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## Spreading Like Wildfire: Solutions for Abating the Fake News Problem on Social Media via Technology Controls and Government Regulation

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## Notes

# Spreading Like Wildfire: Solutions for Abating the Fake News Problem on Social Media via Technology Controls and Government Regulation

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*“Fake news” seems to be the phrase du jour these days. During the 2016 presidential election, fake news and propaganda proliferated on social media sites like Facebook, Twitter, and Google, with many of the concocted faux sources emanating from Russia and elsewhere. In Fall 2017, tech executives and their lawyers were called to Capitol Hill to testify before Congress as to the influence fake news may have had on the American public during the last election season. In response, technology companies and social media networks are considering implementing various changes to their platforms to help users identify fact from falsehoods.*

*This Note examines the modifications technology companies are putting in place to ensure accuracy in news reporting. This Note also proposes a legal solution to curb fake news and warns against certain safeguards to avoid implicating First Amendment free speech rights online.*

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\* Executive Symposium Editor, *Hastings Law Journal*, Volume 69; J.D., University of California, Hastings College of the Law, 2018; B.A., Lake Forest College, 2013. I want to thank Professor Ahmed Ghappour for a stellar seminar and encouraging me to write about a subject that I find truly fascinating. Many thanks also to the *Hastings Law Journal* Notes team for their thoughtful, sharp, and often clever feedback. I dedicate this Note to my mother, Beverly Andorfer, who taught me to read, write, and be critical of most things you hear.

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## INTRODUCTION

Who wants to read the truth? In August 2016, just three months before the November 2016 presidential election, *The Political Insider* ran a headline that read “WikiLeaks Says They Have A BOMBSHELL to Drop About Hillary . . . AND ISIS!!”<sup>1</sup> The article goes on to claim that Wikileaks confirmed presidential candidate Hillary Clinton sold weapons to ISIS.<sup>2</sup>

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1. SOOPERMEXICAN, *Wikileaks Says They Have A BOMBSHELL to Drop About Hillary . . . AND ISIS!!*, POLITICAL INSIDER (Aug. 2, 2016, 4:09 PM), <https://thepoliticalinsider.com/wikileaks-hillary-isis/>.

2. *Id.*

What actually happened? Wikileaks obtained a set of leaked e-mail files between Hillary Clinton and her campaign manager, John Podesta.<sup>3</sup> Julian Assange, Wikileaks founder, later gave an interview where he said the leaked e-mails showed various actions taken by Clinton and the U.S. State Department resulting in weapons flow to ISIS.<sup>4</sup> However, Assange did not say that Clinton knowingly or deliberately sold weapons to ISIS, nor did Wikileaks have e-mails confirming this claim.<sup>5</sup> *Snopes.com* speculated that her actions in Libya and the ongoing Syrian war might have negligently allowed arms to fall into the hands of ISIS, but noted that this is not the same thing as directly “selling weapons to ISIS.”<sup>6</sup> The real story is much more nuanced and speculative than the fake news claim.

Falsity in politics is hardly a new problem. Politicians are quick to overstate or embellish statistics. Candidates for office or their adversaries might distort each other’s position. The news media and political pundits then spin it further. However, the ease of disseminating information on the internet coupled with the increasingly polarized political climate has led to fake news—a phenomenon that politicians and pundits argue had great influence on the November 2016 election in the United States and continues to manipulate the American public today.<sup>7</sup> In October 2017, lawyers and executives from some of America’s biggest technology companies—Facebook, Google, and Twitter—were called to Capitol Hill to testify in front of Congress as to the influence that Russian efforts had on the 2016 presidential race.<sup>8</sup> During the testimony, senators scolded the three companies for their collective limp response in failing to stop false information from spreading across millions of social media feeds given that fake news can sometimes have serious ramifications.<sup>9</sup>

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3. Kim LaCapria, *Shots Hired*, SNOPE (Oct. 13, 2016), <https://www.snopes.com/wikileaks-cofirms-hillary-clinton-sold-weapons-to-isis/>.

4. *Full Interview: Julian Assang on Trump, DNC Emails, Russia, the CIA, Vault 7 & More*, DEMOCRACY NOW! (Apr. 12, 2017), [https://www.democracynow.org/2017/4/12/full\\_interview\\_julian\\_assange\\_on\\_trump](https://www.democracynow.org/2017/4/12/full_interview_julian_assange_on_trump).

5. *Id.*; LaCapria, *supra* note 3.

6. LaCapria, *supra* note 3.

7. See 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/>; see also *Disinformation: A Primer in Russian Active Measures and Influence Campaigns*, Open Hearing Before the Select Comm. on Intelligence, 115th Cong. 30–33 (2017) (statement of Clint Watts, Robert A. Fox Fellow, Foreign Policy Research Institute, Senior Fellow, Center for Cyber and Homeland Security, the George Washington University) [hereinafter *Disinformation*] (stating that Russian falsehoods on social media attempted to shape the U.S. 2016 election results).

8. Cecilia Kang et al., *Tech Executives Are Contrite About Election Meddling, but Make Few Promises on Capitol Hill*, N.Y. TIMES (Oct. 31, 2017), <https://www.nytimes.com/2017/10/31/us/politics/facebook-twitter-google-hearings-congress.html>.

9. *Id.*

In December 2016, a North Carolina man was arrested in an incident later coined “#PizzaGate,” after he entered a Washington D.C. pizza shop and fired a gun, claiming he was “self-investigating” a child-sex ring allegedly run by presidential candidate Hillary Clinton.<sup>10</sup> The man claimed he had read stories about the illicit child-sex ring operation online.<sup>11</sup> Indeed, he may be telling the truth about having seen the stories online and the fact that he believed the story might not raise that many eyebrows considering even Michael Flynn, Jr., the son of former National Security Advisor Michael Flynn, tweeted a message lending his support to the conspiracy theory.<sup>12</sup>

Certainly, conspiracy theories like #PizzaGate have always existed on the Internet, but it was not until recently, in part due to social media’s ubiquitous presence in everyday lives, that fictitious stories gained significant traction. This Note discusses three policy proposals to address fake news online. The first two proposals consist of technology-based solutions aimed at curbing fake news from being shared so easily on social media platforms. Stopping the proliferation of fake news depends in part on reforming the platforms used to spread information, but also on ensuring that everyday people have the media literacy needed to decipher legitimate news from fabricated stories.<sup>13</sup> As such, the first proposal consists of a reporting and flagging process that Facebook recently implemented in the United States.<sup>14</sup> This process uses both human judgment and social media technology to fact-check stories and inform users about potentially inaccurate posts. The second proposal relies solely on technology. As artificial intelligence technology and machine-learning algorithms become better equipped at analyzing language, there is a push to take fact-checking out of human hands to ensure bias does not play a role in deciding what appears online. The third proposal is a legal proposition that makes a case for lowering the level of scrutiny applied to regulations on fake news. While such a proposal might be ripe for criticism, one way to curb the problem after-the-fact is to consider whether fake news should be regulated under the law.

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10. Camila Domonoske, *Man Fires Rifle Inside D.C. Pizzeria, Cites Fictitious Conspiracy Theories*, NPR (Dec. 5, 2016, 9:46 AM), <http://www.npr.org/sections/thetwo-way/2016/12/05/504404675/man-fires-rifle-inside-d-c-pizzeria-cites-fictitious-conspiracy-theories>.

