

REGULATORY RESPONSES TO THE MENACE OF FAKE NEWS- PART 1

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Abstract

The rise of social media has caused a rise in the instances of fake news. Fake news is not a novel concept, however, the rate by which it is harming today's society is novel. Fake news possess a great threat to life, limb, the property of individuals, and democratic institutions. This note analyzes what amounts to fake news, issues associated with its definition, its ill effects on today's society, and different categories of misinformation and disinformation. Though several countries have been adopting measures to curtail fake news, however, the sole concern of them has been on to protect democratic legitimacy and has neglected other grave harms it is capable of inflicting to life, limb & property of people. Furthermore, these measures have been severely criticized due to their ancillary effect on the freedom of speech. Thus a twofold discussion has erupted as to what is important, protection for speakers or protection of listeners. This note henceforth further analyzes the two-fold perspective to the regulation of fake news with a reference to the philosophies of John Mill and Immanuel Kant, the standard of scrutiny to be applied to analyze fake news regulations explained with a reference to United States v. Alvarez, and the global developments to regulate fake news.

Introduction

Technological advancement in the 21st century emerged as a blessing for mankind. It not only enabled us to reach the far extent of the outer space but also to reach the deepest points on earth, which one wouldn't have hoped to come true 80 years ago. It also brought the world closer by eliminating the distance between people residing in different parts of it. People with the assistance of social media and other similar platforms, now, can learn, share, and even trade without even being physically present within the countries they want to do so with. This though

has provided the pool of opportunities & information to people of various ethnicities, has exposed them to various unprecedented harms.

The rise of socialmediaplatforms has led to a decline of reliance on traditional media for information. The availability and sharing of information have become so easy to people that the people have grown to trust the information which they have acquired on their own more than the one delivered to them by the traditional media houses. However, what people often ignore is the probability of such information being false and misleading. The socialmedia and various other platforms over the internet work on an algorithm, the algorithm which is designed to deliver news & information which one wants to see and read, prefers, and which aligns with their psychological inclination.

Acquiring such distorted, unchecked, and often false news has made people less informed. As a result of which the people are unable to make well-informed decisions in the public discourse which is having derogatory effects on both people and the governments governing them. Being a victim of fake news, distrust among people towards traditional media houses and newspapers has also been on the rise, due to which the essential local newspapers and media houses have run dry in terms of funds and information and thus has been unable to perform their essential function of keeping a check on the governments, criticize the government, and keep the citizens well informed. Thus to curb and regulate the menace of fake news various countries irrespective of the form of government they practice, have made regulatory changes in their laws to eliminate or minimize misinformation in the marketplace of ideas. However, such laws may have an incidental effect on *free speech*, which needs to be avoided at all costs.

This note is thus divided into three parts; *Part I* discusses what amounts to *fake news*,¹ (Part IA), what is so problematic about fake news (Part IB); *Part II* analyzes the role of fake news in public discourse (Part IIA) and the judgment of the Supreme Court of the United States in United

¹ Fake news in this paper has been used in a general broader sense and includes categories of misinformation and disinformation

States v. Alvarez (Part IIB); *Part III* discusses the philosophical views of Immanuel Kant and John Stuart Mill regarding the regulation of fake news (Part IIIA), various global developments to curb fake news (Part IIIB), provides suggestions and findings (Part IIIC) and lastly end with a conclusion (Part IIID).

What is fake news?

Though there doesn't exist a precise universal definition for *fake news*, fake news can be better understood by an analysis of its different types based on falseness and intentionality.² According to Claire Wardle, the term *fake news* itself is unhelpful,³ as it's not just our sources of news which are at stake but also our entire information ecosystem. The terminology '*fake news*' fails to describe the graveness & complexity of different types of misinformation and disinformation.⁴ Misinformation is information which being false is disseminated by a person without knowledge of it being false.⁵ While on the other hand disinformation is that information which being false is disseminated by a person while having the knowledge of it being false.⁶ On the basis of this, information can be classified into 7 broad categories which are⁷ – (a) satire & parody, (b) false connection, (c) misleading content, (d) false context, (e) imposter content, (f) manipulated content, (g) fabricated content. For a better understanding of why the terminology *fake news* itself is a problem and is difficult to be defined it is essential to analyze these categories of information.

