

FAKE NEWS AND THE SYSTEMIC LIE IN THE MARKETPLACE OF IDEAS: A JUDICIAL PROBLEM?

ARTICLE

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“Only where a community has embarked upon organized lying in principle, and not only with respect to particulars, can truthfulness as such, unsupported by the distorting forces of power and interest, become a political factor of the first order.”¹

- Hannah Arendt

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INTRODUCTION

THE EMERGENCE OF THE *FAKE NEWS* PHENOMENON HAS BROUGHT NEW LIFE TO the ageless debate regarding the political and social value of truth.

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¹ Hannah Arendt, *Truth and Politics*, THE NEW YORKER at 49, (Feb. 1967), reprinted in THE PORTABLE HANNAH ARENDT 564 (Peter Baehr ed., 2000).

Used, on the one hand, to describe false statements of fact disseminated under the guise of truthful journalism, and, on the other, by politicians to discredit accurate and verifiable information, the term *fake news* has become ubiquitous in today's political conversation.² The overuse of the phrase in mass media and everyday political discourse have rendered it a meaningless cliché, employed indiscriminately by all sides in a political tug of war. Both meanings of the term share the same root; both emerge from a more radical disintegration of truth as an epistemological and political principle. However, for the purpose this article, fake news is conceived broadly, i.e. as the systematic dissemination of falsity under the guise of truthful journalism.

Meanwhile, on the other side of the Atlantic Ocean, fake news has played a decisive role in the public affairs of European countries. In Ukraine, for example, a series of false news stories helped spark civil and political unrest.³ After months of violent mass revolts in Ukraine's capital led to the overthrow of its pro-Russian president, Viktor Yanukovich, Russia counteracted with a carefully planned fake news campaign.⁴ Using social media and other cybernetic outlets, the Internet Research Agency ("I.R.A."), a state-funded organization established with the purpose of developing cyber-propaganda, began disseminating false news stories claiming that a coalition of fascists were taking control of cities throughout Ukraine.⁵ When the inhabitants of the eastern Ukrainian town of Crimea took to the streets, they were quoted as pleading for help from the Russian government against an invasion of pro-European fascists that never actually came to pass.⁶

Seeing how the proliferation of false and misleading news stories has enveloped the political and social landscapes of countries around the world, questions as to the effectivity and legal validity of governmental regulation of fake news have been raised by constitutional commentators and political analysts. On one side, countries like Germany have enacted legislation allowing the government to regulate the dissemination of false news; on the other, opponents of this sort of measure point to the perils of censorship and repression that result from making the State the arbiter of truth.⁷ In addition to difficult legal questions, this dilemma

² Uri Friedman, *The Real World Consequences of "Fake News"*, ATLANTIC (Dec. 23, 2017), <https://www.theatlantic.com/international/archive/2017/12/trump-world-fake-news/548888/>.

³ Gregory Warner, *'Rough Translation': What Americans Can Learn from Fake News in Ukraine*, NPR (Aug. 21, 2017), <https://www.npr.org/2017/08/21/544952989/rough-translation-what-americans-can-learn-from-fake-news-in-ukraine>.

⁴ *Id.*

⁵ Adrian Chen, *The Agency*, N.Y. TIMES (June 2, 2015), <https://www.nytimes.com/2015/06/07/magazine/the-agency>.

⁶ Daisy Sindelar, *The Kremlin's Troll Army*, ATLANTIC (Aug 12, 2014), <https://www.theatlantic.com/international/archive/2014/08/the-kremlins-troll-army>.

⁷ Eugene Volokh, *Fake News and the Law, From 1798 to Now*, WASH. POST (Dec. 9, 2016) <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/09/fake-news-and-the-law-from-1798-to-now> (providing a historical argument against the regulation of fake news); Anthony Faiola & Stephanie Kirchner, *How do You Stop Fake News, In Germany, With a Law*, WASH. POST (Apr.

brings to the fore issues involving the value and function of truth in public discourse and the extent to which the judicial apparatus can and ought to account for it.⁸ Accordingly, the article proposes a critical examination of the fake news phenomenon in view of the judicial principles and theories that have guided First Amendment adjudication of falsity in the past. In particular, this article argues that three of the fundamental suppositions that inform the conception of truth within the theory of the marketplace of ideas—the understanding that truth is the inevitable outcome of free and uninhibited flow of public discourse⁹—are called into question by the fake news phenomenon and the cybernetic dynamics that enable and characterize it. These three pillars are: (1) that ideas encounter and are in a constant dialogue with each other; (2) that the average citizen who participates in the marketplace is a rational being capable and willing to discern truth from falsehood, and (3) that falsity is a marginal and accidental occurrence in the midst of an otherwise adamant pursuit of truth. After elaborating on the theoretical discrepancy, the article turns to examine how, even though the pursuit of truth in public discourse is contemplated by the courts as an essential political virtue, under the prevalent liberal conception of the First Amendment, the mere erosion of truth in the marketplace of ideas would not suffice to deprive fake news of constitutional protection. Ultimately, the article concludes that although regulation of fake news is judicially untenable, politically undesirable and, for reasons that we will see in greater detail, ultimately ineffective, the systematic and widespread use of deliberate lies made possible by the Internet and new technologies poses a genuine threat to truth as a guiding principle of public discourse: a threat with potentially grave political consequences.

I. A BRIEF HISTORY OF FAKE NEWS

Despite the current trivialization of the term, the widespread proliferation of false and misleading news stories has a significant impact in the social and political landscapes of countries around the world. In December 2016, and after reading a string of false news stories which claimed that a group of high-profile Democrats had orchestrated a child-sex ring in a pizzeria restaurant in Washington, D.C., Edward Welch decided to take matters into his own hands.¹⁰ Welch drove all the way from his hometown in North Carolina to Comet Ping Pong restaurant, entered the establishment and opened fire on a crowd with an AR-15 rifle.¹¹

5, 2017), <https://www.washingtonpost.com/world/europe/how-do-you-stop-fake-news-in-germany-with-a-law>.

⁸ Teresa M. Bejan, *The Two Clashing Meanings of 'Free Speech'*, ATLANTIC (Dec 2, 2017), <https://www.theatlantic.com/politics/archive/2017/12/two-concepts-of-freedom-of-speech>.

⁹ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (J. Holmes, dissenting).

¹⁰ Jason Slotkin, *'Pizzagate' Gunman Pleads Guilty to Charges*, NATIONAL PUBLIC RADIO (March 24, 2017), <https://www.npr.org/sections/thetwo-way/2017/03/24/521377765/pizzagate-gunman-pleads-guilty-to-charges>.