11. *Id.*

12. *Id.*

13. Wynne Davis, *Fake or Real? How to Self-Check the News and Get the Facts*, NPR (Dec. 5, 2016, 12:55 PM), <http://www.npr.org/sections/alltechconsidered/2016/12/05/503581220/fake-or-real-how-to-self-check-the-news-and-get-the-facts>.

14. Jessica Guynn, *Facebook Begins Flagging ‘Disputed’ (Fake) News*, USA TODAY (Mar. 6, 2017, 12:04 PM), <https://www.usatoday.com/story/tech/news/2017/03/06/facebook-begins-flagging-disputed-fake-news/98804948/>.

Before diving into each proposal, it is necessary to define the term “fake news.” Fake news is concocted from unsourced, unverified, often made-up information and then masterfully manipulated to pass as real and credible journalism.<sup>15</sup> Fake news is not content that is substantively true but politically challenging for some in government to accept; rather, it is actual *fake*, conspiracy theory-starting shams. The *New York Times* defines fake news as “a made-up story within an intention to deceive, often geared towards getting clicks.”<sup>16</sup> Vivian Schiller, the former head of news and journalism partnerships at Twitter and also the former CEO of NPR, defines fake news as a “content-like object that is a story, an article, a video, [or] a tweet that has been fabricated, completely invented out of thin air, intentionally for the purpose of misleading.”<sup>17</sup> As a demonstration of fake news, Schiller uses a story that trended during the 2016 election season from the *Denver Guardian* (a non-existent newspaper) that claimed Pope Francis had endorsed Donald Trump.<sup>18</sup> The story was completely false, but gets to the heart of fake news’ aim—to intentionally deceive those who read it.<sup>19</sup> Similarly, the term “fake news” is used here to refer to written articles, online posts, or recorded videos that usually appear as if they could be credible journalism and are disseminated on social media networks to promote misinformation and dupe readers into believing the content to be true.<sup>20</sup>

#### I. USING HUMAN JUDGEMENT: FACEBOOK’S FLAGGING AND SELF-REPORTING TOOL NOTIFIES USERS WHEN A STORY MAY BE FALSE

The first potential solution to the fake news problem proposed here focuses on the people who use social media. Social media users on Facebook, Twitter, and other social networking sites should bear some of the burden in preventing fake facts from sweeping social media since users are often those who first see and share these made-up stories. Indeed, humans may be the most capable of distinguishing bona fide news from faux information.<sup>21</sup> Realizing this, Facebook rolled out a

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15. *Id.*

16. Sabrina Tavernise, *As Fake News Spreads Lies, More Readers Shrug at the Truth*, N.Y. TIMES (Dec. 6, 2016), <https://www.nytimes.com/2016/12/06/us/fake-news-partisan-republican-democrat.html>.

17. *Ex-Head of Twitter News: Social Media Companies Alone Shouldn’t Regulate ‘Fake News’*, NPR (Nov. 20, 2016, 9:11 AM), <http://www.npr.org/2016/11/20/502770866/ex-head-of-twitter-news-social-media-companies-alone-shouldn-t-regulate-fake-new>.

18. *Id.*

19. *Id.*

20. *Disinformation*, *supra* note 7, at 1.

21. Tom Simonite, *Humans Can’t Expect AI to Just Fight Fake News for Them*, WIRED (June 15, 2017, 11:04 AM), <https://www.wired.com/story/fake-news-challenge-artificial-intelligence/>.

crowdsourcing solution after the 2016 election to address the fake news problem.<sup>22</sup> Essentially, the Facebook solution uses fact-checking companies like *PolitiFact*, *FactCheck.org*, and *Snopes.com*, to verify posts that are flagged by Facebook users as fake.<sup>23</sup>

A. THE FLAGGING AND REPORTING TOOL RELIES ON USER'S JUDGMENT AND THIRD-PARTY FACT CHECKERS.

Facebook founder and CEO Mark Zuckerberg initially suggested that fake news on Facebook was not a big problem,<sup>24</sup> but in the wake of the 2016 Presidential election, he conceded that Facebook had “much more work” to do in handling false stories on its network.<sup>25</sup> In October 2017, it was revealed that Russia had used social media platforms to spread propaganda during the 2016 presidential campaign.<sup>26</sup> Lawyers for Facebook, along with other tech giants, Google and Twitter, were hauled into Washington and appeared before the Senate for a multi-day congressional hearing regarding possible foreign interference and Russia-sponsored ads that went viral during the campaign. Facebook's counsel admitted that the full scope of Russian active measures was not totally identified,<sup>27</sup> but noted Facebook's effort to stop propaganda from spreading quite so rapidly: Facebook had been developing a reporting process that relies on users to report phony stories appearing in their feed.<sup>28</sup>

Generally, social media sites like Facebook and Twitter use algorithms to show and spread content that the sites think its users might be interested in.<sup>29</sup> Facebook already uses a social media vetting tool that

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22. Parmy Olson, *Facebook Wants Users to Help It Weed out Fake News*, FORBES (Dec. 6, 2016, 8:40 AM), <https://www.forbes.com/sites/parmyolson/2016/12/06/facebook-users-fake-news/#67a8983e47ed>.

23. Jason Schwartz, *Tagging Fake News on Facebook Doesn't Work, Study Says*, POLITICO (Sept. 11, 2017, 6:20 PM), <https://www.politico.com/story/2017/09/11/facebook-fake-news-fact-checks-242567>.

24. Kara Swisher, *Mark Zuckerberg Says It's 'Extremely Unlikely' Fake News on Facebook Changed the Election Outcome*, RECODE (Nov. 13, 2016, 12:15 AM), <https://www.recode.net/2016/11/13/13612442/mark-zuckerberg-extremely-unlikely-hoaxes-changed-election-outcome>.

25. Bill Chappell, *Facebook Details Its New Plan to Combat Fake News Stories*, NPR (Dec. 15, 2016, 2:21 PM), <http://www.npr.org/sections/thetwo-way/2016/12/15/505728377/facebook-details-its-new-plan-to-combat-fake-news-stories>.

26. Kang et al., *supra* note 8.

27. Issie Lapowsky, *Eight Revealing Moments from the Second Day of Russia Hearings*, WIRED (Nov. 1, 2017, 3:40 PM), <https://www.wired.com/story/six-revealing-moments-from-the-second-day-of-russia-hearings/>.

