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Identifying and Countering Fake News

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Fake news presents a complex regulatory challenge in the increasingly democratized and intermediated on-line information ecosystem. Inaccurate information is readily created by actors with varying goals, rapidly distributed by platforms motivated more by financial incentives than by journalistic norms or the public interest, and eagerly consumed by users who wish to reinforce existing beliefs. Yet even as awareness of the problem grew after the 2016 U.S. presidential election, the meaning of the term "fake news" has become increasingly disputed and diffused. This Article first addresses that definitional challenge, offering a useful taxonomy that classifies species of fake news based on two variables: their creators' motivation and intent to deceive. In particular, it differentiates four key categories of fake news: satire, hoax, propaganda, and trolling. This analytical framework can provide greater rigor to debates over the issue.

Next, the Article identifies key structural problems that make each type of fake news difficult to address, albeit for different reasons. These include the ease with which authors can produce user-generated content online and the financial stakes that platforms have in highlighting and disseminating that material. Authors often have a mixture of motives in creating content, making it less likely that a single solution will be effective. Consumers of fake news have limited incentives to invest in challenging or verifying its content, particularly when the material reinforces their existing beliefs and perspectives. Finally, fake news rarely appears alone: it is frequently mingled with more accurate stories, such that it becomes harder to categorically reject a source as irredeemably flawed.

Then, the Article classifies existing and proposed interventions based upon the four regulatory modalities catalogued by Larry Lessig: law, architecture (code), social norms, and markets. It assesses the potential and shortcomings of extant solutions.

Finally—and perhaps most importantly—the Article offers a set of model interventions, classified under the four regulatory modalities, that can reduce the harmful effects of fake news while protecting interests such as free expression, open debate, and cultural creativity. It closes by assessing these proposed interventions based upon data from the 2020 election cycle.

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INTRODUCTION

The concept of fake news exploded onto the American political, legal, and social landscape during the 2016 presidential campaign. Since then, the term has become ubiquitous, serving as both explanation and epithet. Some political commentators suggested that fake news played a decisive role in the closely contested 2016 presidential election results.[1] President Donald Trump employed "fake news" as a favorite insult in contexts from discussions about unfavorable polling data to the journalistic integrity of *CNN*.[2] By now, the term has been used to refer to so many things that it seems to have completely lost its power to describe; as a result, some media critics have recommended abandoning the moniker entirely.[3] Although the term "fake news" is perhaps confusing, some of the concepts it denotes constitute real threats to meaningful public debate on the internet.

Worse still, fake news appears to be an unrelenting phenomenon within the American social and political spheres. Despite repeated interventions by social media companies—including Facebook, Twitter, and YouTube—fake news seems to be only gaining traction, rather than receding.[4] Propaganda flourished in the wake of the 2020 election as President Trump's supporters stormed the Capitol in an attempt to prevent certification of an election that they claim was rife with fraud and misconduct.[5] And, even as political topics receded, fake news about subjects such as vaccinations against the novel coronavirus increased.[6]

In this Article, we bring clarity to the debate over fake news, explain why so many proposed solutions are unable to strike at the root of the problem, and offer potential pathways for designing more robust interventions. We begin with some important taxonomical work. We argue that fake news is not a monolithic phenomenon; instead, we can usefully categorize different types of fake news along two axes: whether the author intends to deceive readers and whether the story is financially motivated.

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1. Oliva Solon, *Facebook's Failure: Did Fake News and Polarized Politics Get Trump Elected?*, THE GUARDIAN (Nov. 10, 2016, 5:59 PM), https://www.theguardian.com/technology/2016/nov/10/facebook-fake-news-election-conspiracy-theories. *But see* Brendan Nyhan, *Five Myths About Misinformation*, WASH. POST (Nov. 6, 2020), https://www.washingtonpost.com/outlook/five-myths/five-myths-about-misinformation/2020/11/06/b28f2e94-1ec2-11eb-90dd-abd0f7086a91_story.html (disputing claim).

2. Callum Borchers, *'Fake News' Has Now Lost All of Its Meaning*, WASH. POST (Feb. 9, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/09/fake-news-has-now-lost-all-meaning.

3. *See, e.g.*, Joshua Habgood-Coote, *Stop Talking About Fake News!*, 62 INQUIRY 1033 (2018); Alice E. Marwick, *Why Do People Share Fake News? A SocioTechnical Model of Media Effects*, 2 GEO. L. TECH. REV. 474, 475–76 (2018).

4. *See* Emily Stewart, *America's Growing Fake News Problem, in One Chart*, VOX (Dec. 22, 2020, 2:20 PM), https://www.vox.com/policy-and-politics/2020/12/22/22195488/fake-news-social-media-2020.

5. Claire Wardle, *The Information Ecosystem that Led to the Capitol Attack*, BOS. GLOBE (Jan. 8, 2021, 4:48 PM), https://www.bostonglobe.com/2021/01/08/opinion/misinformation-campaign-that-led-capitol-attack.

6. *See* Kaya Yurieff & Oliver Darcy, *Facebook Vowed to Crack Down on Covid-19 Vaccine Misinformation but Misleading Posts Remain Easy to Find*, CNN: BUS. (Feb. 8, 2021, 11:55 PM), https://www.cnn.com/2021/02/07/tech/facebook-instagram-covid-vaccine/index.html.

By organizing fake news according to motivations and intent, we not only gain a more accurate understanding of the phenomenon, but also provide a potential roadmap for delineating successful interventions from non-starters. We argue that many proposed—and recently implemented—solutions are aimed primarily at the financial motivations that drive fake news' production. Importantly, however, not all fake news is motivated by profit. Propaganda, unlike hoaxes and satires, is created to influence political discourse, rather than turn a profit. As a result, merely undercutting the financial incentives of fake news production is unlikely to remedy the problem.

However, the inability of any single solution to address the complex landscape of fake news is not reason for dismay. Solutions can be tailored to address specific types of fake news.[7] For instance, hoaxes respond particularly well to financial incentives, so attacking the economic model for these stories is likely to quickly eliminate their creation and spread. Propaganda, by contrast, poses a difficult problem for any regulation of fake news. In our descriptive section, we address unique features of propaganda—its mixture of fact and fiction—that make crafting solutions difficult. Traditional fact-checking is unlikely to be successful because often conspiracy theories have a kernel of truth that enables their creators to artfully mix fact and fiction in a way that upends traditional modes of debunking information.

Finally, we assess potential hurdles to any successful regulation of fake news. In particular, we array potential solutions along Larry Lessig's famous modalities of regulation: code, norms, markets, and law, and then discuss their potential benefits and shortcomings.[8] The key feature of this analysis is that prioritizing any one of these regulatory tools is likely to be largely unsuccessful and may potentially have negative unintended consequences. This Article singles out propaganda as the most vexing problem and offers potential remedies, including creating new, trusted intermediaries that are not subject to traditional funding structures.

We are not alone in our concern over fakes news. Commentators voice unequivocal alarm over false yet popular information and the outcomes it helps generate. Falsehoods about vaccines,[9] including that they will contain a tracking microchip,[10] have created significant reluctance to be immunized in a range of

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7. *See generally* Robert Post & Miguel Maduro, *Misinformation and Technology: Rights and Regulation Across Borders*, *in* GLOBAL CONSTITUTIONALISM 2020: SEEKING SAFETY, KNOWLEDGE, AND SECURITY IN A TROUBLING ENVIRONMENT (2020), https://ssrn.com/abstract=3732537.

8. LAWRENCE LESSIG, CODE VERSION 2.0, at 123 (2006).

9. *See* LESLEY CHIOU & CATHERINE E. TUCKER, FAKE NEWS AND ADVERTISING ON SOCIAL MEDIA: A STUDY OF THE ANTI-VACCINATION MOVEMENT (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3209929.

10. *See Fact Check: RFID Microchips Will Not be Injected With the COVID-19 Vaccine, Altered Video Features Bill and Melinda Gates and Jack Ma*, REUTERS (Dec. 4, 2020, 7:41 AM), https://www.reuters.com/article/uk-factcheck-vaccine-microchip-gates-ma/fact-check-rfid-microchips-will-not-be-injected-with-the-covid-19-vaccine-altered-video-features-bill-and-melinda-gates-and-jack-ma-idUSKBN28E286.

countries.[11] Harvard's Berkman Klein Center has produced a series of empirical studies of fake news.[12] The first, from 2017, concluded that misinformation played a stronger role for politically conservative media outlets during the 2016 election campaign than it did for politically liberal ones.[13] The second, from 2020, argued that mass media and political elites, such as *Fox News* and President Trump, were far more effective in spreading disinformation than social media platforms were.[14] Some legal scholars, such as Alan Chen, defend fake news on second-order instrumental grounds: fake news, he contends, serves as a valuable signal for social identification and grouping, regardless of truthfulness.[15] Others, such as Robert Chesney and Danielle Keats Citron, see the increasing sophistication of fake news as a threat to national security.[16] Abby K. Wood and Ann M. Ravel propose transparency regulation as a means of combatting fake news in online political ads.[17] And Alice Marwick and Rebecca Lewis examine internet subcultures and the mechanisms by which "attention hacking" allows particular actors to manipulate the media.[18]

   The rest of this Article unfolds as follows. Part I describes several distinct phenomena that have all been placed under the rubric "fake news." We categorize these distinct phenomena and demonstrate how different incentives drive their production. By placing these developments in a matrix, the Article demonstrates both how they are related and how regulatory solutions have cross-cutting effects among them. Part II elucidates critical challenges with any intervention that seeks to reduce the harmful influences of fake news. Part III

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11. *See* Mark John, *Public Trust Crumbles Amid COVID, Fake News – Survey*, REUTERS (Jan. 12, 2021, 11:10 PM), https://www.reuters.com/article/health-coronavirus-global-trust/public-trust-crumbles-amid-covid-fake-news-survey-idUSL8N2JM2V9.

12. *See infra* notes 13–14.

13. ROB FARIS, HAL ROBERTS, BRUCE ETLING, NIKKI BOURASSA, ETHAN ZUCKERMAN, & YOCHAI BENKLER, PARTISANSHIP, PROPAGANDA, AND DISINFORMATION: ONLINE MEDIA AND THE 2016 U.S. PRESIDENTIAL ELECTION (2017), https://cyber.harvard.edu/publications/2017/08/mediacloud. The report mixes the terms "misinformation," "disinformation," and "fake news"; we do not make any semantic distinctions among the terms aside from those in the report itself.

14. YOCHAI BENKLER, CASEY TILTON, BRUCE ETLING, HAL ROBERTS, JUSTIN CLARK, ROB FARIS, JONAS KAISER, & CAROLYN SCHMITT, MAIL-IN VOTER FRAUD: ANATOMY OF A DISINFORMATION CAMPAIGN (2020), https://cyber.harvard.edu/publication/2020/Mail-in-Voter-Fraud-Disinformation-2020.

15. Alan K. Chen, *Free Speech, Rational Deliberation, and Some Truths About Lies*, 62 WM. & MARY L. REV. 357, 358 (2020) (arguing that fake news has intrinsic worth for its role in facilitating social cohesion among individuals with certain beliefs and further, that this promotes listener autonomy which ought to be considered a First Amendment value).

16. Robert Chesney & Danielle Keats Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1754 (2019).

17. Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating 'Fake News' and Other Online Advertising*, 91 S. CAL. L. REV. 1223, 1228 (2018) (proposing regulatory interventions that promote transparency including a requirement that social media companies save both political communications and data about these posts in order to allow third party groups to flag disinformation and facilitate other enforcement actions).

18. ALICE MARWICK & REBECCA LEWIS, DATA SOC'Y & RSCH. INST., MEDIA MANIPULATION AND DISINFORMATION ONLINE 20 (2017).

surveys current regulatory approaches, assessing which methods of constraint are best suited to deal with particular species of fake news. The Article contends that applying single interventions in isolation as a panacea to solve fake news problems is often unwise. In particular, propaganda—the most serious type of fake news threat—requires new insights to combat its effects. Finally, Part IV offers a set of model reforms that can ameliorate fake news problems and evaluates the costs and benefits each one poses.

I. A TYPOLOGY OF FAKE NEWS

This Section provides a new way of organizing different types of fake news according to their distinctive attributes. The two defining characteristics used to identify species of fake news are, first, whether the author intends to deceive readers and, second, whether the motivation for creating or disseminating the fake news is financial or not.