² Claire Wardle, *Fake News. It's Complicated*, FIRST DRAFT NEWS, (Feb. 16, 2017), <https://medium.com/1stdraft/fake-news-its-complicated-d0f773766c79>, see also Sandra Baron and Rebecca Crooto of Fighting Fake News, Workshop Report, Yale Law School, (2017), https://law.yale.edu/sites/default/files/area/center/isp/documents/fighting_fake_news_-_workshop_report.pdf

³ Wardle, *supra* note 2; see also Baron and Crooto of *supra* note 2.

⁴ Id.

⁵ Claire Wardle and Hossein Derakhshan, *Thinking about 'information disorder': formats of misinformation, disinformation, and mal-information*, (Cherilyn Ireton and Julie Posetti eds.), Journalism, 'Fake News' & Disinformation, UNESCO (2018).

https://en.unesco.org/sites/default/files/f._jfund_handbook_module_2.pdf

⁶ See *Id.* at 44.

⁷ See *Id.* at 47.

Satire & Parody refers to an act of presenting humorous false stories as if they are true.⁸ This though however is usually considered as art, also may unintentionally mislead the reader/viewers, who fail to understand the humor of it. An example of this could be *The Khabsristan Times*, a satirical column and site, that was the part of the news site *Pakistan Today*.⁹ *False Connection* refers to instances where the headlines, visuals, or captions of a piece of information do not support the content of it e.g. clickbait headlines. *Misleading Content* includes that piece of work where the information is presented in a selective mannerto mislead people or to frame issues or individuals such as by cropping photos or choosing quotes or statistics in a selective manner.¹⁰As the narrative behind disseminating such information is to frame issues or individuals it is also called *Framing Theory*¹¹. *False Context* comprises of that information which being factually true and correct is disseminated out of context or with false contextual information.¹² It is when they are used out of context when they are branded as false or fake. A classic example of this is the picture of untouched vegan food from a Texas store (2017), being widely shared under a false narrative of it being from Australia, and with a headline ‘*Even with the Corona Virus (sic) panic buying, no one wants to eat Vegan food*’¹³. *Imposter Content* includes content that impersonates news from some other genuine source, that is through impersonation of branding of an established media house. For example, during the Kenyan Elections of 2017, it came to the knowledge of *BBC Africathat* a doctored video was circulating on *WhatsApp* which had its BBC logo and strapline photoshopped in it.¹⁴ A content is termed as *Manipulated Content*when a genuine piece of information is manipulated with an

⁸Suzanne Johnson Varney, *Fake News, Misinformation & Disinformation*, SSU Library Guides, (July. 14, 2020, 11:02 AM), <https://shawneesu.libguides.com/c.php?g=651556&p=4570051>

⁹Khabaristan Today, *Anthropologists make contact with remote, cut off tribe still thanking Raheel Sharif*, Pakistan Today, (Jan. 12, 2017), <https://www.pakistantoday.com.pk/2017/01/11/anthropologists-make-contact-with-remote-cut-off-tribe-still-thanking-raheel-sharif/>

¹⁰J. Scott Brennen et al., *Types, sources, and claims of COVID-19 misinformation*, Reuters Institute for the Study of Journalism, (April. 7, 2020), <https://reutersinstitute.politics.ox.ac.uk/types-sources-and-claims-covid-19-misinformation>

¹¹ Robert M. Entman et al., *Nature, sources, and effects of news framing*. In: K. Wahl-Jorgensen and T. Hanitzsch (Contributor), ed., *Handbook of Journalism studies*. [online] New York: Routledge, pp.196-211. (2009) <https://centreforjournalism.co.uk/sites/default/files/richardpendry/Handbook%20of%20Journalism%20Studies.pdf>; see also Wardle and Derakhshan, *supra* note 5, at 47.

¹² See Wardle and Derakhshan *supra* note 5, at 47; see also Varney *supra* note 8.

¹³ See Wardle and Derakhshan *supra* note 5, at 47; see e.g., <https://perma.cc/SCK9-LAL9>; see also Varney *supra* note 8.

