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## Filtering Fake News through a Lens of Supreme Court Observations and Adages

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# FILTERING FAKE NEWS THROUGH A LENS OF SUPREME COURT OBSERVATIONS AND ADAGES

Clay Calvert<sup>⊗</sup> & Austin Vining<sup>▽</sup>

## ABSTRACT

This Essay analyzes multiple issues affecting fake news. It does so through a prism of seven observations by the U.S. Supreme Court concerning the First Amendment, free speech, and other matters. The Court's wisdom in these quotations provides propitious points of entrée for exploring how to address and remedy problems many fear fake news causes. The Essay concludes that because fake news will never be eradicated from the metaphorical marketplace of ideas, greater effort must be spent making real news—fake news's constructive flipside—more appetizing to the public.

## INTRODUCTION

Gallons of ink flooded the popular press in 2016 and 2017 regarding the supposed scourge of a nebulous, moving-target phenomenon dubbed fake news.<sup>1</sup> President Donald J. Trump unabashedly adopted—perhaps, co-opted—the moniker

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<sup>1</sup> See, e.g., Diane Carman, *When Times Are Too Scary, It's Time to Make Merry*, DENV. POST, Dec. 25, 2016, at 4D (“Fake news makes us think twice about the real stuff. When leaders convince us all news is a lie, it's easy to trick us and even defy the rules and traditions on which we depend to make sure no one brings our laws to an end.”); Jessica Guynn, *Facebook Users Are Fed Up With Fake News*, USA TODAY, Dec. 19, 2016, at 3B (asserting that “[f]ake news creates significant public confusion about current events”); Neil Irwin, *Fake News? Welcome to ‘False Remembering’*, N.Y. TIMES, Jan. 26, 2017, at A3 (citing a study suggesting “that the most straightforwardly fraudulent forms of fake news are a small part of what is shaping how people understand the world”); Deepa Seetharaman, *Facebook Commits to ‘News Literacy’*, WALL ST. J., Jan. 12, 2017, at B3 (reporting that “Facebook said it would aim to curb fake news through partnerships with fact-checking organizations and tweaks to its algorithm”); Mike Snider, *Fake News Spread by 23% of Americans, Study Says; More Than 1 in 10 Said They Shared a Story Knowing It Was Fake*, USA TODAY, Dec. 16, 2016, at 4B (explaining how “[f]ake stories and information” became “real news stories . . . as they permeated the . . . U.S. presidential election cycle”).

to relentlessly tar and feather entire news organizations that don't support his views or share his agenda.<sup>2</sup>

Trump's take is profoundly ironic. That's because some liberals blamed fake news for Hillary Clinton's stunning November 2016 loss to Trump,<sup>3</sup> while Clinton claimed fake news needed government action.<sup>4</sup> Isolated anecdotes, such as a shooting at a pizzeria in Washington, D.C.,<sup>5</sup> fueled panic and ostensibly demonstrated fake news's supposedly direct, powerful, and immediate effects on the easily fooled, unenlightened masses.<sup>6</sup> Fake news became a deceitful digital

<sup>2</sup> See, e.g., The Times Editorial Bd., Editorial, *The Problem with Trump: The War on Journalism*, L.A. TIMES, Apr. 6, 2017, at A12 (asserting that Trump "has regularly condemned legitimate reporting as 'fake news'"); Paul Farhi, *President Trump and the Media, From A to Z*, WASH. POST, July 21, 2017, at C1 ("Trump's demonization of reporters and news organizations – fake news! failing media! failing fake news media! – has become as routine as a morning coffee."); Paul Farhi, *At News Conference, Trump Calls BuzzFeed 'Garbage' and CNN 'Fake News'*, WASH. POST, Jan. 12, 2017, at C3 (quoting National Press Club in Washington President Thomas Burr saying that it's "dangerous and unhealthy to declare a news item as 'fake news' to distract from facts that you may not like or don't favor your perspective"); Laura King, *Democrats Pounce on Trump Jr.; President's Opponents See a Potential Turning Point in the Russia Inquiry, and Sinking Polls Add to His Woes.*, L.A. TIMES, July 17, 2017, at A1 (quoting a tweet by President Trump in which he wrote that "my son Don is being scorned by the Fake News Media"); Linda Qui, *After Denouncing 'Fake News,' a Catalog of Falsehoods*, N.Y. TIMES, Feb. 25, 2017, at A12 (quoting President Donald Trump saying "I want you all to know that we are fighting the fake news" and "[t]hey have a professional obligation as members of the press to report honestly").

<sup>3</sup> See John Herrman, *Fixation on Fake News Obscures a Waning Trust in Real Reporting*, N.Y. TIMES, Nov. 19, 2016, at B1 ("For many people, and especially opponents of President-elect Donald J. Trump, the attention paid to fake news and its role in the election has provided a small relief, the discovery of the error that explains everything."); Stacy Washington, *Current Refrain from Election Result Deniers: 'Blame the Russians'*, ST. LOUIS POST-DISPATCH, Dec. 16, 2016, at A17 (writing that "Democrats have offered *fake news*, misogyny, sexism, racism and now those dastardly Russians as reasons for their candidate's loss") (emphasis added).

<sup>4</sup> See Paul Kane, *Hillary Clinton Attacks 'Fake News' in Post-Election Appearance on Capitol Hill*, WASH. POST (Dec. 8, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/12/08/hillary-clinton-attacks-fake-news-in-post-election-appearance-on-capitol-hill> (reporting that during a December, 2016, speech, "Clinton voiced support for some federal legislation to address the 'fake news' issue").

<sup>5</sup> See generally Jessica Gresko, *Suspect in D.C. Pizzeria*, BALT. SUN, Dec. 14, 2016, at A10 (noting that Edgar Maddison Welch had been jailed "since the Dec. 4 shooting at Comet Ping Pong, which has been targeted by purveyors and consumers of fake news who spread false rumors that it's the site of a child sex trafficking ring run by prominent Democrats"); Michelle Hackman, *Trump Transition Team: Gen. Flynn's Son No Longer Involved*, WALL. ST. J., Dec. 7, 2016, at A4 (reporting that "[d]iscredited online conspiracy theories had alleged the Comet Ping Pong pizza restaurant in Washington was at the center of a child sex-trafficking ring tied to Hillary Clinton").

<sup>6</sup> See Peter Hermann et al., *Deluded into a D.C. 'Hero Mission'?*, WASH. POST, Dec. 6, 2016, at A1 (noting that "[f]amily and friends said they are struggling to understand how [Edgar Maddison] Welch apparently became so fixated on a fake news story that he drove from North Carolina with a Colt long rifle, a .38-caliber revolver and a shotgun, determined to take action"); Cecelia Kang & Adam Goldman, *Fake News Brought Real Guns in Washington Pizzeria Attack*, N.Y. TIMES, Dec. 6, 2016, at A1 (asserting that "[t]he shooting underscores the stubborn lasting power of fake news

bogeyman, problematically prowling a political playing field pockmarked by partisanship and lurking whenever a falsehood spread like wildfire on Facebook or went viral on Twitter.

This Essay examines fake news and possible ways to combat it. Seven quotations by the United States Supreme Court—sentiments drawn from opinions spanning nearly a century—guide the analysis. Each quote supplies an entry point for analyzing either a different facet of fake news or possible responses to it. Those responses, in turn, may or may not jibe with traditional conceptions of the First Amendment<sup>7</sup> and free expression embraced by the nation's high court. Ultimately, turning to the logic and reasoning of the justices embodied in these quotations offers a tidy framework for systematically addressing a fret-provoking subject.

### I. “[O]NE MAN’S VULGARITY IS ANOTHER’S LYRIC.”<sup>8</sup>

This statement flows from the Court’s 1971 ruling in the “fuck-the-draft” case of *Cohen v. California*.<sup>9</sup> There, the quotation tapped directly into the vagueness issues and definitional difficulties afflicting the statutory phrase “offensive conduct”<sup>10</sup> and whether, in turn, “fuck” fell within that

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and how hard it is to stamp out,” and adding that “[d]ebunking false news articles can sometimes stoke the outrage of the believers, leading fake news purveyors to feed that appetite with more misinformation”). The notion that media messages have direct, powerful and uniform effects on relatively passive audiences evokes the simplistic and outdated “hypodermic needle” or “magic bullet” theory of communication effects. See JENNINGS BRYANT ET AL., FUNDAMENTALS OF MEDIA EFFECTS 52 (2d ed. 2012) (observing that in “the early years of scientific effects studies in the 20th century, powerful effects were assumed by many. The powerful impact of media messages on audiences was likened to firing a bullet or injecting a drug, which gave rise to the bullet theory or hypodermic needle theory of mass communication.”).