FIGURE 1: CATEGORIES OF FAKE NEWS BY MOTIVATION AND INTENT

| | | **Intent** | |
		Deceptive	Non-deceptive
Financial Motivation	**Pecuniary**	*Hoaxes* (Example: Macedonian teenagers)	*Satire* (Example: *The Onion*)
	Non-pecuniary	*Propaganda* (Example: False information on Secretary Clinton's health) *Trolling* (Example: Jenkem)	*Commentary / Entertainment* (Example: Obvious Twitter parody accounts)

These distinctions are useful for several reasons. Isolating intent to deceive provides a way to distinguish between types of fake news along moral lines: intentional deception is blameworthy. And further, revealing a person or entity's motivations for creating or disseminating fake news can assist in reducing incentives to do so or deterring these activities. Overall, identifying different characteristics of fake news also helps to evaluate which solutions will be most effective at combating the different types of fake news.

Our framework identifies and defines several distinct categories of fake news. First, "satire" is a news story that does not intend to deceive, although it has purposefully false[19] content, and is generally motivated by non-pecuniary interests, although financial benefit may be a secondary goal. A paradigmatic

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19. "False" can refer to either the content of the story being untrue, such as in the humor publication *The Onion*, or the presentation of a true story that satirizes the delivery and performance of traditional news sources, such as the cable television program *The Colbert Report*.

example of satire is the mock online newspaper *The Onion*.[20] *The Onion* presents factually untrue stories as a vehicle for critiques or commentaries about society. For example, one article treats the issues of opioid addiction and prescription drug abuse, under the headline "OxyContin Maker Criticized For New 'It Gets You High' Campaign."[21] Another critiques recent attacks by conservative politicians on alleged censorship of their perspectives with the article, "Conservatives Accuse Nature Of Silencing Right-Wing Voices After Sheldon Adelson Dies At 87."[22] Writers for *The Onion* do not seek to deceive readers into believing the story's content. Scott Dickers, founder of *The Onion*, expressed this point when he said that if anyone is fooled by an *Onion* piece, it is "by accident."[23]

Typically, people who take *Onion* stories at face value have little experience with U.S. media norms. For example, Iranian state media reported as fact an *Onion* article claiming that Iranian Prime Minister Mahmoud Ahmadinejad was more popular with rural U.S. voters than President Barack Obama.[24] When people take an *Onion* article as true, they often miss the underlying critical commentary, which is the raison d'etre for the article.

Second, a "hoax" is a news story with purposefully false content that is intended by the author to deceive readers into believing incorrect information, and that is financially motivated. Examples of hoaxes include the false stories created by Macedonian teenagers about Donald Trump to gain clicks, likes, shares, and profit. In a *Buzzfeed* report, these teenagers admitted "they don't care about Donald Trump"; *Buzzfeed* characterized their fake news operations as merely "responding to straightforward economic incentives."[25] Typically the Eastern European teens who create hoaxes do not have political or cultural motivations that drive the production of their fake news stories.[26] They are simply exploiting the economic structures of the digital media ecosystem to create intentionally deceptive news stories for financial reward.

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20. *See generally* THE ONION, http://www.theonion.com (last visited Mar. 21, 2022).

21. *OxyContin Maker Criticized for New "It Gets You High" Campaign*, THE ONION (July 10, 2017, 10:33 AM), http://www.theonion.com/article/oxycontin-maker-criticized-new-it-gets-you-high-ca-56373.

22. *Conservatives Accuse Nature of Silencing Right-Wing Voices After Sheldon Adelson Dies at 87*, THE ONION (Jan. 12, 2021, 12:00 PM), https://politics.theonion.com/conservatives-accuse-nature-of-silencing-right-wing-voi-1846042894.

23. Ben Hutchinson, *"The Onion" Founder: We Do Satire Not Fake News*, WISN-TV (Feb. 15, 2017, 10:38 PM), http://www.wisn.com/article/the-onion-founder-we-do-satire-not-fake-news/8940879 (implying that writers at *The Onion* do not intend to deceive readers).

24. Kevin Fallon, *Fooled by "The Onion": 9 Most Embarrassing Fails*, THE DAILY BEAST (July 14, 2017, 2:47 AM), http://www.thedailybeast.com/articles/2012/09/29/fooled-by-the-onion-8-most-embarrassing-fails.html.

25. Craig Silverman & Lawrence Alexander, *How Teens in the Balkans Are Duping Trump Supporters with Fake News*, BUZZFEED: WORLD (Nov. 3, 2016, 7:02 PM), https://www.buzzfeed.com/craigsilverman/how-macedonia-became-a-global-hub-for-pro-trump-misinfo.

26. *See* Robyn Caplan, *How Do You Deal With a Problem Like Fake News?*, DATA & SOC'Y: POINTS (Jan. 5, 2017), https://points.datasociety.net/how-do-you-deal-with-a-problem-like-fake-news-80f9987988a9 (labeling sites built by Macedonian teens as a "black and white" case of fake news).

Third, "propaganda" is news or information with purposefully biased or false content intended by its author to deceive the reader and that is motivated by promoting a political cause or point of view, regardless of financial reward.[27] The controversy surrounding Hillary Clinton's health leading up to the 2016 election is a classic example of propaganda.[28] The controversy started when a 2016 YouTube video was artfully edited to piece together the most disparaging images of Hillary Clinton coughing.[29] The story was reposted and amplified by people with a political agenda.[30] And, the controversy reached critical mass when it appeared Hillary Clinton had fainted.[31] The story was not entirely fiction—Hillary Clinton in fact had pneumonia—but the story was deceptively presented to propagate a narrative about Clinton's long-term health and influence political results.

Finally, "trolling" presents news or information with biased or fake content that is intended by its author to deceive the reader,[32] and is motivated by an attempt to get personal humor value (the lulz).[33] One example that captures the spirit of trolling is Jenkem.[34] The term "Jenkem" first appeared in a *New York Times* article that described youth in Africa inhaling bottles of fermented human waste in search of a high.[35] At some point, Jenkem started appearing in internet forums as a punchline or conversation stopper.[36] In the online forum Totse, a user called Pickwick uploaded pictures of himself inhaling fumes from a bottle labeled "Jenkem."[37] The story made its way to 4chan—another online forum— where users posted the images and created a form template to send e-mails to school principals, hoping to trick them into thinking that a Jenkem epidemic was sweeping through their schools. The form letter was written to present the perspective of a concerned parent who wanted to remain anonymous to avoid incriminating her child but also wanted to inform the principal about rampant Jenkem use among the student body. Members of 4chan forwarded the fake letter widely, and the story (or non-story) was eventually picked up by a sheriff's

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27. Gilad Lotan, *Fake News Is Not the Only Problem*, DATA & SOC'Y: POINTS (Nov. 22, 2016), https://points.datasociety.net/fake-news-is-not-the-problem-f00ec8cdfcb#.8r92obruo (offering a similar definition of propaganda as "[b]iased information—misleading in nature, typically used to promote or publicize a particular political cause or point of view").

28. *Id.*

29. *Id.*

30. While one can never be certain about what motivates behavior, it is likely this was in large part politically motivated.

31. Lotan, *supra* note 27.

32. The nature of the deception may vary. Some trolling authors do not intend to deceive readers about the story's content but seek to agitate readers through deception about the author's own authenticity or beliefs.

33. *Lulz*, OXFORD ENGLISH DICTIONARY ONLINE, https://en.oxforddictionaries.com/definition/lulz (defining term as "fun, laughter, or amusement, especially [when] derived at another's expense").

34. WHITNEY PHILLIPS, THIS IS WHY WE CAN'T HAVE NICE THINGS: MAPPING THE RELATIONSHIP BETWEEN ONLINE TROLLING AND POPULAR CULTURE 3–5 (2015).

35. *Id.* at 3.

36. *Id.*

37. *Id.* at 3–4.

department in Florida; later, several local *Fox News* affiliates ran specials on the Jenkem epidemic.[38]

This framework, based on intent to deceive and the source of motivation, can bring greater clarity to discourse about fake news. The next Section addresses instances that cross the boundary lines of this model and responds to the challenges inherent in its methodology.

II. CHALLENGES

This Part explores why some fake news embodies characteristics of several species or exists in a gray or indeterminate area.[39] It also assesses associated potential difficulties in making determinations about where a specific instance of fake news falls in our matrix.

A. MIXED INTENT

Determining intent is a challenge, although hardly one unique to our approach. Understanding the precise intentions that undergird a certain act is difficult and typically requires the use of indirect evidence or proxies. Most theories of intent conceptualize it as a private mental state that motivates a particular action.[40] At present, we cannot directly measure other peoples' thoughts. Legal doctrines recognize this difficulty and often distinguish between subjective and objective intent.[41] Subjective intent is the actual mental state of the person acting, as experienced by that actor.[42] This differs from objective intent, which considers outward or external manifestations of intent and then determines how a reasonable person would understand the actor's intentions based on those manifestations.[43]

This difficulty has not been insurmountable for federal regulations that hinge on determinations about intent. Take, for instance, the Federal Food, Drug, and Cosmetic Act (FDCA), which brings products under the purview of the Food

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38. When the story was picked up by the sheriff's department, Pickwick distanced himself from it and admitted that the images were fake. Without Pickwick, users forwarded the letter—knowing it was false—in an attempt to deceive school administrators and create a fake news story that they found humorous. *Id.* at 4–5.

39. Caplan, *supra* note 26.

40. MODEL PENAL CODE § 2.02(2) (1962).

41. R. George Wright, *Objective and Subjective Tests in the Law*, 16 U.N.H. L. REV. 121, 121 (2017).

42. Instances of subjective intent in the law include tort doctrine, where an act can result, or not result, in liability depending upon the actor's subjective knowledge and goals. *See* DAN DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 29 (2d ed., 2011).

43. Objective intent is a common approach to dealing with intent issues in different areas of law. One of the most well-known examples of deferring to objective intent is issues surrounding contract formation. That is, whether a contract is formed depends on whether an observer would consider the outward actions of a party as indicative of intending to form a binding agreement irrespective of whether a party intends to do so. *See* Lucy v. Zehmer, 84 S.E.2d 516, 521 (Va. 1954) (holding that a contract is still validly formed even if the party to the contract entered into the contract as a joke and did not actually mean to be bound by the agreement); *see also* Keith A. Rowley, *You Asked for It, You Got It…Toy Yoda: Practical Jokes, Prizes, and Contract Law.* 3 NEV. L.J. 526, 528–29 (2003) (discussing the *Zehmer* case at length).

and Drug Administration (FDA) if they are intended to be used as food or drug products.[44] Similarly, a federal statute criminalizes possession of "a hollow piece of glass with a bowl on the end . . . only if it is intended to be used for illicit activities."[45] And the Federal Aviation Authority (FAA) only regulates vehicles that are intended for flight.[46]

Although many federal regulations have successfully managed the problem of identifying intent, this is still a complication for determinations about fake news websites. For instance, Paul Horner—who has been dubbed the impresario of fake news by the *Washington Post*[47]—ran a website that published news stories that were untrue and used a mark that closely resembled that of *CNN*.[48] Horner considered himself a satirist and other commentators claimed that the site was "clearly satire,"[49] yet the close similarity between the real *CNN* and Horner's version often fooled people into viewing the site as disseminating true information.[50]

In our matrix, the distinction between hoax and satire turns on whether the author intended to deceive the audience into thinking that the information is true. Making sound determinations about an author's intent is important because potential solutions should not sweep up satire in an attempt to filter out hoaxes.[51] In crafting solutions, regulators will likely have to decide between assessing the format and content of the article to determine whether it was likely that the author intended to deceive (objective intent) or inquiring into whether the author actually intends to deceive (subjective intent). Both involve challenging subjective decisions, though ones that are also trans-substantive (occurring across multiple areas of law).[52] These determinations about intent are fact-

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44. *See* Christopher Robertson, *When Truth Cannot Be Presumed: The Regulation of Drug Promotion Under an Expanding First Amendment*, 94 B.U. L. Rev. 545, 547 (2014).

45. 21 U.S.C. § 863 (2012) (defining "drug paraphernalia" as "any equipment…which is primarily intended or designed for . . . introducing into the body a controlled substance"); *see also* Robertson, *supra* note 44, at 549. However, some commentators suggest that this regulatory scheme may unconstitutionally burden speech. *See* Jane R. Bambauer, *Snake Oil*, 93 Wash. L. Rev. 73, 100 (2017).

46. 14 C.F.R. § 1.1 (2013); *see* Robertson, *supra* note 44, at 549–50.

47. Caitlin Dewey, *Facebook Fake-News Writer: 'I Think Donald Trump is in the White House Because of Me'*, Wash. Post (Nov. 17, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/11/17/facebook-fake-news-writer-i-think-donald-trump-is-in-the-white-house-because-of-me.

48. *See* cnn.com.de (Paul Horner's website).

49. Sophia McClennen, *All "Fake News" Is Not Equal—But Smart or Dumb It Grows from the Same Root*, Salon (Dec. 11, 2016, 3:00 PM), http://www.salon.com/2016/12/11/all-fake-news-is-not-equal-but-smart-or-dumb-it-all-grows-from-the-same-root.

