated that it will try to fight fake news with “trust indicators.” See Seth Fiegerman, *Facebook, Google, Twitter to Fight Fake News with ‘Trust Indicators’*, CNN: TECH (Nov. 16, 2017), <http://money.cnn.com/2017/11/16/technology/tech-trust-indicators/index.html>; see also *Faking News*, *supra* note 44, at 49–51.

Of the major social media players, it appears that Snapchat is the only one not to have a significant “fake news” problem. This is said to be due to Snapchat’s structure. See Max Chafkin, *How Snapchat Has Kept Itself Free of Fake News*, BLOOMBERG (Oct. 26, 2017, 4:30 AM), <https://www.bloomberg.com/news/features/2017-10-26/how-snapchat-has-kept-itself-free-of-fake-news>.

variety of other code-based approaches to the identification and minimization of “fake news.”²⁸⁰

2. Assessing Platform Self-Regulation

How effective are these interventions likely to be? With respect to what kinds of “fake news”? Are there structural reasons to doubt them? Given the secrecy of the platforms’ processes and their proprietary algorithms, will there be adequate ways to assess the effectiveness of their efforts—or will we just have to trust in the accuracy of the platforms’ assurances? Even if platform initiatives will effectively reduce at least some types of harmful “fake news,” is it desirable to leave speech regulation to non-journalistic commercial platforms? Credible arguments can be made that Facebook’s “fake news” initiatives are either too good or not good enough.

a. Effectiveness

The likely effectiveness of self-regulation by these social media platforms is a complicated issue. On the one hand, their financial models rely on advertising and on scraping as much data as possible from the online activities of all their users to attract advertisers. Although Facebook will surely attempt to reduce the manipulation of its own platform for strategic political purposes, it still faces the imperatives of its own economic business model.²⁸¹ Some have argued that because virality (which increases profits for information intermediaries) is driven by emotional appeals and sensationalistic material rather than high-quality news reporting, entities like Facebook will have a fundamental ambivalence about their commitment to “fake news” reduction.²⁸² At a minimum, one could wonder

²⁸⁰ See, e.g., Verstraete, Bambauer, & Bambauer, *supra* note 42, at 28 (employing user feedback, fingerprinting known fake news items, source identification).

²⁸¹ The point has even been made in comedy, with the evil character Professor Chaos in a recent South Park episode saying, “I make money from Facebook for my fake content in order to pay Facebook to promote my fake stories.” Josh Constine, *South Park Slams Facebook for Selling Fake News*, TECHCRUNCH (Oct. 12, 2017), <https://techcrunch.com/2017/10/12/south-park-vs-zuckerberg/>; see also Thompson & Vogelstein, *supra* note 263 (on the economic rewards of sensationalistic content on social media). For a pessimistic view by an early Facebook investor about the possibility of effective self-regulation by the company for this reason, see Roger McNamee, *How to Fix Facebook—Before it Fixes Us*, WASH. MONTHLY (Jan./Feb./Mar. 2018), <https://washingtonmonthly.com/magazine/january-february-march-2018/how-to-fix-facebook-before-it-fixes-us/>.

²⁸² See, e.g., Josef Drexl, *Economic Efficiency Versus Democracy: On the Potential Role of Competition Policy in Regulating Digital Markets in Times of Post-Truth Politics*, in COMPETITION POLICY: BETWEEN EQUITY AND EFFICIENCY (forthcoming 2017) (manuscript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2881191); see also Bell & Owen, *supra* note 147 (observing that “the structure and the economics of social

whether the platforms' cost/benefit calculus will prompt the most extensive and expensive efforts to reduce "fake news." After all, in light of the fact that they will never be able to eliminate "fake news" entirely and that both unsuccessful and semi-successful attempts will inevitably lead to harsh critique anyway, will the platforms have the incentive to invest maximally in trying to discipline "fake news" on social media?

Even without fundamental skepticism about the platforms' commitment to the reduction of misinformation online, it is obvious that self-regulatory models in which the platforms partner with other entities to check facts will best succeed if their partners are perceived as credible by readers. Are the fact-checking entities with which Facebook has partnered generally seen as credible? Studies suggest that there has been an uptick in the number of fact-checking organizations recently.²⁸³ At least some of them, however, have been characterized by the right-wing press as liberal propagandists,²⁸⁴ while others, such as the conservative *Weekly Standard*, Facebook's new fact-checking partner, have been attacked by liberals.²⁸⁵ In any event, because of the speed with which "fake

platforms incentivize the spread of low-quality content over high-quality material. Journalism with high civic value—journalism that investigates power, or reaches underserved and local communities—is discriminated against by a system that favors scale and shareability."); Verstraete, Bambauer, & Bambauer, *supra* note 42, at 25 (describing some fake news as "a symptom of surveillance capitalism, the economic model underlying many Internet platforms that monetizes collecting data"); *see also* Farhad Manjoo, *Can Facebook Fix Its Own Worst Bug?*, N.Y. TIMES (Apr. 25, 2017), https://www.nytimes.com/2017/04/25/magazine/can-facebook-fix-its-own-worst-bug.html?_r=0 (worrying about Facebook's ability to ignore the likes and dislikes of its users in order to address the pervasive climate of fake news when the whole basis of the social network is responsiveness to its users' likes and dislikes). A recent New America report, #Digitaldeceit, argues that "[t]he financial interests that drive the core technologies of the leading internet platforms and the objectives of disinformation campaigners are often aligned."

²⁸³ See, e.g., Michelle Ye Hee Lee, *Fighting Falsehoods Around the World: A Dispatch on the Growing Global Fact-checking Movement*, WASH. POST (July 14, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/07/14/fighting-falsehoods-around-the-world-a-dispatch-on-the-global-fact-checking-movement/?utm_term=.c8fe63144d6c.

²⁸⁴ See, e.g., James Covert, *Facebook Under Fire for Picking 'Liberal' Outlets to Fact-check*, N.Y. POST (Dec. 16, 2016, 12:52 PM), <https://nypost.com/2016/12/16/facebook-under-fire-for-picking-liberal-outlets-to-fact-check/>; *see also* Guess, Nyhan, & Reifler, *supra* note 60 (study noting that fact-checking "may not effectively reach people who have encountered the false claims it debunks" and concluding that "[p]ositive views of fact-checking are less common among fake news consumers (48%), especially those who support Trump (24%)").

²⁸⁵ Sam Levin, *Conservative Weekly Standard to Aid in Facebook Fact-Checks, Prompting Outcry*, THE GUARDIAN (Dec. 6, 2017, 4:07 PM), <https://www.theguardian.com/technology/2017/dec/06/facebook-weekly-standard-fake-news-fact-check> ("The Weekly Standard will be the first right-leaning news organization and explicitly partisan group to do fact-checks for Facebook, prompting backlash from progressive organizations, who have argued that the

news” can propagate on social media, it is very likely that fact checkers will find it difficult to provide real-time rebuttals. Recent reports suggest that Facebook fact-checkers themselves doubt the efficacy of the company’s initiative: “nearly a year after rolling out a new plan to fight misinformation, Facebook’s fact checkers are skeptical that their work is much more than hastily applied public-relations effort.”²⁸⁶

Social scientists have now publicized a new wrinkle—the “implied truth effect.”²⁸⁷ A recent study suggests that users who do not see a “disputed” label on an item of information on social media will therefore assume that the information must be true. Since fact-checking and “disputed” labeling can never be perfect in today’s information glut environment, the findings prompt the question whether “disputed” labeling can backfire—as Facebook itself concluded when it decided to switch away from such labeling recently.²⁸⁸

In addition, Facebook’s attempts to identify and isolate “fake news” purveyors is likely to become a game of whack-a-mole, or an arms race, as the identified websites morph to avoid identification. This means that the process will be an iterative one, requiring adaptation as “fake news” purveyors change their *modus operandii* in response to attempts to inhibit their success.²⁸⁹ Given Facebook’s blindness to past attempts to manipulate the platform,²⁹⁰ questions might be raised about likely competence going forward as well.

magazine has a history of publishing questionable content.”). But see Alexios Mantzaris, *Conservative Websites Are Far More Likely to Attack Fact-Checkers Than Their Liberal Counterparts*, POYNTER, (June 8, 2017), <https://www.poynter.org/news/conservative-websites-are-far-more-likely-attack-fact-checkers-their-liberal-counterparts> (reporting earlier study).

²⁸⁶ Maya Kosoff, *Facebook’s Fact-Checkers Say They’re Little More Than a P.R. Ploy*, VANITY FAIR (Nov. 13, 2017, 5:37 PM), <https://www.vanityfair.com/news/2017/11/facebook-fact-checkers-say-theyre-little-more-than-a-pr-ploy>.

²⁸⁷ Gordon Pennycook & David G. Rand, The Implied Truth Effect: Attaching Warnings to a Subset of Fake News Stories Increases Perceived Accuracy of Stories Without Warnings (Dec. 8, 2017) (unpublished manuscript), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3035384 (hypothesizing an “implied truth effect” in a study that found that “the presence of warnings caused untagged stories to be seen as more accurate than in the control.”).

²⁸⁸ See *supra* text accompanying note 274.

²⁸⁹ See Anderson & Rainie, *supra* note 21 (quoting Tom Rosenstiel: “Whatever changes platform companies make, and whatever innovations fact checkers and other journalists put in place, those who want to deceive will adapt to them. Misinformation is not like a plumbing problem you fix. It is a social condition, like crime, that you must constantly monitor and adjust to. Since as far back as the era of radio and before, as Winston Churchill said, ‘A lie can go around the world before the truth gets its pants on.’”).

²⁹⁰ For a description of how slow Facebook was to identify “fake news” manipulation, see Thompson & Vogelstein, *supra* note 263.

Moreover, recent changes to Facebook's News Feed have been contested by those who believe that a focus on posts that encourage engagement could amplify the spread of engagement-triggering hoaxes and conspiracy theories.²⁹¹ Even though Facebook has committed to the provision of "high quality" news to mitigate that possibility, its reliance on crowdsourcing source legitimacy from its users has been criticized.²⁹² And the deprioritization of news from media organizations might have "extinction-level" consequences for some small or niche news purveyors.²⁹³

A more optimistic narrative is also possible, however. Social media companies are doubtless sensitive to how their users and advertisers perceive them.²⁹⁴ To the extent that Facebook users feel manipulated by an onslaught of "fake news" on the platform, there is likely to be a dip in trust and a corresponding reputational impact on the company. In fact, several Facebook shareholders have attempted to use corporate law rules to recommend shareholder proposals requesting that Facebook report to the shareholders on the company's efforts to address the problem of "fake news."²⁹⁵ In addition to Facebook

²⁹¹ See, e.g., Matthew Ingram, *Facebook Changes Could Help the Media Kick its Algorithm Addiction*, COLUM. J. REV. (Jan. 12, 2018), <https://www.cjr.org/innovations/facebook-changes-news-feed.php>;

²⁹² See, e.g., Berhnard Clemm, *Facebook Wants Its Users to Drive out Fake News. Here's the Problem with That*, WASH. POST (Feb. 1, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/01/facebook-wants-to-drive-out-fake-news-by-having-users-rate-news-outlets-credibility-heres-the-problem-with-that/?utm_term=.5feb64a79ff1 (explaining that the "reliability of the "trusted sources" measure is dubious, [because] people in superficial surveys of this kind often indicate trust in fake sources that have familiar and vaguely credible names [and because] partisan Facebook users with a high interest in promoting "their" media could bias the results").

²⁹³ Matthew Ingram, *Facebook Changes Could Help the Media Kick its Algorithm Addiction*, COLUM. J. REV., (Jan. 12, 2018), <https://www.cjr.org/innovations/facebook-changes-news-feed.php> (quoting Mother Jones Senior Editor Ben Dreyfuss). Jonah Engel Bromwich & Matthew Haag, *Facebook Is Changing. What Does That Mean for Your News Feed?*, N.Y. Times (Jan. 12, 2018), <https://www.nytimes.com/2018/01/12/technology/facebook-news-feed-changes.html> (describing impact on brands and publishers).

²⁹⁴ It is instructive in this regard that Google's parent company, Alphabet, recently identified fake news as a reputational business risk. Jillian D'Onfro, *Google Now Lists Fake News and 'Objectionable Content' as Risks to its Business*, MSN (Feb. 6, 2018, 3:23 PM), <https://www.msn.com/en-us/money/technologyinvesting/google-now-lists-fake-news-and-objectionable-content-as-risks-to-its-business/ar-BBIMTqe>; see also Renee DiResta, *There are Bots. Look Around.*, RIBBONFARM (May 23, 2017), <https://www.ribbonfarm.com/2017/05/23/there-are-bots-look-around/> ("Becoming hosts of unchecked disinformation campaigns negatively impacts the three things businesses care most about: top line revenue, downstream profit, and mitigating risk. It will ultimately destroy the value of their networks.").