<sup>7</sup> The First Amendment to the U.S. Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>8</sup> *Cohen v. California*, 403 U.S. 15, 25 (1971).

<sup>9</sup> *Id.*

<sup>10</sup> CAL. PENAL CODE § 415(3). The current version of the statute uses the phrase “offensive words” instead of “offensive conduct,” and it only restricts “offensive words” in fighting-words scenarios when they “are inherently likely to provoke an immediate violent reaction.” CAL. PENAL CODE § 415 (Deering 2017). Fighting words are one of the few categories of speech not safeguarded by the First Amendment. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The U.S. Supreme Court opined seventy-five years ago that:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or

definition.<sup>11</sup> More than forty-five years later, the quotation affords an ideal starting point for tackling fake news, forcing one to precisely define what comprises this invasive, inchoate commodity.

One person's fake news, after all, is another's entertainment. Or another's satire<sup>12</sup> or bias or spin or lie or libel<sup>13</sup> or . . . maybe just, in the weaselly words of White House senior adviser Kellyanne Conway in January 2017, "alternative facts."<sup>14</sup> Is fake news, then, even a useful term, or is it a non-starter for discussing a pox purportedly plaguing politics and victimizing vapid, vacuous voters?

For example, Dave Itzkoff asserted in the *New York Times* that "[t]he phrase 'fake news' has now been used so liberally, it's meaningless."<sup>15</sup> That's partly the situation because, as another column in that paper notes, "Trump and his allies in the right media have already turned the term 'fake news' against its critics, essentially draining it of any meaning."<sup>16</sup> In legal parlance, the term fake news is ripe for a void-for-vagueness challenge unless a precise definition accompanies it.<sup>17</sup>

At the most rudimentary level, fake news is a speech-based phenomenon. It typically features words and may involve images. The First Amendment, thus, is relevant to the extent that curtailing fake news entails government action targeting its producers and/or disseminators. The possibility of such government regulation is more than speculative. For instance,

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"fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

*Id.* at 571–72.

<sup>11</sup> *Cohen*, 403 U.S. at 17.

<sup>12</sup> See Meital Balmas, *When Fake News Becomes Real: Combined Exposure to Multiple News Sources and Political Attitudes of Inefficacy, Alienation, and Cynicism*, 41 COMM. RES. 430, 431 (2014) (noting that "satirical news-programs" have been referred to as "fake news" in the literature of media-effects scholars).

<sup>13</sup> See Steven Seidenberg, *Lies and Libel: Fake News is Just False, But Its Cure May Not Be So Simple*, A.B.A. J., July 2017, at 48 (addressing libel lawsuits as one potential remedy for fake news).

<sup>14</sup> Jim Rutenberg, *The Costs of Trump's Brand of Reality*, N.Y. TIMES, Jan. 23, 2017, at B1.

<sup>15</sup> Dave Itzkoff, *The Same Show, But a Changed World*, N.Y. TIMES, Feb. 8, 2017, at C1.

<sup>16</sup> Charles J. Sykes, Opinion, *The Right that Cried Wolf*, N.Y. TIMES, Feb. 5, 2017, at SR1.

<sup>17</sup> See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (observing that "it is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined" such that they fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited"); see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 987 (5th ed. 2015) ("A law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted.").

California Assembly Bill 1104—as originally introduced in February 2017—would have made it:

unlawful for a person to knowingly and willingly make, publish or circulate on an Internet Web site, or cause to be made, published, or circulated in any writing posted on an Internet Web site, a false or deceptive statement designed to influence the vote on either of the following: (A) any issue submitted to voters at an election. (B) Any candidate for election to public office.<sup>18</sup>

This language was later eliminated when the bill was amended in April 2017.<sup>19</sup> But before even considering such a drastic remedial step that surely would face a steep, uphill constitutional battle—political speech lies at the core of the First Amendment,<sup>20</sup> the Supreme Court safeguards lies without

<sup>18</sup> A.B. 1104, 2017–2018 Leg., Reg. Sess. (Cal. 2017) (as introduced by Assembly Member Chau, Feb. 17, 2017).

<sup>19</sup> *Id.* (as amended by Assembly Member Chau, April 19, 2017). The bill was amended to remove the above-quoted text, but it retained language extending the state’s “political cyberfraud” law to protect political candidates. The new bill defines “political cyberfraud” as:

a knowing and willful act concerning a political Web site that is committed with the intent to deny a person access to a political Web site, deny a person the opportunity to register a domain name for a political Web site, or cause a person reasonably to believe that a political Web site has been posted by a person other than the person who posted the Internet Web site, and would cause a reasonable person, after reading the Internet Web site, to believe the site actually represents the views of the proponent or opponent of a ballot measure or of a candidate for public office.

*Id.* (emphasis added). See *The California Political Cyberfraud Abatement Act: Hearing on A.B. 1104 Before the Assemb. Comm. on Privacy & Consumer Prot.*, 2017–2018 Reg. Sess. (Cal. 2017) (noting opposition from the American Civil Liberties Union of California); *The California Political Cyberfraud Abatement Act: Hearing on A.B. 1104 Before the Assemb. Comm. on Elections & Redistricting*, 2017–2018 Reg. Sess. (Cal. 2017) (noting opposition to the prior version of the bill from the California Newspaper Publishers Association); Dave Maass, *California Bill To Ban “Fake News” Would be Disastrous for Political Speech*, ELEC. FRONTIER FOUND. (Mar. 27, 2017), <https://www.eff.org/deeplinks/2017/03/california-bill-ban-fake-news-would-be-disastrous-political-speech> (writing that the bill’s prior language would “fuel a chaotic free-for-all of mudslinging with candidates and others being accused of crimes at the slightest hint of hyperbole, exaggeration, poetic license, or common error,” and asserting that “[a]t a time when political leaders are promoting ‘alternative facts’ and branding unflattering reporting as ‘fake news,’ we don’t think it’s a good idea to give the government more power to punish speech”).

<sup>20</sup> See, e.g., *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1448 (2014) (observing that “the First Amendment safeguards an individual’s right to participate in the public debate through political expression and political association”); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 349 (2010) (“If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.”); *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was

direct causal proof of harm,<sup>21</sup> and content-based statutes must pass strict scrutiny<sup>22</sup>—one first needs to define the facet of fake news one strives to combat.

The following is a possible definition that the authors of this essay, along with two colleagues, propose in a forthcoming article in another law review.<sup>23</sup> Specifically, we narrowly define fake news as encompassing “only articles that suggest, by both their appearance and content,<sup>24</sup> the conveyance of real news,<sup>25</sup> but also knowingly include at least one material<sup>26</sup> factual

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fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”).

<sup>21</sup> See *United States v. Alvarez*, 567 U.S. 709, 718 (2012) (observing that there is no “general exception to the First Amendment for false statements. This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.”).

<sup>22</sup> See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) (observing that “strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based”).

<sup>23</sup> Clay Calvert et al., *Fake News and the First Amendment: Reconciling a Disconnect Between Theory and Doctrine*, 86 U. CIN. L. REV. (forthcoming 2018).

<sup>24</sup> This definition incorporates a reasonable reader standard, akin to that in defamation law, to determine whether an article’s appearance and content suggest it is real news. See, e.g., *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 515 (1991) (concluding that the meaning of a statement in defamation law must be made “by reference to the meaning a statement conveys to a reasonable reader”); *Lynch v. New Jersey Educ. Ass’n*, 735 A.2d 1129, 1136–37 (N.J. 1999) (“If a statement has more than a literal meaning, the critical consideration is what a reasonable reader would understand the statement to mean.”). Variables that might reasonably lead a reader to believe content constitutes a real news article include the presence of a byline, a dateline, short paragraphs, quotations from seemingly authoritative sources, the appearance of objectivity and a layout/presentation format akin to that found on websites of legitimate news websites such as those of the *New York Times*, *Washington Post*, and *Los Angeles Times*. See Eugene Kiely & Lori Robertson, *How to Spot Fake News*, FACTCHECK.ORG (Nov. 18, 2016), <http://www.factcheck.org/2016/11/how-to-spot-fake-news/>.