50. A Buzzfeed article characterized Paul Horner's site as "meant to fool," which could make it more representative of a hoax and not satire under our analysis. *See* Ishmael N. Daro, *How A Prankster Convinced People the Amish Would Win Trump the Election*, Buzzfeed (Oct. 28, 2016, 5:03 PM), https://www.buzzfeed.com/ishmaeldaro/paul-horner-amish-trump-vote-hoax.

51. This assumes that most people find value in satirical news and want it preserved. We think this is largely uncontroversial.

52. *See generally* David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. Rev. 1191 (2013); Stephen Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 Denv. U. L. Rev. 377 (2010).

specific and complicated. Worse still, disclaimers about a site publishing false news stories are often buried in fine print at the bottom of the page, and some fake news stories reveal themselves to be fake in the article itself, which can be a problem in a media culture where many people do not read past the headlines.[53]

The uncritical consumption of fake news divides responsibility among several actors: authors (who intend to deceive), platforms (that are optimized to promote superficial engagement by readers),[54] and, finally, readers themselves (who often do not engage with an article beyond the headlines).[55] Although there is shared responsibility, it is futile to place a significant share of the burden to solve fake news on readers. Readers operate in digital media ecosystems that incentivize low-level engagement with news stories, and digital platforms are crucial tools for the circulation of intentionally deceptive types of fake news.[56] Efforts to educate readers to become more sophisticated consumers of information are laudable but likely will have only marginal effects. Thus, solutions must center on platforms and authors because they will be more responsive to interventions than readers.

B. MIXED MOTIVES

The problem of mixed motives involves two connected difficulties: epistemic and administrative. The epistemic problem of mixed motives is similar to the problem of deciphering intent in that it grows out of the inherent ambiguity of interpreting a person's actions. In short, people act for a variety of reasons; actions driven by different reasons can sometimes produce the same results, and with access only to people's actions (the results), it can be difficult to

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53. *See* Leonid Bershidsky, Opinion, *Fake News is All About False Incentives*, BLOOMBERG (Nov. 16, 2016, 9:26 AM), https://www.bloomberg.com/view/articles/2016-11-16/fake-news-is-all-about-false-incentives (describing how many people do not engage with stories beyond the headline).

54. Brett Frischmann & Evan Selinger, *Why It's Dangerous to Outsource Our Critical Thinking to Computers*, THE GUARDIAN (Dec. 10, 2016, 7:00 AM), https://www.theguardian.com/technology/2016/dec/10/google-facebook-critical-thinking-computers (arguing "[t]he engineered environments of Facebook, Google, and the rest have increasingly discouraged us from engaging in an intellectually meaningful way. We, the masses, aren't stupid or lazy when we believe fake news; we're primed to continue believing what we're led to believe").

55. *How Americans Get Their News*, AM. PRESS INST. (Mar. 17, 2014), https://www.americanpressinstitute.org/publications/reports/survey-research/how-americans-get-news (explaining that most Americans do not invest time reading news stories beyond the headlines); *see also* Chris Cillizza, *Americans Read Headlines. And Not Much Else*, WASH. POST (Mar. 19, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/03/19/americans-read-headlines-and-not-much-else (quoting from the American Press Institute study).

56. Luke Munn, *Angry by Design: Toxic Communication and Technical Architecture*, 7 HUMANS & SOC. SCIS. COMMS. 53, 53 (2020) ("Based on engagement, Facebook's Feed drives views but also privileges incendiary content, setting up a stimulus—response loop that promotes outrage expression.").

comprehend the motivations behind them.[57] This complicates classifications based on motivations for acting.

The debunked Pizzagate story illustrates the problem of mixed motives. Users on 4chan and Reddit promulgated the theory—Pizzagate—that members of the Democratic Party leadership were involved in a child sex trafficking ring operating from a Washington, D.C. pizza restaurant.[58] One conspiracy theorist entered the restaurant armed with an assault rifle and a handgun, firing several rounds during a (fruitless) search for tunnels or hidden rooms that he believed were being used in child trafficking.[59] Assessing the Pizzagate events, Caroline Jack shows that people participate in these sorts of online discussions for a wide variety of reasons: participation in Pizzagate could have been motivated by genuine concern about sex trafficking, play, boredom, politics, or any combination of these.[60]

Mixed motives also create an administrative problem. Because any single instance of fake news may have several motivating factors, interventions that target a single motivating factor—so that only paradigmatic cases of propaganda or a hoax, for example, are within their scope—may be unsuccessful.[61] For example, a person could produce a fake news story that was motivated by both financial considerations and political ones. In January 2021, the voting machine firm Dominion Voting Systems sued Rudy Giuliani, President Trump's personal attorney, for defamation based on his claims that the company's machines were involved in fraud during the 2020 election.[62] Giuliani did so, the firm alleges, not only to help President Trump, but to increase sales of products he endorses, such as gold coins and cigars.[63] If accurate, this depiction is a classic instance of mixed motives: Giuliani had both pecuniary and non-pecuniary (political) reasons for peddling a thoroughly discredited story about election fraud. Even if financial motivations were the primary purpose for creating the story, the story might have been produced without the financial incentives if the political reasons were sufficient on their own. Accordingly, an intervention targeted at pecuniary motives may not suffice. The problem of multiple sufficient motives

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57. *See* Pamela Paresky, Alex Goldenberg, Denver Riggleman, Jacob N. Shapiro, & John Farmer Jr., *How to Respond to the QAnon Threat*, BROOKINGS TECHSTREAM (Jan. 20, 2021), https://www.brookings.edu/techstream/how-to-respond-to-the-qanon-threat.

58. Caroline Jack, *What's Propaganda Got to Do With It*, DATA & SOC'Y: POINTS (Jan. 5, 2017), https://points.datasociety.net/whats-propaganda-got-to-do-with-it-5b88d78c3282#.uj7xfxed0.

59. Marc Fisher, John Woodrow Cox, & Peter Hermann, *Pizzagate: From Rumor, to Hashtag, to Gunfire in D.C.*, WASH. POST (Dec. 6, 2016), https://www.washingtonpost.com/local/pizzagate-from-rumor-to-hashtag-to-gunfire-in-dc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c_story.html.

60. Jack, *supra* note 58.

61. An example of this would be hoaxes that are exclusively based on financial motivations (for example, those of the Macedonian teenagers).

62. *See* Katelyn Polantz, *Election Technology Company Dominion Sues Giuliani for $1.3 Billion Over 'Big Lie' About Election Fraud*, CNN: POLITICS (Jan. 25, 2021, 9:19 PM), https://www.cnn.com/2021/01/25/politics/dominion-lawsuit-giuliani/index.html.

63. *Id.*

shows that although regulating motives may be a tempting starting point, it is likely an insufficient fix on its own.

C. MIXED INFORMATION (FACT AND FICTION)

The problem of mixed information is that true and false information coexist, often subtly and intermixed, in fake news and on platforms. Consider the propaganda narrative about Hillary Clinton's health during her 2016 presidential campaign.[64] This story mixed fact and fiction in a way that made it hard to fact-check and, by extension, difficult to debunk the claim that Clinton had serious long-term health issues that made her unfit to be president. It was true that Clinton had a health problem: she was battling pneumonia.[65] It was false, however, that she had serious long-term health concerns that affected her fitness for the presidency.[66] In particular, propaganda mixes fact and fiction to create narratives that have staying power because some of the narrative elements are true, yet the story is presented in a way that is misleading and not true.

Another location for mixing fact and fiction is on platforms themselves, which may have propaganda interwoven with one-sided news reports. A single resource may display or blend truth and lies side-by-side. One example of this phenomenon is the website *Breitbart*, which, according to Ethan Zuckerman, "mix[es] propaganda and conspiracy theories with highly partisan news."[67] *Breitbart* is not alone in this strategy as other similar platforms convincingly combine propaganda with partisan (yet largely true) news stories. Mixed information on platforms makes it difficult to discern which stories are partisan interpretations of actual events and which narratives have moved beyond reflecting actual events to promote false and misleading accounts.

All of these factors complicate classification of and interventions for fake news. The next Part uses a four-part taxonomy to classify proffered solutions to the problem.

III. SOLUTIONS

This Part identifies four ways to shape conduct. It assesses which existing proposals, if any, are good choices for stemming fake news. This Part adopts Larry Lessig's famous formulation of the four modalities that constrain

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64. *See* Tom Kludt, *Trump Targets Clinton's Health in New Ad*, CNN: POLITICS (Oct. 11, 2016, 2:10 PM), https://www.cnn.com/2016/10/11/politics/donald-trump-ad-hillary-clinton-health/index.html.

65. *See* Jonathan Martin & Amy Chozick, *Hillary Clinton's Doctor Says Pneumonia Led to Abrupt Exit From 9/11 Event*, N.Y. TIMES (Sept. 11, 2016), https://www.nytimes.com/2016/09/12/us/politics/hillary-clinton-campaign-pneumonia.html.

66. *See* Tara Golshan, *How Hillary Clinton's Health Passed from an Online Conspiracy Theory to a Mainstream Debate*, VOX (Sept. 13, 2016, 8:13 AM), https://www.vox.com/2016/9/12/12888498/hillary-clinton-health-conspiracy.

67. Ethan Zuckerman, *The Case for a Taxpayer-Supported Version of Facebook*, THE ATLANTIC: TECH. (May 7, 2017), https://www.theatlantic.com/technology/archive/2017/05/the-case-for-a-taxpayer-supported-version-of-facebook/524037.

behavior: law (state-sponsored sanctions), markets (price mechanisms), architecture (such as code), and norms (community standards).[68] For example, one category of fake news—hoaxes—responds particularly well to market-based constraints. However, as recent research has suggested, and the political climate of the past four years indicates, this species of fake news may have minimal impact on the media ecosystem relative to other species; it is significantly less influential than propaganda.[69] In sketching the different modes of constraining behavior, we assess recent attempts to leverage these techniques to stem the tide of fake news. We highlight why propaganda—arguably the biggest problem emanating from fake news—seems to elude all of these methods.

A. LAW

Law operates through the threat of sanctions from the state.[70] It is often the first response of policymakers to a given challenge. Legal solutions have practical effect, by punishing and disabling those who violate their commands, and also suasive impact, by articulating conduct which the polity expressly disapproves. In theory, law operates equally for all people bound by it, and can command the entire resources of the state—if necessary—to ensure compliance.

Law, however, is not a perfect mechanism. Some commentators disfavor state solutions because they are monopolistic and mandatory.[71] On this account, legal restrictions are undesirable because they do not leave room to experiment with different mechanisms to solve a problem; however, this criticism is largely true for private solutions by internet platforms as well.[72] With high switching costs due to network effects, Facebook, Google, and other similarly situated platforms can implement private ordering that is vulnerable to similar criticisms about the monopolistic effects of regulation.[73]

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68. Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662–63 (1998); *see also* LESSIG, *supra* note 8.

69. Yochai Benkler, Robert Faris, Hal Roberts, & Ethan Zuckerman, *Study: Breitbart-led Media Ecosystem Altered Broader Media Agenda*, COLUM. JOURNALISM REV. (Mar. 3, 2017), http://www.cjr.org/analysis/breitbart-media-trump-harvard-study.php.

70. *See* Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1985).

71. *See, e.g.*, Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 215–16 (1996) (arguing "Error in legislation is common, and never more so than when the technology is galloping forward. Let us not struggle to match an imperfect legal system to an evolving world that we understand poorly. Let us instead do what is essential to permit the participants in this evolving world to make their own decisions").

72. This reasoning is reflected in the idea that states should be "laboratories for democracy," where solutions to social issues can be vetted and the best ones identified. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (arguing that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country").

73. Barbara Engels, *Data Portability Among Platforms*, 5 INTERNET POL'Y REV. 1, 5 (2016), https://policyreview.info/articles/analysis/data-portability-among-online-platforms (discussing the "lock-in effect" that makes switching costs high when personal data is not portable across platforms). *But see* Stan J.