¹¹ *Id.*

Other than the physical and psychological harms that resulted in this case and many other similar incidents, the current wave of fake news has also inundated and shaped today's public discourse. In the months leading up to the 2016 presidential elections, over 760 million false news pages were visited, averaging an amount of three visits per adult,¹² many of whom, as we shall see later in more detail, are incapable of and/or unwilling to discern false news stories from truthful ones. While fake news circulated on both ends of the electoral spectrum, statistical documentation gathered by independent fact-checking organizations demonstrated that right-leaning fake news was three times more prevalent than its counterpart on the left.¹³ In another surge of fake news that took place immediately after the presidential election, a series of false stories alleging a large-scale voter fraud spread through the Internet.¹⁴ These allegations—all of which were proven to be false by various journalists and fact-checking organizations—were contemporaneous with the establishment of the now defunct Commission on Election Integrity.¹⁵ One of the main public policy aims furthered by the Commission was to address the purported rise of illegal voting through the implementation of stricter voter requirements, a policy that has been demonstrated to deter the turnout of minority voters.¹⁶

The exercise of publishing false and misleading news can be traced back to the inception of print journalism itself early in the 15th century and served as a powerful tool of political propaganda throughout history.¹⁷ For instance, during the American War for Independence, and in order to incite people to enlist in the revolutionary forces, Benjamin Franklin published a series of false reports claiming that savage “scalping” Indians had made alliances with King George III.¹⁸ False news also served a crucial role in the Nazi Germany propaganda machine, where state-controlled newspapers and radio broadcast diffused stories of a Jewish conspiracy against the European states.¹⁹

¹² Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 225 (2017).

¹³ *Id.* at 223.

¹⁴ Joseph Williams, *Trump Commission on Election Integrity Found No Evidence of Voter Fraud*, U.S. NEWS (Jan. 10, 2018) <https://www.usnews.com/news/national-news/articles/2018-01-10/trump-commission-on-election-integrity-found-no-evidence-of-voter-fraud>; Alan Yuhas, *Pence to Head Commission Investigating Baseless Voter Fraud Claim, Trump Says*, THE GUARDIAN (Feb. 5, 2017), <https://www.theguardian.com/us-news/2017/feb/05/donald-trump-mike-pence-commission-voter-fraud>.

¹⁵ Yuhas, *supra* note 14.

¹⁶ 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, 69-74 (2017).

¹⁷ Jacob Soll, *The Long and Brutal History of Fake News*, POLITICO (Dec. 18, 2016), <https://www.politico.com/magazine/story/2016/12/fake-news-history-long-violent-214535>.

¹⁸ *Id.*

¹⁹ *Id.*

Early in the 19th century, the rise of modern newspapers in the United States gave birth to a new breed of economically-motivated fake news. The specific practice of publishing false and sensationalistic news as truthful journalism can be traced back to the year 1835, when the *New York Sun*, a serious newspaper that operated in New York from early in the 19th century up to 1950, published the articles collectively known as The Great Moon Hoax, a three-piece story on the scientific discovery of human-like winged creatures on the Moon.²⁰ That event can be said to have inaugurated the attention-seeking model that has informed the journalistic enterprise to this day:²¹ in order to reach the widest possible range of readers and, thus, generate larger margins of revenue, newspapers abandoned the dry realism that characterized journalism articles at the time for more sensational and often false news stories. In fact, the principles of impartiality and objectivity, far from being timeless pillars of the journalistic endeavor, were adopted much later in the 1920s once the public became aware of the role that so-called “yellow journalism” played in igniting the Spanish-American War at the turn of the century.²² It was not until that point in time that fact-based newspapers such as *The New York Times* and *The Washington Post* became the leading models of objective journalism we are familiar with today.²³ This is not to say that sensationalism and business-driven journalism disappeared, nor that false stories and statements were never published by the likes of *The New York Times*; they did and still do today. However, due to rigorous editorial filters and an institutionalized culture of journalistic ethics and integrity, fact-based newspapers became a reliable and trustworthy source of information, where the publication of false and misleading news became rare exceptions in an otherwise adamant pursuit of truth.

It is within the context of objective newspapers’ prevalence as the leading model of journalism throughout the 20th century that the presumption of falsity as error arises as a historically consistent and coherent posture. Since the advent of the Internet, however, fact-based journalism has experienced drastic reductions in sales and advertisement revenue, placing the industry in a precarious economic situation which has led many newspapers to close or reduce their workforce.²⁴ Meanwhile, as traditional journalism outlets keep shrinking, and as the public’s trust in them steadily declines,²⁵ cyber journalism, that is, journalism that is created and diffused in and through cyberspace, became one of the main news outlets

²⁰ *Id.* See Corinne Purtill, *Trump’s “fake news” playbook is ripped straight from the pages of a 180-year-old media hoax*, QUARTZ (Mar. 5, 2017), <https://qz.com/924633/trumps-fake-news-playbook-has-roots-in-a-180-year-old-hoax/>.

²¹ Soll, *supra* note 17.

²² *Id.* See also Adam Cohen, *The Media That Need Citizens: The First Amendment and the Fifth Estate*, 85 S. CAL. L. REV. 1, 16 (2011); Akilah N. Folami, *Using the Press to Amplify Civic Discourse Beyond Mere Opinion Sharing*, 85 TEMP. L. REV. 269, 284 (2013).

²³ Karen Yuan & Matt Peterson, *The History of ‘Fake News’ in America*, ATLANTIC (Jan. 9, 2018), <https://www.theatlantic.com/membership/archive/2018/01/the-history-of-fake-news-in-america>.

²⁴ Soll, *supra* note 17.

²⁵ Allcott & Gentzkow, *supra* note 12, at 215.

and the primary source of fake news. Although false news has been part of public discourse for centuries now—albeit in a marginal way—the Internet and other new technologies' decisive role in the creation, dissemination and consumption of today's false news content makes the recent wave of fake news a distinct and unprecedented incarnation of the phenomenon.²⁶

By making the means of communication readily accessible to anyone with moderate economic means, the Internet and new technologies have allowed individuals to engage in enterprises that until recently had been reserved to exclusive, institutionalized professions. For instance, in the pre-Internet Era, the capacity to disseminate journalistic information to the masses fell exclusively to the traditional media institutions who controlled the primary means of communication, such as radio, television, and print journalism. In the digital age, anyone with a technological device and Internet access has the potential to reaching a global audience. Although this shift in the communicative dynamics facilitates an ample and more pluralistic public discourse, most of the content generated and published in cyberspace does not undergo any curatorial or editorial processes.²⁷ Cyber-journalism lacks an impartial and formal gatekeeping system. For this reason, it provides fertile ground for the systematic dissemination of false news under the guise of objective journalism.

There are two main actors behind the current fake news epidemic: both the ideologically-driven fake news creators and economically-motivated fake news entrepreneurs find the Internet an effective tool for the systematic and purposeful diffusion of unfiltered false news content to vast numbers of people across the world.²⁸ The rationale of the latter is quite simple. Seeing as how false and misleading news are shared more often and provoke more clicks than truthful journalism,²⁹ business-minded individuals (who may or may not be ideologically motivated) find in social media platforms and the Internet a methodical way to generate thousands of dollars on a daily basis.³⁰ In other words, cybernetic platforms such as *Facebook*, *YouTube*, *Twitter* and *Google AdSense* provide a lucrative and stable economic structure that serves as one of the primordial incentives behind the current epidemic of fake news content.³¹ Through *Facebook*, for instance, content creators can pay to maximize content exposure and generate revenue through the *Facebook Ad* feature. Social media platforms also serve as a springboard to webpages that run with website monetization programs such as *Google AdSense*,

²⁶ *Id.* (discussing several reasons behind the growing importance of fake news).

²⁷ Richard Posner, *Bad News*, N.Y. TIMES (Jul. 31, 2005), <https://www.nytimes.com/2005/07/31/books/review/bad-news>.

²⁸ Allcott & Genzkow, *supra* note 12, at 217.