²⁹⁵ Amy Lee Rosen, *Shareholders Demand Google and Facebook Report on Fake News Policies*, CONG. QUARTERLY, (Feb. 3, 2017), 2017 WL 460653. But see Hasen, *supra* note 10, at 227 (noting that shareholder activism has thus far been unsuccessful).

users, brands that have advertised on Facebook have their own reputations to consider. Such advertisers have been increasingly vocal in refusing to have their ads run next to objectionable content.²⁹⁶ In order to retain such advertisers, Facebook has economic incentives to tweak its programmatic ad-buying algorithms to reduce the likelihood of embedding brands’ ads in “fake news” or other commercially undesirable content. Furthermore, to the extent that social bots play a significant role in the dissemination of “fake news” soon after it is published, attempts to reveal and thus curb bot accounts might be a useful step in tackling the “fake news” problem.²⁹⁷

Another, more inchoate, element is the question of personal commitment to improvement on the part of the new platform lords. For example, media reports suggest that Facebook’s Zuckerberg, after an initial period of denial about Facebook’s role in political discourse, has revised his “personal techno-optimism” and made a personal commitment that Facebook “fix the problems swirling around it[.]”²⁹⁸ Arguably, Facebook’s decision knowingly to adopt a News Feed strategy that would lead users to leave Facebook and have a downward impact on the company’s share price²⁹⁹ indicates a more serious commitment to experimenting with ways to contain “fake news” and improve discourse online.³⁰⁰ At a minimum, the fact that the new media landscape is dotted with billionaire saviors³⁰¹ should prompt an expanded and more complex analysis of corporate incentives.

²⁹⁶ See, e.g., Sapna Maheshwari, *Facebook Moves to Keep Ads From Running on Objectionable Videos*, N.Y. TIMES (Sept. 13, 2017), https://www.nytimes.com/2017/09/13/business/media/facebook-ads.html?_r=0.

²⁹⁷ See Shao et al., *supra* note 54.

²⁹⁸ Thompson & Vogelstein, *supra* note 263.

²⁹⁹ Zuckerberg Facebook Post, *supra* note 278 (describing projected impact on time spent by users on Facebook); Edoardo Maggio & Matt Weinberger, *Facebook’s Stock is Dropping After it Announced That it’s Making Big Changes to its News Feed*, BUS. INSIDER (Jan. 12, 2018 7:01 AM), <http://www.businessinsider.com/facebook-stock-dropping-following-news-feed-announcement-of-the-changes-its-making-to-the-news-feed-2018-1> (describing impact on stock).

³⁰⁰ The point here is not to laud or criticize any of the particular approaches Facebook has been taking with respect to the proliferation of “fake news.” Nor is it to suggest that Zuckerberg’s expressed commitments are entirely altruistic and unrelated to promoting long-term profit-maximizing business and legal strategies. It is to argue that allowing for—and studying the results of—such experimentation could bear some fruit in the “fake news” containment strategy.

³⁰¹ See Ryan Chittum, *Jeff Bezos’ Landmark Purchase of the Washington Post*, COLUM. J. REV. (Aug. 5, 2013), https://archives.cjr.org/the_audit/jeff_bezos_landmark_purchase.php (“We’ve now officially entered the Billionaire Savior phase of the newspaper collapse—for good or ill.”); see also Alex Pareene, *Billionaires Gone Wild*, COLUM. J. REV. (Winter 2018), https://www.cjr.org/special_report/rich-journalism-media.php (criticizing a media landscape operating pursuant to the whims of the new “press barons”).

With respect to its new approach to the News Feed, Facebook may be attempting to shift from a strategy of prohibiting “fake news” as such to a strategy designed to crowd out “fake news” through personalized sharing of high quality, trusted content.³⁰² Such an approach might be more effective than a directly prohibitive approach if Facebook develops user surveys designed to assess user trust in a granular and sophisticated way.³⁰³ For example, questions that seek to determine the basis of user trust—whether the user trust is based on content or aligned political/ideological commitments or group identity or emotional reactions—could provide a rich picture of what sources are trusted and why. As has already been noted, the “trusted sources” metric’s dangers could be neutralized by “adjusting for the absolute level of familiarity.”³⁰⁴ It is not impossible that the wisdom of the crowd—if carefully collected and intelligently analyzed—could provide a path to better quality information on social media.

Facebook’s News Feed modification might also have some beneficial effects on publishers.³⁰⁵ Shifting some news consumption directly to publishers themselves might offer the possibility of enhanced reputational branding by press outlets.³⁰⁶ Moreover, as the new Facebook News Feed strategy reduces

³⁰² See Thompson & Vogelstein, *supra* note 263 (“For the past year, Facebook has been developing algorithms to hammer publishers whose content is fake; now it’s trying to elevate what’s good.”).

³⁰³ Of course, this would not be the case if Facebook simply used the two question survey that the company is reportedly proposing to use in assessing its users’ trust in news sources. See Shan Wang, Facebook’s trust survey, which will help determine News Feed ranking, is two questions. But it’s not as simple as it sounds.

NEIMANLAB (Jan. 25, 2018 12:25 PM), <http://www.niemanlab.org/2018/01/facebook-trust-survey-which-will-help-determine-news-feed-ranking-is-two-questions-but-its-not-as-simple-as-it-sounds/> (describing the survey and the fact that responses will be used in conjunction with other user data). Moreover, if Facebook continues to eschew any role in making editorial decisions—either because the company is afraid of being accused of leftward bias, *see* Thompson & Vogelstein, *supra* note 263, or because it does not want to become the world’s most powerful censor, *see* Samidh Chakrabarti, *Hard Questions: What Effect Does Social Media Have on Democracy?*, FACEBOOK: NEWSROOM (Jan. 22, 2018), <https://newsroom.fb.com/news/2018/01/effect-social-media-democracy/> (“[W]e don’t want to be the arbiters of truth”—it might be difficult to ensure that high quality news will in fact crowd out the junk news that undermines democracy).

³⁰⁴ Clemm, *supra* note 292.

³⁰⁵ Reportedly, Facebook is “experimenting with giving publishers more control over paywalls and allowing them to feature their logos more prominently to reestablish the brand identities that Facebook flattened years ago.” Thompson & Vogelstein, *supra* note 263.

³⁰⁶ Admittedly, that may be better news for “traditional news brands than for digital-native ones.” Joshua Benton, If Facebook Stops Putting News in Front of Readers, Will Readers Bother to go Looking for It?, NIEMANLAB (Jan 12, 2018, 12:00 PM), <http://www.niemanlab.org/2018/01/if-facebook-stops-putting-news-in-front-of-readers-will-readers-bother-to-go-looking-for-it/>.

publishers’ incentives to tailor their news content to the ad-supported, click-based model that makes Facebook tick, they may recommit to an exploration of the kind of serious journalism that promotes democracy and the public interest.³⁰⁷

Given that total elimination of “fake news” on social media is an unattainable goal, Facebook representatives have claimed relative success. For example, Facebook recently asserted that it had successfully minimized the dissemination of misinformation during the German election of late September 2017.³⁰⁸ Previously, the company had employed various initiatives to reduce the dissemination of false information during the most recent French election and the U.K.’s Brexit vote.³⁰⁹ Facebook has also claimed that “future impressions on stories labeled false by third-party fact checkers dropped by 80 percent—ostensible proof that its fact-checking system works,

³⁰⁷ See Jason Koebler, *Facebook is Deprioritizing Our Stories*. Good., MOTHERBOARD (Jan. 11, 2018, 9:32 PM), https://motherboard.vice.com/en_us/article/zmqgn4/facebook-algorithm-news-feed-change. The question of how to fund excellence in journalism in today’s economic climate is beyond the scope of this Article. Several possibilities can be mentioned, however. There has been a move toward paywalls of various kinds for digital media, and Facebook has recently changed its algorithms to recognize publisher paywalls. See Thompson & Vogelstein, *supra* note 263; Natalie Jarvey, *Facebook to Launch Publisher Paywalls, Video News Section*, HOLLYWOOD REPORTER (Feb. 12, 2018), <https://www.hollywoodreporter.com/news/facebook-launch-publisher-paywalls-video-news-section-1084144>. Suggestions to create incentives for subscriptions in the U.K. include tax deductions for media subscriptions. Amanda Meade, *Journalism Inquiry Recommends Tax Deductions for News Media Subscriptions*, THE GUARDIAN (Feb. 5, 2018 10:44 PM), <https://www.theguardian.com/media/2018/feb/06/journalism-inquiry-recommends-tax-deductions-for-news-media-subscriptions>. In addition, Rupert Murdoch recently proposed that Facebook pay publishers for use of their trusted content (along a cable television carriage model). Press Release, Statement of Rupert Murdoch, Executive Chairman of News Corp, on a Carriage Fee for Trusted Publishers (Jan. 22, 2018), <https://newscorp.com/2018/01/22/statement-of-rupert-murdoch-executive-chairman-of-news-corp-on-a-carriage-fee-for-trusted-publishers/>; Maya Kosoff, *Rupert Murdoch to Mark Zuckerberg: Shut Up, Pay Me*, VANITY FAIR (Jan. 22, 2018, 6:38 PM), <https://www.vanityfair.com/news/2018/01/rupert-murdoch-to-mark-zuckerberg-shut-up-pay-me>. A recent news report suggests that Facebook would not be unalterably opposed to such a scheme. Kurt Wagner & Theodore Schleifer, *Here Are the Ways Facebook Said it’s Trying to Help Publishers*, RECODE (Feb. 12, 2018, 8:23 PM), <https://www.recode.net/2018/2/12/17005058/facebook-help-publishers-news-feed-algorithm-campbell-brown-adam-mosseri-code-media> (“[F]acebook would not rule out paying publishers for content.”).

³⁰⁸ See Jeremy Kahn, *Facebook Touts Success in Fighting Fake News in German Election*, BLOOMBERG (Sept. 27, 2017, 1:53 PM), <https://www.bloomberg.com/news/articles/2017-09-27/facebook-touts-success-fighting-fake-news-in-german-election>.

³⁰⁹ See, e.g., Natasha Lomas, *Google and Facebook Partner for Anti-fake News Drive During French Election*, TECHCRUNCH (Feb. 6, 2017), <https://techcrunch.com/2017/02/06/google-and-facebook-partner-for-anti-fake-news-drive-during-french-election/>.

albeit not perfectly.”³¹⁰ Admittedly, Facebook’s partner fact-checking organizations complain that a lack of transparency by the company makes it difficult for them to assess accurately whether their fact-checking is in fact having a measurable impact on the dissemination of disinformation on Facebook.³¹¹ And a recent unpublished working paper by Pennycook and Rand suggests that while tagging news stories as disputed led to a reduction in their perceived accuracy, the effect was “modest.”³¹² Still, other studies reveal more optimistic results,³¹³ suggesting that more work needs to be done.

Nevertheless, although success is uncertain,³¹⁴ and although the very structure of the social media platforms’ economic model exerts counter-pressure, there are at least two reasons to believe that the platforms will take the effort seriously. First, such initiatives are taking place very much in the public eye and against a backdrop of both domestic and global regulatory interventions.³¹⁵ Second, if the “fake news” problem is understood not just as a problem for democracy,³¹⁶ but as an economic problem for markets as well, there may be more consistent commercial as well as consumer pressure on the platforms to persevere with self-regulatory efforts. The

³¹⁰ Kosoff, *supra* note 286. But see Guess, Nyhan, & Reifler, *supra* note 60 (disputing effectiveness of fact-checking during U.S. presidential election contest).

³¹¹ See Kosoff, *supra* note 286.

³¹² Pennycook & Rand, *supra* note 287.

³¹³ See, e.g., Brendan Nyhan, *Why the Fact-Checking At Facebook Needs to be Checked*, N.Y. TIMES (Oct. 23, 2017), <https://www.nytimes.com/2017/10/23/upshot/why-the-fact-checking-at-facebook-needs-to-be-checked.html> (reporting findings that “the effects of Facebook-style ‘disputed’ banners on the perceived accuracy of false headlines are larger than those Mr. Pennycook and Mr. Rand observed. The proportion of respondents rating a false headline as ‘somewhat’ or ‘very accurate’ in our study decreased to 19 percent with the standard Facebook ‘disputed’ banner, from 29 percent in the unlabeled condition. It goes down even further, to 16 percent, when the warning instead states that the headline is ‘rated false.’”).

³¹⁴ See, e.g., Anderson & Rainie, *supra* note 21 (reflecting split on experts’ views on the tractability of the fake news problem).

³¹⁵ See, e.g., Thompson & Vogelstein, *supra* note 263 (describing Facebook’s sensitivity to the prospect of regulation).

³¹⁶ Casting the problem as principally one for democracy can enable business corporations (advertisers and otherwise) which are wary of seeming to take partisan political positions to sit out the political “fake news” brouhaha and simply leave policing to the platforms. That might be the case for government officials as well, particularly those concerned about being seen as engaging in censorship. Those who believe that their political fortunes would be enhanced by seeming to act to control “fake news” might propose regulatory moves unlikely to pass constitutional muster. And focusing on the audience—suggesting that the only true solution to the “fake news” problem is information literacy by the electorate—would surely be seen as an attractive way of diminishing responsibility for other participants in the dissemination of “fake news.” To the extent that “fake news” is cast as an exclusively political problem, then, many information market participants might be tempted to mouth platitudes about the democratic dangers of the phenomenon while doing very little as a practical matter.

existence of multiple nodes of pressure could be useful in promoting serious attempts to tackle the problem. “Fake news” today—and, more worryingly, tomorrow—is likely to disrupt not only elections and governments, but also markets. A clear recognition of that reality might help put pressure on the platforms and the rest of corporate America to engage the problem of “fake news” with seriousness.

b. Desirability

The reality of the platforms’ “fake news” initiatives makes almost irrelevant the question whether we *should* “outsource” the solution to our most important democratic challenge to private companies with no governmental nor fiduciary duties to the public and whose efforts are likely to be shrouded from public view. Still, we might worry, in characterizing themselves not as media companies but as simple transmitters or disseminators of information, social media platforms have told us a fundamental truth about their origin stories and their commitments. They did not rise from a journalistic past; they do not hew principally to journalistic values; they do not see themselves as the guarantors of an important constitutional tradition.³¹⁷ Using algorithms injects the issue of hidden skews and censorship.³¹⁸ Algorithmic decision making outsources gatekeeping and censorship to AI-powered filters whose decision making is neither transparent nor accountable.³¹⁹ And, as suggested by the story that Facebook employees admitted to routine suppression of conservative news last year,³²⁰ human involvement may have negative consequences—including implicit bias.