<sup>25</sup> Defining “news” as a stand-alone concept is itself difficult. See, e.g., Robert M. Entman, *The Nature and Sources of News*, in *THE PRESS* 48, 51 (Geneva Overholser & Kathleen Hall Jamieson eds. 2005) (“Journalists, scholars, and the educated public have long thought of news as a more or less self-evident category of media product—the stuff that appears in newspapers, newsmagazines, or on TV shows that have the word ‘news’ in their titles.”); KATHLEEN HALL JAMIESON & KARLYN KOHRS CAMPBELL, *THE INTERPLAY OF INFLUENCE: NEWS, ADVERTISING, POLITICS AND THE INTERNET* 40 (6th ed. 2006) (“Just what is news? Despite many efforts, no neat, satisfactory answer to that question can be given.”). A complete discussion of what constitutes news falls beyond the scope of this essay.

<sup>26</sup> The idea that fake news, under this definition, must involve “material” falsity—rather than minor falsity—borrows partly from a recent U.S. Supreme Court decision affecting defamation law. See *Air Wis. Airlines Corp. v. Hooper*, 134 S. Ct. 852, 861 (2014) (“Indeed, we have required more than mere falsity to establish actual malice: The falsity must be ‘material.’”). Additionally, the Federal Trade Commission uses a materiality standard in considering if a misrepresentation or omission of a fact is actionable. See *Fanning v. Fed. Trade Comm’n*, 821 F.3d 164, 172 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 627 (2017) (“The FTC Act imposes liability for misrepresentations only if they are material.”); *Kraft, Inc. v. Fed. Trade Comm’n*, 970 F.2d 311, 322 (7th Cir. 1992) (“A claim is considered material if it ‘involves information that is important to consumers and, hence, likely to affect their choice

assertion that is empirically verifiable as false and that is not otherwise protected by the fair report privilege.”<sup>27</sup>

Unpacking this definition reveals its narrowness. First, inclusion of the word “articles” is strategic. “Articles” taps into the noun *news* in the term *fake news*. The definition, in turn, applies only to what appear, at least to reasonable readers, to be real news articles. This limitation is important because it correlates with the notion that fake news, as Angie Drobnic Holan of PolitiFact explains, is “masterfully manipulated to look like credible journalistic reports.”<sup>28</sup>

This definition therefore encompasses content that conveys the impression of being a real news article in print or, more relevantly here, on the Internet. In other words, the definition initially focuses on the noun-based *news* aspect of fake news as much as it does on the adjectival *fake* facet.

The definition thus does not apply to any and all falsehoods regarding timely matters or to any information posted by private individuals or entities to Twitter or Facebook. Certainly, a factually inaccurate tweet by a non-journalist can spawn misguided news stories in the mainstream press,<sup>29</sup> but

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of, or conduct regarding a product.” (quoting *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165 (1984))).

<sup>27</sup> Calvert et al., *supra* note 23. Exempting falsities that fall within the scope of the fair report privilege from this definition of fake news is both strategic and crucial. That’s because the fair report privilege—in stark contrast to fake news—actually “promotes our system of self-governance by serving the public’s interest in official proceedings.” *Solaia Tech., LLC v. Specialty Publ’g Co.*, 852 N.E.2d 825, 842 (Ill. 2006). As Dean Rodney Smolla explains, “[t]he rationale for the privilege is of considerable vintage, but remains as relevant as ever: The reporter is a surrogate for the public, permitting it to observe through the reporter’s eyes how the business of government is being conducted.” RODNEY A. SMOLLA, *THE LAW OF DEFAMATION* § 8:67 (2d ed. 2012). Put differently, the fair report privilege exists to enlighten voters, not to confuse them. *See* RESTATEMENT (SECOND) OF TORTS § 611 (1977) (“The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.”); *see also* Richard J. Peltz, *Fifteen Minutes of Infamy: Privileged Reporting and the Problem of Perpetual Reputational Harm*, 34 Ohio N.U. L. REV. 717, 725 (2008) (noting that the fair report privilege protects “the republication of a defamatory falsehood in certain circumstances” and, in particular, when the “falsity is uttered in the course of a public proceeding” and is “clearly attributed” as arising in that proceeding); Samuel A. Terilli et al., *Lowering the Bar: Privileged Court Filings as Substitutes for Press Releases in the Court Of Public Opinion*, 12 COMM. L. & POL’Y 143, 158 (2007) (pointing out that “the fair report privilege is qualified or conditioned upon some showing, generally the fairness and accuracy of the republication of the underlying official action,” and adding that its “protection may be lost if the speaker fails to fairly and accurately report the allegations or events transpiring in the official action, proceeding or meeting”).

<sup>28</sup> Angie Drobnic Holan, *2016 Lie of the Year: Fake News*, POLITIFACT (Dec. 13, 2016, 5:30 PM), <http://www.politifact.com/truth-o-meter/article/2016/dec/13/2016-lie-year-fake-news>.

<sup>29</sup> *See* Sapna Maheshwari, *The Journey of a Fake News Story That Begins With a Single Tweet*, N.Y. TIMES, Nov. 21, 2016, at B1 (providing a real-life example of such a situation).



such a tweet does not purport to be a real news article and therefore does not fall within the definition of fake news as discussed here. The definition targets, instead, only information masquerading in a form and manner that purports to be a real news article.

Second, the definition requires that an article include at least one material—one important, in other words—factual assertion that is objectively verifiable as false. In other words, fake news deals with falsity of facts, not statements of opinion, and those falsities must be of a certain threshold of gravitas, significance, and importance.

Third, the definition includes a scienter requirement via the phrase “knowingly include.” Thus, the individuals targeted by this definition of fake news are those who intentionally fabricate falsities about important matters. Put slightly differently, fake news involves only deliberate falsities, not accidental errors or innocent mistakes. This is akin to the knowledge-of-falsity prong of the Supreme Court’s two-part explication of actual malice.<sup>30</sup>

This definition, of course, is by no means the only possible one for fake news. But for purposes of this essay and for possible regulatory efforts affecting fake news, it provides a starting point. It probably is better to begin small, as it were, especially when a term like fake news is so liberally bandied about and expansively misused and abused. A broader definition—perhaps one defining fake news as any publication of a knowing falsity on a matter of public concern that is intended to deceive—renders nugatory the noun *news* in fake news. As a compound concept, both the adjective (fake) and the noun (news) must carry significance. Otherwise, the problem is simply falsity and fakery, and one might as well substitute for “fake news” the unwieldy “Falsehoods That Keep Us Up at Night Worrying About People Who Might be Fooled.”

## II. “MEN FEARED WITCHES AND BURNT WOMEN.”<sup>31</sup>

This quotation, a snippet from a famous passage in Justice Louis Brandeis’s ninety-year-old concurrence in *Whitney v. California*,<sup>32</sup> compels examination of two facets of fake news.

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<sup>30</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that a public official seeking damages for a defamatory falsehood relating to his official conduct must demonstrate “that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not”).

<sup>31</sup> *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

<sup>32</sup> 274 U.S. 357 (1927).

First and foremost, we must pinpoint precisely what it is we fear about fake news. In other words, what is the harm—what is the injury—we fear fake news causes? The *First Amendment Law Review*, after all, certainly would not devote an entire symposium to fake news if we considered it benign or nonthreatening.

John Stuart Mill's harm principle suggests that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."<sup>33</sup> As encapsulated by Professor Frederick Schauer, this means "that society may proceed only against genuine harms and not against other forms of individual or social discomfort."<sup>34</sup> What then, in Millian terms, is the "harm to others"<sup>35</sup> caused by fake news?

Identifying the harm or harms that we fear fake news produces is a condition precedent for any effective remedial action, be it through legal or private channels. As the lead author of this essay recently asserted elsewhere, the first step that lawmakers seeking to regulate any speech-based phenomenon must take is to "identify, with precision and specificity, the actual problem that the speech caught in the legislative crosshairs allegedly causes."<sup>36</sup> In other words, when it comes to fake news, one must "pinpoint the precise harm, not just some generalized, indistinct worry."<sup>37</sup>

So, what is it that we fear about fake news? There are several possibilities. Is it, on the one hand, a macro-level political worry that the outcome of elections will be unfairly influenced and, in fact, changed as a direct result of fake news? In other words, do we fear that fake news jeopardizes democracy,<sup>38</sup> casting a pall over what philosopher-educator Alexander Meiklejohn nearly seventy years ago called "the voting of wise decisions"?<sup>39</sup>

Meiklejohn seemingly would not afford First Amendment protection to fake news as defined earlier.<sup>40</sup> Why? Because for Meiklejohn, the First Amendment was "not the

<sup>33</sup> JOHN STUART MILL, ON LIBERTY 80 (David Bromwich & George Kateb eds., Yale Univ. Press 2003).