28. *Id.*

29. Kaveh Waddell, *Algorithms Can Help Stomp out Fake News*, ATLANTIC (Dec. 7, 2016), <https://www.theatlantic.com/technology/archive/2016/12/how-computers-will-help-fact-check-the-internet/509870/>; Joe Mullin, *Mark Zuckerberg on Facebook's Fake News: We're Working on It*, ARS TECHNICA (Nov. 20, 2016, 1:00 PM), <https://arstechnica.com/tech-policy/2016/11/mark-zuckerberg-on-facebooks-fake-news-were-working-on-it/>.

searches for controversy-stirring posts from a person's Facebook friends (for example, posts with comments to links like *Snopes.com* or *PolitiFact* that debunk the post's claims).<sup>30</sup> Facebook's new tool provides users with the ability to also flag links that they believe might be potential fake news.<sup>31</sup> Flagged posts will then be referred to third-party fact-checking companies that will determine whether a source is based on truth.<sup>32</sup>

Facebook's trial measures to combat fake news were first rolled out in Germany, and have recently expanded into the United States.<sup>33</sup> To flag an article as fake news, Facebook users click on the upper right hand corner of a post and select the "flag" option. Once a user flags an article, it is sent to a third-party fact-checking organization who verifies the article's veracity.<sup>34</sup> If the fact-checking organization determines that a story is fake, the story will receive a "disputed" tag that stays with the story across the social networking site.<sup>35</sup> Even with the disputed tag, users will still be able to post and share fraudulent articles, but they will be warned that information in the article may be inaccurate or based on misinformation.<sup>36</sup> Any posts deemed fake news will include a 'disputed' badge and be pushed down to the bottom of the user's newsfeed which means fewer people are likely to see and share these disputed stories.<sup>37</sup>

One reason to favor a solution like Facebook's is that it relies on human judgment to determine whether content is fake. One critical issue with a purely technical solution (as discussed next in this Note) is the inherent difficulty in distinguishing between news that is fake and news that is not hard hitting factual journalism, but should be considered "real" for the purposes of determining whether it appears on your newsfeed without a warning, such as opinion or satire pieces. Despite advances in computerized fact-checking and language analysis, only humans are truly capable at assessing the subtleties, nuances, and sarcasm in opinion pieces and satire that might be flagged as fake news by a computer or artificial intelligence ("AI") technology.<sup>38</sup> To avoid

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30. Waddell, *supra* note 29.

31. Jay McGregor, *Facebook's Fake News Solution Has Three Big Problems*, FORBES (Jan. 16, 2017, 12:51 PM), <https://www.forbes.com/sites/jaymcgregor/2017/01/16/facebook-fake-news-solution-has-three-big-problems/#695edf6355d3>.

32. *Id.*

33. Natasha Lomas, *Facebook Takes Its Fake News Fight to Germany*, TECHCRUNCH (Jan. 16, 2017), <https://techcrunch.com/2017/01/16/facebook-takes-its-fake-news-fight-to-germany/>.

34. McGregor, *supra* note 31; Guynn, *supra* note 14.

35. Lomas, *supra* note 33.

36. Chappell, *supra* note 25.

37. McGregor, *supra* note 31.

38. See Lee Rainie et al., *The Future of Free Speech, Trolls, Anonymity and Fake News Online*, PEW RES. CTR. (Mar. 29, 2017), <http://www.pewinternet.org/2017/03/29/the-future-of-free-speech-trolls-anonymity-and-fake-news-online>.



articles from *The Onion*<sup>39</sup> disappearing from Facebook forever, some human judgment is necessary to assess the content's validity and veracity. Facebook's flagging and reporting system, which ensures at least two people analyze an article (first, the user who flags it, and second, the third-party fact checker that reviews it), utilizes humankind's unique ability to engage in complex thought and analysis.

B. HUMAN ERROR AND BIAS AGAINST ESTABLISHED MEDIA MAKE IT DIFFICULT FOR FACEBOOK'S SOLUTION TO BE TOTALLY EFFECTIVE.

While a good start, this self-reporting process is not enough. The fact that Facebook's solution requires people to analyze and evaluate content for it to be deemed fake is an upside, but users on social media are not always adept at discerning truth from lies. A 2016 study conducted by researchers at Stanford University's Graduate School of Education found that even undergraduate college students struggled to evaluate the sources of information in political tweets.<sup>40</sup> In fact, the researchers were shocked by the number of college students who were unable to evaluate the credibility of information on the internet.<sup>41</sup>

Because Facebook's self-reporting and flagging process requires users to have some awareness about current media and news events to circumvent malign content, fake news might fall between the cracks and never be seen by the fact-checkers. There is hope that students entering the world as digital natives will be provided with a curriculum focused on developing student's online civic reasoning in the future, but it would be ineffective to rely solely on humans as social media users to flag and report fake news given people's current inability to distinguish between fake news and real news.<sup>42</sup>

Further, many individuals and organizations creating fake news take pride in being labeled anti-establishment.<sup>43</sup> Fake or "alt" news creators claim that social media strongholds and other media elites are trying to shut down debate from the "little guys," as evidenced by Breitbart News'

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39. *The Onion* is "the world's leading news publication, offering highly acclaimed, universally revered coverage of breaking national, international, and local news events. Rising from its humble beginnings as a print newspaper in 1765, *The Onion* now enjoys a daily readership of 4.3 trillion and has grown into the single most powerful and influential organization in human history." *About the Onion*, ONION, <https://www.theonion.com/about> (last visited May 7, 2018). This, of course, is satire.

40. STAN. HIST. EDUC. GRP., EVALUATING INFORMATION: THE CORNERSTONE OF CIVIC ONLINE REASONING 23 (2016), <https://stacks.stanford.edu/file/druid:fv751yt5934/SHEG%20Evaluating%20Information%20Online.pdf>.

41. Camila Domonoske, *Students Have 'Dismaying' Inability to Tell Fake News from Real, Study Finds*, NPR (Nov. 23, 2016, 12:44 PM), <http://www.npr.org/sections/thetwo-way/2016/11/23/503129818/study-finds-students-have-dismaying-inability-to-tell-fake-news-from-real>.

42. STAN. HIST. EDUC. GRP., *supra* note 40, at 7.

43. McGregor, *supra* note 31.

never-ending attacks on CNN as “very fake news.”<sup>44</sup> Indeed, one reason why fake news has been so successful is that people willfully believe the message, wanting to accept false stories, regardless of whether the source may be recognized as bad journalism.<sup>45</sup> Tailored social media feeds have created echo chambers where users often only see stories and opinions that are in line with their personal views and preferences.<sup>46</sup> Thus, users accept fake news based on their own “confirmation bias.”<sup>47</sup> Those who take part in creating and spreading false content may delight in the opportunity to rival Facebook, tech giants, and mainstream media. It is not hard to surmise that an alt-right website might wear Facebook’s “disputed” button as a “badge of honour.”<sup>48</sup>

Moreover, those who buy into the fake news message are likely to be insulted by Facebook’s intervention and may seek retaliation. Conservative wiki-site Conservapedia<sup>49</sup> illustrates the view many have regarding established news media sources: that media and news networks are government puppets, working at the hands of liberal elites.<sup>50</sup> As such, users on social media who already buy into fake news stories may take pleasure in flagging the *New York Times*, PBS, or other highly-regarded media sources as false information. If this is the case, how effective would *Snopes.com*, *PolitiFact*, or any other fact-checking company be at handling fact-check requests for an article flagged as fake news? If the fact-checkers are drowning in requests from users, the supervising organization may be unable to flag stories that are even patently untrue due to the sheer volume of content the organization receives. Facebook alone creates so much content on a daily basis that it may be incredibly difficult for human fact-checkers to act quickly enough

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44. John Nolte, *Very Fake News: CNN Busted Using Misleading Video to Fabricate Trump Fish Food Blunder*, BREITBART (Nov. 6, 2017), <http://www.breitbart.com/big-journalism/2017/11/06/fake-news-cnn-uses-misleading-video-fabricate-trump-koi-pond-blunder/>.

45. *Id.*

46. *Disinformation*, *supra* note 7, at 59.