Of course, the imperfection of platform self-regulation begs the question “compared to what”? Could direct attempts

³¹⁷ See Bell & Owen, *supra* note 147.

³¹⁸ Recently, progressive news outlets have criticized the platforms’ efforts to reduce “fake news” on the ground that the adjusted algorithm in fact has significantly reduced web traffic to progressive and radical news sites. *See, e.g.*, Don Hazen, *Google’s Threat to Democracy Hits AlterNet Hard*, ALTERNET (Sept. 28, 2017, 9:49 AM), <https://www.alternet.org/media/editorial-googles-threat-democracy-hits-alternet-hard> (referencing negative impact on AlterNet and dozens of other left-leaning or radical outlets); *see also* Bell & Owen, *supra* note 147.

³¹⁹ See Bell & Owen, *supra* note 147.

³²⁰ *See, e.g.*, Michael Nunez, *Former Facebook Workers: We Routinely Suppressed Conservative News*, GIZMODO (May 9, 2016, 9:10 AM), <https://gizmodo.com/former-facebook-workers-we-routinely-suppressed-conser-1775461006>; *see also* Julia Angwin & Hannes Grassegger, *Facebook’s Secret Censorship Rules Protect White Men from Hate Speech But Not Black Children*, PROPUBLICA (Jun. 28, 2017, 5:00 AM), <https://www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms> (discussing Facebook’s rules for deciding when content should be disallowed on the platform).

by government to censor “fake news” be worse, if President Trump’s war against the press is an object lesson?³²¹ Would legislation be able to neutralize the concerns about private censorship, given that the platforms would have to operationalize the regulations anyway? Is it likely that even with direct government regulation, the increasingly central information intermediaries would not be pressed into modes of what Balkin has called “new school” speech regulation?³²² We should not imagine an ideal world in making policy choices.

In light of doubts about platform self-regulation, perhaps the platforms’ inability to eliminate “fake news” might in fact be a feature, not a bug.³²³ Even if self-regulatory efforts could be effective, an expansive metric for effectiveness in this context would be undesirable. Successful attempts to eliminate “fake news” completely would inevitably be overinclusive, censoring much content that should still be part of the public conversation.³²⁴ And to the extent that observers could identify when platform self-regulation appeared to be leading to skews, publicity could have corrective effects.³²⁵

One reason to have some hope in the self-regulation model is that the process of attempting to tackle “fake news” can make it difficult for the platforms to deny the fundamental editorial role they have adopted. A recognition of their role as media companies can trigger more serious attention to journalistic norms. As Jack Balkin has put it, the increasingly elaborate private governance of speech

is by no means guaranteed to be free speech friendly. From the standpoint of free speech

³²¹ But see Julie Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. (forthcoming 2017).

³²² Balkin, *supra* note 25; Jack Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296 (2014).

³²³ It is in that sense that I worry about the suggestion that the platforms affirmatively take on the role of directly and explicitly taking positions about fake news stories. See Verstraete, Bambauer, & Bambauer, *supra* note 42, at 30–31 (arguing for an extension of Morozov’s alerting model and asking them to “leverage[e] their credibility against fake news”). Should Facebook put itself in the position of being a truth arbiter, especially as it sees itself as a tech company rather than a press organ? Verstraete et al. recognize the drawbacks to such a proposal. *Id.* at 31–2.

³²⁴ PEN America has recently made a similar argument. See *Faking News*, *supra* note 44.

³²⁵ For example, publicity about the reduction of web traffic to progressive news sites as a result of algorithmic tinkering could lead to negotiations with Facebook and potentially helpful revisions to the relevant algorithms. Admittedly, this is an optimistic interpretation, but it is one grounded on the importance to Facebook of its reputation with its users and advertisers. Admittedly, the effectiveness of the consumer-irritation constraint depends to a great extent on whether there are other competitive options to which users can switch.

values, the best solution would be for large international infrastructure owners and social media platforms to change their self-perception. Ideally, they would come to understand themselves as a new kind of media company, with obligations to protect the global public good of a free Internet, and to preserve and extend the emerging global system of freedom of expression. Defenders of democratic values should work hard to emphasize the social responsibilities of digital infrastructure companies and help them both to understand and to accept their constitutive role in the emerging global public sphere.³²⁶

Such social responsibilities suggest the need for enhanced transparency—both with respect to disclosures about disseminated content and disclosures about the platforms’ own processes.³²⁷ For example, including sponsorship disclosure requirements for political advertising purchasers might help put the brake on some fabricated news viralization. By analogy, the Federal Communications Act requires the disclosure of the identities of purchasers of political airtime.³²⁸ Even if there were legal roadblocks to adopting such a disclosure regime legislatively, voluntary adoption should present far less of a

³²⁶ Balkin, *supra* note 256.

³²⁷ Admittedly, transparency with respect to Facebook’s own algorithms presents a complicated question. On the one hand, enhanced transparency could help outside observers analyze platform activities both as to effectiveness and as to unexpected consequences—thereby supporting accountability. See *Faking News*, *supra* note 44 (suggesting the need for greater transparency). On the other hand, both economic competitiveness concerns and concerns about not revealing too much information to strategic agents attempting to end-run platform initiatives suggests that platforms like Facebook will not willingly embrace radical algorithmic transparency. But short of that, public pressure can increase the scope of what the platforms make public. And they have begun committing to some kinds of transparency already, as noted in text. See Balkin, *supra* note 25 (framing of transparency obligations for platforms as akin to “due process”). Former FCC Chair Tom Wheeler has recently suggested, as a middle-ground approach, that social media platforms be required to adopt an open application software interface enabling third parties to build software to monitor the results of social media algorithms. Tom Wheeler, *How to Monitor Fake News*, N.Y. TIMES (Feb. 20, 2018), <https://www.nytimes.com/2018/02/20/opinion/monitor-fake-news.html> (arguing that an open application programming interface would “threaten neither a social media platform’s intellectual property nor the privacy of its individual users” while allowing third party monitoring).

³²⁸ For a discussion of political ad disclosure requirements for broadcasting, see Lili Levi, *Plan B for Campaign Finance Reform: Can the FCC Help Save American Politics After Citizens United?* 61 CATH. L. REV. 97 (2011).

problem. Mark Zuckerberg has already publicly promised enhanced Facebook disclosures, as has Twitter.³²⁹

To be sure, the disclosure recommendation will raise the usual questions about the effectiveness of disclosure regimes.³³⁰ Still, there is reason to suspect that disclosure is actually likely to be effective in the “fake news” context, where anonymity is one element in hiding attempts to manipulate people’s opinions. Whatever the justifications for permitting anonymous speech in a First Amendment regime, strategic uses of “fake news” to manipulate vulnerable audiences cannot reasonably be included among them. A deeper problem may be a practical obstacle to effectiveness of such disclosure requirements. This is because of the ever-present likelihood that strategic “fake news” purveyors will find ways to game such disclosure requirements, *inter alia* by using corporate shells and anodyne-sounding group names or avoiding explicit ad buys as such. Requiring the platforms to search further, behind the names, to identify those “really” responsible for the content would present both practical and doctrinal difficulties. Nevertheless, news organizations and other third party entities can help unearth the true identities of strategic buyers of “fake news” spots (as, for example, they did with respect to the Kremlin connections of the shadowy Russian groups paying to post anti-Clinton ads on Facebook). There is also an argument that beyond obviously fabricated factual matter, the breadth of the notion of “fake news” is such that it would be difficult to distinguish among different kinds of “fake news.” Be that as it may, a general disclosure requirement for the purchases of political ads would not require the platforms to make such fine distinctions.³³¹

³²⁹ See, e.g., Alex Heath, *Twitter Says It Will Make All Its Ads Public, And Share Who is Behind Them*, BUS. INSIDER (Oct. 24, 2017, 4:00 PM), <http://www.businessinsider.com/twitter-will-make-all-ads-public-share-how-they-are-targeted-2017-10>.

³³⁰ For cites to disclosure skeptics and an argument for corporate-level disclosure in native advertising contexts, see Levi, *supra* note 153.

³³¹ To be sure, one of the difficulties in this area is that identifying a post as a political ad is likely to be problematic, at least on the margins. In other words, as evidenced by some of the pro-Trump ads purchased on Facebook by Russian interests, the content may not specifically name a political candidate and may just consist of policy recommendations or observations consistent with one or another candidate’s platform. Even though this is a real limitation for the disclosure approach, this Article does not claim that sponsorship disclosure is a cure-all with respect to “fake news” writ large. The fact that there will be “fake news” ads which sponsorship disclosure will not reveal does not mean that we should abandon the beneficial effects of sponsorship disclosure in the numerous situations in which it might be helpful.

c. *Regulatory Possibilities*

Self-regulatory efforts are often undertaken in the shadow of, and to forestall, possible regulatory creep.³³² Unsurprisingly, “fake news” has generated calls for reform from people spanning the political spectrum.³³³ Proposals range from state legislation prohibiting “fake news,” to pending federal legislation requiring sponsorship disclosure, and to a variety of scholarly recommendations for legal responses to “fake news.”

Domestically, a number of states have considered or passed laws seeking to prohibit false statements in political campaign speech.³³⁴ New federal legislation attempting to curb “fake news” is in the offing: John McCain recently joined Democratic Senators Warner and Klobuchar in introducing the Honest Ads Act, a bill that would, *inter alia*, extend FEC disclosure regulations for political ads to Internet ads.³³⁵

Scholars have argued that the platforms’ approach to “fake news” could be regulated pursuant to election law.³³⁶ There has also been discussion of expanded administrative regulation by the Federal Trade Commission (FTC),³³⁷ which has extensive jurisdiction to regulate deceptive practices and has already shut down “fake news” sites in commercial

³³² See, e.g., Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711 (1999) (on self-regulation in broadcasting).

³³³ Admittedly, the “fake news” charge has been deployed more consistently by conservatives against what they take to be the partisanship and liberal slant of the mainstream media (such as the broadcast networks, CNN, national newspapers such as the New York Times and the Washington Post). But liberals as well have been criticizing conservative outlets for peddling “fake news.” Moreover, both liberals and conservatives deploy the “fake news” trope when they are trying to make a point about political slant, rather than mere factual fabrication. It seems likely that both conservatives and liberals would dislike “fake news” as factual fabrication (even if they did not agree as to its salience in electoral politics).

³³⁴ See Catherine Ross, *Ministry Of Truth: Why Law Can’t Stop Prevarications, Bullshit, And Straight-Out Lies In Political Campaigns*, 16 FIRST AMEND. L. REV. 367, 383-88 (2018) (discussing legislation in 16 states to prohibit lies in campaign speech). The Supreme Court has not opined on the constitutionality of such legislation. (The Court only addressed justiciability in *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014), which involved the Ohio legislation of this kind). “Lower and state courts have regularly overturned state campaign deception statutes.” Ross, *supra*.

³³⁵ See, e.g., Byron Tau, *Proposed “Honest Ads Act” Seeks More Disclosure About Political Ads*, WALL ST. J. (Oct. 19, 2017, 5:12 PM), <https://www.wsj.com/articles/proposed-honest-ads-act-seeks-more-disclosure-about-online-political-ads-1508440260>; see also Balkin, *supra* note 25 (arguing that the First Amendment should not be read to preclude regulation of information intermediaries in connection with algorithmic nuisances). The Honest Ads Act would amend the Federal Election Campaign Act of 1971.

³³⁶ See, e.g., Hasen, *supra* note 10, at 220-21.

³³⁷ See, e.g., Verstraete, Bambauer, & Bambauer, *supra* note 42 (discussing and questioning suggestion that the FTC could regulate fake news under its statutory authority).

contexts. As the FCC has reportedly been receiving complaints of “fake news” from television watchers,³³⁸ there may also be an analogy in the Federal Communications Commission (FCC’s) news distortion and hoax regulations.³³⁹ A number of scholars have also recommended varying degrees of roll-back for the social media platforms’ immunity from liability under Section 230 of the Communications Decency Act for content they simply transmit and do not operate or control.³⁴⁰ Other legal approaches focus on attentive enforcement of already-existing individual causes of action, such as defamation actions against “fake news” providers.³⁴¹ Still others focus on constitutional

³³⁸ Jonathan Peters, *TV Viewers Have Been Sending ‘Fake News’ Complaints to the FCC*, COLUM. J. REV. (Apr. 12, 2017), https://www.cjr.org/united_states_project/tv-viewers-have-been-sending-fake-news-complaints-to-the-fcc.php. The agency operates under the extremely broad statutory mandate of regulating in the “public interest, convenience and necessity.” Pursuant to its broad statutory powers, the Commission adopted a policy regulating news distortion in the broadcast medium.

³³⁹ For discussions of the FCC’s news distortion policy and its limits, see Lili Levi, *Reporting the Official Truth: The Revival of the FCC’s News Distortion Policy*, 78 WASH. U. L. Q. 1005 (2000); see also Chad Raphael, *The FCC’s Broadcast News Distortion Rules: Regulating By Drooping Eyelid*, 6 COMM. L. & POL’Y 485 (2001).

