General Condition of Freedom of Speech:

“Fake News” and First Amendment Protection in the Internet Age

I. Introduction

Modern life revolves around the immediacy of the Internet. The democratizing effects of the web empower millions to have a wealth of information at their fingertips, connecting users to a global public forum. In this stateless society, “the First Amendment is a local ordinance,” as postulated by American poet and essayist John Barlow. However, controversies over the laxity of online speech inevitably invoke a review of the First Amendment. This paper examines the state of free speech online, tracks the rise of fake news, and ultimately considers the question, is fake news entitled to Freedom of Speech protection? Overall, the communal effort to defend dialogue on the Internet reveals the very necessity of free speech, which represents the highest ideals of American exceptionalism and the central tenet of basic democracy.

II. Regulating free speech online

The first attempt to regulate material on the untamed Internet, the Communications Decency Act (CDA), was passed as part of the Telecommunications Act in 1996. The CDA, which targeted pornographic material, had two main objectives: to regulate online “obscenity” and “indecency,” as well as shift the culpability of web service providers so that they would not be legally liable for content published by third-party users.¹ However, several issues arose that highlighted the difficulty of policing speech online. Unlike other mediums regulated by the Federal Communications Commision, such as television or radio, the Internet blurs the line

between providers and broadcasters. For many web providers, screening minors online and defining whether material was tolerably indecent or “patently offensive”\(^2\) proved cumbersome and inconsistent. Additionally, attempting to transpose protected speech, such as novels or the “seven dirty words,” to the web resulted in its censorship,\(^3\) raising more concerns over the constitutionality of the CDA. In 1997, the Supreme Court unanimously ruled that the anti-indecency provisions of the CDA violated First Amendment rights, concluding that “the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech.”\(^4\) Other legislation followed, such as the Child Pornography Prevention Act (1996), Child Online Protection Act (1998), and Stop Online Piracy Act (2015), but also ultimately lacked such precision, further underscoring the difficulty of discerning protected and unprotected content online.

Since the new millenium, modern cases concerning Freedom of Speech and social media further test the extent of First Amendment protection. The first Supreme Court case concerning this intersection is the 2014 decision, *Elonis v. United States*, in which the petitioner, Anthony Douglas Elonis, argued that his rap lyrics describing violent acts against his ex-wife, local law enforcement, and a kindergarten class, were artistic speech protected by the First Amendment,\(^5\) and that “true threats” require a subjective, not objective, intent to threaten. The Court determined that threats posted via social media platforms such as Facebook may be considered “true threats,” or threatening communication that is not protected by the Constitution, as defined in *United States v. Watts* in 1969, and that even a subjective intent to threaten disqualifies such

\(^4\) ibid.
speech from protection. Other cases, like *Packingham v. North Carolina* (2017) have also contextualized the geographic scope of the web, establishing that restrictions on access to social media sites to prevent virtual contact between parties are overly broad. Overall, regulations on digital speech suffer from unique issues: they attempt to be content-based, but inconsistently discriminate unprotected from protected speech, and they must be geographically-neutral without being ill-defined.

**III. The rise of “fake news”**

For most agents, the Internet is a powerful medium that encourages a larger community to participate in diverse, meaningful dialogue. For others, it has created an uninhibited network through which virulent misinformation may be easily disseminated. According to a 2017 Pew Research Center report, more than sixty-seven percent⁶ of adults get their news via social media. Sites like Facebook, Twitter, and Reddit have become twenty-first century newstands, relying on algorithms to curate feeds of information based on past activity. The ensuing information bubble provides rich soil for independent groups to sow uncorroborated information, coined as “fake news.” Claire Wardle, writing for First Draft News of Harvard’s Kennedy School of Government, outlines seven types of fake news, in increasing potential for public harm:⁷ first, satire or parody with “no intention to cause harm”; two, false connection or unsupported content; misleading content; false content or “genuine content... shared with false contextual information”; imposter content; manipulated content; and “100% false” fabricated content. Fake news outlets have a variety of incentives, ranging from increasing marketing, soliciting user

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purchases, instigating political motives, or simply sowing chaos and discord. However, misinformation is not by any means a new phenomenon. Rather, the Internet has lowered cost barriers to entry, allowing the dissemination of information to reach an unprecedented scale. Unlike times past, in which one-to-many broadcasts attempted to influence swathes of the public, the implicit trust within social networks allow fake news to infiltrate newsfeeds through peer-to-peer connections. Regardless, the effect of fake news has been toxic to consumers’ trust of the media. According to 2017 surveys from the Knight Foundation and Gallup, respondents are unable to discern fake news from real news twenty percent of the time.⁸

To slow the spread of fake news, technology and news companies have dedicated efforts to tracking and listing fake news sources. In the months following the 2016 presidential election, Google reviewed more than 500 sites suspected of distributing false information, rescinding licenses to almost 200.⁹ Web hosts like GoDaddy.com have shut down independent news and commentary sites like Daily Stormer, citing content that could “incite additional violence” and violated their terms of service.¹⁰ Yet such companies are protected by law to provide or deny service to clients, not to police their speech online. Though this demonstrates that communities may oust unpopular agents from the public forum, the limits of free speech itself remain murky. And, though broadcasters may be kicked out after they have been confirmed to publish false content, hundreds of new sites are ready to replace them and continue catering to consumers.