<sup>34</sup> Frederick Schauer, *On the Relation Between Chapters One and Two of John Stuart Mill's On Liberty*, 39 CAP. U. L. REV. 571, 574 (2011).

<sup>35</sup> MILL, *supra* note 33, at 80.

<sup>36</sup> Clay Calvert, *Legislating the First Amendment: A Trio of Recommendations for Lawmakers Targeting Free Expression*, 35 CARDOZO ARTS & ENT. L.J. 279, 287 (2017).

<sup>37</sup> *Id.* at 290.

<sup>38</sup> See Rory Van Loo, *The Rise of the Digital Regulator*, 66 DUKE L.J. 1267, 1328 (2017) (citing "the threat of fake news to the democratic process").

<sup>39</sup> ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948).

<sup>40</sup> See *supra* notes 24–27 and accompanying text (providing one possible definition of fake news).

guardian of unregulated talkativeness.”<sup>41</sup> Instead, what was essential was “that everything worth saying shall be said.”<sup>42</sup> Fake news therefore could be jettisoned from the cloak of First Amendment protection because it simply is *not* worth saying. Permitting its circulation may harm what Meiklejohn called “the minds of the hearers,”<sup>43</sup> which collectively represent “the point of ultimate interest”<sup>44</sup> in the “method of political self-government.”<sup>45</sup>

Or is our fear, on the other hand, a micro-level, human-dignity concern that people should not be led astray and preyed upon by profiteering and nefarious fake-news mongers? Put slightly differently, is our concern driven by a paternalistic desire to shield the easily duped from their own follies and foibles? And if that, in fact, is the worry, then should the Federal Trade Commission step in to protect individuals from politically oriented fake news stories the same way it currently does when fake-news websites are created to sell products?<sup>46</sup> Expanding the FTC’s jurisdiction from packaged food items to packaged candidates might just do the trick.

Or is our fear stoked by some combination of macro-level and micro-level harms or, perhaps, by something else entirely different? In other words, what is the proper level of analysis for pinpointing the harm(s)?

One thing, at this stage, is definitely clear—we fear that *others* will be more detrimentally affected by fake news than *ourselves*. As the lead author of this essay wrote elsewhere in early 2017, survey data gathered by the Pew Research Center in December 2016 suggest that people tend to believe they are less likely to be hoodwinked by fake news than others.<sup>47</sup> That article explains that this finding comports with what communication researchers call the third-person effect.<sup>48</sup>

Originally postulated by W. Phillips Davison in 1983, the third-person effect boils down to this: “in the view of those trying to evaluate the effects of a communication, its greatest impact will not be on ‘me’ or ‘you,’ but on ‘them’—the third

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<sup>41</sup> MEIKLEJOHN, *supra* note 39, at 25.

<sup>42</sup> *Id.*

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

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See Press Release, Fed. Trade Comm’n, FTC Seeks to Halt 10 Operators of Fake News Sites from Making Deceptive Claims About Acai Berry Weight Loss Products (Apr. 19, 2011), <https://www.ftc.gov/news-events/press-releases/2011/04/ftc-seeks-halt-10-operators-fake-news-sites-making-deceptive>.

<sup>47</sup> Clay Calvert, *Fake News, Free Speech, & the Third-Person Effect: I’m No Fool, But Others Are*, 7 WAKE FOREST L. REV. ONLINE 53 (Feb. 8, 2017), <http://wakeforestlawreview.com/2017/02/fake-news-free-speech-the-third-person-effect-im-no-fool-but-others-are/>.

<sup>48</sup> *Id.*

persons.”<sup>49</sup> Parsed differently, people tend to believe “that others are more likely to be affected by mediated messages than the self.”<sup>50</sup>

Nearly two decades ago, in one of the earliest law journal articles tackling the third-person effect and its relationship to government censorship, the lead author of this essay argued that a vast body of research confirming the third-person effect “has disturbing ramifications for extant and future First Amendment jurisprudence. It suggests the government may be unnecessarily censoring speech based on a perceptual bias about its effects on others.”<sup>51</sup> Lawmakers should keep that in mind when proposing measures targeting people who create and transmit fake news.

Our fears about fake news may also be overblown. One study suggests “the fake news audience is tiny compared to the real news audience—about 10 times smaller on average.”<sup>52</sup> Another report finds “that social media have become an important but not dominant source of political news and information. Television remains more important by a large margin.”<sup>53</sup>

The second reason Justice Brandeis’s observation in *Whitney* is important relates to its burning-witches facet. Are we, perhaps, acting somewhat hysterically today regarding fake news because of President Trump’s surprising election? If Hillary Clinton had prevailed, would we be so fearful and preoccupied by fake news? It is a question to which, of course, we will never know the answer, but one worth pondering to the extent that a person’s political perspective may affect just how concerned he or she is with fake news. The idiomatic elephant in the fake newsroom, as it were, is whether left-leaning academics would care so much if Clinton had triumphed.

Similarly, one might query whether fake news is just another technology-driven moral panic—one in which people increasingly receive information from non-traditional, Internet-driven sources rather than from legacy media such as print, radio, and television—that will fade from journalistic and

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<sup>49</sup> W. Phillips Davison, *The Third-Person Effect in Communication*, 47 PUB. OPINION Q. 1, 3 (1983).

<sup>50</sup> Brett Sherrick, *The Effects of Media Effects: Third-Person Effects, the Influence of Presumed Media Influence, and Evaluations of Media Companies*, 93 JOURNALISM & MASS COMM. Q. 906, 907 (2016).

<sup>51</sup> Clay Calvert, *The First Amendment and the Third Person: Perceptual Biases of Media Harms & Cries for Government Censorship*, 6 COMMLAW CONSPICUOUS 165, 166 (1998).

<sup>52</sup> Jacob L. Nelson, *Is ‘Fake News’ a Fake Problem?*, COLUM. J. REV. (Jan. 31, 2017), <https://www.cjr.org/analysis/fake-news-facebook-audience-drudge-breitbart-study.php>.

<sup>53</sup> Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 223 (2017).

public radar screens as other issues pop up.<sup>54</sup> Is fake news, in other words, the panic de jour that floats like flotsam in the wake of the weird, wacky world of Trump?

And ultimately, if the government takes legal action against fake news purveyors, will we burn the First Amendment freedom of expression in the process? Justice Brandeis's sentiment in *Whitney*, in brief, must not be forgotten today.

**III. "THERE MUST BE A DIRECT CAUSAL LINK BETWEEN THE RESTRICTION IMPOSED AND THE INJURY TO BE PREVENTED."<sup>55</sup>**

This principle regarding causation of harm, drawn from Justice Anthony Kennedy's plurality opinion in *United States v. Alvarez*,<sup>56</sup> becomes most relevant if the government attempts to regulate fake news. The *Alvarez* rule that proof of causation of harm must be demonstrated to uphold a content-based restriction on speech under strict scrutiny<sup>57</sup> springs from the Court's 2011 decision in the violent video game case of *Brown v. Entertainment Merchants Association*.<sup>58</sup>

The Court in *Brown* struck down a California statute limiting minors' access to such games because the Golden State could not "show a direct causal link between violent video games and harm to minors."<sup>59</sup> Writing for the majority, the late Justice Antonin Scalia reasoned that the social science studies on which California relied to support its law "do not prove that violent video games cause minors to act aggressively (which would at least be a beginning). Instead, '[n]early all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in

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<sup>54</sup> Nicholas Bowman, *Banning Smartphones for Kids is Just Another Technology-Fearing Moral Panic*, CONVERSATION (July 10, 2015, 9:05 PM), <http://theconversation.com/banning-smartphones-for-kids-is-just-another-technology-fearing-moral-panic-74485> (providing a concise review of moral panics fueled by new technologies).

<sup>55</sup> *United States v. Alvarez*, 567 U.S. 709, 725 (2012).

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

<sup>57</sup> See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (noting that "content-based restrictions on speech" are permissible "only if they survive strict scrutiny," and adding that strict scrutiny requires the government to prove that the regulation in question "furthers a *compelling governmental interest* and is narrowly tailored to achieve that interest") (emphasis added); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (asserting that because a California law limiting minors' access to violent video games "imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a *compelling government interest* and is narrowly drawn to serve that interest") (emphasis added).