³⁴⁰ See, e.g., Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity* (Univ. Md. Legal Studies Research Paper No. 2017-22, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007720; see also Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 1 (2017). This is contested territory. In addition to questions about what precise benefits would likely flow with respect to “fake news” by a repeal of immunity, recent scholarship suggests that limiting immunity would inhibit some viable attempts to combat “fake news” (such as through crowd-sourced presentation of accurate information via platforms such as Wikimedia). See, e.g., Jacob Rogers, *Wikipedia and Intermediary Immunity: Supporting Sturdy Crowd Systems for Producing Reliable Information*, 127 YALE L.J.F. 358 (2017). The *Identifying and Countering Fake News* report also took the position recently that we should consider expanding legal protections for Internet platforms, rather than reducing such immunities, to encourage them to pursue editorial functions. Verstraete, Bambauer, & Bambauer, *supra* note 42, at 22–23.

³⁴¹ Thus, for example, and depending on the content of the statement, the subject of a fake news report might be able to sue the fake news creator for defamation. See generally David O. Klein & Joshua R. Wueller, *Fake News: A Legal Perspective*, 20 J. INTERNET L. 1 (2017) (providing a bird’s eye view of various possible legal claims, including defamation). The traditional defamation lawsuit is unlikely to have much of a constraining effect on fake news, however. First, many fake news items are couched in language that would skirt liability under state defamation laws. This can be because the claims are unlikely to be deemed defamatory, or because the speaker can claim protection under the constitutional privilege that requires the plaintiff to prove actual malice on the part of the speaker. Second, at least some of the originators of even defamatory fake news are not in the United States and are not subject to the jurisdiction of the US courts. Third, individual lawsuits, even if possible, are expensive to wage. It would be unrealistic to expect individuals with limited means to serve as the front guard of society’s efforts to stop the widespread problem of fake news. In any event, the defamation suit would not undo the harm of the original statement; it would simply offer the plaintiff damages, if successful. Fourth, the true harm of any item of fake news is accomplished by its dissemination and amplification. The problem is that Section 230 of the Communications Decency Act appears to protect those information intermediaries that effectuate that

challenges to government actors’ incitement of violence and discrimination to silence counterspeakers.³⁴²

It is beyond the scope of this Article to address these regulatory possibilities in any depth.³⁴³ It should be noted that the United Nations Special Rapporteur on Freedom of Opinion and Expression and representatives of the OSCE, OAS, and ACHPR issued a joint declaration concerning “fake news” this year, noting major concerns about the negative effects of disinformation, but limiting extensive regulatory responses on freedom of expression grounds.³⁴⁴ With respect to pending federal legislation, Goodman & Wajert have recently argued that the Honest Ads Act “is worth implementing because it could foster a culture of transparency . . .”³⁴⁵ The existence of such regulation—as well as Congressional attention to the use of Facebook by Russian interests seeking to influence the U.S. presidential election—must surely have been a factor in Mark Zuckerberg’s promise of enhanced transparency with respect to

dissemination and amplification. For a discussion of defamation standards as applied to social media, see Lyrissa Barnett Lidsky & RonNell Andersen Jones, *Of Reasonable Readers and Unreasonable Speakers: Libel Law in a Networked World*, 23 VA. J. SOC. POL'Y & L. 155 (2016).

In a new development attempting to address Trump’s own “fake news,” a number of law professors filed a complaint against Counselor to the President Kellyanne Conway with the Office of the Disciplinary Counsel for the District of Columbia for violation of the Rule of Ethics that deems it professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” MODEL RULES OF PROF’L CONDUCT r. 8.4 (AM. BAR ASS’N 2017).

³⁴² See, e.g., Norton, *supra* note 103.

³⁴³ The viability of attempts to regulate “fake news” under current law has been discussed elsewhere. See, e.g., Hasen, *supra* note 10, at 216–21 (discussing election law). With respect to the FCC, the limits of the agency’s news distortion policy and the limited application of its hoax policy to radio hoaxes some time ago, not to mention the fact that even the broad jurisdictional mandate of the Communications Act of 1934 is limited to broadcast regulation, suggest that the Commission would not seek to apply either of those policies in an attempt to regulate “fake news” on the Internet. On the FCC’s regulation of broadcast hoaxes, see Justin Levine, *A History and Analysis of the Federal Communications Commission’s Response to Radio Broadcast Hoaxes*, 52 FED. COMM. L.J. 273 (2000). As for FTC regulation, the Commission’s statutory mandate gives it jurisdiction to regulate deceptive advertising in connection with the sale of products—a limit that might exclude at least some political “fake news” stories.

Nor does the Article address the Verstraete et al. suggestion that a trusted media entity such as the BBC create a non-ad-supported social network that leverages the trusted entity’s “media expertise to make judgments about news content.” Verstraete, Bambauer, & Bambauer, *supra* note 42, at 26 (itself noting the limitations of this kind of potential solution).

³⁴⁴ See *Joint Declaration*, *supra* note 22.

³⁴⁵ Ellen P. Goodman & Lyndsey Wajert, The Honest Ads Act Won’t End Social Media Disinformation, But It’s A Start (Nov. 3, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3064451.

the identities of purchasers of political ads on Facebook.³⁴⁶ Still, such legislation invites a cost/benefit assessment in light of the limited scope of its effectiveness and the breadth and vagueness of some of its terms.³⁴⁷

Moreover, in its current reading, the First Amendment is likely to prove a stumbling block with respect to at least some of the potential regulatory solutions to the “fake news” problem in the United States.³⁴⁸ Despite decades of Supreme Court *dicta* indicating the low value of false factual speech,³⁴⁹ since *United States v. Alvarez*, false speech now no longer seems to be seen as plainly unprotected by the First Amendment as it was previously.³⁵⁰ Although the decision was fractured and its full implications uncertain, it is certain that lies no longer sit completely outside the protections of the First Amendment.³⁵¹ In keeping with that approach, lower federal courts have struck down state laws attempting to regulate false political campaign speech.³⁵² To be sure, *Alvarez* does not establish that strict

³⁴⁶ *Id.*; see also Tony Romm & Kurt Wagner, *Facebook is Taking a Stricter Stance on Political Advertising Ahead of Its Testimony to the U.S. Congress Next Week*, RECODE (Oct. 27, 2017, 1:00 PM), <https://www.recode.net/2017/10/27/16555926/facebook-political-advertising-ads-2016-russia>. On Facebook’s fear of regulation, see Thompson & Vogelstein, *supra* note 263.

³⁴⁷ Even Goodman & Wajert, who support the Honest Ads Act, recognize its potentially limited effectiveness and the dangers of some of its vague language:

If the bill passes, its effectiveness will come down to how the platforms and the FEC interpret the broad definition of “political advertising” and the FEC’s appetite for enforcement. A lax approach will mean that nothing will change. An overly-aggressive approach could frustrate free speech objectives, implicate privacy concerns, and push the most problematic spurious political advertising into unpaid forms of communication . . . [The bill’s] definitions are vague and will have to be narrowed through regulatory interpretation. The bill will only have a marginal impact—the extent of which will depend heavily on the will of the online platforms themselves—but impact at the edges can begin to build a culture of disclosure.

Goodman & Wajert, *supra* note 346.

³⁴⁸ See, e.g., Hasen, *supra* note 10, at 216–26; Wu, *supra* note 14.

³⁴⁹ See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[T]here is no constitutional value in false statements of fact.”).

³⁵⁰ *United States v. Alvarez*, 567 U.S. 709 (2012). In *Alvarez*, a plurality of the Court struck down the Stolen Valor Act (which made false claims of the award of military medals a crime). *Id.* at 730 (plurality opinion). The result was to protect under the aegis of the First Amendment Alvarez’ bare-faced lies about having been awarded the Congressional Medal of Honor. *Id.* at 714, 730.

³⁵¹ Both the plurality and concurring opinions suggest that even though falsity alone cannot be punished criminally, the government may regulate false speech when there is some intent to cause “a legally cognizable harm.” *Id.* at 719; *id.* at 734 (Breyer, J., concurring); see also Chen & Marceau, *supra* note 170, at 16 (“*Alvarez*, then, reflects a turning point: a lie of little or no value and that arguably caused some harm was nonetheless deemed to protect speech.”).

³⁵² See, e.g., *281 Care Comm. v. Arneson*, 766 F.3d 774 (8th Cir. 2014) (striking down a Minnesota law making the intentional participation in “the preparation,

scrutiny applies as the standard of review of all government regulation of lies.³⁵³ Still, these doctrinal developments suggest at a minimum that any attempts to regulate against “fake news” would be drafted very narrowly and with great care. Query, then, whether—as a practical matter—self-regulatory efforts by platforms wouldn’t likely track the sort of regulation that a mandatory approach sensitive to current First Amendment doctrine would invoke.

The reality of U.S. constitutional constraints does not mean, however, that the platforms’ self-regulatory efforts will proceed without any fear of governmental regulation. This is not only because of the likelihood that legislators will see political advantage in proposing regulations regardless of what courts will make of them, but because information intermediaries like Facebook and Google are participants in a global marketplace. To the extent that there are laws in non-U.S. jurisdictions that seek to curtail “fake news,” the companies’ compliance approach will be taking place in the shadow of—and will likely be responsive to—non-U.S. regulation. Some countries have explored extensive regulation of “fake news” on social media platforms. European governments, for example, are putting some significant teeth into these platform self-regulatory efforts.³⁵⁴

dissemination, or broadcast of paid political advertising or campaign material . . . with respect to the effect of a ballot question, that is designed or tends to . . . promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false[]” is a misdemeanor); Commonwealth v. Lucas, 34 N.E.3d 1242, 1257 (Mass. 2015) (striking down Massachusetts’ false political speech law); Rickert v. State Pub. Disclosure Comm’n, 168 P.3d 826, 829–31 (Wash. 2007) (striking down Washington’s political false-statements law); Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2338 (2014) (striking down as unconstitutional Ohio’s false campaign statements laws on the grounds that they “are content-based restrictions targeting core political speech that are not narrowly tailored to serve the state’s admittedly compelling interest in conducting fair elections.”). *Susan B. Anthony List v. Driehaus*, which involved an Ohio law that criminalized certain speech in political campaigns, went up to the Supreme Court on justiciability grounds, and the Court held unanimously that the petitioners had alleged sufficiently grave injury for Article III purposes. *Susan B. Anthony List*, 134 S. Ct. at 2347; *see also* Nat Stern, *Judicial Candidates’ Right to Lie*, 77 M.D. L. REV. (forthcoming 2018) (noting that at least 18 states penalize false political speech and suggesting that states’ attempts to bar falsehoods by judicial candidates “stand on tenuous footing and are probably unconstitutional.”).

³⁵³ The decision was “fractured[,] . . . resulting in a legal framework that remains uncertain.” Chen & Marceau, *supra* note 170, at 16; *see also id.* at 43.

³⁵⁴ Germany, for example, adopted an Act to Improve Enforcement of the Law in Social Networks. For an English translation of the Act, see *An Act to Improve Enforcement of the Law in Social Networks*, BMJV, https://www.bmjjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf?__blob=publicationFile&v=2 (last visited Mar. 15, 2018). Pursuant to this Act, social networks could be fined up to 50 million Euros for failure to take down

Still, domestically, the modern First Amendment would likely stand in the way of particularly invasive content-based regulation of “fake speech.”³⁵⁵ It is true that liberal and progressive constitutional scholars have identified and criticized the Roberts Court’s libertarian First Amendment.³⁵⁶ Recently, prominent scholars have raised the question whether the information glut enabled by the Internet and today’s radically different modes of coercive control over political speech create an environment that renders the traditionally identified core focus of the First Amendment increasingly irrelevant.³⁵⁷ Such

unlawful material (apparently including fake news) within the prescribed statutory period of 24 hours for “manifestly” unlawful content, and 7 days for other unlawful content. *Id.*; see also Anya Schiffrin, *How Europe Fights Fake News*, COLUM. J. REV. (Oct. 26, 2017), <https://www.cjr.org/watchdog/europe-fights-fake-news-facebook-twitter-google.php>. In the United Kingdom, the Committee on Standards in Public Life, which advises the prime minister on ethics, recently released a report calling for legislation to impose liability on social media platforms for hosting illegal content.

See Rajeev Syal, Make Facebook Liable For Content, Says Report On UK Election Intimidation, THE GUARDIAN (Dec. 12, 2017, 7:01 PM), https://www.theguardian.com/society/2017/dec/13/make-facebook-liable-for-content-says-report-on-uk-election-intimidation?utm_source=esp&utm_medium=Email&utm_campaign=Media+briefing+2016&utm_term=256396&subid=3924084&CMP=ema_546. French President Emmanuel Macron has also sought legislation to fight online “fake news.” Pascal-Emmanuel Gobry, *France’s ‘Fake News’ Law Won’t Work*, BLOOMBERG (Feb. 14, 2018, 11:44 AM), <https://www.bloomberg.com/view/articles/2018-02-14/fake-news-france-s-proposed-law-won-t-work>. That 11 members of the U.K. Parliament came to Washington DC to “grill witnesses from U.S.-based technology companies as part of an inquiry into “fake news” by the Digital, Culture, Media and Sport Committee” surely sent notable signals to the heads of these companies (such as Google and Facebook). *See Evelyn Douek, U.K. Committee Grills Big Tech on Fake News*, LAWFARE (Feb. 13, 2018, 2:00 PM), <https://www.lawfareblog.com/uk-committee-grills-big-tech-fake-news> (describing hearing).

³⁵⁵ Progressive scholars claim that modern First Amendment doctrine does not help, and indeed could be used to evade, proper responses to the “fake news” crisis—allowing the First Amendment to stand as a barrier to attempts to improve the health of the information environment. *See, e.g.*, Wu, *supra* note 14; *see also* Helen Norton, *The Government’s Lies and the Constitution*, 91 IND. L.J. 73 (2015) (describing the limits to legal challenges to government’s destructive speech); Norton, *supra* note 103.