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Thus, the digital dilemma arises: when post-truth politics threaten to undermine established news networks and journalism, should fake news be entitled to free speech protections?

In short, the answer is yes. Despite its corrosive effect on public trust, fake news is protected until, like other controversial forms of speech, it crosses legal boundaries such as defamation, obscenity, fighting words, true threats, and incitement to imminent lawless action. Though the shutting down of sites may quell isolated sources of misinformation, it is a shortsighted fix to the deeper issue of sorting truth from falsehood. Instead of halting the production of fake news, increased censorship may wrongfully implicate innocent third parties or unnecessarily restrain speech, as proven by the CDA, the Child Pornography Prevention Act, Child Online Protection Act, and Stop Online Piracy Act. Worse, sites like Daily Stormer and other false media outlets will simply move to the dark web, making them harder to confront. Again, it is important to remember that the phenomenon of misinformation is not new; rather, the agility of the Internet has exacerbated its spread.

Though tolerating fake news seems counterintuitive, a robust democracy must measure conflicting opinions for the sake of progress. Free speech advocate Jonathan Rauch remarks, "A liberal society stands on the proposition that we should all take seriously the idea that we might be wrong... no one, including ourselves, [is] beyond the reach of criticism."\footnote{Rauch, Jonathan, and George F. Will. Kindly Inquisitors The New Attacks on Free Thought. University of Chicago Press, 2014.} In other words, protecting free speech, no matter how egregious or unpopular, allows the public at large to practice the healthy skepticism that is a prerequisite for rigorous dialogue. Through this cycle, the Internet fundamentally provides a public forum which facilitates the best products of
free speech. Exposure, analysis, and debate continue to be the key processes for social change, even online.

**IV. Combating misinformation: a two-pronged approach**

So, what is the future of Freedom of Speech in the Internet Age? Two solutions come to mind. First, lawmakers must make web providers accountable for monitoring, not censoring, content. The CDA failed to regulate unprotected, obscene expression by vaguely threatening, rather than empowering, web participants to take action. As initiated by technology giants following the 2016 presidential election, web providers and users should actively screen content. Ideally, providers would publically flag content that is uncorroborated, signalling it as compromised information. This approach allows companies to honor contracts without discriminating against broadcasters and also maintain transparency with consumers. Most of all, dialogue will take place in the open - the public square of cyberspace - rather than in siloed echo chambers of the web.

Second, Internet users must equip themselves with sharper tools to make informed decisions about the media they consume. Like learning proper grammar or basic fire safety, honing one’s cyber-skepticism will be a skill to develop into protocol. Instead of further polluting the information ecosystem with thoughtless clicks and reposts, consumers must begin by exercising greater discernment. Their choices supply existing algorithms with new, more accurate information, which will help established journalistic sources surface amidst noisy paupers. On the other hand, a consumer movement to demand rigorous professional standards, such as peer review or clear designation between commentary and news, for self-proclaimed news outlets may also help minimize the influence of fake news disseminators. As a whole, web
users must develop heartier immunity to fake news’ malignant effects - misinformation is here to stay, but its potency can be inhibited.

V. Conclusion

Two centuries since the adoption of the First Amendment, the state of free speech is changing more rapidly than our Founders might have anticipated. "Speech" itself is now almost used figuratively, as digital mediums of communication challenge traditional notions of speech, providers, broadcasters, and consumers. And, in an age of fake news, free speech advocacy has come to center not only on the defense of contested forms of speech, but also on its effect on public trust. As technology advances and the public increasingly intertwine their personal lives with digital mediums, defining free speech online has become tantamount to the continuation of American democracy. Various attempts at regulating content illuminate the difficulties of applying First Amendment rights to cyberspace, and are especially highlighted when the speech in review is unpopular, unsupported, or fabricated. To disrupt the information bubble and spur lasting change, fake news must be considered like other forms of protected speech, eligible for collective conversation. Most importantly, the onus is on providers and consumers to be vigilant against misinformation and to defend dialogue. Free speech is the catalyst for social change, and its efficacy lies in its accessibility: anyone, regardless of background, socioeconomic status, or political affiliation, is able to ascend the cyber soapbox and express their ideas to whomever may listen.
Bibliography


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