¹⁴ *Kenya election: Fake CNN and BBC news reports circulate*, BBC News, (July. 29, 2017), <https://www.bbc.com/news/world-africa-40762796>

intention to deceive,¹⁵ an example of this could be the case from South Africa where images of HuffPost Editor Ferial Haffajee's images were manipulated and disseminated as he was sitting on the lap of businessman Johan Rupert.¹⁶ The last of these types is *Fabricated Content* which includes utterly, wholly false information. This type of content is rated exceedingly on the falsity scale and includes the content of text format¹⁷ such as a fantasy article published by a fabricated news site e.g. 'saunas and hair dryers preventing COVID-19'¹⁸, and content which is visual¹⁹ in nature such as the circulation of the graphic which depicted that people could vote for Hillary Clinton via SMS.²⁰

Well to know about this categorization of misinformation and disinformation requires a deeper knowledge and interest in the information ecosystem, which generally fewer people have. And thus the larger section of society often generally refers to every piece of misinformation or information that is not accurate as 'fake news'. This hasty generalization of every piece of information which is slightly inaccurate as *fake news* has often lead to politicizing of the phrase and used as a tool by people in authority to escape criticism and undermine the reporting of media houses which runs contrary to their interest.²¹ The reason for such a generalization can be, *firstly* lack of an inclusive definition and *secondly* how the public construes the term in accordance with the existing extensively broad definitions.

¹⁵See Wardle and Derakhshan *supra* note 5, at 48.

¹⁶Ferial Haffajee and Marc Davies, *Ferial Haffajee: The Gupta Fake News Factory And Me*, HUFFPOST, (June. 6, 2017, 04:57), [https://www.huffingtonpost.co.uk/2017/06/05/ferial-haffajee-the-gupta-fake-news-factory-and-me_a_22126282/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAHohE4UuodG0nt7f-x3ItcmNtQGGu3eevJkpjgm3jMDE9CAV6k6Jd6Alp1qIoE0_puq-R8HwOveaEC04XTAkJiNdcU44Mceh99e24ozGHu72u8z_HbCC14dP-4RAp3lly9ru0hrIuVGpqi7BMTgV3g0g3vNKuU0WZPda0TUHMj7q](https://www.huffingtonpost.co.uk/2017/06/05/ferial-haffajee-the-gupta-fake-news-factory-and-me_a_22126282/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAHohE4UuodG0nt7f-x3ItcmNtQGGu3eevJkpjgm3jMDE9CAV6k6Jd6Alp1qIoE0_puq-R8HwOveaEC04XTAkJiNdcU44Mceh99e24ozGHu72u8z_HbCC14dP-4RAp3lly9ru0hrIuVGpqi7BMTgV3g0g3vNKuU0WZPda0TUHMj7q;); *see also* Id.

¹⁷See Wardle and Derakhshan *supra* note 5, at 48.

¹⁸ See e.g., W.G. Dunlop and AFP USA, *Hot air from saunas, hair dryers won't prevent or treat COVID-19*, AFP Fact Check, (Mar. 20, 2020, 03:27 PM), <https://factcheck.afp.com/hot-air-saunas-hair-dryers-wont-prevent-or-treat-covid-19>; *see also* Varney *supra* note 8.

¹⁹See Wardle and Derakhshan *supra* note 5, at 48.

²⁰Fruzina Eordogh, *Pro-Trump Trolls Want You To Vote For Hillary Via Text (You Can't)*, Forbes, (Nov. 3, 2016, 06:45 AM), <https://www.forbes.com/sites/fruzsinaeordogh/2016/11/03/pro-trump-trolls-want-you-to-vote-for-hillary-via-text-you-cant/#6b7f93d4a099>.

²¹Tambini, Damian (2017) *Fake news: public policy responses*. LSE Media Policy Project Series, Tambini, Damian and Goodman, Emma (eds.) (Media Policy Brief 20). The London School of Economics and Political Science, London, UK. (2017); *see also* Wardle and Derakhshan *supra* note 5, at 43.

There doesn't exist a precise universal definition to define fake news, however, a reliance can be placed on the existing definitions of fake news which depicts how a layman might construe the term: Fake news can be defined as news or information which is false, fabricated with no sources or quotes to verify the authenticity of it.²² The Cambridge dictionary defines fake news as '*false stories that appear to be news, spread on the internet or using other media, usually created to influence political views or as a joke*'.²³ While Oxford dictionary defines fake news as '*false reports of events, written and read on websites*'.²⁴ All of the abovementioned definitions define fake news as news which is false, in other words, news which is not true, which is however not true in every case of misinformation or disinformation. Misleading content for instance generally comprises information which though however is true had been selectively put to use. Such a piece of information cannot be labeled as fake or false. Further, the definitions are too broad and fail to disintegrate the different categories of mis/dis-information. For instance, relying on the Oxford definition of fake news can be troublesome as it is too broad and even satire & parody can be brought under its ambit²⁵. The existing definitions are too broad and overlook the various categories of information that exist in the information ecosystem which also is the reason behind the failure in framing a precise definition. A single definition is not easy to adopt as it might have an ancillary effect on the other category or even ignore its recognition. Thus it is better to quit the idea of defining fake news and to get more associated with the categorical terminology of misinformation and disinformation.