²⁹ Peter Dizikes, *Study: On Twitter, False News Travel Faster True Stories*, MIT NEWS OFF. (Mar. 08, 2018), <http://news.mit.edu/2018/study-twitter-false-news-travels-faster-true-stories-0308>. A recent comprehensive study showed that on Twitter, fake news travel six times faster than truthful information.

³⁰ Allcott & Genzkow, *supra* note 12, at 217.

³¹ *Id.* at 7.

that allow content creators to generate revenue in correspondence with the amounts of clicks a story gets.³²

In the days following the 2016 presidential election, the *Washington Post* interviewed Paul Horner, the creator of many fake news articles embraced and shared by Trump supporters through social media during the months leading up to the elections.³³ In a somewhat perplexed and remorseful tone, Horner admitted that he in fact had strong reservations regarding Trump and was amazed by how well the false stories he had peddled were received by right-wing audiences.³⁴ In another instance of economically motivated fake news that surfaced just after the elections, over 100 fake news webpages were traced to a dozen content creators in a small, poor town in Macedonia called Veles.³⁵ In an interview with *CNN Money*, one of the young entrepreneurs explained how through an intricate system of fake social media accounts and webpages they earned up to 2,500 euros a day from the clicks that their fake news stories generated.³⁶

Meanwhile, the Internet and its social media platforms also provide an infrastructure for the dissemination of ideological and politically motivated fake news. Recently, thirteen Russian nationals, including the I.R.A.,³⁷ have been charged with illegally interfering in the 2016 U.S. presidential election to tip the scales in favor of Donald Trump's candidacy, according to an indictment filed by Robert S. Muller III, the special counsel assigned to the case.³⁸ Following months of investigation, Muller and his team found that the Russians, in an elaborated four-year scheme, created thousands of fake social media accounts and pages, staged several pro-Trump political rallies in cities throughout the United States and were responsible for the systematic production and dissemination of right-leaning false news and advertisements on social media.³⁹

³² Dan Tynan, *How Facebook Powers Money Machines for Obscure Political 'News' Sites*, THE GUARDIAN (Aug. 24, 2016), <https://www.theguardian.com/technology/2016/aug/24/facebook-click-bait-political-news-sites-us-election-trump>.

³³ 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>.

³⁴ *Id.*

³⁵ Florence D. Attlee & Isa Soares, *The Fake News Machine: Inside a Town Gearing Up for 2020*, CNN MONEY (2017), [HTTP://MONEY.CNN.COM/INTERACTIVE/MEDIA/THE-MACEDONIA-STORY](http://money.cnn.com/interactive/media/the-macedonia-story) (last visited June 16, 2018).

³⁶ *Id.*

³⁷ This same agency carried out a cyber-propaganda campaign in Ukraine a few years earlier.

³⁸ Matt Apuzzo & Sharon LaFraniere, *13 Russians Indicted as Mueller Reveals Effort to Aid Trump Campaign*, N. Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/2018/02/16/us/politics/russians-indicted-mueller-election-interference.html>.

³⁹ Alicia Parlapiano & Jasmine C. Lee, *The Propaganda Tools Used by Russians to Influence the 2016 Election*, N. Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/interactive/2018/02/16/us/politics/russia-propaganda-election-2016.html>.

II. TRUTH, INDIVIDUAL AUTONOMY AND THE MARKETPLACE OF IDEAS

The ability of every citizen to think and speak freely is essential to the North American democratic project. Citing Justice Cardozo in *Palko v. Connecticut*, constitutional commentators Kathleen Sullivan and Noah Feldman characterize the First Amendment as a “‘fundamental’ liberty in part because ‘our history, political and legal’, recognized ‘freedom of thought and speech’ as ‘the indispensable condition, of nearly every other form of freedom’.”⁴⁰ Therefore, when viewed from a structural standpoint (that is, in relation to the political ideals and aspirations enshrined in the U.S. Constitution), the First Amendment occupies a vital place within the broader democratic design. Throughout First Amendment jurisprudence, the Supreme Court of the United States has elaborated a series of rationales that articulate the constitutional values furthered by the freedoms of expression: (1) the operability of democratic self-governance; (2) the realization of individual autonomy, and (3) the pursuit of political truth.⁴¹ These rationales can be divided in two categories: one of intrinsic value, referring to the inherent value of free speech and thought for the individual citizen, and another of instrumental value, concerning the political and social role that freedom of expression play in democratic society.

The intrinsic branch of the First Amendment corresponds to the rationale of individual autonomy. According to this posture, the democratic principle of individual autonomy is realized through the free exercise of the *act* of expression.⁴² The individual autonomy rationale usually takes two forms. Firstly, proponents of an enlightened conception of individual autonomy sustain that expression, being more than a vehicle of information and ideas, is essential to the fulfillment of an individual’s sense of self and intellectual faculties.⁴³ In this regard, thinking and speaking freely are indispensable requisites for the realization of the human identity and spirit. This humanist understanding of the freedoms of expression reflects the values and tenets of the Enlightenment period, pursuant to which freedom and reason are quintessential human qualities that every form of government ought to strive towards.⁴⁴ The philosophy of the Enlightenment permeates the entire Constitution and is particularly palpable in the theories and principles that guide the Supreme Court’s First Amendment jurisprudence.

The second conception of the rationale of individual autonomy holds that freedom of expression legitimizes the decisions taken by the dominant majority

⁴⁰ Kathleen Sullivan & Noah Feldman, CONSTITUTIONAL LAW 886 (citing *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937)).

⁴¹ Thomas Emerson, *Toward a General Theory of The First Amendment*, 72 YALE L.J. 877 (1963); see also Kathleen Sullivan & Noah Feldman, *supra* note 40, at 935-40.

⁴² *Id.* at 879.

⁴³ Franciska A. Coleman, *They Should be Fired: The Social Regulation of Free Speech in the U.S.*, 16 FIRST AMEND. L. REV. 1, 13-14 (2017).

⁴⁴ See DOMENICO LOSURDO, CONTRAHISTORIA DEL LIBERALISMO (2005).

by allowing the individual to participate in the deliberative, decision-making processes.⁴⁵ This variety of the individual autonomy rationale presupposes that through expression the individual can inform public discussion and participate in decision-making and that said participation in turn allows “the citizenry [to] perceive[] these decisions as legitimate rather than as imposed by dominant societal forces.”⁴⁶ From this perspective, the freedoms of expression guarantee individual autonomy in a model of representative democracy where the bulk of decisions are made in non-participatory processes by an elected majority that often contradict the will of vast segments of the population. In both conceptions of the individual autonomy rationale, the act of expression is considered to be more important than its content.

Beyond the intrinsic constitutional value attributed to the individual’s expressive act, however, the Supreme Court has time and again conceived the First Amendment as being instrumental to democratic self-governance and to the “discovery and spread of political truth.”⁴⁷ In *Whitney v. California*, for instance, Justice Brandeis called upon the political utility of the freedoms of expression when he wrote:

[W]ithout free speech and assembly[,] discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.⁴⁸

Forty years later in the landmark case, *New York Times Co. v. Sullivan*, Justice Brennan, writing for the majority, stated that “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”⁴⁹ The main assumptions underlying this instrumental conception of the First Amendment’s value are that an unimpeded public discourse (1) serves the democratic polity by informing and contributing to the elaboration of public policy and law; (2) functions as a check on governmental abuse of power, and (3) allows dissenting ideas to grapple with the dominant discourse. The freedoms of expression are also conceived as being instrumental to the pursuit of political truth. Specifically, it presupposes that “the freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.”⁵⁰ In both the self-governance and

⁴⁵ Coleman, *supra* note 43, at 13-14 (2017).