<sup>58</sup> 564 U.S. 786 (2011).

<sup>59</sup> *Id.* at 799.

methodology.”<sup>60</sup> In a nutshell, a mere association won’t pass constitutional muster; only causation suffices.<sup>61</sup>

Some people blamed Hillary Clinton’s loss to Donald Trump on fake news,<sup>62</sup> but there is no empirical causal link proving Clinton lost because of fake news. A July 2017 article, premised on the findings of a *Wall Street Journal*/NBC News poll, asserted that “many of the themes that led” to Trump’s victory included “the resonance of his call to protect U.S. jobs and the unfavorable view that many voters took of Democratic presidential nominee Hillary Clinton.”<sup>63</sup> And, of course, James Comey’s eleventh-hour decision to further investigate private-server email questions swirling around Clinton allegedly contributed to her electoral demise.<sup>64</sup> In brief, multiple factors may influence a person’s decision to vote for a candidate.

Consider the infamous shooting at a pizzeria spawned by fake news.<sup>65</sup> It constitutes anecdotal evidence of one variety of harm caused by fake news. Out of the likely tens of thousands of people who read the same fake news involved in that incident and who actually may have believed it, only one person took potentially deadly action as a direct result. To regulate fake news because of one incident is akin to restricting violent video games based on a few shootings by minors, despite the fact that millions of people play such games yet commit no crimes. And *Brown v. Entertainment Merchants*

<sup>60</sup> *Id.* at 800 (quoting *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 964 (9th Cir. 2009)).

<sup>61</sup> See Clay Calvert & Matthew D. Bunker, *An “Actual Problem” in First Amendment Jurisprudence? Examining the Immediate Impact of Brown’s Proof-of-Causation Doctrine on Free Speech and Its Compatibility with the Marketplace Theory*, 35 HASTINGS COMM. & ENT. L.J. 391, 395–97 (2013) (providing a synopsis of this logic from *Brown* and referring to *Brown*’s “proof-of-causation doctrine” as “demanding”).

<sup>62</sup> See Deepa Seetharaman, *Zuckerberg Refutes Election Criticism*, WALL ST. J., Nov. 14, 2016, at B4 (observing that there was “criticism that fake news and misinformation on the social-media site [Facebook] may have swayed the outcome of the presidential election”); Nausicaa Renner, *The Media Today: Is Fake News Here to Stay?*, COLUM. J. REV. (July 19, 2017), [https://www.cjr.org/the\\_media\\_today/the-media-today-is-fake-news-here-to-stay.php](https://www.cjr.org/the_media_today/the-media-today-is-fake-news-here-to-stay.php) (remarking that “Trump’s win was partly attributed to the popularity of fake stories denigrating Hillary Clinton”).

<sup>63</sup> Michael C. Bender, *Poll: Trump’s Supporters Have His Back*, WALL ST. J., July 19, 2017, at A6.

<sup>64</sup> See Matt Apuzzo et al., *Trying to Avoid Politics, Comey Shaped Election*, DAYTON DAILY NEWS, Apr. 23, 2017, at A6 (asserting that FBI Director James Comey “upended the 2016 election” and contending that his plan “to tell Congress that the FBI had received new evidence and was reopening its investigation into Hillary Clinton” violated “the policies of an agency that does not reveal its investigations or do anything that may influence an election”); Kevin Johnson, *FBI Head ‘Mildly Nauseous’ About Any Election Impact: Comey Defends Revealing Email Matter So Close to November Vote*, USA TODAY, May 4, 2017, at A3 (noting that “[Hillary] Clinton has blamed Comey as recently as Tuesday for torpedoing her campaign as the Democratic presidential nominee” and quoting James Comey as saying, “It makes me mildly nauseous that we would have had an impact on the election”).

<sup>65</sup> Gresko, *supra* note 5, at 4 and accompanying text.

*Association* tells us that such regulation of video games is, indeed, misguided and unjustified in the absence of a direct causal link of harm.<sup>66</sup>

Yes, people may believe fake news; let's stipulate to that fact.<sup>67</sup> But believing something that is objectively verifiable as false is not a legally cognizable harm. If the government could regulate people's false beliefs, it would be a truly scary moment.

All of this ties back to the earlier question of precisely what it is that we fear about fake news. Once we identify the specific harm about which we are concerned, then courts will require proof that the harm is directly caused by fake news in order for a government regulation to pass constitutional muster.

#### IV. "IT IS ALWAYS SOMEWHAT COUNTERINTUITIVE TO ARGUE THAT A LAW VIOLATES THE FIRST AMENDMENT BY ABRIDGING TOO LITTLE SPEECH."<sup>68</sup>

This quotation, drawn from the five-justice majority opinion penned by Chief Justice John Roberts in *Williams-Yulee v. Florida Bar*,<sup>69</sup> taps directly into the notion that a statute can be unconstitutional because it is underinclusive. Roberts added that "[u]nderinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest in a comparable way."<sup>70</sup>

This logic forces consideration of whether fake news is the real problem or, instead, whether it is merely one facet of the much larger problem that is today's news media ecosystem. In brief, fake news may simply be the tip of a vast informational iceberg—a visible manifestation or overt indicator of a more immense challenge regarding news consumption that has festered for years as citizens turned away from reading daily

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<sup>66</sup> *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011); see also *Calvert & Bunker*, *supra* note 61, at 395 ("[I]n *Brown*, Justice Antonin Scalia wrote that the strict scrutiny standard of judicial review to which content-based laws are subject demands proof of a 'direct causal link' between the speech in question and an 'actual problem' allegedly resulting from it.").

<sup>67</sup> See Allcott & Gentzkow, *supra* note 53, at 212 (citing a study by Ipsos Public Affairs that found that "many people [75 percent] who see fake news stories report that they believe them"); Balmas, *supra* note 12, at 446 (finding that "the extent to which fake news is perceived as realistic is greater among individuals with *high* exposure to fake news and *low* exposure to hard news than among individuals with *high* exposure to both hard and fake news"); Brendan Nyhan & Jason Reifler, *Displacing Misinformation About Events: An Experimental Test of Causal Corrections*, 2 J. EXPERIMENTAL POL. SCI. 81, 90 (2015) (asserting that "corrections of misinformation are frequently ineffective").

<sup>68</sup> *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015) (emphasis added).

<sup>69</sup> 135 S. Ct. 1656 (2015).

<sup>70</sup> *Id.* at 1670.

newspapers<sup>71</sup> and watching the evening news.<sup>72</sup> As Professor Anthony Gaughan recently observed, “[t]raditional news journalism has shrunk dramatically both in terms of consumers and profitability.”<sup>73</sup> He noted that one 2016 study demonstrates “that television news audiences are shrinking just as fast as newspaper readership, especially among younger viewers.”<sup>74</sup>

For instance, estimated weekday newspaper readership has fallen by more than 25 million since 1987.<sup>75</sup> One recent study reveals that:

total weekday circulation for U.S. daily newspapers—both print and digital—fell 8% in 2016, marking the 28th consecutive year of declines. (Sunday circulation also fell 8%.) The overall decline includes a 10% decrease in weekday print circulation (9% for Sundays) and a 1% decline in weekday digital circulation (1% rise for Sundays).<sup>76</sup>

Similarly, audience size for local television newscasts has decreased.<sup>77</sup> Additionally, many people simply do not trust the news media.<sup>78</sup> For instance, a 2016 Gallup poll found that

<sup>71</sup> See *infra* notes 75–76 and accompanying text (providing data on declining newspaper readership over time in the United States).

<sup>72</sup> See Frank C.S. Lui, *Declining News Media Viewership and the Survival of Political Disagreement*, 29 INT’L J. PUB. OPINION RES. 240, 241 (2017) (observing that “[i]n 2005, six broadcast networks, with the exception of ABC and Fox, suffered a 13% decline in their viewership” and that “[i]n 2010, cable news viewership for CNN, MSNBC, and Fox News also continued to fall precipitously”).

<sup>73</sup> 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, 64 (2017).

<sup>74</sup> *Id.* at 65.

<sup>75</sup> See *Newspaper Fact Sheet: Data*, PEW RESEARCH CTR. (June 1, 2017) <http://www.journalism.org/fact-sheet/newspapers/> (finding that weekday newspaper readership has been continuously falling from a high of 62,826,000 in 1987 to an estimated 34,657,199 in 2016).