³⁵⁶ *See, e.g.*, Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (2016); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016); Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205 (2014); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015). For an early diagnosis of “ideological drift” in First Amendment doctrine, see Balkin, *supra* note 25; *see also* Wu, *supra* note 14 (questioning whether a First Amendment focused on government censorship in an information-poor world is well-adapted to the digital context of infoglut and weaponized cheap speech used as a tool of speech control). For an attempt to unpack the meaning of the First Amendment Lochnerism charge, see Wasserman, *supra* note 175. For an argument in support of information libertarianism, see Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CAL. L. REV. 335 (2017).

³⁵⁷ *See, e.g.*, Wu, *supra* note 14 (focusing on the scarcity not of speech but of attention, and concerned about the skewing impacts of the “cheap speech” enabled by technology enables). For an excellent critique of the consequences of “cheap speech” on the Internet, see Hasen, *supra* note 10, at 202–16. Recently, Jack Balkin

skeptics would find willing ears in progressive public movements that seek to balance commitments to free speech with other constitutional and human values. These scholars’ skepticism about the modern First Amendment’s speech doctrine is joined by many citizens.³⁵⁸

While there is much appeal in these arguments, “caution is in order”³⁵⁹—it is also important to note that the “fake news” phenomenon is currently being used as an excuse or cover to justify repressive speech initiatives by authoritarian leaders around the world (including Donald Trump in the United States). Speech management called for by “fake news” can take (and has taken) many forms. Widespread global calls to eliminate “fake news” have generated a spectrum of direct and indirect speech control initiatives around the world. Governments have used concerns about “fake news” to justify direct crackdowns on speech.³⁶⁰ On the indirect front, speech-suppressing activity online has increased dramatically, with troll armies, information flooding, and propaganda robots—

has demonstrated that in today’s Algorithmic Society, we face a pluralist model of speech control, reflecting a struggle among states, information intermediaries and speakers, and a regime of private governance—all of which stretch beyond the state censorship focus of pre-digital First Amendment theory. *See Balkin, supra* note 25; *see also* Nabiha Syed, *Real Talk About Fake News: Towards a Better Theory for Platform Governance*, 127 YALE L.J.F. 337 (2017).

³⁵⁸ Today, for example, large numbers of young people seem to reject an absolutist approach to free speech protections, opting instead for views that balance interests in free speech with concerns about the harms of such free speech. The current debate over free speech on campus implicates these issues. *See, e.g., Free Expression on Campus: A Survey of U.S. College Students and U.S. Adults*, GALLUP (2016), https://www.knightfoundation.org/media/uploads/publication_pdfs/FreeSpeech_campus.pdf; *see also Debating Free Speech on Campus*, BILL OF RIGHTS INST., <https://www.billofrightsinst.org/educate/educator-resources/lessons-plans/debating-free-speech-on-campus/> (last visited Mar. 15, 2018). On the issue of hate speech, see Jacob Poushter, *40% of Millennials OK with Limiting Speech Offensive to Minorities*, PEW RESEARCH CTR. (Nov. 20, 2015) <http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/>.

³⁵⁹ Hasen, *supra* note 10, at 216 (“First Amendment doctrine may serve as a bulwark against censorship and oppression that could be enacted by the government in the name of preventing ‘fake news.’”).

³⁶⁰ *See, e.g.*, Steven Erlanger, *Fake News,’ Trump’s Obsession, Is Now a Cudgel for Strongmen*, N.Y. TIMES (Dec. 12, 2017, 7:30 PM), <https://www.nytimes.com/2017/12/12/world/europe/trump-fake-news-dictators.html>; *see also* William Gallo, *Cambodia Threatens Media Outlets, Using Trump as Justification*, VOA (Feb 27, 2017), <https://www.voanews.com/a/cambodia-threatens-media-outlets-using-donald-trump-justification/3742602.html>; CPJ Chairman Says Trump Is Threat To Press Freedom, COMM. TO PROTECT JOURNALISTS (Oct. 13, 2016 12:30 PM), <https://cpj.org/2016/10/cpj-chairman-says-trump-is-threat-to-press-freedom.php>; Jason Schwartz, *Trump’s ‘Fake News’ Mantra a Hit with Despots*, POLITICO (Dec. 8, 2017 05:03 AM), <https://www.politico.com/story/2017/12/08/trump-fake-news-despots-287129>.

launched by both states and individuals—harassing and seeking to silence speakers with whom they disagree.³⁶¹

It is for these reasons that this Article recommends a shift in the treatment not of free *speech*, but of the free *press*, and an initiative to promote social media platforms' recognition of themselves as media companies with public interest responsibilities.

B. Audience Empowerment—Information Literacy and Improving the Effectiveness of Corrections

Those who have little confidence in platform self-regulation and doubt the viability of large scale regulatory interventions in controlling fabricated news might argue that the real backstop is the news consumer, and that people need to be given the tools with which to assess information critically. On this view, the principal answer to the “fake news” problem, if any, lies with informed and empowered audiences.³⁶² This approach therefore emphasizes the desirability of media or information literacy³⁶³ to fight “fake news.” Although there is controversy over the precise meaning of media or information literacy in application, the general idea is to provide the audience with the tools to understand the frames, biases, and inaccuracies in news reports, and to be able to evaluate the likely truth of factual allegations. A casual search on Google reveals dozens of new media literacy programs designed to counteract the harms of “fake news.”³⁶⁴ And arguably no new law would be required here, as virtually all states have media literacy in one form or another in their education-oriented legislation or rules.³⁶⁵ Recent polls show that the public has an appetite for training on how to find online resources for trustworthy information.³⁶⁶

The challenges to the notion of media literacy as the solution to the “fake news” problem, however, all have to do

³⁶¹ For a recent description of these effects, see Hasen, *supra* note 10, at 209–16; Wu, *supra* note 14.

³⁶² See, e.g., *Faking News*, *supra* note 44, at 70–75.

³⁶³ I use the terms “media literacy” and “information literacy” interchangeably here.

³⁶⁴ See Search Results for “Media Literacy Fake News”, GOOGLE, <https://www.google.com/search?q=media+literacy+fake+news&ie=utf-8&oe=utf-8&client=firefox-b-1> (last visited Mar. 15, 2018).

³⁶⁵ See, e.g., MEDIA LITERACY NOW, <https://medialiteracynow.org/your-state-legislation/> (last visited Mar. 15, 2018) (website of media literacy advocacy group listing legislative developments).

³⁶⁶ See John B. Horrigan & John Gramlich, *Many Americans, Especially Blacks and Hispanics, Are Hungry for Help as They Sort Through Information*, PEW RESEARCH CTR. (Nov. 29, 2017), <http://www.pewresearch.org/fact-tank/2017/11/29/many-americans-especially-blacks-and-hispanics-are-hungry-for-help-as-they-sort-through-information/>.

with the question of effectiveness in current circumstances. How will we be able to design media literacy programs that will work to debunk the “fake news” that is circulating virally on the Internet? Empirical research has begun to explore that question, although there is much yet to be studied and consensus does not yet appear to have been achieved.³⁶⁷ Studies are already exploring these issues, although more work needs to be done.³⁶⁸

One obstacle is that, to the extent media literacy programming is focused on young people in public schools, existing media literacy programs arguably have not been particularly effective.³⁶⁹ To the extent that universities are developing media literacy programs, many different flowers are growing without any easy way to compare and assess them.³⁷⁰ And these educationally grounded interventions are limited in their audiences, and do not address voters as a whole.

There is an even more powerful objection to the traditional type of media literacy approach, however—one that is being revealed by studies in political science and cognitive

³⁶⁷ See, e.g., Lazer et al., *supra* note 17; see also Gordon Pennycook, Tyrone Cannon, & David G. Rand, *Implausibility and Illusory Truth: Prior Exposure Increases Perceived Accuracy of Fake News but Has No Effect on Entirely Implausible Statements* (Dec. 12, 2017) (unpublished manuscript), available at https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2958246; Gordon Pennycook & David Rand, *Who Falls for Fake News? The Roles of Analytic Thinking, Motivated Reasoning, Political Ideology, and Bullshit Receptivity* (Sept. 15, 2017) (unpublished manuscript), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3023545; Verstraete, Bambauer, & Bambauer, *supra* note 42;

³⁶⁸ See, e.g., Lazer et al., *supra* note 17 (calling for additional “study of social and cognitive interventions that minimize the effects of misinformation on individuals and communities”).

³⁶⁹ See, e.g., Renee Hobbs, *Seven Great Debates in the Media Literacy Movement—Circa 2001*, CTR. FOR MEDIA LITERACY, <http://www.medialit.org/reading-room/seven-great-debates-media-literacy-movement-circa-2001> (last visited Mar. 15, 2018); see also *Alarmed by Fake News, States Push Media Literacy in Schools*, VOA (Dec. 30, 2017, 8:52 PM), <https://www.voanews.com/a/alarmed-fake-news-states-push-media-literacy-schools/4186222.html> (reporting bipartisan push by lawmakers to have public school systems do more to teach media literacy skills). Query whether media literacy should be considered a First Amendment issue and government responsibility on a reoriented First Amendment model. See Rebecca Tushnet, *Not Waving but Drowning: Saving the Audience from the Floods (response to Wu)*, KNIGHT FIRST AMEND. INST. (Fall 2017), <https://knightcolumbia.org/content/not-waving-drowning-saving-audience-floods>.

³⁷⁰ See, e.g., Kitson Jazynka, *Colleges Turn ‘Fake News’ Epidemic Into a Teachable Moment*, WASH. POST (Apr. 6, 2017), https://www.washingtonpost.com/lifestyle/magazine/colleges-turn-fake-news-epidemic-into-a-teachable-moment/2017/04/04/04114436-fd30-11e6-99b4-9e613afeb09_story.html?utm_term=.dfb90c11b945; see also Michael Rosenwald, *Making Media Literacy Great Again*, COLUM. J. REV. (Fall 2017), https://www.cjr.org/special_report/media-literacy-trump-fake-news.php.

psychology.³⁷¹ The typical reaction to correcting false information is to show the falsity of the false information and provide the true alternative instead. The difficulty is that studies by political scientists have shown that instead of reversing political misperceptions, simply correcting misinformation by repeating the original false statements and offering corrective truthful information does not seem to correct false beliefs effectively.³⁷² Indeed, some studies suggest that this kind of corrective approach might even backfire to reinforce the false beliefs.³⁷³

One of the possible reasons for this is that people are subject to a variety of heuristics and cognitive biases³⁷⁴—such as confirmation bias³⁷⁵ and repetition bias—and exposure to accurate information “may not be enough” to counteract

³⁷¹ See Strong, *supra* note 33 (arguing that empirical research has demonstrated “that conventional means of responding to legal and political misconceptions (i.e., content-oriented speech aimed at those who are believed to have simply failed to hear the relevant information) are not longer capable of fostering and promoting rational discourse.”).

³⁷² See, e.g., Brendan Nyhan & Jason Reifler, *The Roles of Information Deficits and Identity Threat in the Prevalence of Misperceptions* (Feb. 24, 2017) (unpublished manuscript), available at <https://www.dartmouth.edu/~nyhan/opening-political-mind.pdf> [hereinafter Nyhan & Reifler, *The Roles of Information Deficits*]; see also Strong, *supra* note 33, at 138; Edward Glaeser & Cass Sunstein, *Does More Speech Correct Falsehoods?*, 43 J. LEGAL STUD. 65 (2014); Lazer et al., *supra* note 17, at 6; Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEH. 303 (2010) [hereinafter Nyhan & Reifler, *When Corrections Fail*]; DJ Flynn, Brendan Nyhan & Jason Reifler, *The Nature and Origins of Misperceptions: Understanding False and Unsupported Beliefs About Politics*, 38 POL. PSYCHOL. 127 (2017).

³⁷³ See, e.g., Nyhan & Reifler, *When Corrections Fail*, *supra* note 373. Nyhan and Reifler’s first study suggested that attempts to correct the misperceptions of people who are strongly committed to their viewpoints might in fact reinforce their false beliefs. The more recent studies, however, suggest that the backfire effect may not be as common as originally thought. See Giovanni Luca Ciampaglia, *Fighting Fake News: A Role for Computational Social Science in the Fight Against Digital Misinformation*, 1 J. COMPUTATIONAL SOC. SCI. 147, 149 (2017).

³⁷⁴ See, e.g., DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2013); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1125 (1974). See also David Z. Hambrick & Madeline Marquardt, *Cognitive Ability and Vulnerability to Fake News*, SCI. AM. (Feb. 6, 2018), <https://www.scientificamerican.com/article/cognitive-ability-and-vulnerability-to-fake-news/> (reporting on study that suggests some people scoring low on tests of cognitive ability may be more vulnerable to misinformation).