A more trenchant criticism of a legal approach to fake news is that speech regulations backed by state enforcement are likely to run afoul of the First Amendment.[74] Although there are specific carve-outs for speech that are not subject to First Amendment protection, criminal and civil lawsuits under these causes of action are likely to have only a minor effect on the robust fake news ecosystem.[75] One example of speech that is specifically removed from First Amendment protection is defamation. Defamation—making false statements about another that damage their reputation—is not protected, and, on the surface, seems like it could be effectively applied as a cause of action to remedy fake news.[76] However, this may not be effective in clearing up fake news that references public figures such as politicians or celebrities. For a public figure to succeed with a defamation claim, that person must prove that the writer or publisher acted with actual malice (either knowledge of the falsity of the information or reckless disregard as to falsity), which is exceptionally difficult.[77] Even private figures must establish some fault, even if only negligence, on the part of the defendant in assessing whether information is false.[78]

Beyond the standard speech-based causes of action, a few commentators have suggested new legal tools to combat fake news. *MSNBC*'s chief legal correspondent has proposed that the Federal Trade Commission (FTC) regulate fake news under its statutory authority,[79] which allows the FTC to police "unfair or deceptive acts or practices in or affecting commerce."[80] For the FTC to gain a solid basis for regulation, it would have to make the difficult argument that fake news is a commercial product even though people are often not paying to read it.[81] David Vladeck, a former director of the FTC's Bureau of Consumer Protection, says that it is unlikely that the FTC could make compelling

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Liebowitz & Stephen E. Margolis, *Are Network Externalities A New Source of Market Failure?*, 17 RSCH. L. & ECON. 1, 12 (1995).

74. *See, e.g.*, Derek E. Bambauer, *What Does the Day After Section 230 Reform Look Like?*, BROOKINGS TECHSTREAM (Jan. 22, 2021), https://www.brookings.edu/techstream/what-does-the-day-after-section-230-reform-look-like (noting that First Amendment constrains Congress' ability to regulate how platforms manage content).

75. *See* U.S. v. Stevens, 559 U.S. 460, 468–69 (2014) (listing categories of speech that can be regulated without triggering First Amendment scrutiny).

76. All Things Considered, *What Legal Recourse Do Victims of Fake News Stories Have?*, NPR, at 01:04 (Dec. 7, 2016), http://www.npr.org/2016/12/07/504723649/what-legal-recourse-do-victims-of-fake-news-stories-have.

77. N.Y. Times v. Sullivan*, 376 U.S. 254, 279–80 (1964).

78. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (holding "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual").

79. Callum Borchers, *How the Federal Trade Commission Could (Maybe) Crack Down on Fake News*, WASH. POST (Jan. 30, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/30/how-the-federal-trade-commission-could-maybe-crack-down-on-fake-news/?utm_term=.ce40f260d732.

80. 15 U.S.C § 45(a)(1).

81. Borchers, *supra* note 79.

arguments about the commercial nature of fake news, even in paradigmatic cases like the hoaxes perpetuated by Macedonian teenagers for financial gain.[82]

A second solution, offered by Professor Noah Feldman, attempts to build on the defamation exception to First Amendment protection.[83] Under this scheme, Congress would create a private right to delist libelous statements from the internet.[84] To protect people from abusing this removal power, the regime would require that parties adjudicate whether the statements were false and defamatory and then have the court direct a removal order to search engines or other internet platforms.[85]

There are reasons to think that this solution may unduly threaten speech that deserves protection. First, as Feldman notes, this would require changing existing laws that insulate internet publishers from liability arising from hosting the speech of others.[86] The strongest statutory shield from liability for internet intermediaries is Section 230 of the Communications Decency Act, which insulates publishers and distributors from most civil liability for hosting third-party content.[87] Ironically, this is one of the few issues in technology law upon which Democrats and Republicans largely agree, although they have critical differences over how to reform Section 230.[88] Laws that protect intermediaries from liability promote free exchange and robust public debate on the internet.[89] The specter of fake news, although a real threat, is not severe enough to merit stripping protections from internet intermediaries. If anything, removing shields from liability may be a bigger threat to democratic debate than fake news itself.[90]

Second, even if Congress stripped liability from speech aggregators, hosts of third party speech still have First Amendment rights that cannot be abridged based on a "trial like hearing" where they are not involved.[91] Confining judicial

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82. *Id.*

83. Noah Feldman, Opinion, *Closing the Safe Harbor for Libelous Fake News*, BLOOMBERG VIEW (Dec. 16, 2016, 9:24 AM), https://www.bloomberg.com/view/articles/2016-12-16/free-speech-libel-and-the-truth-after-pizzagate.

84. *Id.*

85. *Id.*

86. *Id.*

87. 47 U.S.C. § 230.

88. *See* Jessica Guynn, *Biden and Section 230: New Administration, Same Problems for Facebook, Google and Twitter as Under Trump*, USA TODAY (Jan. 20, 2021), https://www.usatoday.com/story/tech/2021/01/20/biden-trump-censorship-section-230-google-facebook-scrutiny/4238357001.

89. *See* Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51, 63 (2015).

90. Revenge porn—and some varieties of cyber harassment—are cases where the threat may be severe enough to consider imposing liability on parties that are hosts of third-party content. Even then, liability should be framed as narrowly as possible and not, for example, extend to Google for listing links to revenge porn websites. *See* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 347 (2014). *But see* Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2055 (2014).

91. Under the prevailing view, search results are protected by the First Amendment. *See* Eugene Volokh & Donald M. Falk, *First Amendment Protection for Search Engine Results—A White Paper Commissioned by Google* (UCLA Sch. of L., Research Paper No. 12-22, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2055364; *see also* Jane R. Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 60 (2014); Derek E. Bambauer, *Copyright = Speech*, 65 EMORY L.J. 199, 201 (2015). *But see* Tim Wu, *Machine Speech*, 161 U. PA. L.

proceedings to the allegedly defamed party and the original speaker improperly curtails the First Amendment rights of content hosts, who—like publishers of traditional media—are entitled to seek to vindicate their rights before having a court direct removal orders at their platform.[92]

To sum up, legal solutions are likely to be over-inclusive and threaten flourishing, robust public debate on the internet to a greater degree than fake news imperils it. Even if legal solutions seem like an effective tool to combat fake news, administering new legal remedies will be difficult given the strength of constitutionally guaranteed speech protections. Finally, propaganda relies on mixing truth and falsehood to promote a narrative; it is unlikely that legal solutions, which rely on the ability to prove statements are untrue, will be effective to restrain the production and dissemination of propaganda.

B. MARKETS

Markets regulate through changes in price that, in turn, determine which activities and goals people pursue. Market-based solutions can occur naturally as the result of changes in supply or demand, or they can be intentionally created when governments intervene in markets to promote or discourage certain economic activity through subsidies or taxes.[93] The underlying logic (or driving mechanism) of regulation through markets is that people respond to financial incentives.

In the wake of the 2016 U.S. presidential election, Google announced that it would ban websites that publish fake news articles from using its advertising platform.[94] Google's decision involved AdSense, which allows websites to profit from third-party ads hosted on their sites.[95] Google's decision to restrict access to AdSense undercut the funding model that many fake news sites

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REV. 1495, 1496–98 (2013); Oren Bracha & Frank Pasquale, *Federal Search Commission - Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1152 (2008); James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868, 912 (2014); Heather M. Whitney & Mark Robert Simpson, *Search Engines, Free Speech Coverage, and the Limits of Analogical Reasoning*, *in* FORTHCOMING FREE SPEECH IN THE DIGITAL AGE, 1, 14 (Susan J. Brison & Kath Gelber, eds., 2017) (arguing that not all search engine results should be constitutionally protected).

92. *See* Brief of Amici Curiae First Amend. and Internet Law Scholars in Support of Appellant, Yelp, Inc., at 34, Hassell v. Bird, 247 Cal. App. 4th 1336 (Cal. 2017) (No. S235968), http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?filename=3&article=2463&context=historical&type=additional (claiming that the Court abridged Yelp's First Amendment Rights by ordering it to remove content without first providing Yelp an opportunity to vindicate its rights in court).

93. It is worth noting that government intervention in markets through subsidies and, especially, taxation has some relevant characteristics of legal regulation, including the threat of sanctions for unpaid taxes. *See* U.S. v. Am. Library Ass'n, 539 U.S. 194, 199 (2003) (upholding a statute that required libraries receiving federal discounts for internet access to install adult content filters on computers).

94. Nick Wingfield, Mike Issac, & Katie Benner, *Google and Facebook Take Aim at Fake News Sites*, N.Y. TIMES (Nov. 14, 2016), https://www.nytimes.com/2016/11/15/technology/google-will-ban-websites-that-host-fake-news-from-using-its-ad-service.html.

95. *Id.*

leverage to make a profit.[96] By removing some financial incentives for fake news, Google sought to decrease the number of fake news sites.[97]

Google's decision to restrict the use of AdSense to exclude sites it deems fake news—as an instance of regulation through markets—is likely to be both over-inclusive and under-inclusive. First, as discussed in the section on mixed intent, determinations at the edges between hoaxes and satire are complicated.[98] Many commentators disagree about where satire ends and hoaxes begin.[99] For example, faux *CNN* publisher Paul Horner has been accused of perpetuating hoaxes while others see his site as satire.[100] It is likely Google's restriction will sweep too broadly in at least some cases and chill the production of satire, at least in the gray areas between the categories. The worry is that short-term pressure will result in over-inclusive solutions that extend to speech that deserves protection.

At the same time, Google's market-based solution is likely to be under-inclusive because it does not reach the incentives that power trolling and propaganda. In the description of this Article's matrix, we illustrated how propaganda and trolling[101] are strongly motivated by non-financial incentives. This makes market solutions ineffective at combatting these two species. Restrictions on AdSense use will only curtail fake news production that has financial motivations that are sufficient for its production, such as the wholly economically motivated hoaxes by Macedonian teenagers.

In addition, Yonathan Arbel suggests that "truth bounties" (a market solution) are a better approach to fake news than expanding existing defamation laws (a legal solution).[102] Truth bounties, according to Arbel, are rewards offered by journalists and publications to anyone who can prove that a story is false.[103] These rewards are inherently market-based because they create

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96. *Id.*

97. Google's decision to remove the funding apparatus is not wholly a market-based solution. By all accounts, Google's decision was motivated by an attempt to promote good digital citizenship. Google also appears to be responding to norms about how we want our platforms to operate, or at least, Google was responding partly to non-market forces. Like motivations and intentions, solutions can be mixed, which further complicates the discussion.

98. *See infra* Parts II.A–C.

99. Kyle Wiggers, *Researchers Develop AI that Distinguishes Between Satire and Fake News*, VENTUREBEAT (Nov. 5, 2019), https://venturebeat.com/2019/11/05/researchers-develop-ai-that-distinguishes-between-satire-and-fake-news.

100. Robert G. Parkinson, *Fake News? That's a Very Old Story*, WASH. POST. (Nov. 5, 2016), https://www.washingtonpost.com/opinions/fake-news-thats-a-very-old-story/2016/11/25/c8b1f3d4-b330-11e6-8616-52b15787add0_story.html.

101. The question of whether to regulate trolling and propaganda is a separate issue. Trolling may have defenders, but propaganda seems—almost by definition—like something society wants to reduce. *See* John Maxwell Hamilton & Kevin R. Kosar, *Call It What It Is: Propaganda*, POLITICO (Oct. 8, 2020), https://www.politico.com/news/magazine/2020/10/08/government-communication-propaganda-427290.

102. Yonathan Arbel, *Slicing Defamation by Contract*, U. CHI. L. REV. ONLINE (2020), https://lawreviewblog.uchicago.edu/2020/03/30/slicing-defamation-by-contract-by-yonathan-arbel.

103. *Id.*

additional financial incentives to produce truthful reporting. Of course, truth bounties are not required by law; however, Arbel claims that many publications will opt into this system because of the signaling effects of truth bounties.[104] That is, publications that do not offer rewards for falsification are potentially indicating lower quality information and, by extension, may be viewed more skeptically by the general public.[105]

While Arbel's truth bounties are innovative and potentially useful, they do not appear to remedy the full spectrum of fake news. Truth bounties may be effective against hoaxes where the information contained in the story is provably false. However, in order for truth bounties to combat hoaxes, publishers of hoax websites would have to offer rewards for falsification, which seems unlikely. Still, the absence of truth bounties on hoax websites may offer additional information that alerts potentially duped readers that the information may not be credible. Truth bounties offer less purchase to remedy the effects of propaganda. This is largely because propaganda exists in a grey area of truthfulness that makes it exceedingly difficult (if not impossible) to debunk. Propagandists can present factual information in a way that encourages readers to draw unwarranted conclusions, as was the case in many of the stories about Hillary Clinton's health issues.[106] Even though truth bounties cannot resolve all issues of fake news, they represent an imaginative solution that may restore trust in some historically respected publications, as stalwarts like the *New York Times* would offer significant rewards for falsification of their stories.

Taken together, market solutions are only marginally effective. They are better situated to respond to hoaxes where the incentives of production are primarily financial and the content is decisively false. However, tinkering with the financial incentives of information production will offer little protection against trolling and propaganda where the incentives for creating these stories are largely non-monetary.