47. McGregor, *supra* note 31.

48. McGregor, *supra* note 31.

49. Conservapedia’s website claims that it “is a clean and concise resource for those seeking the truth. [Conservapedia] do[es] not allow liberal bias to deceive and distort here. . . . No other encyclopedic resource on the internet is free of corruption by liberal untruths.” *Conservapedia: About*, CONSERVAPEDIA, <http://www.conservapedia.com/Conservapedia:About> (last visited May 7, 2018).

50. See *Liberal Media Elite*, CONSERVAPEDIA, [http://www.conservapedia.com/Liberal\\_media\\_elite](http://www.conservapedia.com/Liberal_media_elite) (last visited May 7, 2018) (stating that the “[l]iberal media elite is the clique of highly paid, left-leaning executives and journalists who directly control most output of the main newspapers and broadcasting organizations. They are epitomized by the staff of such organizations as the BBC, CNN, NBC, ABC, CBS, PBS, the CBC, The Guardian, The Independent, New York Times, and the Washington Post”).

to monitor the expansive social network ecosystem in real time.<sup>51</sup> Moreover, there are significant costs from human monitoring.<sup>52</sup> Given that there is so much fake news floating around the Internet, those concerned with stopping fake news should be wary about Facebook's flagging and reporting process that depends on human fact-checkers to keep up with the demand on social media.

## II. A PURELY TECHNOLOGICAL SOLUTION: USING AI TECHNOLOGY TO COMBAT FAKE NEWS

Since relying solely on humans to flag content on social media may be insufficient on its own, social media networks should also incorporate AI and machine-learning algorithms to warn users about potentially untrustworthy content.<sup>53</sup> Many computer programmers advocate for a technical solution to combat fake news since computers, and automated fact-checkers have the capability to use AI algorithms to check information circling around the Internet and assess it against factual data.<sup>54</sup>

### A. AI TECHNOLOGY IS CAPABLE OF ANALYZING LANGUAGE AND FACT CHECKING ARTICLES RELATIVELY FREE FROM PERSONAL BIAS.

Like Facebook's fact-checking process using third-party fact checking organizations, computer fact-checking can also be utilized as an effective tool to assess basic data and warn online users of errors before a post is shared. A team of students and faculty in the media and computer science programs at West Virginia University are working on projects to develop AI technology capable of detecting fake news.<sup>55</sup> One approach is a machine learning technology that analyzes an article's text and then generates a score which represents the likelihood that the content is fake news.<sup>56</sup> This score is accompanied by a breakdown explaining the scoring and rating process to provide transparency to users.<sup>57</sup> In addition to language processing, other proposed AI technology that could prove effective in the fight against fake news includes smart-filtering and content analysis, both of which can be used to send signals

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51. Nicky Woolf, *How to Solve Facebook's Fake News Problem: Experts Pitch Their Ideas*, GUARDIAN (Nov. 29, 2016, 3:37 PM), <https://www.theguardian.com/technology/2016/nov/29/facebook-fake-news-problem-experts-pitch-ideas-algorithms>.

52. *Id.*

53. Waddell, *supra* note 29.

54. Waddell, *supra* note 29.

55. W. Va. Univ., *Can Artificial Intelligence Detect Fake News?*, SCI. DAILY (Mar. 27, 2017), <https://www.sciencedaily.com/releases/2017/03/170327143654.htm>.

56. *Id.*

57. *Id.*

to an algorithm built to detect fake news.<sup>58</sup> Much like spam filters or blocking features on e-mail, these algorithms would assist humans in identifying fake news by automatically filtering erroneous content from appearing at the top of your newsfeed.<sup>59</sup>

The benefit in using AI technology is two-fold. First, recent research on AI and fake news reveals that AI technology tends to be more accurate.<sup>60</sup> Once AI technology has gone through deep learning, it is able to detect over eighty percent of fake news, while humans are generally only capable of discerning fake news at a sixty-six percent rate.<sup>61</sup> Second, AI does not get bogged down in partisan politics.<sup>62</sup> People may get emotionally invested in information, but AI technology is able to assess a volume of information free from feeling. MIT computer science professor David Karger believes AI tools will help filter out bad information on the Internet.<sup>63</sup> On the subject of Internet trolls (such as, typically anonymous internet users who sow discord by posting inflammatory content) or others who endeavor to spread hate and false information online (including fake news),<sup>64</sup> Karger said:

My own research group is exploring several novel directions in digital commentary. In the not too distant future all this work will yield results . . . We will be able to ascribe sources and track provenance in order to increase the accuracy and trustworthiness of information online. We will create tools that increase people's awareness of opinions differing from their own and support conversations with and learning from people who hold those opinions . . . The future Web will give people much better ways to control the information that they receive, which will ultimately make problems like trolling manageable (trolls will be able to say what they want, but few will be listening).<sup>65</sup>

Essentially, Karger's idea is not to prevent trolls from speaking or fake news from being created, but to use AI filtering to decrease the impact that false, hateful, or negative information has on users who see it. Technology does not necessarily completely remove bad actors online, but modifies the traction fake news gets by checking facts and banishing false information to the bottom of the page where it will not spread quite so rapidly.

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58. Rosalie Chan, *Artificial Intelligence Is Going to Destroy Fake News*, INVERSE (Feb. 21, 2017), <https://www.inverse.com/article/27723-artificial-intelligence-will-destroy-fake-news>.

59. *Id.*

60. Simonite, *supra* note 21.

61. Simonite, *supra* note 21; Lim Jeong-yeo, *Weeding Out Fake News with Evolving AI*, Korea Herald (Nov. 10, 2017, 4:26 PM), <http://www.koreaherald.com/view.php?ud=20171110000741>.

62. Chan, *supra* note 58.

63. Rainie et al., *supra* note 38.

64. Adrian Chen, *The Troll Hunters*, MIT TECH. REV. (Dec. 18, 2014), <https://www.technologyreview.com/s/533426/the-troll-hunters>.

65. Rainie et al., *supra* note 38.

B. AI TECHNOLOGY MAY REFLECT THE ATTITUDE OF ITS CREATORS AND COULD LEAD TO TECH COMPANIES CENSORING INFO WITHOUT TRANSPARENCY.

One major drawback to a purely technical AI solution is that it puts the fate of journalism in the hands of Facebook (and other social media or technology companies) who implement AI technology to monitor content. For instance, Google recently launched a code project on their network called Perspective.<sup>66</sup> Perspective is currently being tested by sources like the *New York Times* and the *Economist* to monitor “abusive” and “offensive” comments that might be considered “hate speech” so that media sources can remove unwanted, harmful comments from articles.<sup>67</sup> Perspective uses machine learning to detect insults and online harassment automatically.<sup>68</sup> Essentially, all it takes is for a sentence to be entered into the Perspective interface and the AI can “immediately spit out an assessment of the phrase’s ‘toxicity’ more accurately than any keyword blacklist, and faster than any human moderator.”<sup>69</sup> However, this often means that users with political views that fall outside the mainstream find that their post is flagged by the AI technology for being offensive.<sup>70</sup> Critics of Google’s Perspective project criticize the technology for “sanitiz[ing] public discussions based on algorithmic decisions.”<sup>71</sup>

Robert Epstein, a research psychologist at the American Institute for Behavior Research and Technology, penned an opinion piece for *U.S. News & World Report* in June 2016 stating that Google “maintains at least nine different blacklists that impact our lives, generally without input or authority from any outside advisory group, industry association or government agency. Google . . . is currently the biggest bully on the block.”<sup>72</sup> By calling Google a “bully,” the point Epstein makes is that private technology companies that have no expertise in news reporting have become the primary source of journalism to the public.<sup>73</sup> As a result, social networks call all the shots regarding what comments amount to offensive material or what constitutes real and valuable news.