<sup>76</sup> Michael Barthel, *Despite Subscription Surges for Largest U.S. Newspapers, Circulation and Revenue Fall for Industry Overall*, PEW RESEARCH CTR. (June 1, 2017) <http://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry/>.

<sup>77</sup> See *Local TV News Fact Sheet*, PEW RESEARCH CTR. (July 13, 2017) <http://www.journalism.org/fact-sheet/local-tv-news/> (reporting that “[i]n 2016, viewership for network local affiliate news stations (ABC, CBS, Fox, and NBC) declined in key time slots—morning, early evening and late night, according to Pew Research Center analysis of Nielsen Media Research data” and adding that “[s]ince 2007, the average audience for late night newscasts has declined 31%, while morning audience declined 12% and early evening audience fell 19%”).

<sup>78</sup> See *Attitudes Towards the Mainstream Media Take an Unconstitutional Turn*, ECONOMIST (Aug. 2, 2017), <https://www.economist.com/blogs/graphicdetail/2017/08/daily-chart-0> (reporting that “[w]hen Republicans were asked whether they trusted Mr[.] Trump more than the *New York Times*, the *Washington Post* or CNN, at least 70% sided with the



Americans' level of trust in the mass media to fairly and accurately report the news had "dropped to its lowest level in Gallup polling history, with 32% saying they have a great deal or fair amount of trust in the media. This is down eight percentage points from last year."<sup>79</sup> By comparison, "Americans' trust and confidence hit its highest point in 1976, at 72%, in the wake of widely lauded examples of investigative journalism regarding Vietnam and the Watergate scandal."<sup>80</sup> That, sadly, was more than forty years ago.

Furthermore, the number of daily newspapers in the United States is shrinking.<sup>81</sup> It is an ecosystem in which people turn to online social media and Google for news, while Google and Facebook turn to algorithms to ferret out bogus stories.<sup>82</sup>

In terms of addressing fake news, it ultimately may be that our efforts—be they through education,<sup>83</sup> counter speech,<sup>84</sup> legislation,<sup>85</sup> or something else—will do far too little to cure a much larger systemic problem.

**V. "[T]HE ULTIMATE GOOD DESIRED IS BETTER REACHED BY FREE TRADE IN IDEAS—THAT THE BEST TEST OF TRUTH IS THE POWER OF THE THOUGHT TO GET ITSELF ACCEPTED IN THE COMPETITION OF THE MARKET . . . ."**<sup>86</sup>

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president each time" and that when "asked whether courts should be allowed to 'shut down news media outlets for publishing or broadcasting stories that are biased and inaccurate', 45% of Republicans were in favour, compared with 20% who opposed the measure" and "[m]ore than half thought it acceptable to fine an offending news outlet); *The State of the First Amendment: 2016*, NEWSEUM INST. 1, 4–5, [http://www.newseuminstitute.org/wp-content/uploads/2016/06/FAC\\_SOFA16\\_report.pdf](http://www.newseuminstitute.org/wp-content/uploads/2016/06/FAC_SOFA16_report.pdf) (last visited Feb. 26, 2018) (finding that "a record low percentage [74%] of Americans . . . agree that the media are unbiased" and that "[t]he majority of Americans, 51%, stated that the news media has been very (23%) or somewhat (28%) inaccurate in reporting on the 2016 presidential campaign").

<sup>79</sup> Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), <http://www.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx>.

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

<sup>81</sup> See *Newspapers: Number of Daily Newspapers*, PEW RESEARCH CTR. (last visited Oct. 21, 2017), <http://www.journalism.org/media-indicators/newspapers-number-of-daily-newspapers/> (providing that the total number of daily newspapers fell from 1457 in 2004 to 1331 in 2014).

<sup>82</sup> See Associated Press, *Google is Taking Steps to Block Fake News*, L.A. TIMES, Apr. 26, 2017, at C2 (noting that Google "began revising the closely guarded algorithms that generate its search with the help of 10,000 people who rate the quality and reliability of the recommendations during tests" and that "Google also rewrote its 140-page book of rating guidelines that help the quality-control evaluators make their assessments").

<sup>83</sup> *Infra* notes 101–08 and accompanying text (addressing education and digital literacy).

<sup>84</sup> See *infra* Part VI.

<sup>85</sup> See *supra* notes 18–19 and text accompanying note 19 (noting a California bill that was initially drafted to address fake news).

<sup>86</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

This quotation from Justice Oliver Wendell Holmes, Jr.'s dissent in *Abrams v. United States*<sup>87</sup> nearly 100 years ago imported the marketplace of ideas theory of free expression into First Amendment jurisprudence.<sup>88</sup> The marketplace theory, Dean Rodney Smolla points out, "is perhaps the most powerful metaphor in the free speech tradition."<sup>89</sup>

As former Yale Law School Dean Robert Post summarizes it, "in *Abrams*, Holmes explicitly oriented his theory of the First Amendment toward the value of truth."<sup>90</sup> The Supreme Court in *Hustler Magazine v. Falwell*<sup>91</sup> reiterated decades later the importance of "the truth-seeking function of the marketplace of ideas."<sup>92</sup>

Holmes's sentiment in *Abrams* built upon the works of both John Milton and John Stuart Mill.<sup>93</sup> Milton famously asserted that governments, rather than engaging in censorship and licensing to protect the truth, should let truth "and falsehood grapple; whoever knew truth put to the worse in free and open encounter?"<sup>94</sup>

In 2017, it seems clear that marketplace competition forces, standing alone, will not drive fake news from the field of expression. For some people, truth may be put to the worse when grappling—more likely, passively accepting—fake news.

What's more, to the extent that one defines fake news as encompassing empirically disprovable falsehoods, the marketplace of ideas—in other words, the marketplace of *opinions* rather than *facts*—has no relevance. As Professor

<sup>87</sup> 250 U.S. 616 (1919).

<sup>88</sup> See Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 823–25 (2008) (observing that Justice Holmes' passage in *Abrams* "conceptualized the purpose of free speech so powerfully that he revolutionized not just First Amendment doctrine, but popular and academic understandings of free speech," noting that the "metaphor he employed was the 'marketplace of ideas,'" and adding that "[n]ever before or since has a Justice conceived a metaphor that has done so much to change the way that courts, lawyers, and the public understand an entire area of constitutional law").

<sup>89</sup> RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 6 (1992); see also MATTHEW D. BUNKER, *CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY* 2 (2001) (calling the marketplace of ideas "one of the most powerful images of free speech, both for legal thinkers and for laypersons").

<sup>90</sup> Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 153, 158 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

<sup>91</sup> *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

<sup>92</sup> *Id.* at 52 (discussing the impact that false statements of fact have on the marketplace of ideas).

<sup>93</sup> See Christoph Bezemek, *The Epistemic Neutrality of the "Marketplace of Ideas": Milton, Mill, Brandeis, and Holmes on Falsehood and Freedom of Speech*, 14 FIRST AMEND. L. REV. 159, 173 (2015) (asserting that "[t]he influence Milton and Mill had on Holmes's thought cannot be denied").

<sup>94</sup> JOHN MILTON, *AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING* 45 (H.B. Cotterill, ed., MacMillan & Co, Ltd. 1959) (1644).

Christoph Bezemek notes, neither Milton nor Mill had in mind factual statements, but rather, respectively, “competing ideological convictions”<sup>95</sup> and “[t]rue ideas, rather than factual truth.”<sup>96</sup> The metaphor, after all, is the marketplace of ideas, not the marketplace of facts.

Indeed, the late Professor Steven Gey observed that the marketplace of ideas only provides strong justification for protecting speech concerning “normative questions”<sup>97</sup>—ones that “are highly contestable,”<sup>98</sup> such as matters of “social morality [and] political policy.”<sup>99</sup> In contrast, he asserted that:

[t]he marketplace of ideas justification for free speech provides a much weaker footing for protecting expression that can be readily disproved than it does for normative advocacy. If the determination of truth is the objective of the entire marketplace mechanism, there is no point in permitting the further dissemination of proven falsehoods.<sup>100</sup>

There may, however, be some benefit to having fake news circulate in the metaphorical marketplace of ideas. Specifically, if one knows fake news exists, then it should make one a more thoughtful, active, and inquisitive news consumer. People who understand fake news as a reality should rightfully be more skeptical about the veracity of what they read rather than accepting it blindly or at face value. They should, in turn, seek out confirmation from credible mainstream news sources such as the *New York Times*, *Washington Post*, *Wall Street Journal* and *USA Today*. Certainly, these news organizations may have their own biases and make journalistic mistakes, but they nonetheless possess mainstream credibility that other news sources may lack.