C. ARCHITECTURE/CODE

Architecture (code, in the internet context) constrains through the physical (or digital) realities of the environment. This includes both built and found features of the world. "That I cannot see through walls is a constraint on my ability to snoop. That I cannot read your mind is a constraint on my ability to know whether you are telling me the truth."[107] Thus, Larry Lessig provides

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104. *Id.*

105. *Id.*

106. Lisa Lerer, *No, Hillary Clinton Is Not Having a Seizure in That Video, Says AP Reporter Who Was There*, CHI. TRIB. (Aug. 12, 2016, 7:40 PM), https://www.chicagotribune.com/opinion/commentary/ct-hillary-clinton-health-20160812-story.html.

107. Lessig, *supra* note 68, at 663.

examples of built (walls) and found (laws of nature) realities that regulate our actions.[108]

Under Lessig's view, the contingency of the digital environment can either promote or obstruct certain values.[109] Because code is always built and never found, it provides its creators with an opportunity to structure an environment that promotes certain values (such as privacy, free expression, etc.).[110] Similarly, because the digital environment is subject to change, corporate or national interests could co-opt its workings to suppress or alter these values.[111] Thus, the technological determination thesis of the internet—that it *must* promote these positive values—is both untrue and dangerous, because it lulls digital communities into believing that the capacity for free expression is an inherent feature of the internet.[112]

The structure of Facebook's Timeline section demonstrates how behavior can be constrained through architecture. With limited space in the section, selection mechanisms that promote certain stories at the expense of others play a significant role in determining what gets read and shared in Facebook's digital environment. Included stories are likely to receive more attention than excluded ones. Facebook determines the "rules of the game" by deciding which stories are selected to appear, and Facebook's use of both human and algorithmic selection mechanisms is contentious.[113] When only humans determined which news stories were appropriate for inclusion, there were concerns about bias. For example, a *Gizmodo* report alleged that Facebook's curators frequently suppressed politically conservative perspectives.[114] In response, the U.S. Senate Commerce Committee launched an inquiry—spearheaded by Republican Senator John Thune—into Facebook's processes, including whether conservative stories were intentionally suppressed or more liberal stories were intentionally added into the section.[115] This concern has hardened into a nearly-ubiquitous belief in bias among Republicans.[116]

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108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. The contingency of free expression on the internet is much more apparent now than it was when Lessig first published CODE in 1998. *See* EVGENY MOROZOV, THE NET DELUSION 263 (1st ed., 2012).

113. Nick Hopkins, *Revealed: Facebook's Internal Rulebook on Sex, Terrorism and Violence*, THE GUARDIAN (May 21, 2017), https://www.theguardian.com/news/2017/may/21/revealed-facebook-internal-rulebook-sex-terrorism-violence.

114. Michael Nunez, *Senate GOP Launches Inquiry into Facebook's News Curation*, GIZMODO (May 10, 2016), http://gizmodo.com/senate-gop-launches-inquiry-into-facebook-s-news-curati-1775767018.

115. *Id.*

116. *See* David French, *The Right's Message to Silicon Valley: 'Free Speech for Me, but Not for Thee'*, TIME (Jan. 16, 2021), https://time.com/5930281/right-wing-silicon-valley-free-speech; Cecilia Kang & David McCabe, *Big Tech Was Their Enemy, Until Partisanship Fractured the Battle Plans*, N.Y. TIMES (Oct. 6, 2020), https://www.nytimes.com/2020/10/06/technology/lawmakers-big-tech-power-bipartisan.html.

Partially in response to these concerns about bias, Facebook altered its selection process to be more automated and require fewer human decisions.[117] However, with the reduced role of human editors, hoaxes on Facebook flourished.[118] A fake news story showing that anchor Megyn Kelly supported Hillary Clinton went viral and caused her to be fired from *Fox News*.[119] Facebook's architecture is optimized for stories that are likely to produce clicks and shares.[120] Fake news is likely to cause users to distribute its content, often by confirming biases, which in turn makes it proliferate through Facebook's news ecosystem.[121]

Distinguishing between satire and more pernicious forms of fake news requires human judgment (at least with the current state of algorithmic capability). Architecture alone is not up to the task of providing useful distinctions between satire and hoaxes, nor is it an effective remedy for propaganda. If anything, the current architecture of social networking platforms favors the spread of fake news instead of limiting it. Again, this is largely a consequence of Facebook and other social networking sites optimizing their algorithms to display stories that users are likely to share.[122] Fake news stories are often popular, in part by being inflammatory or catering to pre-existing viewpoints.[123] When this happens, users are likely to share the fake news story within their networks. Code alone may thus worsen the problem instead of ameliorating it.

D. Norms

Social norms constrain behavior by pressuring individuals to conform to certain standards and practices of conduct.[124] They structure how we communicate with each other and seem to be a useful starting point for informal regulation of fake news. For instance, Seana Shiffrin advocates for a norm of sincerity to govern our speech with others.[125] Interestingly, Shiffrin claims that this "duty of sincerity" arises from the opacity of other people's minds and our moral need to understand each other.[126] This maps nicely to the primary problem

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117. *See* French, *supra* note 116; Kang & McCabe, *supra* note 116; *see also Search FYI: An Update to Trending*, Facebook (Oct. 16, 2016), https://newsroom.fb.com/news/2016/08/search-fyi-an-update-to-trending.

118. *See* Caplan, *supra* note 26.

119. *Id.*

120. *See* Frischmann & Selinger, *supra* note 54.

121. *Id.*

122. *See* Brett Frischmann & Mark Verstraete, *We Need Our Platforms to Put People and Democratic Society Ahead of Cheap Profits,* Recode (June 16, 2017), https://www.recode.net/2017/6/16/15763388/facebook-fake-news-propaganda-federated-social-network-bbc-trus-surveillance-capitalism.

123. *Id.*

124. Robert Ellickson, Order Without Law (1991); *see also* Lisa Bernstein, *Opting Out of the Legal System,* 21 J. Legal Stud. 115 (1992).

125. Seana Shiffrin, Speech Matters: On Lying, Morality, and the Law 184 (2014).

126. *Id.*

that plagues the classification of fake news—mainly, that mental content is private. This analytical similarity makes inculcating norms of sincerity a good starting point for stemming fake news that we find harmful; however, it has complications of its own.

First, norms arise organically and are usually not the result of design and planning.[127] Unlike legal rules, it is hard, and maybe impossible, to summon them out of nothing. It is one thing to say that we ought to have certain norms and quite another to bring the desired norms into practice.[128] This is a practical limitation on implementing norms to govern behavior.

Second, norms are often nebulous and diverse. When it comes to limitations on speech, the conventional wisdom—and what is constitutionally required when the government regulates speech—is to tie the regulation to a concrete harm as closely as possible.[129] The fear is that regulation will intrude on fundamental values and chill free expression. Similarly, because norms are nebulous, a norm of sincerity would likely pick out all of our species of fake news (even *The Onion*, which is the paradigmatic case of satire and thus worthy of protection). Finally, as some commentators have noted, norms may be harder to enforce online.[130]

IV. A WAY FORWARD

Fake news is a complex phenomenon that resists simple or quick solutions. Any intervention must strike a delicate balance by offering a sufficiently robust response to fake news while also not causing more harm than the inaccurate information does. In this Part, we offer potential models for such interventions, while acknowledging that each proposal is likely to solve only a segment of the problem. Rather than endorsing any of these models—or even suggesting that they be adopted as a package—we intend the proposals to generate debate and dialogue about how solutions ought to be structured and about the trade-offs they will produce. We organize these model interventions based on Lessig's four modalities, as we did earlier in categorizing fake news.

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127. Cristina Bicchieri & Ryan Muldoon, *Social Norms*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2011), https://plato.stanford.edu/entries/social-norms.

128. This challenge was central to the difficulties of combating copyright infringement over peer-to-peer networks. *See generally* Yuval Feldman & Janice Nadler, *The Law and Norms of File Sharing*, 43 SAN DIEGO L. REV. 577 (2006).

129. This is the structure of strict scrutiny analysis for speech. *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011) (noting when a law "imposes a restriction on the content of protected speech, it is invalid unless [the government] can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest").

130. *See, e.g.*, Jessa Lingel & danah boyd, *"Keep it Secret, Keep it Safe": Information Poverty, Information Norms, and Stigma,* 64 J. AM. SOC'Y INFO. SCI. & TECH. 981 (2013).

A. LAW

Legal interventions for fake news are limited by law itself in two ways: As a matter of First Amendment doctrine and as a matter of federal statute. Liability for creating or distributing fake news is constrained by the Constitution— political speech is at the heart of First Amendment protection,[131] and the Supreme Court has recently applied more searching scrutiny, as a practical matter, to commercial speech as well.[132] Even openly false political content is heavily protected.[133] Similarly, federal statutes such as Section 230 of the Communications Decency Act[134] and Title II of the Digital Millennium Copyright Act[135] limit liability for publishers and distributors (though not authors) of tortious or copyright-infringing material. Moreover, augmenting liability for fake news is not likely to be effective. Platforms face a daunting task in policing the flood of information posted to their servers each day,[136] and a sizable judgment can be fatal to a site.[137] Most authors are judgment-proof— unable to pay damages in any meaningful amount—and may be difficult to identify or be beyond the reach of U.S. courts. Overall, there is a consensus in the United States that the internet information ecosystem is best served by limiting liability, not increasing it.[138]

However, this consensus does highlight one useful change that the law could make to combat fake news. The immunity conferred under Section 230 was intended to create incentives for intermediaries to police problematic content on their platforms, without fear of triggering liability for performing this gatekeeping function.[139] In recent years, though, a series of decisions have chipped away at Section 230's immunity, creating both risk and uncertainty for

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131. *See* U.S. v. Alvarez, 567 U.S. 709, 711 (2012).

132. *See, e.g.*, Sorrell v. IMS Health, 564 U.S. 552, 572 (2011) (prescription information); Matal v. Tam, 137 S.Ct. 1744, 1767 (2017) (trademarks); Expressions Hair Design v. Schneiderman, 137 S.Ct. 1144, 1150 (2017) (credit card surcharge statements); *see generally* Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. 335 (2017).

133. *See* N.Y. Times v. Sullivan, 376 U.S. 254, 279-80 (1964); *Alvarez*, 567 U.S. at 709.

134. 47 U.S.C. § 230.

135. 17 U.S.C. § 512.

136. *See generally* H. Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56 KAN. L. REV. 369 (2008); David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373 (2010).

137. *See* Sydney Ember, *Gawker, Filing for Bankruptcy After Hulk Hogan Suit, is for Sale*, N.Y. TIMES (June 10, 2016), https://www.nytimes.com/2016/06/11/business/media/gawker-bankruptcy-sale.html.

138. *See generally* Eric Goldman, *Online User Account Termination and 47 U.S.C. § 230(c)(2)*, 2 U.C. IRVINE L. REV. 659 (2012). There may be harms that justify curtailing Section 230's immunity from liability, but fake news does not yet rise to that level. *See generally* Danielle Citron, *Revenge Porn and the Uphill Battle to Pierce Section 230 Immunity (Part II)*, CONCURRING OPINIONS (Jan. 25, 2013), https://concurringopinions.com/archives/2013/01/revenge-porn-and-the-uphill-battle-to-pierce-section-230-immunity-part-ii.html.

139. *See* Zeran v. Am. Online, 129 F.3d 327, 330 (4th Cir. 1997).

platforms.[140] Statutory reform could fill the cracks in Section 230 immunity, reducing both risk and cost for platforms. As cases such as the lawsuits against the websites Ripoff Report[141] and Yelp![142] show, internet firms may face legal risks from hosting both truthful and allegedly false information. Increased immunity would enable platforms to filter information with confidence that their decisions would not open them up to lawsuits and damages.

In particular, Congress could consider three specific textual changes to Section 230. The first would change section 230(e)(3) to read: "No cause of action may be brought, and no liability may be imposed, under any state or local law that is inconsistent with this section. *A court shall dismiss any such cause of action or suit with prejudice when it is filed, or upon motion of any party to such cause of action or suit*" (change italicized).[143] This would authorize—and indeed require—courts to dismiss lawsuits that run counter to Section 230 immunity on their own authority, without requiring defendants to answer a complaint or incur litigation costs. In addition, the change emphasizes that the focus is on laws that are *inconsistent* with Section 230, rather than implicitly encouraging courts to search for ways of making them consistent.