³⁷⁵ Confirmation bias refers to people’s tendencies to filter out and ignore information that conflicts with their preexisting beliefs while retaining information confirming their beliefs. Strong, *supra* note 33 and sources cited therein. Many cognitive biases have been identified, of which a number can apply in the context of evaluating fake news. Confirmation bias is a type of anchoring bias (a human tendency to rely on the first thing we learn about an event). See *id.* at 1128 (on how the ultimate judgment is influenced by the anchor). For a listing of recognized cognitive biases, see Jeff Desjardins, *This Infographic Lists All The Cognitive Biases Humans Experience*, BUS. INSIDER (Sept. 26, 2017), <http://www.businessinsider.com/infographic-list-of-cognitive-biases-2017-9>.

people’s false beliefs.³⁷⁶ Familiarity- and fluency-biases in people’s cognitive processing can lead misinformation to persist even if the hearer believes the correction.³⁷⁷ Social science data reveals that “belief echoes” based on false information can affect people’s political attitudes even though they recognize the falsity of the information.³⁷⁸ Furthermore, people often have a “bias blind spot” (which makes them unaware of their own biases even when they recognize those of others).³⁷⁹

Research shows that “source credibility profoundly affects the social interpretation of information[,]” and that people prefer to receive information that confirms the hearers’ existing views.³⁸⁰ On Facebook, people trust news they receive from people they trust as credible, rather than examining the sources of the news stories themselves.³⁸¹ Social media users tend to be less critical of stories they receive from sources they perceive as credible or that confirm their prior views.³⁸² They tend to discount information that is inconsistent with their beliefs or that comes from an opposition source.³⁸³ Some evidence confirms Eli Pariser’s now-famous “filter bubbles” and the fear that personalized news enables people to operate within their own echo chambers. Studies show that when they are not exposed to facts and ideas of people with whom they disagree—when they are insulated within their echo chambers—their views can also become more extreme.³⁸⁴ On the other hand, still other recent studies suggest that concerns about echo chambers may be overstated, that people in their behavior have exposure to different sources even if their reports indicate group-based filters,³⁸⁵ and that the more accurate observation may be our vulnerability as human beings to believing misinformation of all sorts.³⁸⁶ In the view of those

³⁷⁶ See Nyhan & Reifler, *supra* note 373, (manuscript at 2); see also Flynn, Nyhan, & Reifler, *supra* note 373, at 138–39.

³⁷⁷ See Lazer et al., *supra* note 17; see also Pennycook, Cannon, & Rand, *supra* note 368.

³⁷⁸ Emily Thorson & Stephan Stohler, *Maladies in the Misinformation Marketplace*, 16 FIRST AMEND. L. REV. 442 (2018).

³⁷⁹ See Strong, *supra* note 33, at 140–41.

³⁸⁰ Lazer, et al., *supra* note 17, at 6.

³⁸¹ See ‘Who Shared it?: How Americans Decide What News to Trust on Social Media’, AM.. PRESS INST. (Mar. 20, 2017, 8:00 AM), <https://www.americanpressinstitute.org/publications/reports/survey-research/trust-social-media/>.

³⁸² See Lazer et al., *supra* note 17, at 6.

³⁸³ See *id.*

³⁸⁴ See, e.g., CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA (2017) (*inter alia* on how echo chambers breed extremism).

³⁸⁵ See Guess, Nyhan, & Reifler, *supra* note 39.

³⁸⁶ See, e.g., Brendan Nyhan & Yasaku Horiuchi, *Homegrown ‘Fake News’ is a Bigger Problem Than Russian Propaganda. Here’s a Way to Make Falsehoods More Costly for*

who are persuaded by the power of these cognitive heuristics, media literacy initiatives might well fail if they do not take into account the powerful insights of cognitive psychology about human behavior. The problem, of course, is that “it is not clear how to best protect people from believing false claims.”³⁸⁷

Media literacy initiatives face the additional daunting hurdles that technology can make falsity seem indistinguishable from truth, and that sophistication in data mining and psychometric analysis can end-run the audience’s ability to put media literacy tools into effect before being swept along into mistaken belief. Those wishing to influence how those individuals behave (politically or otherwise) have increasingly sophisticated AI machine tools to deploy in doing so. To the extent that these appeals—to people’s emotions and their psychological tendencies and weaknesses—are successful, they are likely to end-run and undermine any attempts to achieve media literacy through rational analytic processes. When the “weaponized AI propaganda machine”³⁸⁸ stealthily manipulates people’s reactions without their even recognizing the effect, media literacy projects directed to the rational mind are unlikely to fare well. This suggests that information literacy theories should take into account the powerful targeting effects of data-driven and persistent AI communications of false information.

These observations do not mean that information literacy campaigns are useless and not to be explored. While the lessons of cognitive psychology are powerful, it must be remembered that not everyone is fungible, and that the described biases are generalizations. Moreover, there are likely to be ways to offer effective feedback to digital users that particular stories are fake and that further sharing them would have negative reputational effects on the sharers.³⁸⁹ For example, social pressure can impact the acceptance of information, and people are concerned with their reputations in their circles. To the extent that they worry about the embarrassment and reputational effects of being found to have shared news thought to be fake by their peers, they may be

Politicians, WASH. POST (Oct. 23, 2017),
https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/23/homegrown-fake-news-is-a-bigger-problem-than-russian-propaganda-heres-a-way-to-make-falsehoods-more-costly-for-politicians/?utm_term=.c4f60b523c0b.

³⁸⁷ *Id.*

³⁸⁸ See Anderson & Horvath, *supra* note 29.

³⁸⁹ See, e.g., Lazer et al., *supra* note 17.

open to the use of “fact-checking tools on social media.”³⁹⁰ Moreover, to the extent that “fake news” is spread virally by celebrities and media sources, it is possible to focus the information literacy initiatives on helping those influencers become more skeptical news sharers.³⁹¹ Even if a small number of corrections would not dislodge a false belief, there is evidence that a large enough number of challenges can make people doubt whether they have made a bad decision.³⁹² There is reason to believe that exposing people to fact checks can have positive impacts over the long term.³⁹³ Similarly, summary fact-checking—which “presents an overview of the fact-checking ratings for a politician” (as opposed to focusing on the truth or falsity of a single statement)—might be a useful tool.³⁹⁴ This is apparently an increasingly popular type of fact-checking format.³⁹⁵ A recent set of experiments suggests that study participants who saw summary fact-check ratings “viewed the legislators in question less favorably and rated their statements as less accurate” than study participants who were shown fact-checks of individual statements by politicians.³⁹⁶ This is notable not only because it indicates some degree of effectiveness for summary fact-check ratings (effectiveness on the demand side), but also because the increasing adoption of the format might deter some false statements by politicians (effectiveness on the supply side).³⁹⁷ To the extent that “people fall for fake news because they *fail* to think [and] not because they think in a motivated or identity-protective way, . . . interventions that are

³⁹⁰ See *id.* at 5. Query, however, whether such tools will have long lasting effects on beliefs.

³⁹¹ See *id.* at 8.

³⁹² See, e.g., David P. Redlawsk, Andrew J. W. Civettini, & Karen M. Emmerson, *The Affective Tipping Point: Do Motivated Reasoners Ever “Get It”?*, 31 POL. PSYCHOL. 563, 589 (2010).

³⁹³ See, e.g., Jane Elizabeth & Alexios Mantzarlis, *Surprise! Readers May Actually Pay Attention to Fact-Checking*, POYNTER (Sept. 2, 2016), <https://www.poynter.org/news/surprise-readers-may-actually-pay-attention-fact-checking/>; see also Michael Barthel & Jeffrey Gottfried, *Majority of U.S. Adults Think News Media Should Not Add Interpretation to the Facts*, PEW RESEARCH CTR. (Nov. 18, 2016), <http://www.pewresearch.org/fact-tank/2016/11/18/news-media-interpretation-vs-facts/> (on public approval of fact-checking by news organizations).

³⁹⁴ See Nyhan & Horiuchi, *supra* note 387.

³⁹⁵ See *id.*

³⁹⁶ See *id.*; see also Brendan Nyhan et al., *Counting the Pinocchios: The Effect of Summary Fact-Checking Data on Perceived Accuracy and Favorability of Politicians*, DARTMOUTH, <http://www.dartmouth.edu/~nyhan/summary-fact-checking.pdf>.

³⁹⁷ See Nyhan & Horiuchi, *supra* note 387 (“Summary fact-checking won’t persuade everyone, of course. But if we can make politicians fear the political costs of a pattern of false claims a little bit more, there may be less misinformation to report in the first place.”).

directed at making the public more thoughtful consumers of news media may have promise.”³⁹⁸

There is also evidence that “the format in which information is delivered could substantially affect misperceptions” according to researchers in this area.³⁹⁹ Attempts to help people navigate their overwhelming informational environment can be designed to be aware of and responsive to what cognitive psychologists and behavioral economists have discovered about how people learn, who and how they trust, and how they change their minds. One positive sign is that people may be more likely to believe that something consistent with their worldview is in fact false if they are advised of its falsity by “surprising validators”—people who they would consider to be of like mind.⁴⁰⁰ Thus, for example, Republicans would be more likely to believe that Hillary Clinton was not involved in a sex trafficking ring if they heard that it was “fake news” from a trusted Republican rather than from a Democratically inclined news organization. Therefore, some scholars suggest that more conservatives should be invited into the discussion of political misinformation.⁴⁰¹ So, building trust among different constituencies, through finding common goals and common ground, might help limit the cognitive biases that inhibit information literacy at a time of pervasive misinformation in public discourse.⁴⁰² Finally, recent research suggests that knowledge about the structure of the media ecosystem and the “nuts and bolts of everyday journalism” can help dispel misinformation and reduce belief in conspiracy theories.⁴⁰³

³⁹⁸ Pennycook & Rand, *supra* note 368.

³⁹⁹ Nyhan & Reifler, *supra* note 373 (manuscript at 2); *see also* Strong, *supra* note 33, at 141.

⁴⁰⁰ Strong, *supra* note 34, at 141–42; *See also* Glaeser & Sunstein, *supra* note 353, at 67; *see also* Glaeser & Sunstein, *supra* note 353, at 91 (“Surprising validators have special credibility to precisely the people who would otherwise be inclined to dismiss them.”).

⁴⁰¹ *See* Guess, Nyhan & Reifler, *supra* note 60 (on skew in fake news exposure during presidential election contest).

⁴⁰² *See* Strong, *supra* note 33 (discussing usefulness of empirical research in both social and hard sciences to help address the “problems created by the proliferation of alternative facts.”). Strong argues for a “robust interdisciplinary approach to ensure the development of a process that is capable of addressing psychological, neurological and social factors driving the alternative fact phenomenon,” and calls for coordination among the legal community and other sectors of civil society as well as the use of data from a wide range of disciplines to overcome the “the challenges of a post-truth society.” *Id.* at 145. On the positive normative effects of speaking out against government attempts to monopolize the narrative by sowing doubt, see Norton, *supra* note 103.

⁴⁰³ *See, e.g.*, Jackie Spinner, *Study: Educating News Consumers About The Media Can Curb Conspiracy Theory Appeal*, COLUM. J. REV. (Dec. 20, 2017), https://www.cjr.org/united_states_project/news-media-literacy-conspiracy-

In any event, the remaining uncertainty in the social science argues in favor of exploring a variety of corrective mechanisms, without adoption of a single one-size-fits-all combination. More empirical work needs to be done in this area, including dealing with the fact that the possibility of AI learning will lead “fake news” bots to evolve in the way they operate.

With respect to audience empowerment, then, this Article proposes that audience-focused solutions be responsive to: 1) the type of “fake news” at issue; 2) the lessons to be learned from cognitive psychology for effective media literacy; 3) reputational solutions allowing audiences to distinguish among news organizations; and 4) structural and disclosure-based responses to the potentially manipulative uses of “fake news” in coordination with big-data-grounded psychometric targeting.⁴⁰⁴

Importantly, though, studies of what kind of information literacy techniques are likely to be effective in arming audiences against “fake news” must confront an underlying question about legitimacy. To the extent that media literacy tools are designed to end-run the effects of people’s cognitive short-cuts, will they thereby themselves manipulate the audience and replicate the manipulation problem posed by the strategies of data-mining persuaders?⁴⁰⁵ Information literacy design will not generate consensus without addressing that issue.

IV. A COUNTERINTUITIVE OPTION? EMPOWERING THE PRESS TO ENHANCE PUBLIC TRUST

The solutions discussed in Section III, *supra*—focusing on technological fixes and audience information literacy—are attempts to minimize the flow of fabricated content and to arm news consumers with tools to assess information critically. They do not address the use of the “fake news” charge as a tool of delegitimation deployed in the service of criticism-deflecting governance. A third piece to the puzzle, then, should address

theory.php; see generally Stephanie Craft, Seth Ashley & Adam Maksil, *News Media Literacy and Conspiracy Theory Endorsement*, 2 COMM. & PUB. 388 (2017) (survey finding that “greater knowledge about the news media predicted a lower likelihood of conspiracy theory endorsement, even for conspiracy theories that aligned with their political ideology”).

⁴⁰⁴ See *supra* notes 42, 371, 295-96, 327, and accompanying text.

⁴⁰⁵ Questions about the ethical dimensions of behavioral law and economics’ “nudge”-based regulatory approaches have faced these questions as well. See Cass Sunstein, *The Ethics of Nudging*, 32 YALE J. REG. 413 (2015).

how to reverse the decline in the public's trust in the institution of the press.⁴⁰⁶

There seems to be agreement that "fake news" has found fruitful soil precisely because of such a decline in public trust in what should be authoritative institutions. When the mainstream press is trusted less than "friends" on Facebook to curate one's exposure to news, and when party affiliation drives belief, unverified and fabricated news can flourish. Thus, the conversation has turned to exploring ways of increasing public trust. This Article takes the position that giving the press broad freedom to unearth news and disseminate it without fear, joined with some changes in press behavior, could be a central element in a broad trust-building strategy. This Article suggests, therefore, that an affirmative commitment to enhanced protection for press activities should join technological solutions and information literacy in order to respond to the crisis of "fake news." This way forward is revealed by the limitations in the proposed responses to "fake news" described in Section III above.⁴⁰⁷

A. Press Preferences

The crisis of "fake news" should serve as a clear justification for the adoption of expansive protections for the institutions that could combat "fake news"—protections not directly about "fake news" as such, but designed to scaffold the institutions that can positively affect public and political discourse. The epidemic of "fake news," and the rise of the weaponized AI-aided propaganda machine, are wake-up calls to why the law should more clearly help press-workers and journalistic institutions to perform their job as watchdogs. Thus, this Article asserts that the "fake news" crisis is a perfect justification for press preferences,⁴⁰⁸ especially in connection

⁴⁰⁶ See Swift, *supra* note 113.