⁴⁶ Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 79 (1984).

⁴⁷ *Whitney v. California*, 274 U.S. 357, 375 (1927).

⁴⁸ *Id.*

⁴⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

⁵⁰ *Bose Corp v. Consumers Union of the United States*, 466 U.S. 485, 503-04 (1984).

the pursuit-of-truth rationales, the freedoms of expression are means to a greater social and political good.

A. *Falsity in the Marketplace of Ideas*

Despite conceiving the pursuit of truth in public discourse as one of the essential values advanced by the freedoms of expression, the Supreme Court has repeatedly held that falsity, in and of itself, is not sufficient to justify governmental interference with citizens' expressive freedoms.⁵¹ Instead, the Supreme Court posits that an open marketplace of ideas in which citizens can freely pronounce and exchange all sorts of artistic, scientific, commercial, even hateful and false expressions without fear of governmental coercion, produces a more vibrant and healthy public discourse; a public discourse that, in turn, invariably leads to the emergence of truth. This theory made its first appearance in Justice Holmes' dissent in *Abrams v. United States*, and has been reiterated generally by the Supreme Court.⁵²

According to this theory, the free and constant circulation of ideas results in the emergence and acceptance of truth over falsity and error, without the need for judicial or governmental interference.⁵³ False expressions, the argument goes, rather than valueless obstacles or deviations, actively contribute to the search for truth by serving as a contrast that allows truth to stand out, so to speak, from the abundance of inconsequential and erroneous ideas that flood the marketplace. In other words, it is only by furnishing an open space where reasoned dialogue between false and truthful ideas takes place that truth can triumph over falsity.⁵⁴ If, on the contrary, the State were to censor false statements, society's ability to embrace truth would suffer in the long run. For this reason, false expressions by themselves, that is, those which produce minimal to no detrimental effects, are appropriately rectified by the ordinary flow of public discourse. Conversely, the only circumstance in which the Court has been inclined to regulate or sanction false expressions is when it can be associated with a sufficient and judicially cognizable harm, such as in the case of defamatory speech. As we will see in greater detail in the subsequent section, libelous and defamatory expression, defined as false statements made in detriment of an individual's reputation, fall within the narrow list of speech excluded from constitutional protection.

However, due to the fact that the great majority of defamatory expression occurs in the ambit of politically driven journalism and commentary, the Court was careful not to establish an expansive definition of defamatory expressions, so as

⁵¹ *United States v. Alvarez*, 567 U.S. 709, 719 (2012) ("The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment."). See *Gertz v. Robert Welch*, 418 U.S. 323, 339 (1974) ("Under the First Amendment there is no such thing as a false idea."); see also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988); *Sullivan*, 376 U.S. at 280.

⁵² *Abrams v. United States*, 250 U.S. 616, 630 (1919) (J. Holmes, dissenting).

⁵³ Joel Timmer, *Fighting Falsity: Fake News, Facebook, and the First Amendment*, 35 *CARDOZO ARTS & ENT. L.J.* 669, 676-77 (2017).

⁵⁴ *Id.*

not to subject journalists and other political commentators to the possibility of frequent and indiscriminate defamation law suits. In other words, delineating a broad exception for defamatory speech from First Amendment protection would have had the undesired effect of dissuading critical commentary on public figures and issues, rule that would interfere with the exercise of political critique against public officials. Therefore, in order to provide the necessary breathing space for political critique while furnishing an adequate judicial remedy for the reputational harms suffered by the individual, the Court determined that only defamatory statements made with knowledge of its falsity or reckless disregard of truth lack First Amendment protection.

In *Alvarez v. United States*, the court's most recent pronouncement on the issue of falsehood and First Amendment, Justice Kennedy reinstated the long-held posture that even though false expressions lack constitutional value, mere falsity is insufficient to warrant governmental intrusion in the freedoms of expression.⁵⁵ After falsely claiming to be the recipient of a military medal of honor in various public meetings, Xavier Alvarez, a local politician from Claremont, California, was indicted for violating the Stolen Valor Act, which criminalizes anyone who fraudulently professes having received a military medal of honor. The Court argued that the harms a false reclamation of a military medal of honor could have on military institutions and the recipients of such distinctions were adequately rectified by making accessible public records detailing the names of the recipients of military medals of honor, as well as investigative journalism and ordinary public commentary on the issue.⁵⁶ Therefore, in the particular context of *Alvarez*, the harms produced by falsely claiming to be the recipient of a military distinction were appropriately redressed, not by legislative or judicial action, but by the public disclosure of falsity through *counter-expression*.

When understood in light of the individual autonomy rationale, the *laissez-faire* posture that characterizes the theory of the marketplace of ideas responds, in part, to an exercise of judicial prudence. For a governmental declaration as to what is and not true would undermine the individual's freedom to make his or her own mind and to express him or herself accordingly. Moreover, it also responds to the threat of expressive oppression, a censorship that results when the government is allowed to regulate expression merely because of the falsity of the expression. In other words, the exclusion of false statements from First Amendment protection would render the citizenry's freedom of expression vulnerable to paternalism and political repression. In this regard, by arguing that truth is the result of its reckoning with falsity in an open and public marketplace of ideas, the marketplace theory makes the pursuit of truth contingent upon the expressive freedom of the individual and not upon some form of governmental regulation or interpretation.

⁵⁵ *Alvarez*, 567 U.S. at 719.

⁵⁶ *Id.* at 726-29.

However, truth and freedom, when considered outside the theoretical framework of the marketplace of ideas often find themselves in conflict. For example, the indifferent stubbornness of facts in face of individual beliefs, opinions and convictions can be perceived as a threat to the democratic value of individual freedom. The individual, in other words, is not free to impose the *validity* of her particular beliefs and opinions over and above the unequivocal and unambiguous character of factual truth. This is what Hannah Arendt calls the tyrannical nature of truth, that is, the manner in which truth compels by necessity.⁵⁷ On the other side of the equation, the individual is free to say and think whatever she pleases even when her expressions are patently false. Ordinarily, therefore, the exercise of individual freedom of expression does not have to (and often does not) correspond with factual truth. When considered at this rudimentary level, the Court's professed pursuit of truth in public discourse becomes incompatible with its fundamental adherence to a liberal and hence individualistic conception of political freedom. Nevertheless, the marketplace theory, by conceiving falsity as instrumental to the ultimate emergence of truth, reconciles this inherent incongruence between individual freedom and truth. The balance struck by the marketplace theory, however, rests upon a series of fundamental presuppositions that are put into question by the recent epidemic proliferation of false and misleading news in cyberspace.

III. THEORETICAL ASSUMPTIONS AND INCONGRUENCES: MARKETPLACE THEORY AND FAKE NEWS

A. *Error vs. Deliberate Lie: Falsity in Context*

Despite its fundamental role in delineating the place of truth within the broader First Amendment system, the theory of the marketplace of ideas entails various assumptions that have not been examined yet by the Supreme Court. Those assumptions become evident and problematic when considered in view of the expressive dynamics of the fake news phenomenon. In *Sullivan*, for instance, the Court tackles the issue of truth in opposition to error, not the deliberate lie.⁵⁸ Justice Brennan, citing John Stuart Mill, stated that “[e]ven a false statement may be deemed to make a valuable contribution to public debate” because it delivers a “clearer perception and livelier impression of truth, produced by its *collision with error*.”⁵⁹ The controversy in *Sullivan* involved the publication of an advertisement paid by a civil rights group in 1960, denouncing a series of violent incidents that took place between a group of protestors led by Martin Luther King Jr. and the

⁵⁷ HANNAH ARENDT, *THE LIFE OF THE MIND – THINKING* 59 (1971).