Second, Congress could reduce the ability to bypass Section 230 immunity through exploiting the exception for intellectual property (IP) claims. It is easy for creative plaintiffs' attorneys to re-characterize tort causes of action—which should be pre-empted by Section 230 immunity—as IP ones, which are not pre-empted in most circuits.[144] For example, a defamation claim can be readily re-cast as one for infringement of the plaintiff's right of publicity; in most states, the right of publicity is treated as an IP right that protects against the use of one's name or likeness for commercial or financial gain.[145] Congress could change section 230(e)(2) to only allow suits based on federal IP laws to circumvent immunity by altering the text to read: "Nothing in this section shall be construed to limit or expand any law pertaining to *federal* intellectual property" (change

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140. *See* Eric Goldman, *Ten Worst Section 230 Rulings of 2016 (Plus the Five Best)*, TECH. & MKTG. L. BLOG (Jan. 4, 2017), https://blog.ericgoldman.org/archives/2017/01/ten-worst-section-230-rulings-of-2016-plus-the-five-best.htm; Eric Goldman, *The Regulation of Reputational Information*, *in* THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 293 (Berin Szoka & Adam Marcus eds., 2010).

141. *See* Vision Sec. v. Xcentric Ventures, No. 2:13-cv-00926-CW-BCW (D. Utah Aug. 27, 2015), http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2036&context=historical.

142. *See* Tim Cushing, *California Appeals Court Reaffirms Section 230 Protections in Lawsuit Against Yelp for Third-Party Postings*, TECHDIRT (July 19, 2016), https://www.techdirt.com/articles/20160716/14115134996/california-appeals-court-reaffirms-section-230-protections-lawsuit-against-yelp-third-party-postings.shtml.

143. The italics indicate added text. The change would also delete the first sentence of § 230(e)(3) and add two commas to what is currently the second sentence.

144. *Compare* Perfect 10 v. CCBill, 488 F.3d 1102, 1107 (9th Cir. 2007) (pre-empting state IP claims under Section 230), *with* Universal Commc'ns Sys. v. Lycos, Inc., 478 F.3d 413, 418 (1st Cir. 2007) (permitting state IP claims under Section 230).

145. *See, e.g.*, CAL. CIV. CODE § 3344 (2019).

italicized). While the proposed change does not completely foreclose creative pleading, it reduces its scope by removing claims based in state law.

Finally, Congress could reverse the most pliable and pernicious exception to Section 230 immunity, where courts hold defendants liable for being "responsible, in whole or in part, for the creation or development of information."[146] Courts have used the concept of being partly responsible for the creation or development of information to hold platforms liable for activities such as structuring the entry of user-generated information[147] or even focusing on a particular type of information.[148] Logically, a platform is always partly responsible for the creation or development of information—it provides the forum by which content is generated and disseminated. And, platforms inherently make decisions to prioritize certain content, and to create incentives to spread it across the network, such as where Facebook's algorithms accentuate information that is likely to produce user engagement. If that activity vitiated Section 230 immunity, though, it would wipe out the statute.

A strong version of statutory reform would change section 230(f)(3) to read: "The term 'information content provider' means the person or entity that is *wholly* responsible for the creation or development of information provided through the Internet or any other interactive computer service" (change italicized). If this alteration seems to risk allowing the actual authors or creators of fake news to escape liability by arguing they were not entirely responsible for its generation, Congress could adopt a more limited reform by changing the statutory text to read: "The term 'information content provider' means any person or entity that is *chiefly* responsible for the creation or development of information provided through the Internet or any other interactive computer service" (change italicized). This would assign liability only to the entity most responsible for the generation of the information at issue.

These proposed reforms to Section 230 immunity would harness law to reduce legal liability for internet platforms and to encourage intermediaries to filter fake news without risk of lawsuits or damages.

B. MARKETS

Market-based solutions provide an appealing starting point for managing fake news. One species of fake news—hoaxes—responds particularly well to altering the economic structure that drives their production. Many creators of hoaxes are driven mainly (or solely) by the potential profit that these fake news stories can provide. Because of this, interventions that change the profitability of fake news should result in the production of fewer hoaxes.

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146. 47 U.S.C. § 230(f)(3).

147. *See, e.g.*, Fair Hous. Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157, 1163 (9th Cir. 2008).

148. *See, e.g.*, NPS LLC v. StubHub, 25 Mass. Law Rep. 478, 480 (Mass. Sup. Ct. 2006).

However, only addressing the economic incentives that attend the creation of hoaxes is an incomplete reaction. First, other types of fake news are not as responsive to economic incentives. For instance, propaganda is driven primarily by non-financial motivations, so solutions that only change pecuniary incentive structures are unlikely to alter the production of propaganda. Second, authors are not the only entities motivated by economic factors to produce fake news—platforms are also optimized to spread fake news for financial gain. Addressing the economic incentives of social media platforms requires different market interventions than those directed towards the creators of hoaxes.

Some fake news may be a symptom of surveillance capitalism, the economic model underlying many internet platforms that monetizes collecting data and using it to effectively serve advertisements.[149] In this sense, fake news—and other stories that play to our cognitive biases to harvest clicks—are key to Facebook's business model because this information increases user activity, which, in turn, allows Facebook to more effectively tailor its advertisements. Understanding fake news as a symptom of these deeper structural issues requires that solutions introduce an entirely new incentive structure to digital platforms.

Recognition of the economic incentives that underlie proprietary social networking sites has spurred other attempts to create non-market alternatives. Federated social networks such as diaspora* were introduced as an alternative to Facebook and other proprietary platforms.[150] These social networking arrangements offered the possibility of protecting user privacy because their business model did not require widespread collection of user data.[151] Similarly, social networks that do not rely on collecting user data would potentially limit the spread of hoaxes that generate user engagement and increase platform profitability. However, these networks have yet to achieve success, in terms of user base or funding, that even begins to compete with sites such as Facebook.[152]

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149. Evgeny Morozov, *Moral Panic Over Fake News Hides the Real Enemy - The Digital Giants,* THE GUARDIAN (Jan. 7, 2017), https://www.theguardian.com/commentisfree/2017/jan/08/blaming-fake-news-not-the-answer-democracy-crisis; *see also* Frischmann & Selinger, *Why It's Dangerous to Outsource Our Critical Thinking to Computs*., THE GUARDIAN (Dec. 10, 2016), https://www.theguardian.com/technology/2016/dec/10/google-facebook-critical-thinking-computers.

150*. See Welcome to Diaspora**, DIASPORA* FOUND., https://diasporafoundation.org (last visited Mar. 21, 2022).

151. Christopher Shea, *Is a Social Network that Doesn't Share User Data Possible? We Asked Someone Who's Trying*, VOX (Mar. 27, 2018), https://www.vox.com/conversations/2018/3/27/17168790/ello-facebook-alternative-data-privacy-cambridge-analytica-deletefacebook.

152. *See* Will Oremus, *The Search for the Anti-Facebook*, SLATE (Oct. 28, 2014), http://www.slate.com/articles/technology/future_tense/2014/10/ello_diaspora_and_the_anti_facebook_why_alt ernative_social_networks_can.html; JIM DWYER, MORE AWESOME THAN MONEY: FOUR BOYS AND THEIR HEROIC QUEST TO SAVE YOUR PRIVACY FROM FACEBOOK (2014).

Still, non-market-based social networking alternatives may not limit the creation and spread of propaganda.[153] One way forward would be for a trusted media entity—like the British Broadcasting Company (BBC)—to create a social networking platform that is not financed through advertising and that leverages its media expertise to make judgments about news content.[154] This strategy has at least two benefits.

First, while the non-commercial funding model creates a remedy for hoaxes, it is worth noting that the BBC is not funded by the U.K. government, but is instead funded through private licenses paid by every household that watches any live television.[155] This funding structure insulates the BBC from being pressured into promoting the government's narrative, although it is ultimately dependent upon enforcement by the government. This license model also insulates a potential social networking platform from the economic incentives that force Facebook to select for hoaxes and other fake news in order to increase profitability.

Second, the BBC can provide a remedy to non-financially motivated fake news (specifically propaganda). The BBC has an elite staff of editors and journalists who can make difficult editorial judgments about propaganda. Editors have the requisite expertise to determine if a narrative is baseless and is promulgated simply to manipulate people.[156] Although there are many details to work out with this new model, it provides a remedy to both financially and non-financially motivated fake news.

However, this potential solution has limitations. Like federated social networks, a BBC social networking platform may fail to draw a critical mass of users. Social networks are governed by network effects, which make platforms with a large user base more desirable than platforms with very few users.[157] It may be difficult to entice people to switch away from Facebook when all their

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153. For example, ISIS has used the diaspora* network to spread propaganda after being forced off Twitter. *Islamic State Shifts to New Platforms After Twitter Block*, BBC NEWS (Aug. 21, 2014), http://www.bbc.com/news/world-middle-east-28843350. The network's decentralized architecture has made its organizers unable to respond effectively or to remove the ISIS content. *Islamic State Fighters on Diaspora**, DIASPORA* FOUND.: BLOG (Aug. 20, 2014), https://blog.diasporafoundation.org/4-islamic-state-fighters-on-diaspora.

154. Brett Frischmann, *Understanding the Role of the BBC as a Provider of Public Infrastructure* (Cardozo Legal Studs. Research Paper No. 507, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2897777 (calling for the BBC to consider creating a social media network); *see* Frischmann & Verstraete, *supra* note 122.

155. *See The Licence Fee*, BBC, https://www.bbc.com/aboutthebbc/governance/licencefee (last visited Mar. 21, 2022).

156. Andrew M. Guess, Michael Lerner, Benjamin Lyons, Jacob M. Montgomery, Brendan Nyhan, Jason Reifler & Neelanjan Sircir, *A Digital Media Literacy Intervention Decreases Discernment Between Mainstream and False News in the United States and India*, 117 PROC. NAT. ACAD. SCI. 15536, 15536 (2020) (noting that social media lacks traditional editorial controls).

157. Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects,* 86 CALIF. L. REV. 479, 483–85 (1998) (explaining network effects).

friends and family still use it.[158] Implementation of the license model may require government action to enforce any requirement to purchase licenses. Management of the license fee mechanism could be costly.[159] Finally, imposing the cost of licenses on users may be unpopular, especially when Facebook is free.

C. ARCHITECTURE/CODE

Code-based interventions seem to hold considerable promise for managing fake news.[160] The internet platforms that are the principal distribution mechanisms for this information run on code: it defines what is permitted or forbidden, what is given prominence, and what (if anything) is escalated for review by human editors. While software code requires an initial investment in development and debugging, it is nearly costless to deploy afterwards. Code runs automatically and constantly. More sophisticated algorithms may be capable of a form of learning over time, enabling them to improve their accuracy.[161]

However, code also has drawbacks. At present, even sophisticated programs have trouble parsing human language. Software is challenged by nuance and context—a fake news item and a genuine report are likely to have similar terms, but vastly different meanings.[162] Code will inevitably make mistakes, classifying real news as fake, and vice versa. Inevitably, software programs have bugs, and humans will try to take advantage of them.

Nonetheless, code-based solutions have potential to reduce the effects of fake news. It is unsurprising that a number of internet platforms have begun testing software-based interventions. Twitter has developed a prototype feature for crowd-sourcing the identification of fake news; users would be able to single out tweets with false or misleading information for review or, potentially, de-listing.[163] The company is already attempting to identify characteristics that indicate a Tweet is fake news, including via algorithms and associations with

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158. Some commentators have tried to solve some problems of network effects by introducing various types of data portability. *See* Gabriel Nicholas, *Taking it With You: Platform Barriers to Entry and the Limits of Data Portability*, 27 MICH. TECH. L. REV. 263 (2021).

159. Jim Waterson, *How is the BBC Funded and Could the Licence Fee Be Abolished?*, THE GUARDIAN (Dec. 16, 2019), https://www.theguardian.com/media/2019/dec/16/qa-how-the-bbc-is-funded-by-tv-licences (describing how the UK enforces the license requirement for the BBC).

160. Kyle Wiggers, *Microsoft Claims its AI Framework Spots Fake News Better than State-of-the-Art Vaselines*, VENTUREBEAT (Apr. 7, 2020), https://venturebeat.com/2020/04/07/microsoft-ai-fake-news-better-than-state-of-the-art-baselines. *But see* Samuel Wooley, *We're Fighting Fake News AI Bots by Using More AI. That's a Mistake*, MIT TECH. REV. (Jan. 8, 2020), https://www.technologyreview.com/2020/01/08/130983/were-fighting-fake-news-ai-bots-by-using-more-ai-thats-a-mistake.

161. Karen Hao, *What Is Machine Learning?*, MIT TECH REV. (Nov. 17, 2018), https://www.technologyreview.com/2018/11/17/103781/what-is-machine-learning-we-drew-you-another-flowchart.