What is wrong with Fake News? Why is it problematic?

A free press is crucial to a democracy and its democratic legitimacy,²⁶ and is termed as the true bastion of a democracy, which not only serves as 'a bulwark against tyranny'²⁷ but also

²²*Fake News, " Lies and Propaganda: How to Sort Fact from Fiction*, M Library, (Jun. 24, 2020, 01:51 PM), <https://guides.lib.umich.edu/fakenews>

²³Definition of fake news, Cambridge Advanced Learner's Dictionary & Thesaurus, Cambridge University Press, <https://dictionary.cambridge.org/dictionary/english/fake-news>

²⁴Definition of fake news, Oxford Learner's Dictionaries, Oxford University Press, <https://www.oxfordlearnersdictionaries.com/definition/english/fake-news>

²⁵ Id.

²⁶See C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317, 349 (1998) at 388; *see also* Andrea Butler, *Protecting the Democratic Role of the Press: A Legal Solution to Fake News*, 96 WASH. U. L. REV. 419 (2018).

²⁷See Andrea Butler, Id at 422.

facilitates in upholding the rights of every individual by providing him with a platform for all to consider.²⁸ However, this would be overlooking the other functions which a free press performs such as delivering information to the public,²⁹ keeping a check on the functioning and powers of the government,³⁰ reflecting the values of a society,³¹ and serving as a forum for public comment and criticism.³² However the rising instances of fake news have severely affected the public's ability in trusting the traditional media houses,³³ which ultimately has disabled the press in serving its role in a democracy.³⁴

Before analyzing what are the regulatory responses undertaken to curb *fake news* and whether they have an ancillary effect on free speech, it becomes highly essential to analyze the effects fake news has on the public, information system, and a democratic government. The problem *Fake news* causes can be summarized as follows: it undermines the legitimacy of traditional media, disables the people to form well-informed decisions, improper governance and functioning of the government, and leads to disharmony and chaotic situation in a society.

As James Madison wrote, "Public opinion sets boundaries for functioning of a government and thus is the real sovereign in every free one"³⁵ and since a democratically elected government must be responsive to public opinion,³⁶ it becomes of utmost importance for people to form well-informed opinions regarding public policy. Traditionally it was the news media which assisted

²⁸See Sonja R. West, The "Press," Then & Now, 77 OHIO ST. L.J. 49, 66 (2016) (quoting ROBERT W.T. MARTIN, THE FREE AND OPEN PRESS: THE FOUNDING OF AMERICAN DEMOCRATIC PRESS LIBERTY, 1640–1800, at 3–4 (2001))

²⁹See William T. Coleman, Jr., A Free Press: The Need to Ensure an Unfettered Check on Democratic Government Between Elections, 59 TUL. L. REV. 243 (1984).

³⁰See Vincent Blasi, The Checking Value in First Amendment Theory, 1977 AM. B. FOUND. RES. J. 521, 538; Yochai Benkler, A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate, 46 HARV. C.R.-C.L. L. REV. 311, 357 (2011)

³¹The Commission on Freedom of Press, *A Free and Responsible Press: A General Report on Mass Communication: Newspapers, Radio, Motion Pictures, Magazines and Books*, (Robert D. Leigh ed., 1947).

³²See Butler, *supra* note 26 at 423.

³³Sabrina 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>

³⁴See Baker, *supra* note 26.