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66. Cheryl Chumley, *Google Launches AI Tool to Flag Online ‘Hate’ Speech*, WORLDNETDAILY (Feb. 23, 2017, 10:08 AM), <http://www.wnd.com/2017/02/google-launches-ai-tool-to-flag-online-hate-speech>.

67. *Id.*

68. Andy Greenberg, *Now Anyone Can Deploy Google’s Troll-Fighting AI*, WIRED (Feb. 23, 2017, 7:00 AM), <https://www.wired.com/2017/02/googles-troll-fighting-ai-now-belongs-world>.

69. *Id.*

70. Chumley, *supra* note 66.

71. Greenberg, *supra* note 68.

72. Chumley, *supra* note 66.

73. A May 2016 Pew Research Center report revealed sixty-two percent of Americans get their news first and foremost from social media. Rainie et al., *supra* note 38.

Google's ability to automatically flag and delete comments using AI technology begets the question: is it appropriate to put the fake news crisis into the hands of billionaire Silicon Valley CEOs? Technology companies laud the benefits of using algorithms as being free from personal bias, but to a certain extent, AI technology reflects the subjective decisions and choices of the engineers who design the tools and software.<sup>74</sup> Further, engineers do not necessarily prioritize journalistic integrity and fair media practices when they create technology that can be used to tackle fake news. As follows, Facebook, Google, and other technology companies now take part in shaping political agenda and news media based on the information its AI algorithms choose to bump up or down one's feed.

Additionally, some argue that using algorithms as a means of deciding what posts appears in a feed amounts to censorship.<sup>75</sup> Certainly, private companies like Google and Facebook have the right to decide what content appears on their site, but now they can make these decisions with little transparency to users and little consideration given to groups whose speech might not align with traditional mainstream media viewpoints, such as the alt-right.<sup>76</sup> AI-approved content might filter out abusive content, but it could also remove diverse content, which leaves one asking what a censorship-prone administration could do with such technology if ever implemented for governmental use.<sup>77</sup>

In a December 2016 interview, Edward Snowden, the controversial leaker who released a number of privileged National Security Agency documents to the public, addressed recent claims that fake news on social media outlets helped sway voters in Donald Trump's favor.<sup>78</sup> Snowden did not reveal whether he agreed with those claims, but expressed concern that technology companies would use fake news as a reason to censor content on their networks.<sup>79</sup> Indeed, tasking social media networks with implementing AI technology that determines what is fake

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74. Woolf, *supra* note 51.

75. Dean Pomerleau, *Time to Challenge 'Fake News' with AI*, MEDIUM (Feb. 1, 2017), [https://medium.com/@deanpomerleau\\_24908/time-to-challenge-fake-news-with-ai-7036a1f22cod](https://medium.com/@deanpomerleau_24908/time-to-challenge-fake-news-with-ai-7036a1f22cod).

76. See Kalev Leetaru, *Fighting Words Not Ideas: Google's New AI-Powered Toxic Speech Filter Is the Right Approach*, FORBES (Feb. 23, 2017, 10:32 AM), <https://www.forbes.com/sites/kalevleetaru/2017/02/23/fighting-words-not-ideas-googles-new-ai-powered-toxic-speech-filter-is-the-right-approach/#41b4d2923462>.

77. David Auerbach, *If Only AI Could Save Us from Ourselves*, MIT TECH. REV. (Dec. 13, 2016), <https://www.technologyreview.com/s/603072/if-only-ai-could-save-us-from-ourselves/>.

78. See Max Kutner, *Edward Snowden: Fight 'Fake News' with Truth, Not Censorship*, NEWSWEEK (Dec. 13, 2016), <http://www.newsweek.com/edward-snowden-jack-dorsey-twitter-periscope-531573>; see also Greenberg, *supra* note 68.

79. Kutner, *supra* note 78.

or what is real is fraught with danger.<sup>80</sup> Any initiative to put a stop to fake news must take pains to prevent sliding down the slippery slope to censorship. Facebook, Google, Twitter, and their fellows must engage in critical thought when deciding what information their AI technology filters out to avoid accusations that the networks are engaging in biased filtering.<sup>81</sup>

Twitter recently came under fire for suspending certain Twitter accounts, most of which were accounts from the alt-right.<sup>82</sup> Although it was a team of real, live human executives at Twitter who made the decision to restrict users rather than computerized fact-checking technology, the same problems and potential for censorship exist should AI technology be utilized to stop fake news. The problem is not that Twitter and other social media companies are seeking to prevent abuse and hate speech and stop the spread of inaccurate information; rather, the problem is that implementing technology that automatically filters out information results in very little transparency and consistency behind the decision-making process that suspends an account, confers a disputed badge on a story, or condemns a story to the bottom of a newsfeed.<sup>83</sup>

### III. LEGAL REMEDIES: REGULATING FAKE NEWS LIKE COMMERCIAL SPEECH

Whether technology companies can stop the spread of fake news remains to be seen as Facebook, Google, Twitter, and other social media giants continue to roll out new prevention methods. A third, non-technical solution to curtail fake news online is to regulate it rather than relying on social media networks to solve the fake news problem. While the First Amendment prohibits Congress from abridging free speech completely, the government is not without recourse as far as regulating commercial speech goes.<sup>84</sup> Commercial speech differs from regular speech protected by the First Amendment because “commercial

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80. Ryan Bourne, *Fake News Is Troubling—but Censorship Is Far Worse*, CATO INST. (Jan. 30, 2017), <https://www.cato.org/publications/commentary/fake-news-troubling-censorship-far-worse>.

81. *Id.*

82. *Ex-Head of Twitter News*, *supra* note 17.

83. *Ex-Head of Twitter News*, *supra* note 17.

84. *See generally* U.S. CONST. amend. I; *Schenck v. United States*, 249 U.S. 47, 48 (1919) (stating that speech is not protected when words are used in circumstances that create a “clear and present danger that they will bring about the substantive evils which Congress has a right to prevent”); *New York v. Ferber*, 458 U.S. 747 (1982) (adding child pornography as another category of speech excluded from First Amendment protection in addition to obscenity, defamation, incitement, and “fighting words”); *FCC v. Pacifica Found.*, 438 U.S. 726 (1977) (allowing the Federal Communication Committee to review the content of completed broadcasts because broadcasts have limited First Amendment protection based on the uniquely pervasive presence that radio and television occupy in the lives of people).

speech is less likely to be confronted by counter or corrective speech . . . .”<sup>85</sup> Early twentieth-century Supreme Court Justice Oliver Wendell Holmes, Jr. introduced an often repeated idea behind the First Amendment—that true speech should compete with falsehoods in the “marketplace of ideas” until the truth eventually wins.<sup>86</sup> However, entertainment stories often attract more attention than news stories, since journalistic standards limit news reporting to the truth.<sup>87</sup> Fake news, on the other hand, can be biased, dishonest, and hyper-sensational to please an audience that would be crestfallen with anything less.<sup>88</sup> Given that fake news is being widely disseminated and believed by many to be true, perhaps some regulation is appropriate.