⁴⁰⁷ For example, if media literacy initiatives face uphill battles because of human cognitive tendencies (and their manipulability through modern automated propaganda), then perhaps we should focus less on individuals and more on institutions. Similarly, to the extent that the current legal landscape does not offer rich resolutions to fake news, then perhaps the answer is to look at what tools the law might offer to affect fake news indirectly through focusing on legal rules beyond "fake news" as such.

⁴⁰⁸ Some scholars are already engaged in the work of promoting a more robust reading of the Press Clause. See, e.g., Sonja West, *Awakening the Press Clause*, 2012 BYU L. REV. 1953 (2011). This Article argues that "fake news"—of all the types described in the taxonomy above—provides a modern explanation and justification in support of such readings. The Article does not specifically argue that the institutional protections for the press it recommends are implicit in the Press Clause. It simply claims that—whether as a matter of constitutional principle, legislation, regulation, or common law interpretation—the institutional press should receive

with newsgathering broadly conceived.⁴⁰⁹ Explicit recognition of a preferred constitutional and social status for the press would lead to enhancing journalistic tools to reveal and report in order to accomplish the press’s constitutional watchdog function. This is obviously not the only path to invigorate trust in the press; it is simply the one explored in this Article.⁴¹⁰

certain kinds of newsgathering protections (and not be limited to the constitutional protections associated with publication). The main point is less doctrinal than attitudinal—the recognition of the press as a constitutionally protected institution would justify protections as to which there is no clear consensus today.

⁴⁰⁹ See Elizabeth Jensen, *Looking to the Future: Restoring Public Trust in the Media*, NPR (May 15, 2017 2:06 PM), <http://www.npr.org/sections/ombudsman/2017/05/15/528158488/looking-to-the-future-restoring-public-trust-in-the-media>.

⁴¹⁰ For example, many have argued that the only way to really increase the public’s trust in the press is to eliminate the advertising-support model of press funding in favor of subscription models. This Article does not take a position on such suggestions, preferring to first address a less foundational set of reforms.

News organizations and those who believe in a press renaissance in today’s fake news climate have begun to explore various tools and methods to enhance modern journalism and enhance public trust. For example, Wikipedia founder Jimmy Wales recently unveiled WikiTribune, a news service providing free, donation-supported factual, “evidence-based journalism” with articles sourced by professional and volunteer journalists. See WIKITRIBUNE, <https://www.wikitribune.com/> (last visited Mar. 15, 2018); see also Elizabeth Jensen, *Looking to the Future: Restoring Public Trust in the Media*, NPR (May 15, 2017 2:06 PM), <http://www.npr.org/sections/ombudsman/2017/05/15/528158488/looking-to-the-future-restoring-public-trust-in-the-media>. Universities are exploring what it takes for news organizations to win public trust, including adoption of best practices for journalism. Jensen, *supra* (discussing Santa Clara University’s The Trust Project.); see also Lazer et al., *supra* note 17 (on academics collaborating with journalists to “make the truth ‘louder.’”). One recent report designed to distill the proceedings of a high-level conference on fake news recommends closer collaboration between researchers and the media, pursuant to which journalists would have access to curated data for news stories, “cheap and reliable” sources of information, lists of experts, and help with statistical analysis and relevant background information. Lazer et al., *supra* note 17, at 10. The Knight Foundation has recently granted several million dollars in support to a variety of projects seeking to rebuild trust in journalism, and has established the Knight Commission on Trust, Media and Democracy, to study the erosion of trust in institutions such as the press. Paul Fletcher, *Knight Foundation Makes Grants Of \$2.5M to Projects Seeking to Rebuild Trust in Journalism*, FORBES (Sept. 30, 2017), <https://www.forbes.com/sites/paulfletcher/2017/09/30/knight-foundation-makes-grants-of-2-5m-to-projects-seeking-to-rebuild-trust-in-journalism/#33b98abe3273>. Many of the projects supported by the Knight Foundation involve various ways to enhance verification. These are only the tip of the iceberg. Substantive improvement in press coverage is also suggested as another way of enhancing public trust. On that score, some emphasize a reengagement with local and regional coverage by the press. See, e.g., Hasen, *supra* note 10, at 202, 230; see also Mark Little, *Here Comes Somebody: Journalism and the Trust Economy*, NIEMANREPORTS (Apr. 3, 2017), <http://niemanreports.org/articles/here-comes-somebody-journalism-and-the-trust-economy/> (arguing for personalized news feed that does not make the reader feel like a commodity and is offered by journalists, rather than ad-supported social media).

This Article adds to those suggestions an experiment with allowing the press to use the best tools available—without fear of extensive legal concerns—in the exercise of genuine, public interested accountability journalism. Under this approach, the crisis of “fake news” and the President’s attempt to delegitimize the

Offering the press better legal protection to engage in newsgathering and resist censorship would be a useful adjunct in the project of rebuilding the public's trust in the "real" news. At a minimum, those protections—formal and informal—that have been eroded should be restored and made more certain.⁴¹¹ The details remain to be determined, though the following are some possibilities. In broad brush, the press should have greater protections in connection with its newsgathering activities because access to information becomes increasingly necessary when politicians and government officials attempt to use a variety of techniques to avoid public interest scrutiny through accountability journalism.⁴¹² The law should give the press more access to the information it needs to cover the news in depth and accurately, including through enhancing FOIA and state sunshine laws.⁴¹³ One important protection for the press would be a clear commitment to immunity from prosecution for such aggressive newsgathering techniques when they are undertaken for purposes of accountability journalism.⁴¹⁴ The government should explicitly reject the possibility of prosecuting journalists under the Espionage Act for refusing to name their sources and for publishing national security information they did not themselves obtain illegally. Another possibility would be a broad scope for existing reporter's privileges.⁴¹⁵ Courts should be sensitive to the potentially skewing impact of third party litigation funding of defamation or privacy actions and should return to a more deferential interpretation of newsworthiness than is currently in vogue today.⁴¹⁶ Furthermore, the "fake news" phenomenon could be addressed if the press had better and more consistent access to

institutional press are to be seen as invitations for the press to embrace its watchdog role with vigor. If constraints on journalists' ability to tell the truth without fear or favor are reduced, then perhaps they will do so.

⁴¹¹ See generally *supra* Section II.

⁴¹² Newsgathering activities include, *inter alia*, dealing with sources reporters cannot name and with individuals, groups or organizations engaged in leaking; undertaking documentary and data investigations; and engaging in subterfuge, lying, and undercover reporting.

⁴¹³ See generally David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDNOZ L. REV. 835 (2017) (discussing public access to court records); see also Erin C. Carroll, *Protecting the Watchdog: Using the Freedom of Information Act to Preference the Press*, 2016 UTAH L. REV. 193, 195 (2016) (arguing that the nature of the preferences given the press should change and expand, including "[p]roviding faster and better access to information about government activity").

⁴¹⁴ See *supra* Section II.

⁴¹⁵ For such an argument, see Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515 (2007).

⁴¹⁶ For a contrary argument in the context of assessing newsworthiness in litigation against the press, see Erin C. Carroll, *Making News: Balancing Newsworthiness and Privacy in the Age of Algorithms*, 106 GEO. L.J. 69 (2017).

documents and information that it could use to fact check and tell counter-stories. On the informal front, the President should not communicate inflammatory anti-press rhetoric unleashing violence and harassment against the press. More indirect changes might also be useful. For example, to the extent that net neutrality rules enhance local journalism,⁴¹⁷ their recent rollback by the FCC⁴¹⁸ should be reconsidered. News organizations should be granted exemptions from antitrust rules prohibiting joint activity when they seek to negotiate collectively with the platforms.⁴¹⁹

Why is recognition of a preferred role for journalists important today? Don’t they already have sufficient legal protections to do their jobs? Since they can wield the threat of publication if crossed, don’t they have powerful extra-legal recourse if thwarted? Perhaps most importantly, haven’t they forfeited any legitimate claim to special treatment by their own behavior? Do we really trust that entities accused of partisanship to use press privileges wisely in the public interest? Is the recommendation here simply “arming the criminal”? After all, the modern press is criticized by both right and left. Media watchers diagnose and bemoan sensationalism, bias, false objectivity, limited sourcing, and “he-said-she-said” journalism.⁴²⁰ Why take away any accountability by giving journalists permission to become even worse, particularly in light of the economic pressures on news organizations?⁴²¹ In

⁴¹⁷ See, e.g., Matthew Ingram, *The Media Today: The Loss of Net Neutrality Threatens Local Journalism*, COLUM. J. REV. (Dec. 13, 2017), https://www.cjr.org/the_media_today/net-neutrality-local-news.php.

⁴¹⁸ See, e.g., Cecilia Kang, *F.C.C. Repeals Net Neutrality Rules*, N.Y. TIMES (Dec. 14, 2017), https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html?_r=0.

⁴¹⁹ See, e.g., Jim Rutenberg, *News Outlets to Seek Bargaining Rights Against Google and Facebook*, N.Y. TIMES (Jul. 9, 2017), <https://www.nytimes.com/2017/07/09/business/media/google-facebook-news-media-alliance.html>; see also NEWS MEDIA ALL., <https://www.newsmediaalliance.org/> (last visited Mar. 15, 2018); see also Bell & Owen, *supra* note 147 (on how “[t]he rebundling of publishing power is arguably responsible for a mass defunding of journalistic institutions”).

⁴²⁰ See, e.g., Edelson, *supra* note 102 (arguing that protections and prestige should only be granted to journalists “whose work actually advances First Amendment values” by vindicating the “values of truth and democratic competence”).

This is not even mentioning the shocking revelations of sexual improprieties at the highest levels of print and electronic news organizations. See, e.g., Ellen Gabler et al., *NBC Receives at Least 2 New Complaints About Matt Lauer*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/business/media/nbc-matt-lauer.html>; see also Alexandria Neason, *What We Found When We Asked Newsrooms About Sexual Harassment*, COLUM. J. REV. (Dec. 1, 2017), <https://www.cjr.org/analysis/sexual-harassment-newsrooms-misconduct.php>.

⁴²¹ What about the press’ own “fake” news? Those who distrust the institutional press will ask whether it makes sense to further empower the “fake news”—the

addition, today's press is less of a unitary institution than a variety of very different kinds of players, some of which—like the right wing/alt-right mediasphere—in fact amplify President Trump's attack on the mainstream press. More broadly, how can we justify a preferred place for journalism when technology has changed the informational ecosystem so much that we can no longer even define who should count as a journalist? And what would a preferred position mean in operation? What additional rights should the press have beyond what is permitted to all speakers? What is likely to serve as a viable constraint on news organizations' abuse of additional press privileges? There is, of course, no guarantee that any press privileges will not be abused. Still, there are reasons to believe that the vast majority of journalists and press institutions would take their roles seriously.

B. Revised Press Practices⁴²²

Journalists doubtless already realize that achieving increased public trust is practically an existential requirement. Admittedly, though, public trust is hard to come by in light of the news media's self-inflicted wounds.⁴²³ For this perhaps-counter-intuitive experiment to work, the press as a whole must develop and adhere to professional journalistic norms. They must not allow partisanship to trump their professional obligations.⁴²⁴ News organizations must recognize that if they

purveyors of ideological and biased information? They will claim that it is precisely because the mainstream press is untrustworthy and biased that the fake news crisis was able to snowball. This argument is common not only as deployed by politicians like President Trump, but also in the right-wing mediasphere. Progressives as well criticize the mainstream media, *inter alia* for their "he said, she said" type of coverage—"treating both sides of the argument equally [even] when one is demonstrably false." Edelson, *supra* note 102 (labeling this the "balance trap").

⁴²² One of the major impediments to improved press performance (particularly in terms of investigative reporting) and increased constitutional salience (*inter alia* through litigation) is obviously financial constraints. A variety of proposals for funding accountability journalism have been proposed. See Carroll, *supra* note 414, at 219–22 (describing several). This Article does not address the funding issue and takes no position on the matter.

⁴²³ Jones & Sun, *supra* note 6, at 30. Even the venerable Gray Lady has "shifted from a 'paper of record model' to a crowd-sourced conversational model," reducing its copy editor staff, eliminating its public editor position, and opening the door to opinionated headlines. See Paul Horwitz, *Breaking the News*, COMMONWEAL (Nov. 5, 2017), <https://www.commonwealmagazine.org/breaking-news-1>.

⁴²⁴ Recently, for example, in a "fake news" sting, a woman apparently working for right wing activist group Project Veritas, attempted to entrap the Washington Post into publishing her false claim that she had obtained an abortion at 15 after then-Senate candidate Roy Moore had impregnated her. See, e.g., Callum Borchers, *A Botched Sting with a Phony Roy Moore 'Accuser' Was Supposed to Discredit the Media. Like Similar Schemes, it Did the Opposite.*, WASH. POST (Nov. 27, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/11/27/a-botched-sting-with-a-phony-roy-moore-accuser-was-supposed-to-discredit-the-media-like-similar->

are given additional protections for their newsgathering activities, they will further lose the public’s trust if they misuse their new protections. They must commit to engaging in serious journalism and investigative work enabled by the enhanced press protections recommended here. They must recognize that consumer expectations for brand sites require them to build trust on a number of fronts.⁴²⁵ Professionalism, expertise, transparency, and a commitment to disinterestedness and listening would go a long way to enhancing trust for all but those most wedded to conspiracy theories.⁴²⁶ Journalists and news organizations must also see beyond their individual interests and build on their identities collectively as “the press.” It is time for journalists to recognize that if they continue to see themselves as a snarling pack of competitive individual reporters and outlets fighting over scraps in a free-for-all information marketplace, they will all face existential dangers. Being targeted by the highest governmental actors should itself be enough to make the press see itself as such—as an accountability-seeking institution with a role deep in the structure of the Constitution.