⁵⁸ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964) (citing JOHN STUART MILL, *ON LIBERTY* 15 (Blackwell 1947) (1859) (emphasis added)).

⁵⁹ *Id.*

police department of Montgomery, Alabama.⁶⁰ Sullivan, the Montgomery Police Department's Commissioner, argued that the allegations made in the advertisement were false and hence defamatory. The Court acknowledged that some of the claims in the advertisement had indeed been exaggerated. For example, the advertisement stated that Martin Luther King had been arrested seven times, when he had been arrested four times and also described that the protestors sang *My Country, Tis of Thee* when they actually sang the national anthem.⁶¹ However, the Court determined that in the case of public figures, only defamatory statements made with knowledge of falsity or reckless disregard of truth lack First Amendment protection and are thus susceptible to a defamatory tort action; the advertisement did not meet this criterion.⁶²

One way of reading the presumption of falsity as error that undergirds the Court's reasoning in *Sullivan* is by placing it in historical context. In 1964, the year that *Sullivan* was decided, newspapers such as *The New York Times* served as the primary sources of journalism on issues of public relevance.⁶³ At the time, thanks to rigorous editorial processes and an ethical commitment to fact-based journalism, newspapers like *The New York Times* were widely regarded as honest and trustworthy sources of information. Fact-driven newspapers, however, have not always been the predominant model of newspaper journalism. On the contrary, despite being considered a perennial example, impartial and objective journalism did not emerge on the scene until early in the 20th century.⁶⁴

When considered in view of the methodical, deliberate nature of the fake news phenomenon, the notion of falsity as error becomes patently inadequate. In other words, while in the past the dissemination of false news was a marginal occurrence, today's fake news phenomenon is distinctive for its systematic and purposeful instrumentalization of false news for economic and political purposes.

B. The Eco-Chamber Phenomenon and the Fragmentation of the Marketplace of Ideas

Since its inception, one of the central tenets of the marketplace theory is "that the dynamics of free speech, of counter-speech, of refutation, can overcome the lie."⁶⁵ In turn, the *counter-speech* dimension of the theory supposes that false ideas and statements encounter truthful ones in a constant dialogue. It is through this constant and uninhibited dialogue between different and opposite ideas that falsehood ultimately yields to truth. Although the counter-speech principle holds true in the analog, *real-life* version of the marketplace, where one inevitably finds

60 *Id.* at 256-58.

61 *Id.* at 258-59.

62 *Id.* at 279-80.

63 Yuan & Peterson, *supra* note 23.

64 Soll, *supra* note 17.

65 *Unite States v. Alvarez*, 567 U.S. 709, 726 (2012).

oneself having an unwanted conversation or encountering an unwelcome opinion on the Internet, information is shared and discussed in enclosed and isolated pockets that rarely encounter each other. As evidenced in a recent study performed by a team of researchers at the Massachusetts Institute of Technology Media Lab, today's political discussions take place in various dimensions of cyberspace that rarely, if ever intersect. Social scientists refer to this as the eco-chamber phenomenon.⁶⁶ Eugene Yi and his team of researchers used the entire *Twitter* archive to compile and analyze millions of tweets made during the 2016 presidential campaign. Then, the researchers created an interactive map illustrating the connections between users who tweeted and shared information on issues of electoral and political concern. One of the many findings of the study was that the content posted and shared by supporters of a particular candidate barely, if at all, overlapped with the issues and topics tweeted by the users who supported the opposing candidate. Thus, the eco-chamber phenomenon provides the ideal grounds for the proliferation of false and misleading information.⁶⁷

As a recent study shows, 62% of news readers get their news from social media networks.⁶⁸ Fake news is posted and shared on social media platforms with more frequency and up to six times faster than truthful news.⁶⁹ The fault, however, does not fall squarely on social media users. To maximize engagement, social media platforms employ algorithms that select information that a particular user is exposed to by reference to his beliefs and interests. For this reason, the posts and stories that social media users encounter in their news feeds have links that redirect them to similar content. It is in these insulated pockets of the Internet that non-facts can be shared as factual truths by vast numbers of like-minded people without ever having to confront a contrary statement or idea.⁷⁰

C. *The Ideal Rational Citizen and Today's News Reader*

Another central notion of the marketplace theory is that citizens are rational actors that are both capable of and willing to discern truth from falsehood. Inspired by the writings of John Milton, a prominent Enlightenment writer, the ide-

⁶⁶ Eugene Yi et al., *The Horse Race of Ideas*, MEDIUM (Nov. 7, 2016), <https://medium.com/@social-machines/the-horse-race-of-ideas-at-the-finish-line>; see also Eugene Yi et al., *Electome*, MIT MEDIA LAB (2016), <http://electome.org> (last visited June 16, 2018).

⁶⁷ Filipo Menczer, *Fake Online News Spread Through Social Echo Chambers*, SCI. AM. (Nov. 28, 2016), <https://www.scientificamerican.com/article/fake-online-news-spreads-through-social-echo-chambers>.

⁶⁸ Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, PEW RESEARCH CENTER (May 26, 2016), <http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016/>.

⁶⁹ Peter Dizikes, *Study: On Twitter, False News Travel Faster True Stories*, MIT NEWS OFF. (Mar. 08, 2018), <http://news.mit.edu/2018/study-twitter-false-news-travels-faster-true-stories-0308>.

⁷⁰ Menczer, *supra* note 67.

alized notion of the rational citizen at the center of the marketplace theory is derived from a time in Western civilization when human reason was held as the quintessential human quality.⁷¹ One of—if not the—central axiom of the Enlightenment was that truth was no longer imparted by divine authority (the prevalent notion during the medieval period) but through the exercise of human reason, a faculty which every human being possesses. During this period, truth was understood to be attained, not by means of a decree handed down by authority or divine will, but through the reasoned efforts of the human mind.⁷²

However, according to academic studies, the profile of today's prototypical news reader is not that of the rational citizen that stands at the core of the marketplace theory. A poll, carried out by Ipsos, demonstrated that 75% of people who read false news stories in 2016 considered them to be true.⁷³ Meanwhile, a study carried out by Emily Thorson, a Political Science professor at Boston College, demonstrated how even after being exposed to verified false statements of fact the vast majority of news readers were unwilling to amend their beliefs and convictions on the corrected issue.⁷⁴ This tendency was stronger in cases where the false news stories pertained the political and ideological views of the readers.⁷⁵ In a similar vein, another study performed by a group of scholars found that both liberals and conservatives were prone to discarding scientific theories that contradict their ideological beliefs and opinions.⁷⁶ These studies demonstrate that news readers are not only poorly equipped with critical thinking tools and the criteria necessary to identify fact-based information from false information, but that they are also unwilling to adjust their opinions on issues even after they have been proven to be false. Precisely here, I argue, in the disparity between the disregard for the truth that characterizes today's news readers and the concept of a rational citizenry capable and willing to tell truth from falsity, lays one of the primary reasons why the theory of the marketplace of ideas becomes irreconcilable with the reality of the Fake News phenomenon.