A. LOWERING THE LEGAL STANDARD MIGHT PROTECT THE MARKET FOR REAL NEWS AND VALUABLE JOURNALISM.

If we take Holmes’ marketplace metaphor seriously, we must also recognize that sometimes markets fail. In fact, Holmes articulated the most often recited example of when the free speech market might fail in *Schenck v. United States*, stating that “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”<sup>89</sup> After *Schenck*, the First Amendment analysis considers whether the speech in question “create[s] a clear and present danger . . . .”<sup>90</sup> In the crowded theater example, the person yelling “fire” is aware there is no fire, but the masses do not have time to contemplate the truth, so panic ensues as people logically scramble for the exit.

Fake news incites similar trouble, even beyond problems of intentional assault in instances like #PizzaGate. As it happens, true news stories are expensive to create; news requires research and reporting, as well as institutional structures including editors and fact checkers to support the writing process.<sup>91</sup> The creative process behind fake news takes but one person with a little imagination and a working computer to create fake content, leaving others scrambling for the truth of the matter.

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85. Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1154 (2012).

86. Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1161–62 (2015).

87. Clarence Page, *Does the First Amendment Protect Fake News?*, CHI. TRIB. (Dec. 6, 2016, 2:30 PM), <http://www.chicagotribune.com/news/opinion/page/ct-pizzagate-fake-news-first-amendment-perspec-1207-20161206-story.html>.

88. *Id.*

89. *Schenck*, 249 U.S. at 52.

90. *Id.*

91. Noah Feldman, *Fake News May Not Be Protected Speech*, BLOOMBERG (Nov. 23, 2016, 10:22 AM), <https://www.bloomberg.com/view/articles/2016-11-23/fake-news-may-not-be-protected-speech>.



While far-fetched, fake news could theoretically stamp out the market for real journalism due to the viral inevitability of certain information.<sup>92</sup>

Social media echo chambers make it easy for online readers of all political stripes to fall victim to confirmation bias, seeking out stories that match personal beliefs and purposefully ignoring news that conflicts with their ideology. Because users seek out like-minded social circles online, it becomes profitable for clickbait websites to brainstorm hoaxes and reap financial benefit from the advertising revenue; it makes sense for hyper-partisan sources to publish rumors, conspiracy theories, and fake stories to sway public opinion and influence American democracy.<sup>93</sup> Given how easy it is to create fake accounts controlled by software, the news industry is swamped with fake news stories.<sup>94</sup> Because there seems to be a never-ending supply of fake content floating around the Web, users get bogged down in differentiating the good from the bad, the true from the faux.<sup>95</sup> In a congested marketplace, one frequently proposed solution to remedy market failure is to regulate the market. Certainly this is what Holmes believed when he proposed his famous First Amendment analysis.

Following the November 2016 election in the United States, the *New York Times* published a feature story titled “Inside a Fake News Sausage Factory: ‘This is All About Income,’” which details how creators of fake news make money through disseminating their content via social media.<sup>96</sup> Google usually pays a few cents each time a reader clicks on an article featured on a fake news story.<sup>97</sup> Some fake news stories have been so successful, that creators have earned thousands of dollars, just for a single article. Cameron Harris, a May 2016 Davidson College graduate, crafted a story about an electrical worker who found a box full of pre-marked Clinton ballots in a warehouse in Ohio.<sup>98</sup> The story, which was completely fabricated and took Harris a mere fifteen minutes to write,

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

93. *Id.*

94. *Id.*

95. Nsikan Akpan, *Everyone Is too Distracted to Stop Sharing Fake News, Study Shows*, PBS (June 26, 2017, 4:06 PM), <https://www.pbs.org/newshour/science/distracted-stop-sharing-fake-news-study-shows>; Filippo Menczer, *Misinformation on Social Media: Can Technology Save Us?*, CONVERSATION (Nov. 27, 2016, 8:24 PM), <https://theconversation.com/misinformation-on-social-media-can-technology-save-us-69264>.

96. Andrew Higgins et al., *Inside a Fake News Sausage Factory ‘This Is All About Income’*, N.Y. TIMES (Nov. 25, 2016), <https://www.nytimes.com/2016/11/25/world/europe/fake-news-donald-trump-hillary-clinton-georgia.html>.

97. *Id.*

98. Scott Shane, *From Headline to Photograph, a Fake News Masterpiece*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/us/fake-news-hillary-clinton-cameron-harris.html>.

earned him \$5,000 within a few days. Harris, who continued to write fake-news stories, estimated that he earned about \$1,000 an hour in web advertising revenue during his brief foray into the fake news industry.<sup>99</sup>

If enterprising individuals like Harris have been able to capitalize from creating fake news and turning it into a money-making venture, then there may be a good argument for lowering the level of scrutiny applied to regulating fake-news sources. Under First Amendment doctrine, speech usually receives the most stringent constitutional protection,<sup>100</sup> but commercial speech is awarded only an intermediate level of scrutiny.<sup>101</sup> One reason courts allow for commercial speech regulation is that the commercial expression's primary purpose is to persuade consumers to buy goods.<sup>102</sup> Although free speech proponents are likely to fiercely oppose lowering the standard, regulating fake news under something resembling the *Central Hudson* test, discussed *infra*, may be appropriate to discourage fake news from parading as reliable journalism. If the courts can be convinced that those who create and disseminate fake news are not actually engaging in political discourse, but rather pursuing a commercial enterprise where fake news is a sellable commodity, then perhaps government regulation could assist in the fight against fake news.

Considering that articles like Harris' bogus ballot box story actually resulted in an unnecessary investigation by the Franklin County Board of Elections into the false fraud claims,<sup>103</sup> why should fake news be given the most stringent levels of protection as it dupes social media users and harms the political process? Indeed, other industrialized countries are pursuing regulation to stop fake news. In April 2017, Germany unveiled a social-media bill to combat the spread of fake news and hate speech online.<sup>104</sup> The bill, which the German parliament passed, compels social media outlets like Facebook and Twitter to remove fake news stories inciting hate or other "criminal" content or risk facing fines up to fifty

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99. *Id.*

100. Regulations on speech, such as political speech and protest, are held to a strict scrutiny standard, but regulations on obscenity may be upheld. See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1775-76 (2004). Likewise, the First Amendment also permits regulations that control incitement and libel. *Id.* at 1771.

101. *Id.* at 1776.

102. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 580 (1980).

103. Shane, *supra* note 98.

104. Anthony Faiola & Stephanie Kirchner, *How Do You Stop Fake News? In Germany, with a Law.*, WASH. POST (Apr. 5, 2017), [https://www.washingtonpost.com/world/europe/how-do-you-stop-fake-news-in-germany-with-a-law/2017/04/05/e6834ad6-1a08-11e7-bcc2-7d1a0973e7b2\\_story.html?utm\\_term=.9e495b2572b5](https://www.washingtonpost.com/world/europe/how-do-you-stop-fake-news-in-germany-with-a-law/2017/04/05/e6834ad6-1a08-11e7-bcc2-7d1a0973e7b2_story.html?utm_term=.9e495b2572b5); Joe Miller, *Germany Votes for 50m Euro Social Media Fines*, BBC NEWS (June 30, 2017), <http://www.bbc.com/news/technology-40444354>.

million euros.<sup>105</sup> The bill's objective is to hold social networks responsible for users who exploit the platforms "to spread hate crime [sic] or illegal false news."<sup>106</sup> Recently, Germany has seen a rise in violence by the far-right, such as arson attacks at refugee centers and assaults on police officers.<sup>107</sup> To limit the effect that alt-parties had on the most recent September 2017 election, Germany took the "boldest step yet" by enacting legislative measures to counter the fake news scourge.<sup>108</sup>

Despite criticism that the German bill amounts to a "sharp limitation of freedom of speech," proponents of the law say it simply requires social media websites to comply with already existing laws that govern hate speech and incitement in Germany.<sup>109</sup> Since the United States, like Germany, has also seen a growing list of incidents involving bigotry and hate crimes in recent months,<sup>110</sup> perhaps they should take heed and also consider whether regulating false information on the Internet could help stamp out hateful lawlessness.