Political scientists’ empirical studies suggest that mainstream news organizations must work to “avoid being drawn into alignment with either of the parties.”⁴²⁷ To the extent that there is ideological or party-based asymmetry in people’s susceptibility to “fake news,” solutions should be

schemes-it-did-the-opposite/?utm_term=.ae8acab37c1. Instead of discrediting the press, as the sting was supposed to do, it was subjected to rigorous vetting and ignored. *Id.* (describing other such examples directed to other media organizations as well). For a less positive view of the *Washington Post* (and mainstream press as a whole), see Greenwald, *supra* note 151.

⁴²⁵ Rande Price, *Trust As A Proxy for Brand Value*, DIGITAL CONTENT NEXT (Dec. 6, 2017), <https://digitalcontentnext.org/blog/2017/12/06/dcns-new-research-trust-proxy-brand-value/>.

⁴²⁶ See Horwitz, *supra* note 424; Margaret Sullivan, *Polls Show Americans Distrust the Media. But Talk to Them and It’s a Very Different Story.*, WASH. POST (Dec. 28, 2017), https://www.washingtonpost.com/lifestyle/magazine/polls-show-americans-distrust-the-media-but-talk-to-them-and-its-a-very-different-story/2017/12/27/ed9bbabe-ce3b-11e7-81bc-c55a220c8cbe_story.html?utm_term=.b917cb578ba1.

⁴²⁷ Guess, Nyhan, & Reifler, *supra* note 39; see also Barthel & Gottfried, *supra* note 394. This is particularly critical at a time of increasing “partyism.” See generally Cass R. Sunstein, *Partyism*, 2015 U. CHI. LEGAL F. 1 (describing party-based hostility).

Such party-neutrality is of course, difficult to recommend for explicitly partisan news outlets—those that define themselves as conservative or liberal. As to those, what might be helpful is transparency as to point of view. See Carrie Brown-Smith, *Transparency Finally Takes Off*, NEIMANLAB, <http://www.niemanlab.org/2017/12/transparency-finally-takes-off/> (last visited Mar. 15, 2018); see also Mathew Ingram, *Glenn Greenwald vs. the NYT’s Bill Keller on Objectivity and the Future of Journalism*, GIGAOM (Oct. 28, 2013, 9:47 AM), <https://gigaom.com/2013/10/28/glenn-greenwald-vs-the-nyts-bill-keller-on-objectivity-and-the-future-of-journalism/>.

tailored in response. In that spirit, press outlets should seriously consider eliminating the op-ed page. Especially in light of the fact that newspaper content is unbundled when accessed on social media, the organizational structure of the traditional newspaper—with its clear delineation between the news and the op-ed pages—is no longer available to help readers distinguish the news organizations' own factual reporting from its service as platform for opinion. News organizations might also consider focusing more on substantive news reporting and debunking fabricated news, and less on every White House insult to journalists. This is not to minimize the danger posed by the attempt to delegitimize the press as an institution. Rather, it is to suggest that the press should not itself become Trump's anti-press megaphone.

Changes in operations are also likely to be needed. For example, because research suggests that it is local involvement that enhances trust⁴²⁸ and that corruption in local and regional governments flourishes without local media as watchdogs,⁴²⁹ news organizations should revive commitments to the coverage of local and regional news and the statehouse.⁴³⁰ In addition, increasing the transparency of the press's own documents, processes, and editorial work would likely help assure audiences of journalists' good faith.⁴³¹ Would this entail development of best practices for leaks and anonymous sourcing? Clearly, news organizations must try to get the story right the first time,⁴³² identify errors quickly, resolve them, and publicize their correcting processes. The development of additional trusted fact-checking outfits would also likely be helpful. Attention must be paid also to whether the needle could be moved on public trust by a public education campaign distinguishing between social media platforms and news organizations. These are just a few possibilities. Attention is now turning to the issue of building public trust, although

⁴²⁸ See, e.g., *supra* note 409 and accompanying text; see also Shereta Williams, *In the Age of Fake News, Local Media Scores Greater Trust*, MEDIAPOST, <http://www.videatv.news/age-fake-news-local-media-scores-greater-trust/> (last visited Feb. 8, 2018).

⁴²⁹ See, e.g., Hasen, *supra* note 10, at 209–10.

⁴³⁰ See, e.g., Jensen, *supra* note 411; Lazer et al., *supra* note 18, at 10.

⁴³¹ See also *Faking News*, *supra* note 44, at 60–63 (on building credibility through enhanced transparency); Raney Aronson-Rath, *Transparency is the Antidote to Fake News*, NIEMANLAB (Dec. 2017), <http://www.niemanlab.org/2017/12/transparency-is-the-antidote-to-fake-news/>.

⁴³² For a list of such recommendations, see Brendan Nyhan & Jason Reifler, *Misinformation and Fact-Checking: Research Findings from Social Science*, NEW AM. FOUND. 1, 1 (Feb. 2012), http://www.dartmouth.edu/~nyhan/Misinformation_and_Fact-checking.pdf.

empirical assessments of the various projects are not yet complete.⁴³³

The very fact that the President of the United States has commenced a public war against the press (while himself publishing lies and overstatements) is likely to awaken in journalists the recognition that their role is empowering the public in a democracy, and not merely entertaining an audience. At a minimum, this kind of situation invites the development of product-differentiating branding strategies. To the extent that some news outlets will not take the opportunity to retake political journalism, the market for information presents opportunities for product differentiation.⁴³⁴ News organizations can develop reputations for truthful reporting and effective fact-checking. They can continue to partner with independent fact-checking organizations. They can create incentives for collaboration within the press and among publishers and news organizations. To the extent that economics will drive increased collaboration, journalist and news organization reputations for accuracy and veracity could well play important roles in cooperative ventures.⁴³⁵ There is

⁴³³ See, e.g., Fletcher, *supra* note 411.

⁴³⁴ One recent suggestion of that sort is the possibility of developing a nongovernmental, voluntary accreditation system to help people distinguish between reliable information and “fake news.” See Anna Gonzales & David Schulz, *Helping Truth With Its Boots: Accreditation as an Antidote to Fake News*, 127 YALE L.J.F. 315 (2017). While initially attractive, such a proposal raises a number of questions. For example, it assumes without question that the existing accreditation systems that exist in other fields, such as university accreditation, in fact work to achieve their aims of ensuring quality. Moreover, as the proposal would focus “on the conduct and standards used to produce a story, rather than the accuracy of a given report,” *id.* at 323, it could invite the camel’s nose into the tent to a potentially problematic degree.

⁴³⁵ Admittedly, branding-focused trust strategies are not a panacea and finances still pose a high hurdle to improved press functions. It is likely that strategic attacks will be made against any collaborative verification initiatives. Fact-checking organizations have already been subjected to criticism for being ideological and having political agendas. See, e.g., *id.* Perhaps more problematically, news organizations today have increasingly ceded their control over their content to the platforms. See Bell & Owen, *supra* note 147. It is unclear at this point how many news publishers will be able to develop real brands, given how people now receive their news online. Facebook’s incorporation of news publishers is both dangerous to the publishers’ independent brands, and it also succeeds in starving the news publishers of the money they would need to engage in expensive accountability journalism in the public interest. *Id.* Here, however, the ability to negotiate with the platforms as a cohesive group would doubtless enhance the bargaining position of the news organizations and publishers. See *supra* text accompanying note 401 (discussing news organizations’ attempts to obtain antitrust exemptions from Congress).

Other novel alternatives—such as the development of a journalism accreditation scheme pursuant to which accredited newspapers could reap the reputational benefits of being accredited—may be even more problematic. See Gonzales & Schultz, *supra*. But accreditation schemes are more attractive in the

reason to hope that the combination of the three-pronged recommendations made here could be helpful.

Admittedly, it is true that the activist right-wing mediasphere will still present challenges to the mainstream institutional press. But “fake news” can become the wedge to separate the traditional conservative press from the rising alt-right and alt-lite⁴³⁶ media. A united front against media disseminators of false information can emerge when mainstream conservative news outlets come to recognize that their professional norms give them much more in common with even liberal professional news media than with pseudo-populist Breitbart-like alt-right “news” outlets.⁴³⁷

CONCLUSION

The phenomenon of “fake news” has become the central rallying cry both of Trumpists who chide the mainstream press for their unsympathetic coverage of President Trump’s Administration and for liberals who worry that fabricated political content perhaps has, and definitely could, influence American elections. President Trump has used the charge of “fake news” to attempt to defang and delegitimize the mainstream media. There is a palpable fear that “fake news” in all its meanings is cheapening American democracy and political self-determination. This Article takes the position that even though “fake news” is socially, politically, and economically a highly disruptive development, it represents an occasion for collaborative commitments to truth on the part of information intermediaries, consumers, and a newly empowered press.

Recent studies suggest that there is little consensus on the question of whether there are likely to be solutions to the

abstract than in operation. *See* discussion, *supra* note 416. In any event, it would be difficult to convince courts holding a libertarian interpretation of the First Amendment (such as the current Supreme Court) that accreditation is not a close cousin to licensing, notwithstanding the recommendation that the accrediting agencies would nominally be private and not governmental entities. Cf. Jonathan Friendly, *National News Council Will Dissolve*, N.Y. TIMES (Mar. 23, 1984), <http://www.nytimes.com/1984/03/23/us/national-news-council-will-dissolve.html> (reporting that “[t]he National News Council, established in 1973 with the announced aim of increasing public trust in journalism by assessing complaints about the work of major news organizations, voted yesterday to dissolve itself. The group attributed its demise to ‘a general lack of news media acceptance of the concept of a news council.’”); Campbell, *supra* note 333, at 747 (on news councils).

⁴³⁶ *See, e.g.*, Bridges, *supra* note 50.

⁴³⁷ *See* Conor Friedersdorf, *Can Conservative Journalism Survive?* THE ATLANTIC (Sept. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/09/can-conservative-journalism-survive/539181/>.

“fake news” problem.⁴³⁸ Responses to the dissemination of fabricated news content have focused on regulation, platform self-regulation, and information literacy for the audience. But there are questions about how viable such responses are likely to be. As part of their claim that the First Amendment has gone over to the dark side, progressive critics argue that the difficulty of regulating “fake news” under current First Amendment doctrine demonstrates that the First Amendment is obsolete. While some types and degrees of platform self-regulation are likely to help reduce the amount of “fake news,” the platforms’ economic structure creates some counter-forces that lead to questions about self-regulatory effectiveness in the final analysis. And while information literacy initiatives are naturally attractive—and require nothing from either the government or the disseminators of “fake news”—the question of how to make them truly effective has not yet been answered. What we know is that people’s cognitive biases will often lead them to continue to hold on to their beliefs even after they have been shown to rest on falsity. What to do about that is still shrouded in mystery.

Still, as the adage goes, the perfect is the enemy of the good. Much headway is likely to be made by a combination of platform self-regulation and information literacy advocacy. Platform self-regulation is likely to continue if there is customer pressure, and it is likely to be somewhat effective so long as the platforms recognize the process as an iterative one that must evolve in response to sophisticated attempts to game the developing rules. When “fake news” begins to be seen as a problem that afflicts markets and commerce as well as the political world, then corporations can become partners with platforms in exploring ways to discipline the effects of disinformation. Commercial participants in the information marketplace are developing multiple technological ways to address “fake news.” Whether or not mandatory disclosure obligations applicable to political ads on the Internet would pass constitutional muster, such rules can be voluntarily adopted to enhance current technological “fixes” to “fake news.” Similarly, information literacy initiatives are likely to be increasingly effective the more they take account of the lessons taught by psychologists and political scientists. They just need to avoid the legitimacy trap themselves—by which they could

⁴³⁸ Anderson & Rainie, *supra* note 21. This report asserted that 51% of the experts it polled were pessimistic on the question, while 49% were more optimistic (although no one thought “fake news” could be eliminated rather than reduced). The attitudes apparently depended largely on whether the experts were optimistic about human nature and technology. *See id.*

be criticized for using manipulative techniques to combat manipulation.

Nevertheless, these sorts of developments, while laudable and likely to reduce the flow of “fake news,” are not sufficient to rebuild public trust in the press. They do not directly address the underlying threat to democracy posed by the consistent delegitimation of the press by the president, other governmental figures, and nakedly ideological segments of the so-called press itself. Authoritarianism and corruption can grow unchecked in contexts where an independent press is not there to watch, discover, and reveal. Periodic information dumps by leakers and shadowy entities like WikiLeaks cannot make up for the loss of professional accountability journalism. Leaving the public sphere to mediation solely by Facebook, Google, and Twitter is a dangerous strategy. Therefore, the Article argues, we need to take the perhaps counter-intuitive step of empowering the press both doctrinally and with respect to its customs and practices. The first step is the reversal of the ground that has already been lost in terms of press protection, both formal and informal. The second step is a more sustained inquiry into expanding press protections, both legislatively and judicially. The last step is the changes that the press would have to undertake in order to regain public trust. None of this is an easy case, nor are the consequences of legally empowering the press likely to be unalloyed benefits. The principal reason to advocate for this, however, is that the alternative is likely to be far worse.