⁷¹ LOSURDO, *supra* note 44; see also UDAY MEHTA, *LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH CENTURY LIBERAL THOUGHT* (1999).

⁷² HANNAH ARENDT, *THE LIFE OF THE MIND/ WILL AND INTELECT* 151 (1971).

⁷³ Niall McCarthy, *Report: Most Americans are Fooled by Fake News Headlines*, FORBES (Dec. 8, 2016), <https://www.forbes.com/sites/niallmccarthy/2016/12/08/report-most-americans-are-fooled-by-fake-news-headlines-infographic/#4394000141c1>. See also Wineburg et al., *Evaluating Information: The Cornerstone of Civic Online Reasoning*, STAN. DIGITAL REPOSITORY (2016), available at <http://purl.stanford.edu/fv75yt5934>.

⁷⁴ Emily Thorson, *Belief Echoes: The Persistent Effects of Corrected Misinformation*, 33 POL. COMM. 460, 477 (2016).

⁷⁵ *Id.* at 475.

⁷⁶ Elizabeth Suhay & James Druckman, *The Politics of Science: Political Values and the Production, Communication, and the Reception of Scientific Knowledge*, 658 ANNALS. AM. ACAD. POL. SOC. SCI. 1 (Mar. 2015).

IV. THE COLLAPSE OF TRUTH IN THE MARKETPLACE AND ITS JUDICIAL CONSEQUENCES

An argument could still be made that, even though at present times fake news appears to be incompatible with the theory of the marketplace of ideas, in the long run, the market's internal self-governing dynamics will eventually find a way of curbing this phenomenon. Such an argument finds support in the steps that many social media networks and cyber intermediaries have recently taken to address the proliferation of fake news on their platforms. Late in 2016, for instance, *Facebook* enforced a system where dubious news stories were verified by third-party fact checkers and, once confirmed as false, were publicly flagged as fake news.⁷⁷ However, after a year of carrying out this policy, the social media network found that flagged posts were being shared with more frequency than before.⁷⁸ As a result, *Facebook* abandoned this approach and instead started displaying corroborated articles alongside the disputed ones.⁷⁹

More recently, in an effort to burst the informational eco-chamber, Mark Zuckerberg announced a plan to conduct a trustworthiness survey where users would be asked to rate a broad list of news media organizations on their credibility,⁸⁰ in order to provide more newsfeed placement to those which are trusted across the user spectrum.⁸¹ By not providing their Ad monetization programs to known fake news webpages and giving less news feed exposure to their stories, *Facebook* and *Google* also implemented a series of measures aimed at dismantling the economic incentives that sustain fake news.⁸² Meanwhile, *YouTube* attempted to confront state-sponsored fake news schemes by labeling state-funded videos as such.⁸³ Also, *Twitter* announced that it will send e-mails to the owners of accounts who had some form of interaction with accounts created by Russia's Research Internet Agency during the past elections.⁸⁴

⁷⁷ Bill Chapel, *Facebook Details Its New Plan to Combat Fake News Stories*, NATIONAL PUBLIC RADIO (Dec. 15, 2016), <https://www.npr.org/sections/thetwo-way/2016/12/15/505728377/facebook-details-its-new-plan-to-combat-fake-news-stories>.

⁷⁸ *Facebook Ditches Fake News Warning Flag*, BBC (Dec. 21, 2017), <http://www.bbc.com/news/technology-42438750>.

⁷⁹ *Id.*

⁸⁰ Dave Lee, *Facebook to Use Surveys to Boost "Trustworthy" News*, BBC (Jan. 19, 2018), <http://www.bbc.com/news/technology-42755832>.

⁸¹ *Id.*

⁸² Dipayan Ghosh & Ben Scott, *Russia's Election Interference is Digital Marketing 101*, ATLANTIC (Feb. 19, 2018), <https://www.theatlantic.com/international/archive/2018/02/russia-trump-election-facebook-twitter-advertising/553676/>.

⁸³ Hadas Gold, *YouTube to Start Labeling Videos Posted by State-Funded Media. Some Signs Show the Problem Continues*, CNN (Feb. 3, 2018), <http://money.cnn.com/2018/02/02/media/youtube-state-funded-media-label/index.html>.

⁸⁴ Eli Rosenberg, *Twitter to Tell 677,000 Users They Were Had by the Russians*, WASH. POST (Jan. 19, 2018), <https://www.washingtonpost.com/news/the-switch/wp/2018/01/19/twitter-to-tell-677000->

Despite these efforts, a recent wave of fake news alleging that a group of students who survived the Parkland High School shooting in Florida, who have received extensive media coverage for their vocal activism in favor of gun regulation, were paid actors, went viral on *YouTube* and social media networks.⁸⁵ This demonstrates that although the tech companies' efforts might prove effective in minimizing the circulation of fake news, the public's reception and disposition towards fake news is unaffected by such measures. In this respect, even though the social media platforms are in an ideal position to monitor the technological infrastructure upon which fake news relies, its existence appears to persist even in the face of direct or indirect regulation. The reasons behind the stubbornness of fake news adherents are many and complex, ranging from psychological predispositions that move us towards discard factual information that contradicts our firmly held beliefs and worldviews, to the general disintegration of truth as a political value and epistemological criterion, a phenomenon that—as discussed in Part I—finds its historical roots at the turn of 17th century.⁸⁶

In this regard, the disintegration of truth in public discourse made apparent by the fake news phenomenon turns the basic premise behind the marketplace theory on its head; in other words, the marketplace of ideas and its search of *political truth* may be threatened, not only by tyrannical state interference, but also on account of the market's own participants and internal dynamics. The legal issue, therefore, boils down to whether the current erosion of truth in the marketplace of ideas is enough to warrant government intervention. This, however, is not the first time that the marketplace has collapsed from within. In the 1970s and 80s, constitutional commentator and theorist Jerome Barron identified the perils inherent to the monopolization of the marketplace of ideas in the hands of corporate mass media.⁸⁷ Barron argued that “when a comparatively few private hands are in a position to determine not only the content of information but its very availability, the soap box yields to radio and the political pamphlet to the monopoly newspaper”; the individual citizen's right to participate in public discourse is critically undermined.⁸⁸ Media corporations, Barron continued, had total dominance over what was said and who could participate in public conversation, and thus compromised the *openness* which ought to define the marketplace of ideas.⁸⁹ In response, he advocated for the creation of a constitutional right of access to the media that would force media conglomerates to furnish ample time and space for

users-they-were-had-by-the-russians-some-signs-show-the-problem-continues/?utm_term=.13299643b947.

⁸⁵ Daniel Arkin & Ben Popken, *How the Internet's Conspiracy Theorists Turned Parkland's Students Into "Crisis Actors"*, NBC NEWS (Feb. 21, 2018), <https://www.nbcnews.com/news/us-news/how-internet-s-conspiracy-theorists-turned-parkland-students-crisis-actors-n849921>.

⁸⁶ ARENDT, *supra* note 72.

⁸⁷ Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641-42 (1967).

⁸⁸ *Id.* at 1643.