B. REGULATIONS ON FAKE NEWS MAY NOT STAND WHEN PUT TO THE *CENTRAL HUDSON* TEST.

The *Central Hudson* test is used today to determine whether a regulation on commercial speech or advertising violates the First Amendment.<sup>111</sup> In short, the four-part test resembles intermediate scrutiny<sup>112</sup> and asks (1) whether the speech is lawful and non-misleading; (2) whether the asserted governmental interest in regulating the speech is substantial; (3) whether the regulation directly advances the stated governmental interest; and (4) whether the regulation is no more extensive than necessary to achieve that interest.<sup>113</sup>

Under *Central Hudson*, the starting inquiry is whether the speech is misleading. On this first prong, a hypothetical regulation prohibiting fake news from being created and shared on social media would seemingly pass muster since, as the title implies, fake news is fictitious. The

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105. Faiola & Kirchner, *supra* note 104.

106. Faiola & Kirchner, *supra* note 104 (quoting a statement from German Justice Minister Heiko Mass).

107. Faiola & Kirchner, *supra* note 104.

108. Faiola & Kirchner, *supra* note 104.

109. Faiola & Kirchner, *supra* note 104.

110. Holly Yan et al., 'Make America White Again': Hate Speech and Crimes Post-Election, CNN (Dec. 22, 2016, 4:24 PM), <http://www.cnn.com/2016/11/10/us/post-election-hate-crimes-and-fears-trnd/>.

111. See generally *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

112. See Michael Mazur, *Commercial Speech and the First Amendment in the 21st Century—Does the Nike Test Help to Keep Corporations Honest?*, 5 U.C. DAVIS BUS. L.J. 999 (2005).

113. *Cent. Hudson*, 477 U.S. at 566.

remaining three prongs of the *Central Hudson* test pose more difficulty. Certainly, there is merit in the proposition that the government has a substantial reason to regulate misleading fake news since the proliferation has led prominent politicians on both sides of the spectrum to complain that misleading stories are damaging.<sup>114</sup>

Following the October 2017 congressional hearing in which lawmakers questioned Facebook, Google, and Twitter, South Carolina Senator Lindsey Graham alluded to the need for potential regulation of online political information and advertising.<sup>115</sup> As he stated, “[w]hat we need to do is sit down and find ways to bring some of the controls we have on over-the-air broadcast to social media to protect the consumer.”<sup>116</sup> Former President Barack Obama also expressed misgivings about online disinformation, stating in November 2016 that he was “concern[ed] about the general misinformation from all kinds of sources, domestic, foreign, on social media, that make it very difficult for voters to figure out what’s true and what’s not.”<sup>117</sup> If the government could mold this apprehension into legislation based on a meaningful purported interest (such as, a “substantial” interest) and then show that the regulation does, indeed, advance its goals to stop fake news, it is conceivable that the second and third prongs of the *Central Hudson* test could be met. The fourth prong, however, will pose the steepest difficulties.

The way fake news fits into the average consumer’s news diet is messy and unclear. Social media users are privy to both fake and real news stories on a regular basis.<sup>118</sup> Moreover, what constitutes fake news is difficult to define. News sites fall on a spectrum, meaning some sources like the #PizzaGate or the *Denver Guardian* article claiming that the Pope backed Donald Trump are totally inaccurate and made up, while other sources may publish correct information, but distort the headlines or supporting facts. For example, *Drudge Report*, a website purporting to offer news through a conservative lens, is frequently criticized for

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114. Daniel Chaitin, *Reporter: FTC Can Regulate What’s Real News, What’s ‘Fake News’*, WASH. EXAMINER (Jan. 30, 2017, 4:14 PM), <http://www.washingtonexaminer.com/reporter-ftc-can-regulate-whats-real-news-whats-fake-news/article/2613392> (quoting President Trump’s comments about “fake news” outlets); see also Clay Calvert, *Fake News, Free Speech, & the Third-Person Effect: I’m No Fool, but Others Are*, 7 WAKE FOREST L. REV. ONLINE 12 (2017), <http://wakeforestlawreview.com/2017/02/fake-news-free-speech-the-third-person-effect-im-no-fool-but-others-are/>.

115. Kang, *supra* note 8.

116. Kang, *supra* note 8.

117. Gardiner Harris, *As Obama’s Tour Ends, He Says U.S. Involvement Abroad Must Not*, N.Y. TIMES (Nov. 21, 2016), <https://www.nytimes.com/2016/11/21/world/as-obamas-tour-ends-he-says-us-involvement-abroad-must-not.html>.

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

misleading readers with inaccurate headlines about true events.<sup>119</sup> Furthermore, as discussed above, there are intentionally false news stories meant to be satirical from sites like *The Onion* and *Clickhole*.<sup>120</sup> Because social media newsfeeds display both real and fake news, and because there is significant “gray area” regarding what actually constitutes fake news, any regulation prohibiting false stories may also suppress too much legitimate speech for a regulation to meet the final narrowly-tailored prong needed to comply with *Central Hudson*.

C. BEYOND *CENTRAL HUDSON*, FURTHER FIRST AMENDMENT ISSUES  
ARISE IN ATTEMPTING TO REGULATE FAKE NEWS.

Even if fake news can be likened to commercial speech and regulated under *Central Hudson*, the most basic efforts to regulate fake news run contrary to the fundamental notions that the First Amendment seeks to protect, particularly that political expression is valuable and important.<sup>121</sup> In 2012, the U.S. Supreme Court in *United States v. Alvarez* recognized that First Amendment protection extends to deliberate, non-libelous falsehoods.<sup>122</sup> In the aftermath of *Alvarez*, it is unlikely that any court would uphold a regulation against fake news simply because fake news is “demonstrably untrue and may lead astray those who hear the statements and are too lazy or dim-witted to sort out truth from falsehood.”<sup>123</sup> Instead, the Supreme Court made it clear that the Constitution and free speech “confirms the freedom to think for ourselves.”<sup>124</sup>

To punish fake news via a claim other than fraud or defamation would require a “direct causal link” between the speech in question and the harm that resulted.<sup>125</sup> The fact that a local Ohio investigation was launched after readers saw Cameron Harris’ story regarding pre-marked ballots may not be sufficient to show that fake news produces harm. Total, direct causation must be proven. Specifically, more empirical

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119. *Id.* (characterizing Drudge Report as a news site publishing some accurate information beneath “misleading or distorted headlines”); Chelsea Rudman, *Right-Wing Media Falsely Claim Biden Called For “Global Tax”*, MEDIA MATTERS FOR AM. (Mar. 30, 2012, 11:36 PM), <https://www.mediamatters.org/research/2012/03/30/right-wing-media-falsely-claim-biden-called-for/184366> (detailing a 2012 Drudge Report article that claimed then Vice President Joe Biden called for a “global tax” during a campaign stop in Iowa when he was actually referring to the U.S. taxing corporate profits abroad when they move shipping jobs or profits overseas) .