162. Wiggers, *supra* note 99.

163. Elisabeth Dwoskin, *Twitter is Looking for Ways to Let Users Flag Fake News, Offensive Content*, WASH. POST (June 29, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/06/29/twitter-is-looking-for-ways-to-let-users-flag-fake-news.

known reliable (or unreliable) sources.[164] Facebook has moved to tag posts as fake news, relying on users to identify suspect posts and independent monitors to make a final determination.[165] The social network may reduce the visibility of fake news stories in users' feeds based on these judgments.[166] However, critics have challenged Facebook's efforts as ineffective, if not counterproductive.[167] Google has redesigned its News page to include additional fact-checking information from third-party sites,[168] which it also includes alongside its search results.[169] And Google users can flag Autocomplete suggestions or the search engine's "Featured Snippets" as fake news.[170]

Thus far, platforms have attempted to contextualize fake news by generating additional relevant information using algorithms, but other code-based responses are also possible. For example, firms could employ user feedback in determining where information appears in one's Twitter timeline or Facebook News Feed—or, indeed, if it appears there at all. The tech news site *Slashdot* enables selected users to moderate comments by designating them as good or bad; this scoring increases or decreases the visibility of the comments.[171] Similarly, platforms could identify and remove, known fake news items or sources by "fingerprinting" them or by evaluating them using algorithms.[172] While this intervention requires subjective determinations by internet companies, most already censor some information: Facebook does not permit

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164. *Id.*

165. *How is Facebook Addressing False Information Through Independent Fact-Checkers?*, FACEBOOK, https://www.facebook.com/help/733019746855448 (last visited Mar. 21, 2022); Amber Jamieson & Olivia Solon, *Facebook to Begin Flagging Fake News in Response to Mounting Criticism*, THE GUARDIAN (Dec. 15, 2016), https://www.theguardian.com/technology/2016/dec/15/facebook-flag-fake-news-fact-check.

166. FACEBOOK, *supra* note 165.

167. Sam Levin, *Facebook Promised to Tackle Fake News. But the Evidence Shows It's Not Working*, THE GUARDIAN (May 16, 2017), https://www.theguardian.com/technology/2017/may/16/facebook-fake-news-tools-not-working.

168. Joseph Lichterman, *Google News Launches a Streamlined Redesign That Gives More Prominence to Fact Checking*, NIEMANLAB (June 27, 2017), http://www.niemanlab.org/2017/06/google-news-launches-a-streamlined-redesign-that-gives-more-prominence-to-fact-checking.

169. April Glaser, *Google is Rolling Out a Fact-Check Feature in its Search and News Results*, VOX (Apr. 8, 2017), https://www.vox.com/2017/4/8/15229878/google-fact-check-fake-news-search-news-results.

170. Hayley Tsukayama, *Google's Asking You for Some Help to Fix its 'Fake News' Problem*, WASH. POST (Apr. 25, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/04/25/googles-asking-you-for-some-help-to-fix-its-fake-news-problem.

171. CmdrTaco, *Slashdot Moderation*, SLASHDOT, https://slashdot.org/moderation.shtml (last visited Mar. 21, 2022).

172. For example, Google uses its Content ID system to scan videos uploaded to YouTube to identify material that may infringe copyright. *How Content ID Works*, YOUTUBE, https://support.google.com/youtube/answer/2797370?hl=en (last visited Mar. 21, 2022).

nudity;[173] Google removes child pornography[174] and certain information that violates individual privacy rights;[175] Twitter has moved to purge hate speech.[176] Since they already curate information, sites could reward or penalize users based on the content they post: people who post genuine news could gain greater visibility for their information or functionality for their accounts, while those who consistently disseminate fake news might be banned altogether. Finally, platforms might make some initial, broad-based distinctions based upon the source of the information: the *New York Times* (as genuine news) and *The Onion* (as satire) could be whitelisted, while *InfoWars* and *Natural News* (as fake news) could be blacklisted. This would leave substantial amounts of information for further analysis, but could at least use code to process easy cases.

Code-based solutions have limitations but show promise as part of a strategy to address fake news.

D. NORMS

Norms are a potent regulatory tool: they are virtually costless to regulators once created, enjoy distributed enforcement through social mechanisms, and may be internalized by their targets for self-enforcement. Yet these same characteristics make them difficult to wield. It is challenging to create, shift, or inculcate norms—campaigns against smoking worked well,[177] while ones against copyright infringement and unauthorized downloading were utter failures.[178] Changes in norms are unpredictable, as are the interactions between norms and other regulatory modalities. Part of the move by platforms such as Google and Facebook to engage in greater fact-checking of news stories relies upon norms—if users do not internalize the norm of verifying information, then these efforts will come to naught. And, these efforts must reckon with the reality that fake news is popular for some viewers, particularly when it has the effect of confirming their pre-existing beliefs or prior information.[179] The norm of fact-

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173. *See* Julia Angwin & Hannes Grassegger, *Facebook's Secret Censorship Rules Protect White Men from Hate Speech but Not Black Children*, PROPUBLICA (June 28, 2017), https://www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms.

174. Robinson Meyer, *The Tradeoffs in Google's New Crackdown on Child Pornography*, THE ATLANTIC (Nov. 18, 2013), https://www.theatlantic.com/technology/archive/2013/11/the-tradeoffs-in-googles-new-crackdown-on-child-pornography/281604.

175. *Removal Policies*, GOOGLE SEARCH HELP, https://support.google.com/websearch/answer/2744324?hl=en (last visited Mar. 21, 2022).

176. *Twitter Takes New Steps to Curb Abuse, Hate Speech*, CBS NEWS (Feb. 7, 2017), http://www.cbsnews.com/news/twitter-crack-down-on-abuse-hate-speech.

177. *See, e.g.*, Benjamin Alamar & Stanton A. Glantz, *Effect of Increased Social Unacceptability of Cigarette Smoking on Reduction in Cigarette Consumption*, 96 AM. J. PUB. HEALTH 1359 (2006).

178. *See* John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 539 (2007); Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 171 (2002).

179. *See* Gordon Pennycook, Tyrone D. Cannon & David G. Rand, *Prior Exposure Increases Perceived Accuracy of Fake News*, 147 J. EXPERIMENTAL PSYCH.: GEN. 1865 (2018).

checking comes into conflict with the psychological tendency to validate confirmatory information and to discount contrarian views.[180] In addition, fact-checking may be irrelevant for people for whom false information serves as a key part of their identity and group affiliations.[181] Thus, while the prospect of acting as a norm entrepreneur to combat fake news is an appealing one, its likelihood of success is uncertain.[182]

One norm-based intervention would be for platforms to use their own reputation and credibility to combat fake news. At present, entities such as Google and Facebook outsource the role of contextualizing or disputing false information to other entities such as *Snopes* or the *Associated Press*.[183] Tagging stories as "disputed" or displaying alternative explanations alongside them is implicitly a form of commentary by the platform. However, it is one that largely masks the intermediary's role, particularly since the countervailing information comes under a different brand and because Google, among others, tries to portray its search results as organic, rather than artificially constructed.[184] And, research suggests that flagging only a subset of questionable pieces of information as suspect increases readers' confidence in the remaining data.[185]

Platforms could, though, be more direct and explicit in taking positions about fake news stories.[186] The internet scholar Evgeny Morozov offers one potential model.[187] In 2012, he urged Google to take a more overt role in opposing discredited theories such as those promulgated by the anti-vaccine movement and 9/11 conspiracy theory adherents.[188] Morozov's proposal is not

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180. *See* David Braucher, *Fake News: Why We Fall for It*, PSYCH. TODAY (Dec. 28, 2016), https://www.psychologytoday.com/blog/contemporary-psychoanalysis-in-action/201612/fake-news-why-we-fall-it; Elizabeth Kolbert, *Why Facts Don't Change Our Minds*, NEW YORKER (Feb. 19, 2017), http://www.newyorker.com/magazine/2017/02/27/why-facts-dont-change-our-minds.

181. *See* Dan M. Kahan, *Misconceptions, Misinformation, and the Logic of Identity-Protective Cognition* 4 (The Cultural Cognition Project, Working Paper No. 164, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2973067.

182. *See generally* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

183. Daniel Funke, *The AP Isn't Abandoning its Fact-Checking Partnership with Facebook. It's Expanding It*, POYNTER (Apr. 9, 2019), https://www.poynter.org/fact-checking/2019/the-ap-isnt-abandoning-its-fact-checking-partnership-with-facebook-its-expanding-it.

184. *See generally* Dave Davies, *The Death of Organic Search (As We Know It)*, SEARCH ENGINE J. (Mar. 29, 2017), https://www.searchenginejournal.com/death-organic-search-know/189625.

185. *See* Gordon Pennycook, Adam Bear, Evan T. Collins, & David G. Rand, *The Implied Truth Effect: Attaching Warnings to a Subset of Fake News Headlines Increases Perceived Accuracy of Headlines Without Warnings*, 66 MGMT. SCI. 4944, 4948 (2020). *But see* Antino Kim, Patricia L. Moravec, & Alan R. Dennis, *Combating Fake News on Social Media with Source Ratings: The Effects of User and Expert Reputation Ratings*, 36 J. MGMT. INFO. SYS. 931 (2019) (finding that applying ratings to a subset of articles increased skepticism about unrated ones).

186. Facebook does take a direct role in deciding what content to permit in its News Feeds, or to remove from them, following a complicated model that permits critiques of groups but not of sub-groups. However, the site's criteria are hardly explicit or transparent. *See* Angwin & Grassegger, *supra* note 173.

187. Evgeny Morozov, *Warning: This Site Contains Conspiracy Theories*, SLATE (Jan. 23, 2012), https://slate.com/technology/2012/01/anti-vaccine-activists-9-11-deniers-and-googles-social-search.html.

188. *Id.*

censorship: he does not advocate altering search results or removing fake news. Rather, he wants platforms to alert their users that they are at risk of consuming false information, and to provide them with an alternative path to knowledge that has been verified as accurate.[189] He suggests that "whenever users are presented with search results that are likely to send them to sites run by pseudoscientists or conspiracy theorists, Google may simply display a huge red banner asking users to exercise caution and check a previously generated list of authoritative resources before making up their minds."[190] Morozov notes that Google already intervenes in similar fashion for users in some countries when they search for information about suicide or similar self-harm.[191] And, Google famously added a disclaimer to its search results when the top site corresponding to a search for "Jew" was that of a neo-Nazi group.[192] Similarly, the firm changed its autocomplete suggestions for searches when they included offensive assertions about Jews, Muslims, and women.[193] By extending Morozov's model, platforms could counter fake news stories and results by explicitly dissociating their companies from them and by offering alternative information on their own account, under the companies' brands.[194] Users might well pay more attention to an express statement of disavowal by Facebook than they would to analysis by an unrelated third party such as the *Associated Press*. In effect, platforms would leverage their credibility against fake news.

   This proposal has drawbacks.[195] First, it requires platforms to explicitly take a position on particular fake news stories, which they have been reluctant to do even in clear cases.[196] When fake news is popular, opposing it may make platforms unpopular, which is a difficult undertaking for publicly-traded companies in a competitive market. Second, it functions best (and perhaps only)

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189. *Id.*

190. *Id.*

191. *Id*; *see also Helping You Find Emergency Information When You Need It*, GOOGLE: BLOG (Nov. 11, 2010), https://googleblog.blogspot.com/2010/11/helping-you-find-emergency-information.html.

192. *See* Danny Sullivan, *Google In Controversy Over Top-Ranking for Anti-Jewish Site*, SEARCH ENGINE WATCH (Apr. 24, 2004), https://searchenginewatch.com/sew/news/2065217/google-in-controversy-over-top-ranking-for-anti-jewish-site.

193. Samuel Gibbs, *Google Alters Search Autocomplete to Remove 'Are Jews Evil' Suggestion*, THE GUARDIAN (Dec. 5, 2016, 10:00 AM), https://www.theguardian.com/technology/2016/dec/05/google-alters-search-autocomplete-remove-are-jews-evil-suggestion.

194. Danny Sullivan offered a similar suggestion to counteract, or at least contextualize, the results obtained when one searches for the term "Santorum" on Bing. Danny Sullivan, *Why Does Microsoft's Bing Search Engine Hate Rick Santorum?*, SEARCH ENGINE LAND (Feb. 8, 2012), http://searchengineland.com/why-does-bing-hate-rick-santorum-110764.

195. *See generally* Adam Thierer, *Do We Need a Ministry of Truth for the Internet?*, FORBES (Jan. 29, 2012), https://www.forbes.com/sites/adamthierer/2012/01/29/do-we-need-a-ministry-of-truth-for-the-internet/#20ea49d91f51.

196. *See* Jeff John Roberts, *A Top Google Result for the Holocaust Is Now a White Supremacist Site*, FORTUNE (Dec. 12, 2016), http://fortune.com/2016/12/12/google-holocaust.

for stories or results that are clearly and verifiably false.[197] There is empirical proof that the Earth is not flat or that its climate is warming. But even though most scientists agree that humans contribute significantly to global warming, the issue is not completely free from doubt.[198] And some issues remain unsettled, such as whether increases in the minimum wage reduce employment or help employees.[199] Platforms will have to adopt standards for when to implement disclaimers or warnings, and critics will attack those standards.[200] Finally, there is the risk of expanding demands for warnings or context. Platforms that retreat from a position of overt neutrality could face pressure to contextualize other allegedly negative information, from critical reviews of restaurants to disputed claims over nation-state borders. This possibility (perhaps a probability) would likely increase firms' reluctance to engage in express curation or discussion of third-party content.