⁸⁹ *Id.* at 1641.

ordinary citizens to take part in the public discussions and debates that take place in their platforms.⁹⁰ Barron's ideas are anchored in the instrumental conception of the First Amendment and thus transcend the mere protection of the individual's right to expression. In other words, Barron's position, shared with other constitutional critics and commentators,⁹¹ is that, beyond furnishing citizens with a judicial shield against governmental intervention in the freedoms of expression, the First Amendment ought to serve an active role in ensuring the operability and political effectiveness of public discourse.

However, the argument that the First Amendment ought to serve as a tool to combat the deficiencies caused by the private actor—be it a mere individual or a powerful corporation—has not been embraced by the U.S. Supreme Court. For instance, in addressing the issue of the monopolization of the channels of public discourse and the right of access to the media, the Court in *Turner Broadcasting v. FCC* held that the “mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to non-broadcast media.”⁹² Therefore, in the context of the fake news phenomenon, under the current First Amendment jurisprudence, a parallel argument made in light of the role that social media platforms and the so-called Big Tech companies play in enabling the organized dissemination of false and misleading news content would not be enough. For, under the prevalent liberal conception that informs our juridical norms and apparatus—a conception which defines rights strictly in terms of a set of the individual political liberties opposable only against the actions of the State—the disintegration of truth at the hands of private actors would not be enough for the Supreme Court to sanction judicial or governmental regulation aimed at the Fake News phenomenon.

V. GOVERNMENTAL REGULATION: PERILOUS AND INEFFECTIVE SOLUTION

Excluding fake news from First Amendment protection evokes the all-too-real and menacing risk of partisan censorship and politically-motivated repression. After all, the exclusion of fake news from constitutional protection would provide the government with a judicially sanctioned mechanism to prohibit the publication of information it finds contrary to the furtherance of its interests or objectives. In other words, governmental regulation of fake news, rather than being determined by the factuality of statements, runs the risk of hinging on the whim of partisan machinations. It takes but a brief look at the President's recent legal threats to prohibit the publication of a book about the internal affairs of the White

⁹⁰ *Id.* at 1642.

⁹¹ Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1424 (1985); see also Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1974).

⁹² *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 640 (1994); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 249-58 (1974).

House on the grounds that it is “fake news” to foresee the genuine dangers inherent to government regulation of expression on account of its alleged falsity.⁹³

And yet, in view of the fluidity and decentralization that characterizes the dissemination of information through cyberspace, furnishing the government with the faculty of prohibiting the publication of false journalism would not only be undesirable but also ultimately ineffective. Supposing, for the sake of argument, that the government acknowledges the threats that fake news present to the integrity of democratic processes and institutions, and decides to regulate the dissemination of false news content. For the government to successfully censure a publication, it needs first to identify the source of the information and, secondly, to have the effective material capacity to impede its publication. These conditions, while easily met in the case of traditional print journalism, are usually absent in the cyberspace context due to the fluid informational dynamics of the Internet. In other words, while the material means and processes of the printing press can be traced to particular and identifiable journalistic institutions that are thus vulnerable to total governmental censorship, the speed and plasticity with which information is exchanged through the Internet impedes the realization of the classical notion of governmental censorship. This is not to say that cyberspace is exempt from state censorship. However, any serious attempt at eradicating false news content from the Internet would require the implementation of an intricate and aggressive system filters and firewalls; a system that would ultimately affect Internet use in more profound ways than false news content.

China, for instance, through a complex system of filters and firewalls, limits access and takes down all sorts of information and content from Internet circulation.⁹⁴ One arm of China’s censorship program consists of IP and DNS filters or firewalls (aptly named the Great Fire Wall of China) that blocks access to foreign websites such as Facebook and *Google*.⁹⁵ Other than these network filters, the Chinese government employs a set of search filters that function by listing sensitive terms and forbidden URLs that are identified and suppressed.⁹⁶ This type of *softer* filters are employed to censor smaller scale citizen blogs, chats and news websites, including specific social media posts.⁹⁷ Although effective, these search filters heavily rely on domestic companies such as Sina Weibo, *Facebook’s* equivalent in China, to carry out the actual suppression of content.⁹⁸ Moreover, the term and URL blacklist technique is by no means exact, since it tends to encompass web

⁹³ Peter Baker, *After Trump Seeks to Block Book, Publisher Hastens Release*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/us/politics/trump-threatens-sue-fire-fury-publisher.html>.

⁹⁴ David Bamman et al., *Censorship and Deletion Practices in Chinese Social Media*, 17 FIRST MONDAY no. 3-5 (March 2012), <http://firstmonday.org/ojs/index.php/fm/article/view/3943/3169>.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

addresses and content beyond those intended to be censored.⁹⁹ It is important to note that this form of overreaching occurs at a technical level, meaning that it is a byproduct of the technology employed to censor information and not the discretion of the government or private entities. Therefore, even in the ideal situation where government does indeed regulate fake news without abusing its discretion, it will present the threat of technical overreaching.

Furthermore, a censorship system such as this would not be able to process the sheer number of blogs and webpages that the Internet gives birth to on a daily basis. Thus, while China's aggressive censorship system has served as a model for other illiberal democracies and autocratic regimes such as Turkey and Venezuela,¹⁰⁰ the nature and scale of such initiatives are fundamentally incompatible with the legal, economic and political reality of U.S. democracy. Criminalization poses further problems because a vast number of fake news creators operate overseas, as is the case with the Russia's IRA and Veles, a small town in Macedonia responsible for thousands of the fake news stories that circulated in the U.S. during the 2016 Presidential elections.¹⁰¹

Regulations aimed at addressing the flow of fake news through Internet intermediaries, however, appear to be a more viable option; this approach has been recently adopted by Germany and is widely regarded as a more efficient and transparent alternative.¹⁰² In 2017, Germany's parliament passed an anti-fake news law ("NetzDG") which penalizes social media networks for harboring false and hateful content in their platforms.¹⁰³ Upon receiving notification, the law provides a 24-hour period for the intermediaries to remove the false content from their platform. If the platform does not comply, it may be subject to fines of up to 50 million euros.¹⁰⁴ From a technical standpoint, this sort of mediated regulation is somewhat more efficient insofar as social media platforms are themselves better positioned to identify and remove false content. Nevertheless, such measures still entail the risk of governmental overreach into otherwise legitimate and valuable forms of expression. In fact, Germany's anti-fake news law is already under review for being too vague and thus permitting the suppression of content beyond hateful and fake news.¹⁰⁵ This possibility becomes even more alarming after taking into account the

99 *Id.*

100 Phillip Bennet & Moises Naim, *21st Century Censorship*, COLUM. JOURNALISM REV. (Jan. 2015), https://archives.cjr.org/cover_story/21st_century_censorship.php.

101 Attlee & Soares, *supra* note 35; see also Krishnadev Calamur, *What Is The Internet Research Agency?*, ATLANTIC (Feb. 16, 2018), <https://www.theatlantic.com/international/archive/2018/02/russia-troll-farm/553616/>.