120. Nelson, *supra* note 118, at 5.

121. Calvert, *supra* note 114, at 4.

122. *United States v. Alvarez*, 132 S. Ct. 2537 (2012); *see also* Calvert, *supra* note 114, at 4.

123. Calvert, *supra* note 114, at 4 (quoting Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 2–3 (2008)).

124. Calvert, *supra* note 114, at 4.

125. *See* Calvert, *supra* note 114 (quoting *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799 (2011)).

evidence is needed to show that false news stories on social media produce harmful outcomes that otherwise would have turned out differently but for fake news.<sup>126</sup>

Further, using regulation to suppress fake news begins to resemble the way in which authoritarian governments used the force of law to silence dissenting voices.<sup>127</sup> Setting a precedent that the government can regulate news and media outlets to curb misinformation could easily be manipulated by populist forces who feel threatened by mainstream thought and media, even when those sources are fact-checked and legitimately verified.<sup>128</sup> It is not hard to imagine certain world leaders today aiming regulations at established media rather than sources peddling fake news and “alternative facts.”<sup>129</sup> It would be dangerous to entrust a regulatory body with the ability to make determinations about what is fake or what is real, especially in the current partisan political environment. Tasking the government with deciding the true from the faux when it comes to news on social media seems increasingly paternalistic, if not blatantly unconstitutional and contradictory of democratic self-governance.

#### CONCLUSION

Provided that each solution detailed above has significant drawbacks, one solution is not necessarily preferable over the others. In fact, the best solution to ensure people are presented with real news rather than the fabrications may be to implement all three solutions to some effect. Users should learn to be critical of the information they consume online, so a plan like Facebook’s reporting and flagging system, which still utilizes human oversight when it comes to assessing a source’s veracity, is essential. Is a source fake or merely satire? Is an article truly obscene and hateful to the point that it will incite violence or is it reporting on a sad, unfortunate truth? The answers to these questions require judgment by actual people, which is why a reporting and flagging

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126. See Calvert, *supra* note 114, at 4.

127. Pippa Norris & Ronald Inglehart, *Silencing Dissent—The Impact of Restrictive Media Environments on Regime Support*, HARV. U., 14–17 (2007), <https://www.hks.harvard.edu/fs/pnorris/Acrobat/Silencing%20dissent.pdf>.

128. See Mirren Gidda & Zach Schonfeld, *Donald Trump’s Threat to Press Freedom: Why it Matters*, NEWSWEEK (Nov. 12, 2016, 11:02 AM), <http://www.newsweek.com/2016-election-donald-trump-press-freedom-first-amendment-520389> (explaining the problems with an elected official using the power of his or her office to limit journalistic freedom and integrity).

129. “Alternative facts” is a phrase used by Kellyanne Conway, senior advisor to President Trump, during a *Meet the Press* interview on January 22, 2017 to defend then-Press Secretary Sean Spicer’s false statement regarding the number of people in attendance at President Trump’s inauguration speech. Eric Bradner, *Conway: Trump White House Offered ‘Alternative Facts’ on Crowd Size*, CNN (Jan. 23, 2017, 12:38 PM), <http://www.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts/index.html>.

process that relies on users to first report stories they see and moderators to fish out the facts before stories are deemed erroneous is still valuable despite people's inability to distinguish fake news from real stories.

However, because even college-educated people do not necessarily have the aptitude to distinguish fake news from real news, exploring AI technology and its use on social media is a vital step toward ensuring accuracy and making online news better. Oxford Dictionaries appointed "post-truth" as 2016's Word of the Year, noting that social media's increasing use as a news source and a growing distrust of facts reported by the media establishment, has embedded the fake news culture into our society.<sup>130</sup> As a result, it may not be entirely wise to trust humans, and only humans, to flag content as fake. Accordingly, social networks should incorporate machine-learning algorithms and AI technology to warn users about untrustworthy stories. Those online users who are knowledgeable about the way false content circulates "take for granted that others don't understand URL structure, domain names or bylines."<sup>131</sup> Thus, implementing technology to serve as the baseline protection mechanism and provide a simple warning that content is potentially fake is a worthwhile action toward educating the uninitiated.<sup>132</sup>

Those who argue that it is the tech giants' power to decide what credible content amounts to censorship, forget about the filters already in place on technology frequently used by people the world over. Arguably, leaving Facebook to filter fake news—whether via a reporting and flagging process or through AI technology—is comparable to the spam filtering on an email account. We value the fact that Gmail's spam filters prevent messages with subject lines like "New Genius Pills—SHOCKING Test Results!!!"<sup>133</sup> from appearing in our inboxes next to messages we want to read. If we allow email service providers to filter our emails, leaving social networks to develop technology as a first course of action to warn people against fake news and prohibit it from appearing alongside reliable journalism should cause few alarm bells.

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130. "Post-Truth" is defined as "relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief." See Katy Steinmetz, *Oxford's Word of the Year for 2016 Is 'Post-Truth'*, TIME (Nov. 15, 2016), <http://time.com/4572592/oxford-word-of-the-year-2016-post-truth/> (quoting *Post-Truth*, OXFORD DICTIONARIES (2016)).

131. Annemarie Dooling, *Algorithms Could Help Social Media Users Spot Fake News*, N.Y. TIMES (Nov. 22, 2016, 3:20 AM), <http://www.nytimes.com/roomfordebate/2016/11/22/how-to-stop-the-spread-of-fake-news/algorithms-could-help-social-media-users-spot-fake-news>.

132. See *id.*

133. This was an actual e-mail sitting in the Author's spam inbox at the time which this Note was written.

The last proposition—allowing the government to impose regulations on the fake news industry—is undoubtedly the most contentious solution proposed. Lowering the standard of scrutiny for fake news regulations would very likely receive a great deal of pushback from free speech advocates, and it is unclear whether regulations on phony media could avoid running afoul of the Constitution even if they were held to an intermediate scrutiny standard. However, it seems wrong to assume that the U.S. government has only two options when it comes to journalism: do nothing or take absolute control. There is a big difference between China's *People's Daily* and *BBC News*. Multiple developed countries boast both freedom of the press and government-funded, government-regulated news outlets.<sup>134</sup> The *Central Hudson* test may not be the perfect fit for regulating fake news, but the idea that both Congress and governments in other countries have historically had some leeway as far as regulating harmful and false information is important to keep in mind. If one believes in having strong institutions from a policy perspective, perhaps the government should have some role in regulating the fake-news problem.

In this “post-truth” society, fake news and the debate surrounding what to do about it serve as a constant reminder that information as it exists in our online echo chambers has become increasingly politicized. Social media networks like Facebook, Google, and Twitter now actually shape political conversation rather than serve as mere conduits that help users explore content. Journalists, software engineers, social media CEOs, legislators and policy makers should work together to emphasize impartiality and accuracy in the media to make sure fake news does not have any undue influence in our country's politics going forward.

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134. Nicholas Lemann, *Solving the Problem of Fake News*, *NEW YORKER* (Nov. 30, 2016), <http://www.newyorker.com/news/news-desk/solving-the-problem-of-fake-news>.