³⁵For the National Gazette, [Ca. 19 December] 1791, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-14-02-0145>

³⁶See Robert C. Post, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State*, Yale University Press, 2012.

the public to form well-reasoned opinions, which in turn steered the government action and oversight.³⁷ However, the eruption of social media and fake news has caused sensationalism of traditional media.³⁸ As a result of which global newspaper readership has declined severely,³⁹ and the information disseminated online (including fake news) has increased rapidly.⁴⁰

The fake news has unleashed unprecedented harms to people globally, harms which the earlier philosophers never contemplated. Kant's objection to lies however appears most suitable to the misinformation marketplace.⁴¹ He argued, that fake news acts like a blanket of fog which interferes with the voter's ability to make informed rational decisions about the candidate by obscuring the receiving of real news and information communicated during campaigns.⁴² The falsehood spread regarding elections disrupts the voter's ability to choose a candidate of their interest and may further dampen voting by confusing voters about polling locations, timings for voting, and voter's eligibility.⁴³

Political misinformation is not a new problem, it existed even before the existence of social media, however, the targeted dissemination of fake news to the masses has disrupted the marketplace of ideas in unprecedented and troubling ways.⁴⁴ Furthermore, the vast reach of social media enabled political actors to overwhelm users by their charismatic persona and disrupt their sense of reality by disseminating false stories & political ads rapidly to an unprecedented speed and degree.⁴⁵ The extreme outrageous and shocking nature of false stories as compared to true

³⁷See *id.* at 35.

³⁸See Daniela C. Manzi, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, 87 *Fordham L. Rev.* 2623 (2019).

³⁹See Pradeep Tewari, *Is Print Readers Declining? A Survey of Indian Online Newspaper Readers*, *Journal of Socialomics*, DOI: 10.41 72/2167-0358.1000177, (2016).

⁴⁰See Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 *FIRST AMEND. L. REV.* 200, 201 (2017).

⁴¹See Manzi, *supra* note 38 at 2627.

⁴² See Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 *J. DEMOCRACY* 63, 69 (2017).

⁴³See Staci Lieftring, *Note, First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech After United States v. Alvarez*, 97 *MINN. L. REV.* 1047, 1064 (2013), *see also* Becky Kruse, *The Truth in Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes*, 89 *CALIF. L. REV.* 129, 143, 159 (2001).

⁴⁴See Manzi, *supra* note 38 at 2628.

⁴⁵See Jonathan D. Varat, *Truth, Courage, and Other Human Dispositions: Reflections on Falsehoods and the First Amendment*, 71 *OKLA. L. REV.* 35, 48–49 (2018).

news further makes them more likely to be shared on social media platforms.⁴⁶The practice of reporting news from other sources without verification or giving credit to the original sources, called Parasitic journalism, further amplifies this problem.⁴⁷The study conducted by Massachusetts Institute of Technology found that “false stories diffused ‘farther, faster, deeper and more broadly than the truth in all categories of information’” and that “the truth, in simpler words, failed to rise to the top of the market place of ideas because the marketplace was jam-packed with false content.”⁴⁸

The ease in uploading and sharing content provided by social media means that fake news can spread rapidly and reach anywhere from hundreds to millions of viewers.⁴⁹ Political entities, on social media, use ads or automated generated messages sent by bots to target a specific category of people, that are more vulnerable to deception messages, to vote against their interests.⁵⁰ The Indian and U.S presidential elections clearly demonstrate how these techniques are being used to confuse and deceive on an enormous scale. The 2016 U.S presidential elections witnessed a huge storming of fake news. Facebook witnessed a widespread of false pro-Clinton and false pro-Trump articles during the 2016 election, where false pro-trump articles were shared 30.3 million times and false pro-Clinton articles were shared 7.6 million times.⁵¹ A BuzzFeed analysis of top fake stories found that 20 most shared false stories during the campaigns generated more user engagement as compared to any other top story from major news houses.⁵² These stories asserted absurdly false claims such as ISIS purchased weapons from Clinton, Trump was being endorsed by the pope, and Clinton was barred from holding any federal office.⁵³

⁴⁶See Carol Pauli, “Fake News,” *No News, and the Needs of Local Communities*, 61 HOW. L.J. 563, 575 (2018).

⁴⁷See Philip M. Napoli, *What if More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L.J. 55, 69 (2018).

⁴⁸See Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 863 (2018) (quoting Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCIENCE 1146, 1147 (2018)), see also Manzi, *supra* note 38 at 2628.

⁴⁹ See Varat, *supra* note 45, at 48-49.

⁵⁰See *id.*

⁵¹ See Hasen, *supra* note 40, at 208.