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

103 *Id.*

104 *Id.*

105 *Germany: Flawed Social Media Law*, HUMAN RIGHTS WATCH (Feb. 14, 2018), <https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law>; *Germany Looks to Revise Social Media Law as Europe Watches*, CNBC (Mar. 8, 2018, 6:30 PM),

fact that social media platforms, being private actors, can validly interfere with and suppress the content of their users without giving way to an actionable First Amendment claim. This troubling scenario is increasingly commonplace in times where the marketplace of ideas has been almost entirely relocated from the public streets and squares to the private domain of social media platforms and cyber intermediaries. In the case of the United States, however, making intermediaries liable for their users' content is proscribed by Section 230(c)1 of the Telecommunications Act of 1996.¹⁰⁶

Furthermore, online censorship has been proven to unintentionally exacerbate the circulation and popularity of the suppressed material. Known as the Streisand effect, the phenomenon refers to situations where attempts at online censoring inadvertently lead to greater interest and exposure in the censored content.¹⁰⁷ After a series of videos of political prisoners were uploaded on *YouTube* and *Dailymotion*, then-president of Tunisia, Zine El Abidine, blocked access to these platforms.¹⁰⁸ Immediately after, a group of activist hyperlinked the image of Tunisia's Presidential Palace with videos depicting human and civil rights violations, calling, in turn, the world's attention to an otherwise purely regional affair.¹⁰⁹ In a similar vein, France's Homeland Intelligence Agency compelled *Wikipedia* to remove a page concerning a classified radio military station from their database.¹¹⁰ After refusing to comply, a *Wikipedia* administrator posted an editorial note citing the criminal code disposition with which they were threatened and defied the government by leaving the page up. *Station hertzienne militaire de Pierre-sur-Haute* became the most viewed *Wikipedia* page in France at the time.¹¹¹

The Streisand effect is a clear example of psychological reactance, a tendency to react to a threat against individual freedoms by actively protecting and exercising the proscribed activity.¹¹² Moreover, psychologists have found that in the case of censorship, individuals not only actively oppose the restriction, but also become

<https://www.cnbc.com/2018/03/08/germany-looks-to-revise-social-media-law-as-europe-watches.html>.

¹⁰⁶ Telecommunications Act of 1996, 47 U.S.C. § 230(c) (2006).

¹⁰⁷ It is named after an incident in which the famous singer Barbra Streisand intended to suppress the circulation of a photo of one of her Malibu estates, which consequently went viral. T.C., *What is the Streisand Effect?*, *ECONOMIST* (Apr. 16, 2013), <https://www.economist.com/blogs/economist-explains/2013/04/economist-explains-what-streisand-effect>; Mario Cacciottolo, *The Streisand Effect: When Censorship Backfires*, *BCC NEWS* (Jun. 15, 2012), <http://www.bbc.com/news/uk-18458567>.

¹⁰⁸ Ethan Zuckerman, *The First Twitter Revolution?*, *FOREIGN POL'Y* (Jan. 15, 2011, 12:05 AM), <http://foreignpolicy.com/2011/01/15/the-first-twitter-revolution-2/>

¹⁰⁹ *Id.*

¹¹⁰ Megan Geuss, *Wikipedia Editor Allegedly Forced by French Intelligence to Delete "Classified" Entry*, *ARS TECHNICA* (Apr. 6, 2013), <https://arstechnica.com/tech-policy/2013/04/wikipedia-editor-allegedly-forced-by-french-intelligence-to-delete-classified-entry/>.

¹¹¹ *Id.*

¹¹² Stephen Worchel & Susan Arnold, *The Effects of Censorship and Attractiveness of the Censor on Attitude Change*, 9 *J. EXP. SOC. PSYCHOL.* 365 (1973).

more prone to sympathize with the censored content.¹¹³ In a certain regard, the Streisand effect demonstrates how in the Internet Age the very notion of censorship, which presupposes that the total suppression of a particular kind of information would avoid a greater evil, is not only unrealizable but ultimately counterproductive. Put differently, it seems that any measure aimed at censoring fake news would most likely incentivize its proliferation and encourage its adherents. Given that most of the false news stories are permeated by a sense of mistrust and suspicion towards the government, it seems likely that the Streisand effect would be even more pronounced in the context of fake news.

CONCLUSION

Even though under the prevailing liberal conception of the First Amendment the mere disintegration of truth in the marketplace of ideas would not make an effective judicial argument, and while a governmental regulation of the phenomenon presents a genuine threat of abuse and censorship, the systematic instrumentalization of false news nonetheless presents a real and concrete political threat. The question is what, exactly, do we stand to lose from the disintegration of the truth-seeking function of the freedoms of expression. What perils arise when the dynamics of the marketplace of ideas serve to hinder the discovery and spread of political truth?

Hannah Arendt considered the political importance of truth in an essay titled *Truth and Politics*, first published by the *New Yorker* in February of 1967.¹¹⁴ In it, Arendt draws a distinction between rational truth, which in simple terms concerns the knowledge produced by philosophical enterprises, and factual truth, which concerns the witnessing of a public event.¹¹⁵ While rational truth is the product of the *singular* and *isolated* efforts of an individual inquirer, be it a philosopher or scientist:

Factual truth, on the contrary, is always related to other people: it concerns events and circumstances in which many are involved; it is established by witness and depends upon testimony; it exists only to the extent that it is spoken about, even if it occurs in the domain of privacy.¹¹⁶

Factual truth, therefore, is by definition an *intersubjective* and public achievement. For Arendt, factual truth is political, not in that it conforms to partisan interest or that it is informed by particular political ideology, but in that it emerges from and concerns the shared fabric of common public life. Political truth, in this regard, is not didactic nor prescriptive; it does not pretend to conform reality to a specific partisan strategy or worldview, but rather accounts for that which occurs

¹¹³ *Id.*

¹¹⁴ Arendt, *supra* note 1.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 553.

to citizens in the plural. In this respect, the appropriate metaphor for political truth is that of attestation or testimony: the bearing witness of an event that occurred (always in the past) in midst of others.

This is not to say that opinions do not belong in the realm of politics; far from expropriating opinion from the political realm, factual truth serves as the foundation from which opinion can emerge in a way that effectively addresses the actual conditions of public affairs. For, though opinions are always expressed from a specific standpoint, they inevitably allude, in one way or another, to a shared experience of factual reality. Opinions, therefore, while partial, are never totally disjointed from the reality they assess and give an account of. An appraisal or idea wholly divorced from the historical and political coordinates of factual reality is not an opinion, but rather a mere fantasy or madness. In Arendt's lucid words:

Facts and opinions, though they must be kept apart, are not antagonistic to each other; they belong to the same realm. Facts inform opinions, and opinions, inspired by different interests and passions, can differ widely and still be legitimate as long as they respect factual truth. Freedom of opinion is a farce unless factual information is guaranteed and the facts themselves are not in dispute. In other words, factual truth informs political thought just as rational truth informs philosophical speculation.¹¹⁷

The deliberate lie, on the other hand, is not a fragmentary and limited apprehension of reality—an opinion in the sense that is discussed above—but rather an intentional disfigurement of it. Seen in isolation, a deliberate lie can be understood as serving a specific social, psychological or political end. For example, while the desirability of minority voting is a matter of political debate and opinion, asserting that the number of illegal votes cast in the past presidential elections exceeded the millions is a deliberate lie that not only reflects but asserts the ideological predispositions of its proclaimers and adherents. When the deliberate lie, however, is employed systematically beyond the purview of a specific ideological or strategical agenda, the damage it does is far greater than merely introducing a specific lie into the social and political landscape. What is ultimately at stake behind the fake news phenomenon is not that a particular lie would be embraced by the public and the political elites, but that society would lose the common ground from which public opinions, conversations and debates gain their meaning and political effectiveness.

¹¹⁷ *Id.* at 554.