This, of course, is where enhanced media literacy efforts in public schools come into play. Such endeavors should not only raise awareness about the mere existence of fake news in the marketplace of ideas but also strive to teach minors ways of detecting it.

California lawmakers in 2017 considered a bill that called on the state’s Instructional Quality Commission to

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<sup>95</sup> Bezemek, *supra* note 93, at 165.

<sup>96</sup> *Id.* at 166.

<sup>97</sup> Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 8 (2008).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 9.

develop “a model curriculum for pupils in kindergarten and in grades 1 to 12, inclusive, in media literacy, . . . for voluntary use by educators.”<sup>101</sup> The measure defined media literacy as “the ability to access, analyze, evaluate, develop, produce, and interpret media, and involves a diverse set of foundational skills related to current technology and social media use and includes the norms of appropriate, responsible, and healthy behavior.”<sup>102</sup> The bill’s sponsor, Jimmy Gomez of Los Angeles, said the goal was to prepare students to distinguish “between news intended to inform and fake news intended to mislead.”<sup>103</sup> This is a laudable mission.

Gomez’s bill died in the Assembly Appropriations Committee in May 2017,<sup>104</sup> but a similar measure in the California Senate was still alive in July 2017.<sup>105</sup> Bill Dodd, sponsor of California Senate Bill 135, contends that:

Developing a comprehensive media literacy curriculum is critical to combating fake news . . . . While information has become more accessible than ever, many lack the tools to identify fake or misleading news and information. By giving students the proper tools to analyze the media they consume, we can empower them to make informed decisions.<sup>106</sup>

Education clearly is one important way to combat fake news. As Mac McKerral, former national president of the Society of Professional Journalists notes, “[s]ome wise people years ago recognized the need for media literacy in curriculum, and it got some ‘buzz’ for a while. But as is often the case, those things that catch journalism education’s fancy quickly get replaced with the next great idea.”<sup>107</sup> Such efforts must be reinvigorated immediately.

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<sup>101</sup> A.B. 155, 2017–18 Leg., Reg. Sess. (Cal. 2017).

<sup>102</sup> *Id.*

<sup>103</sup> Melanie Mason, *Fake News 101? Lawmakers Want California Schools to Teach Students How to Evaluate What They Read on the Web*, L.A. TIMES (Jan. 11, 2017, 5:42 PM), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-los-angeles-assemblyman-proposes-bill-1484182108.htmlstory.html>.

<sup>104</sup> *Fake News Curriculum Bill Dies in California Legislature*, NBC L.A., <http://www.nbclosangeles.com/news/national-international/Fake-News-Curriculum-Bill-Dies-in-California-Legislature-424813563.html> (last updated May 27, 2017, 12:14 PM).

<sup>105</sup> S.B. 135, 2017–18 Leg., Reg. Sess. (Cal. 2017).

<sup>106</sup> Rachel Raskin-Zrihen, *Dodd Bill to Teach Media Literacy Clears Initial Hurdle*, VALLEJO TIMES HERALD (Cal.), Apr. 21, 2017, at A2.

<sup>107</sup> Mac McKerral, *Tips for Digging Out of the ‘Fake News’ Sinkhole*, SOC’Y. OF PROF’L JOURNALISTS: QUILL (Apr. 13, 2017), [https://www.spj.org/quill\\_issue.asp?REF=2287](https://www.spj.org/quill_issue.asp?REF=2287).

Furthermore, digital media literacy should also be infused into college-level curricula. As Professor Tom Kelleher recently wrote:

Those of us working in media and communication programs in colleges and universities need to up our game when it comes to digital literacy. We can't expect K-12 educators to bear all the responsibility, and we shouldn't be lulled into assumptions that digital literacy is mostly a matter of remedial education by the time students reach college.<sup>108</sup>

In summary, fake news likely will always circulate in the marketplace of ideas. Educating people how to ferret it out is key.

**VI. "THE REMEDY FOR SPEECH THAT IS FALSE IS SPEECH THAT IS TRUE . . . THE RESPONSE TO THE UNREASONED IS THE RATIONAL; TO THE UNINFORMED, THE ENLIGHTENED; TO THE STRAIGHT-OUT LIE, THE SIMPLE TRUTH."**<sup>109</sup>

Justice Anthony Kennedy's statement from *United States v. Alvarez*,<sup>110</sup> in which a fractured Court struck down a federal statute that made it a crime to lie about having won a Congressional Medal of Honor, taps into the long-standing doctrine of counter speech. Kennedy's words track Justice Brandeis's more famous maxim from *Whitney* that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."<sup>111</sup>

The insights of both Kennedy and Brandeis counsel that the remedy for fake news is not censorship, but rather accurate news that rebuts and refutes it. Counter speech, in the form of correcting falsities spread via fake news, surely is a great and noble endeavor. Websites like PolitiFact<sup>112</sup> perform an amazing

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<sup>108</sup> Tom Kelleher, *What Universities Can Do About Digital Literacy in the Age of Fake News*, MEDIASHIFT (May 30, 2017), <http://mediashift.org/2017/05/what-universities-can-do-about-digital-literacy-in-the-age-of-fake-news>.

<sup>109</sup> *United States v. Alvarez*, 567 U.S. 709, 727 (2012).

<sup>110</sup> 567 U.S. 709.

<sup>111</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

<sup>112</sup> PolitiFact describes itself as:

a fact-checking website that rates the accuracy of claims by elected officials and others who speak up in American politics. PolitiFact is run by editors and reporters from the *Tampa Bay Times*, an independent newspaper in Florida. . . . The PolitiFact state sites are

service—at least for those individuals who care enough to take the time to seek them out. But who are the individuals paying attention to the growing number of credible sources that offer truth to counter fake news? Are these websites, in other words, reaching their target audience—the people about whom those concerned with the proliferation of fake news are most worried? Or are they simply attracting already well-informed citizens who want confirmation of their already on-point understanding, much like the undergraduates who come to my office hours already carrying an “A” average and simply want to go over their notes and outlines to maintain that mark? The failing students, of course, only come in when it is far too late in the semester, seeking mercy rather than answers.

An equine adage has it that you can lead a horse to water, but you can’t make it drink. When it comes to fake news, how can we both lead people to websites that offer counter speech and, once there, make them drink (and believe) the truth? That is a difficult question to answer.

Again, this is not to dismiss the importance of counter speech, teaching people how to spot fake news and efforts like First Draft.<sup>113</sup> It simply raises the issue of whether fact-checking websites actually reach the audience befuddled by fake news with which we are most concerned.

## VII. “THREE GENERATIONS OF IMBECILES ARE ENOUGH.”<sup>114</sup>

While First Amendment scholars generally associate Justice Oliver Wendell Holmes, Jr. with the optimistic marketplace of ideas metaphor addressed earlier,<sup>115</sup> they may forget his views about eugenics and government-imposed sterilization of the feeble minded in *Buck v. Bell*.<sup>116</sup> But as Justice David Souter observed in 2004, the Court in *Buck*, with Holmes

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run by news organizations that have partnered with the *Times*. The state sites . . . follow the same principles as the national site.

Bill Adair, *Principles of PolitiFact*, POLITIFACT (May 31, 2013, 9:41 AM), <http://www.politifact.com/truth-o-meter/article/2013/may/31/principles-politifact/>.

<sup>113</sup> See *About*, FIRST DRAFT, <https://firstdraftnews.com/about/> (last visited Mar. 3, 2018) (“First Draft grew out of a collaboration between nine founding organizations in June 2015 to raise awareness, perform research, and address challenges relating to trust and truth in media in the digital age. . . . In September 2016, First Draft began coordinating with a community of newsrooms, technology companies, human rights organizations and universities across the globe to help inform and scale its work, and to champion collaboration.”).

<sup>114</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927).

<sup>115</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>116</sup> *Buck*, 274 U.S. at 200–08.

penning the majority opinion, “was not grudging in sustaining the constitutionality of the once-pervasive practice of involuntarily sterilizing those with mental disabilities.”<sup>117</sup> Indeed, Holmes suggested that it was but very small sacrifice for individuals like Carrie Buck, who “already sap the strength of the State,”<sup>118</sup> to be sterilized by Virginia “in order to prevent our being swamped with incompetence.”<sup>119</sup>

*Buck*, of course, has nothing to do with the First Amendment. Yet the quotation should give us pause to realize that some people inevitably will be duped by fake news, no matter how much education they receive about it and how many digital-media literacy classes schools offer. As a modern-day, Midwestern sage named John Mellencamp once sang, “people believe what they want to believe when it makes no sense at all.”<sup>120</sup> In turn, we should not take drastic measures against them to protect the rest of society from their ignorance even if their erroneous beliefs stemming from fake news might lead to some type of harm.