⁵² Craig Silverman, *This Analysis Shows How Viral Election News Stories Outperformed Real News on Facebook*, BUZZFEED NEWS (Nov. 16, 2016, 5:15 PM), <https://www.buzzfeednews.com/article/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook>.

⁵³See *id.*; see also Manzi, *supra* note 38, at 2629.

The situation in India was also hauntingly similar where several false anti-Congress and anti-BJP articles were spread during the 2019 elections. A false message claiming that Sonia Gandhi, the President of the Congress, and the wife of former Prime Minister, was the fourth richest woman in the world was shared 19000 times. Another message which selectively represented facts from the Congress Manifesto that promised government benefits to the Muslim population such as free electricity to mosques and scholarships for Muslim students was represented as that the party only favored Muslims.⁵⁴ In the days following the incident involving suicide bombing which caused the martyrdom of several Indian Army personnel, a false message was widely circulated against the Congress Party leader which claimed that the leader had promised to pay a hefty amount to the attacker's family, to free other terrorists and stone-pelters of the Kashmir valley, if people voted for Congress.⁵⁵ This was an attempt to tarnish the party's image and repainting it as soft against the militants and as anti-national.⁵⁶ However apart from BJP supporters, supporters of other parties including Congress also indulge in these activities, but only the BJP has a social media outreach to such a massive scale.⁵⁷ The BJP has a cyber-army of 400+ WhatsApp groups,⁵⁸ and assigned the task of local campaigning to 1.2 million party workers/volunteers during the 2019 elections.⁵⁹

False stories go viral easily due to the high shock value they come up with, and thus political conspiracy theories have gained momentum in recent years and have caused harm to individuals, businesses, organizations, democratic institutions, and society at large.⁶⁰ The conspiracy theory which claimed that Sandy Hook's shooting was a fake story put forward by anti-gun lobbyists had caused people to harass the victim's family.⁶¹ The "Pizzagate" conspiracy theory postulating

⁵⁴Snigdha Poonam and Samarth Bansal, *Misinformation Is Endangering India's Election*, The Atlantic, (April. 1, 2019) <https://www.theatlantic.com/international/archive/2019/04/india-misinformation-election-fake-news/586123/>

⁵⁵See *id.*

⁵⁶See *id.*

⁵⁷Kevin Ponniah, **WhatsApp: The 'black hole' of fake news in India's election**, BBC NEWS, (April. 5, 2019), <https://www.bbc.com/news/world-asia-india-47797151>

⁵⁸ See Poonam and Bansal, *supra* note 54.

⁵⁹Karishma Mehrotra, *Forward posts: The journey political posts make before they reach millions*, The Indian EXPRESS, (April 5, 2019, 8:13 AM), <https://indianexpress.com/elections/forward-posts-lok-sabha-elections-twitter-facebook-whatsapp-social-media-congress-bjp-5630131/>; see also Poonam and Bansal, *supra* note 54.

⁶⁰See Manzi, *supra* note 38, at 2629.

⁶¹See David S. Han, *Conspiracy Theories and the Marketplace of Facts*, 16 FIRST AMEND. L. REV. 178, 181 (2017).

that the Democratic Party was running a sex-trafficking ring under the garb of pizzeria operations caused the owner to receive death threats and a gun being shot in the restaurant.⁶² The conspiracy theory postulating gangs of child kidnappers and organ harvesters targeting nearby villages of Gujarat-Mumbai highway led to the mob lynching of two sages and their driver by the villagers of Palghar District of India.⁶³ These incidents, however, are not limited to India and America and have surfaced in various countries globally such as China,⁶⁴ Malaysia,⁶⁵ France⁶⁶, Germany,⁶⁷ Italy,⁶⁸ Australia⁶⁹ and many more.

These incidents not only demonstrate the harm caused to institutions and organizations, but also, people's vulnerability to fake news irrespective of its absurdity and their growing distrust in the traditional media. According to Public policy professor Philip Napoli, "Journalism produces value for society as a whole, which often goes unnoticed and unrecorded in the economic transactions between news producers and consumers."⁷⁰ This non-recognition of economic transaction leads to market inefficiency in the form of underproduction of journalism.⁷¹ This

⁶² Cecilia Kang, *Fake News Onslaught Targets Pizzeria as Nest of Child-Trafficking*, N.Y. TIMES (Nov. 21, 2016), <https://www.nytimes.com/2016/11/21/technology/fact-check-this-pizzeria-is-not-a-child-trafficking-site.html>.

⁶³ Gautam S. Mengle, *3 lynched in Palghar after rumours over mistaken identity*, THE HINDU, (APRIL 18, 2020, 01:15 IST), <https://www.thehindu.com/news/cities/mumbai/3-lynched-in-palghar-after-rumours-over-mistaken-identity/article31371237.ece>

⁶⁴ See e.g., Maria Repnikova, *China's Lessons for Fighting Fake News*, Foreign Policy, (Sep. 6, 2018, 1:15 PM), <https://foreignpolicy.com/2018/09/06/chinas-lessons-for-fighting-fake-news/> (Fake news of plastic being found in seaweed causes decline in sales of local business).

⁶⁵ See Moonyati Mohd Yatid, *Truth Tampering through Social Media: Malaysia's Approach in Fighting Disinformation & Misinformation*, Indonesian Journal of Southeast Asian Studies, 2(2), 203. doi:10.22146/ikat.v2i2.40482, <https://pssat.ugm.ac.id/wp-content/uploads/sites/513/2019/03/Paper-4.pdf> (False news claiming infiltration of Bangladeshis to swing the election lead to manhandling of foreign looking voters).

⁶⁶ Jack Guy, *Fake news sparks anti-Roma violence in France*, CNN, (Mar. 27, 2019), <https://edition.cnn.com/2019/03/27/europe/paris-fake-kidnapping-scli-intl/index.html> (Fake news of Roma community kidnapping children leads to attacks on Roma community in France).

⁶⁷ Amol Ranjan, *Germany leads fightback against fake news*, BBC News, (Feb. 16, 2017), <https://www.bbc.com/news/entertainment-arts-38991973> (19 year olds selfie with Angela Merkel falsely circulated as him being a terrorist).

⁶⁸ Reality check team and BBC Monitoring, *Coronavirus: Italy sees rapid spread of fake news*, BBC News, <https://www.bbc.com/news/world-europe-51819624> (False news claiming military on the street to capture 50 escaped prisoners caused unrest among citizens).

⁶⁹ Chris Zappone, *#ArsonEmergency: how 'fake news' created an information crisis about the bushfires*, The Sydney Morning Herald, (Feb. 12, 2020), <https://www.smh.com.au/world/oceania/arsonemergency-how-fake-news-created-an-information-crisis-about-the-bushfires-20200211-p53zma.html> (False news claiming Australia's bushfires were initiated by arsonists).

⁷⁰ See Manzi, *supra* note 38, at 2630.

⁷¹ See Napoli, *supra* note 47, at 89-90.

market inefficiency further threatens an already shrinking market for legitimate news.⁷²The practice of Parasitic journalism further adds on to this inefficiency by drawing viewership and revenue away from the original legitimate sources which incur significant costs in producing authentic news content.⁷³

Due to the frequent encounter with fake news people are more likely to distrust and abandon news.⁷⁴ The dissemination of the same fake news from various sources by Bots tricks the readers into believing that the fake news is more generally accepted than its true counterparts.⁷⁵ This trick has worked out so well that certain false stories even become ‘trending’ on social media.⁷⁶ This technique to flood the user’s timeline with false news can cause them to stop trusting the media completely;⁷⁷ the overload of the information ecosystem with false news hampers people’s ability to make reasoned decisions as they no longer know what to believe and thus avoid both credible and unreliable sources.⁷⁸As explained by Professor Seana Shiffrin, “deliberate misrepresentations weakens the warrants we have to accept each other’s testimonial speech, interfering with objectives of free speech and culture.”⁷⁹ Recurring falsehoods in the media work similarly by undermining viewer’s confidence in the news as a source of factually accurate and authentic information.⁸⁰ The problem is intensified by social media companies providing news to their viewers. These companies work on the algorithm and provide content they believe their viewers will like, which leads to the development of echo chambers where users are exposed to the same type of information repeatedly, without exposure to information from contradicting sources with contradicting views.⁸¹

⁷²See Hasen, *supra* note 40, at 203, *see also* Manzi, *supra* note 38, at 2630.

⁷³See Napoli, *supra* note 47, at 69-70.

⁷⁴See Manzi, *supra* note 38, at 2630.

⁷⁵See Baron and Crootof, *supra* note 2.