So if the government cannot give modern-day Carrie Bucks, cast adrift in a fake-news world, a magical shot that suddenly transforms them into savvy news consumers and regular readers of the Sunday *New York Times*, should the government at least tell them what the truth is? The answer is a resounding no.

We don’t want the government to play the role of truth arbiter, providing people with its official version of the truth. This would turn citizens into passive receivers of information, and the Orwellian overtones of a government-sanctioned Ministry of Truth are clear and don’t need belaboring here.

The work of Professor Steven Gey, instead, better explains the dangers of this scenario. He argued that the “government has no paternalistic role over matters of the intellect, just as it has no paternalistic role over matters of the soul. It is up to individual citizens alone to sort out truth from

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<sup>117</sup> *Tennessee v. Lane*, 541 U.S. 509, 534 (2004) (Souter, J., concurring).

<sup>118</sup> *Buck*, 274 U.S. at 207.

<sup>119</sup> *Id.* Whether Carrie Buck was really feeble-minded was called into serious question by Professor Paul Lombardo, who asserts that:

Throughout Carrie’s adult life she regularly displayed intelligence and kindness that belied the “feeble-mindedness” and “immorality” that were used as an excuse to sterilize her. She was an avid reader, and even in her last weeks was able to converse lucidly, recalling events from her childhood. Branded by Holmes as a second generation imbecile, Carrie provided no support for his glib epithet throughout her life.

Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 61 (1985).

<sup>120</sup> JOHN MELLENCAMP, *Walk Tall, on WORDS & MUSIC: JOHN MELLENCAMP’S GREATEST HITS* (Island Records 2004).

falsehood.”<sup>121</sup> Noting that “[w]e instinctively assume that the government does everything for a political reason,”<sup>122</sup> Gey elaborated that:

Politicians are not scholars, and politicians’ claims of factual veracity should never be taken at face value—even when there is independent evidence that the government is actually correct. This is not to say that the politicians are always wrong; it is to say that determinations of right and wrong should not be in the hands of politicians.<sup>123</sup>

Ultimately, we should resign ourselves to the fact that some people will continue to be fooled by fake news and it is not the government’s role to tell them what the truth is. The government can’t cure the deep-seated cognitive biases that influence the sources of information people seek out and what they choose to believe.<sup>124</sup> And, in turn, we cannot treat those people like the Commonwealth of Virginia—with the esteemed Justice Holmes’s memorable blessing—treated Carrie Buck.

### VIII. CONCLUSION

This Essay offered a septet of Supreme Court quotations to provide a framework for addressing, in orderly fashion, some of the many complicated issues wrought by fake news. The Essay, of course, does not purport to resolve the problems currently blamed on fake news. But perhaps one facet of what

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<sup>121</sup> Gey, *supra* note 97, at 21.

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

<sup>123</sup> *Id.* at 22.

<sup>124</sup> Among other variables, three factors that influence the way people obtain, process and internalize news include selective attention, selective perception, and selective interpretation. See Toby Bolsen & Thomas J. Leeper, *Self-Interest and Attention to News Among Issue Publics*, 30 POL. COMM. 329, 330, 342 (2013) (noting that “individuals pay close attention only to a small number of political issues they care about a great deal” and “that individuals are more likely to follow news that affects their self-interest”); Lauren Feldman, *Learning About Politics From The Daily Show: The Role of Viewer Orientation and Processing Motivations*, 16 MASS COMM. & SOC’Y 586, 590–91 (2013) (writing that the existing body of research and theory propose a “sequence of relationships whereby viewers’ message orientation, which is conceptualized here as a reaction to or perception of a media stimulus, influences the effort an individual devotes to processing the stimulus, which, in turn, influences learning”); Silvia Knobloch-Westerwick et al., *Political Online Information Searching in Germany and the United States: Confirmation Bias, Source Credibility, and Attitude Impacts*, 65 J. COMM. 489, 489 (2015) (asserting that selective exposure “has often been used to describe the phenomenon that information users prefer attitude-consistent messages over attitude-discrepant messages” and that “[a] more specific term for this pattern is *confirmation bias*”).



surely must be a multi-pronged attack on fake news involves shifting part of our efforts from fake news to real news.

Consider a food-centric analogy. Fake news is junk food—it's not good for your informational diet, and it fills your head with mush. Conversely, real news is health food—it promotes an informed citizenry and improves your understanding of the world.

Yet, when it comes to health, getting a certain percentage of people to improve their diet or to exercise more is nearly impossible. As a July 2017 story in the *Wall Street Journal* reported:

Finding ways to encourage healthy behavior, such as exercise and eating a nutritious diet, is a big challenge facing the U.S. health system. More than a third of U.S. adults are obese, driving health problems and deaths from heart disease and other causes. But . . . it isn't a simple matter to nudge Americans to adopt healthier habits like regular workouts.<sup>125</sup>

Maybe a sliver of the answer—clearly not the sole solution, for there is no magic bullet remedy for fake news—is to focus on real news and, specifically, ways to make it more appealing to the massive number of Americans who bypass reading traditional daily newspapers and watching local television newscasts produced by reputable organizations. In other words, part of the answer to fake news requires concentrating on real news.

Imagine, for instance, if people found reading real news equally as appealing as taking narcissistic selfies and posting them on Instagram and Twitter. Or envision people willing to pay \$4 for a weekday copy of the *Wall Street Journal* in the same way they willingly shell out \$4 for a latte during the workday. Or picture them willing to spend thirty minutes more of their day viewing a network newscast on ABC, CBS, or NBC rather than binge-watching trendy fictional dramas on Netflix or Hulu. All of that is hard to fathom. If anything, it should temper our expectations about curing fake news.

The truth is that quality journalism exists, but many people simply don't attend to it. As Joshua Benton, director of Nieman Lab, wrote in Fall 2016, "[t]here was an enormous amount of good journalism done on Trump and this entire election cycle. For anyone who wanted to take it in, the

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<sup>125</sup> Ben Leubsdorf, *Are Gym Incentives Exercise in Futility?*, WALL ST. J., July 19, 2017, at A2.

pickings were rich.”<sup>126</sup> The trouble, Benton asserts, “is that not enough people sought it out. And of those who did, not enough of them trusted it to inform their political decisions.”<sup>127</sup>

Those last two sentences tap into two issues that journalists must tackle: how to make real news stories capture greater attention and, in turn, how to gain greater trust from readers and viewers in those stories. It’s a matter of attention plus trust. Additionally, as Leonard Downie Jr., former executive editor of the *Washington Post*, observed in early 2017, “[t]he news media must separate in the public mind responsible journalism from recklessly inaccurate and purposely false information disguised as news for profit or influence by charlatans.”<sup>128</sup>

Ultimately, as journalist Cathal Sheerin explains, “we must accept that lies and fabricated or inaccurate stories are the inevitable price that we have to pay to be able to enjoy our right to communicate freely. Attempts by governments to determine and regulate what is (or what isn’t) fake news should be rejected.”<sup>129</sup> And as Professor Bonnie Brennan writes, “false information has always existed and fake news has been a part of online news since it began.”<sup>130</sup> This is not to say we must capitulate in the battle against fake news. Rather, it is to recognize limits on what we can accomplish, be it through education, counter speech, or—least desirable—laws criminalizing its creation and dissemination.

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<sup>126</sup> Joshua Benton, *Get Serious About Getting Rid of Fake News*, NIEMAN REPS., Fall 2016, at 38, 39.

<sup>127</sup> *Id.*

<sup>128</sup> Leonard Downie Jr., *Trump’s Undermining of the Press*, N.Y. TIMES, Jan. 14, 2017, at A19.

<sup>129</sup> Cathal Sheerin, *Regulations are a Bigger Threat Than Fake News*, 64 MEDIA DEV., no. 2, 33, 35 (2017).

<sup>130</sup> Bonnie Brennan, *Making Sense of Lies, Deceptive Propaganda, and Fake News*, 32 J. MEDIA ETHICS 179, 180 (2017).