⁷⁶See *id.*

⁷⁷See Manzi, *supra* note 38, at 2630.

⁷⁸See Varat, *supra* note 45, at 48-49.

⁷⁹Seana Valentine Shiffrin, *Speech Matters: On Lying, Morality, and the Law*, Princeton; Oxford: Princeton University Press (2014); *see also* Manzi, *supra* note 38, at 2630.

⁸⁰See Manzi, *supra* note 38, at 2630.

⁸¹See Baron and Crootof, *supra* note 2, at 4-5.

The dawn of the internet age has caused a steep decline in the use of traditional media, and distrust in such sources will contribute more to the troubling trend of fake news.⁸² According to Richard Fletcher and Rasmus Nielsen, users were unable to make a distinction between real news, fake news, and other disinformation.⁸³ The major findings of their study conducted on 70000 respondents of 36 counties were, firstly that trust people had on traditional media was substantially low, and secondly trust in social media was even lower.⁸⁴ Another report of a globally conducted study by Nic Newman of Reuters Institute finds that the average trust in news in general remains at 44% globally, and slightly over half, only 51% trust the news of media they rely upon, and only 23% trust the news available on social media.⁸⁵ These statistical data demonstrates the growing distrust in traditional media among people. Distrust in traditional media harms its role as stabilizing democratic machinery.⁸⁶ The media works as a watchdog in a democracy and if people lose their trust in traditional media it'll be unable to keep a check on the government.⁸⁷ Since governmental accountability is mostly driven by a watchful and free press, a decline in its functioning could lead to increased corruption.⁸⁸

A decline in traditional media in favor of social media also causes the flourishing of unchecked false news spread by politicians and their supporters which further demeans democracy and causes a greater level of political corruption.⁸⁹ Earlier it was the traditional media which used to serve as an intermediary between people and government and fostering well informed rational-minded citizens, however they have been replaced by the social media.⁹⁰ But social media, unlike traditional media, neither have a core principle purpose of serving as a true bastion of democracy nor of enabling truth-seeking in the marketplace of ideas.⁹¹

⁸²See Hasen, *supra* note 40, at 202-203

⁸³See Tiago Lima Quintanilha et al., *Fake news and its impact on trust in the news. Using the Portuguese case to establish lines of differentiation*, Communication & Society, doi:10.15581/003.32.3.17-33.

⁸⁴See *id.*

⁸⁵Nic Newman et al, Digital News Report 2018, Reuters Institute for the Study of Journalism, (7th Annual ed. 2018), <http://media.digitalnewsreport.org/wp-content/uploads/2018/06/digital-news-report-2018.pdf>

⁸⁶See Hasen, *supra* note 40, at 201-05.

⁸⁷See Manzi, *supra* note 38 at 2631.

⁸⁸See Hasen, *supra* note 40, at 209-10.

⁸⁹See *id.* at 209.

⁹⁰See Persily, *supra* note 42, at 74.

⁹¹See *id.*

Also, earlier political candidates only had traditional media as means to communicate with constituents, whereas now can reach the public at large directly with social media without any critical intervention, which has its own advantages and disadvantages. Provocateurs now can easily spread inflammatory content without any filtration by traditional media, which earlier have corrected fallacious and exaggerated claims up to a great extent.⁹² Without legitimate media as an intermediary to filter news, the government has an increased ability to utilize false speech for wicked purposes.⁹³ Politicians by using false speech have often been able to demean critics, manipulate public opinion, or divert public attention from investigating government actions.⁹⁴

The rising instances of fake news have supplemented the already increasing distrust among traditional media⁹⁵ and with its widespread and easy dissemination, it is unlikely to reduce without any regulatory responses. Though various countries have enacted laws to curtail fake news, most of them have been criticized by scholars due to their ancillary effect on free speech. Some of them even went to an extent to postulate the importance of fake news vis a vis free speech and thus argued in favour of minimum regulation. The next part, therefore, discusses the importance of fake news in the public discourse, and the scrutiny of speech regulations in the United States v. Alvarez.

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⁹²See Hasen, *supra* note 40, at 212–14

⁹³See generally Helen Norton, *The Government's Manufacture of Doubt*, 16 FIRST AMEND. L. REV. 342 (2017).

⁹⁴See *id.* at 355.

⁹⁵See Newman, *supra* note 85.