In addition, mainstream media outlets might improve their efficacy in combating fake news through a shift in journalistic norms. Traditional journalism seeks to be objective, offering balanced coverage of all positions on an issue and leaving ultimate determinations of correctness to readers or listeners.[201] This style of reporting, reminiscent of the "marketplace of ideas" model, came under severe stress during President Trump's four years in office.[202] The U.S. President is perhaps the world's pre-eminent news figure; they have a capacity to generate and direct media coverage that is unequaled. Past presidents elided the truth or simply lied on occasion, such as with President Reagan's denial that his government had authorized weapons sales to Iran in exchange for the release of American hostages,[203] President Clinton's falsehoods about his extramarital affair with White House intern Monica

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197. *See* Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election,* 31 J. ECON. PERSP. 211, 213–14 (2017) (limiting their analysis of "fake news" to verifiably false news stories and noting numerous categories of false or misleading stories that do not meet the definition).

198. *See generally* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT, CONTRIBUTION OF WORKING GROUPS I, II AND III TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (R.K. Pachauri & L.A. Meyer eds., 2014).

199. *See* Ekaterina Jardim, Mark C. Long, Robert Plotnick, Emma van Inwegen, Jacob Vigdor & Hilary Wething, *Minimum Wage Increases, Wages, and Low-Wage Employment: Evidence from Seattle* (Nat'l Bureau of Econ. Res., Working Paper No. 23532, 2017), https://evans.uw.edu/sites/default/files/NBER%20Working%20Paper.pdf; Rachel West, *Five Flaws in a New Analysis of Seattle's Minimum Wage*, CTR. FOR AM. PROGRESS (June 28, 2017), https://www.americanprogress.org/issues/poverty/news/2017/06/28/435220/five-flaws-new-analysis-seattles-minimum-wage.

200. *See* Angwin & Grassegger, *supra* note 173.

201. *See SPJ Code of Ethics*, SOC'Y OF PROF. JOURNALISTS (last updated Sept. 6, 2014), https://www.spj.org/ethicscode.asp; *Ethics Guidelines*, POYNTER, https://www.poynter.org/guidelines-2 (last visited Mar. 21, 2022).

202. *See, e.g.*, Sean Illing, *How Trump Should Change the Way Journalists Understand "Objectivity"*, VOX (Aug. 4, 2020), https://www.vox.com/policy-and-politics/2020/8/4/21306919/donald-trump-media-ethics-tom-rosenstiel.

203. *See* BOB WOODWARD, VEIL 562–64 (1987).

Lewinsky,[204] or President Obama's claims that his troop "surge" in Afghanistan was working.[205]

Generally, though, propaganda has been the exception rather than the rule. President Trump inverted that relationship. While media organizations worked to increase their fact-checking to push back on Trump's false claims, the president tends to get the first word, with context provided later. Journalists should strongly consider reversing the order of that presentation. If, for example, the president makes a false claim about climate change, reporting should begin with the context (the scientific consensus on human-driven global warming) and then cover the chief executive's remarks, while accurately describing them as false or inaccurate. Research suggests there is some inertia with information initially presented to readers, even if later explanations debunk or controvert it.[206] By starting with the issue, and then moving to what the president has to say about it, journalists can present information accurately, with a higher chance of comprehension, while still covering breaking news effectively.

Despite the difficulties in operationalizing norms-based interventions, they could prove to be a potent part of a remedy for fake news.

V. PROVING GROUND: FAKE NEWS IN 2020-2021

The past year produced a deluge of fake news in the United States.[207] The COVID-19 novel coronavirus pandemic generated false claims about disinfectants,[208] root causes,[209] vaccines,[210] government tracking of patients,[211] and a panoply of other topics. Former Vice President Joseph Biden defeated incumbent President Donald Trump amidst a campaign awash in propaganda about voting fraud,[212] corruption in Biden's family,[213] and responsibility for the

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204. *See* JEFFREY TOOBIN, A VAST CONSPIRACY 251–52 (1999).

205. *See* Thomas Gibbons-Nerf, *Documents Reveal U.S. Officials Misled Public on War in Afghanistan*, N.Y. TIMES (Dec. 9, 2019), https://www.nytimes.com/2019/12/09/world/asia/afghanistan-war-documents.html.

206. *See*, *e.g.*, Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 303 (2010); Zara Abrams, *Controlling the Spread of Misinformation*, 52 AM. PSYCH. ASS'N 44 (2021), https://www.apa.org/monitor/2021/03/controlling-misinformation.

207. *See* Josh A. Goldstein & Shelby Grossman, *How Disinformation Evolved in 2020*, BROOKINGS: TECHSTREAM (Jan. 4, 2021), https://www.brookings.edu/techstream/how-disinformation-evolved-in-2020.

208. *See Coronavirus Disease (COVID-19) Advice for the Public: Mythbusters*, WORLD HEALTH ORG. (May 5, 2021), https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/myth-busters#bleach.

209. *Research Shows COVID-19 Was Not Manufactured in a Lab*, AP NEWS (Sept. 16, 2020), https://apnews.com/article/9391149002.

210. *See* REUTERS, *supra* note 10.

211. *Id.*

212. *See*, *e.g.*, Philip Bump, *There is Not and Has Not Been Any Credible Evidence of Significant Fraud in the 2020 Election*, WASH. POST (Dec. 14, 2020), https://www.washingtonpost.com/politics/2020/12/14/there-is-not-has-not-been-any-credible-evidence-significant-fraud-2020-election.

213. *See* Matthew Brown, *Fact Check: False Conspiracy Theories Allege Connection Between Biden Victory and Ukraine*, USA TODAY (Jan. 15, 2021), https://www.usatoday.com/story/news/factcheck/2021/01/15/fact-check-conspiracy-theories-falsely-link-bidens-victory-ukraine/4149335001.

armed attack on the U.S. Capitol on January 6th[214]—much of it generated by Trump himself.[215] The latest wave of fake news reinforces three conclusions from this paper. First, propaganda is the most difficult form of fake news to remediate, especially when it originates with senior government officials. Second, interventions to combat fake news are complex, difficult, and only partially effective. And lastly, fake news is an ever-shifting target—it is a mechanism rather than a topic in itself.[216]

It remains challenging to combat propaganda.[217] The dynamic of this type of fake news in American politics shifted between the last two presidential elections. In 2016, propaganda was primarily a bottom-up phenomenon: foreign actors and other interests released politically-motivated fake news onto social media and friendly mainstream media outlets, boosting the electoral success of Donald Trump.[218] In 2020, by contrast, propaganda started at the top—with the president and his advisors—and moved outwards and downwards.[219] Americans' trust in government continues to wane, but for a small group of far-right extremists, state-driven propaganda confirmed and reinforced their fears of a stolen election and concomitant consequences for the mythical campaign against Satanist child abusers.[220] This Article explores the possibility that independent, but possibly government-funded, journalism institutions and platforms might be an effective intervention against fake news. The propaganda campaign driven by QAnon and other allied sources, though, lumped all non-believers into a single unified threat, purportedly acting in concert.[221]

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214. *See* Brian Stelter, *Capitol Riot Denialism is Already Here*, CNN (Jan. 14, 2021), https://www.cnn.com/2021/01/14/media/capitol-hill-insurrection-denial/index.html.

215. *See* Glenn Kessler, Meg Kelly, Salvador Rizzo & Michelle Ye Hee Lee, *In Four Years, President Trump Made 30,573 False or Misleading Claims*, WASH. POST (last updated Jan. 20, 2021), https://www.washingtonpost.com/graphics/politics/trump-claims-database/.

216. *See* Davey Alba & Sheera Frenkel, *From Voter Fraud to Vaccine Lies: Misinformation Peddlers Shift Gears*, N.Y. TIMES (Jan. 7, 2021), https://www.nytimes.com/2020/12/16/technology/from-voter-fraud-to-vaccine-lies-misinformation-peddlers-shift-gears.html.

217. There have been encouraging advances in understanding the structure of fake news. *See, e.g.*, Timothy R. Tangherlini, Shadi Shahsavari, Behnam Shahbazi, Ehsan Ebrahimzadeh & Vwani Roychowdhury, *An Automated Pipeline for the Discovery of Conspiracy and Conspiracy Theory Narrative Frameworks: Bridgegate, Pizzagate and Storytelling on the Web*, PLOS ONE (June 16, 2020), https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0233879&type=printable.

218. *See* PHILIP N. HOWARD, BHARATH GANESH, DIMITRA LIOTSIOU, JOHN KELLY & CAMILLE FRANCOIS, OXFORD COMPUTATIONAL PROPAGANDA RES. PROJECT, THE IRA, SOCIAL MEDIA, AND POLITICAL POLARIZATION IN THE UNITED STATES, 2012-2018 (2018), https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/93/2018/12/IRA-Report-2018.pdf.

219. *See* John Maxwell Hamilton & Kevin R. Kosar, *Call It What It Is: Propaganda*, POLITICO (Oct. 8, 2020), https://www.politico.com/news/magazine/2020/10/08/government-communication-propaganda-427290.

220. Jeff Tollefson, *Tracking QAnon: How Trump Turned Conspiracy-Theory Research Upside Down*, 590 NATURE 192, 193 (2021), https://media.nature.com/original/magazine-assets/d41586-021-00257-y/d41586-021-00257-y.pdf.

221. *See* Kevin Roose, *How 'Save the Children' Is Keeping QAnon Alive*, N.Y. TIMES (Sept. 28, 2020), https://www.nytimes.com/2020/09/28/technology/save-the-children-qanon.html; Kevin Roose, *What Is QAnon, the Viral Pro-Trump Conspiracy Theory?*, N.Y. TIMES (Sept. 3, 2021), https://www.nytimes.com/article/what-is-qanon.html (describing group as a "big tent conspiracy theory"); Ben Collins, *As Trump Meets with QAnon*

An insidious aspect of the QAnon propaganda is that it both builds upon and moves to replace existing structures of trust and authority. The QAnon conspiracy theory places President Trump at the center of its cosmology, and simultaneously urges followers to reject any dissenting or questioning views.[222] For those inclined to trust in government, Trump's overt, repeated false claims lend credibility to the propaganda;[223] for those who are skeptics of the state, QAnon and its ilk offer an alternative source of authority.[224]

The 2020 election cycle proved, again, that fake news is difficult to combat. Mainstream media sources and platforms undertook invigorated efforts to combat falsehoods: news organizations such as the *Associated Press* engaged in fact-checking;[225] Twitter labeled propaganda as suspect;[226] Facebook initiated a wholesale block on QAnon content;[227] and YouTube blocked uploads of videos falsely claiming that Trump had defeated Biden.[228] Although some of these interventions occurred relatively late during the electoral campaign,[229] they have had at least an incremental effect, pushing some propaganda onto less popular platforms such as Telegram and Gab.[230] Still, these alternatives enable fake news to spread, albeit likely at a slower velocity. Even the inauguration of President Biden on January 20, 2021 did not dissuade some propaganda adherents, although they had conclusively predicted that President Trump would

Influencers, The Conspiracy's Adherents Beg for Dictatorship, NBC NEWS (Dec. 22, 2020), https://www.nbcnews.com/tech/internet/trump-meets-qanon-influencers-conspiracy-theory-s-adherents-beg-dictatorship-n1252144.

222. Drew Harwell, Isaac Stanley-Becker, Razzan Nakhlawi & Craig Timberg, *QAnon Reshaped Trump's Party and Radicalized Believers. The Capitol Siege May Just Be the Start.*, WASH. POST (Jan. 13, 2021), https://www.washingtonpost.com/technology/2021/01/13/qanon-capitol-siege-trump.

223. *See* Thomas B. Edsall, Opinion, *America, We Have a Problem*, N.Y. TIMES (Dec. 16, 2020), https://www.nytimes.com/2020/12/16/opinion/trump-political-sectarianism.html.

224. *See* Kaleigh Rogers, *Americans Were Primed to Believe the Current Onslaught of Disinformation*, FIVETHIRTYEIGHT (Nov. 12, 2020), https://fivethirtyeight.com/features/americans-were-primed-to-believe-the-current-onslaught-of-disinformation; Kevin Roose, *Why Conspiracy Theories Are So Addictive Right Now*, N.Y. TIMES (Oct. 7, 2020), https://www.nytimes.com/2020/10/07/technology/Trump-conspiracy-theories.html.

225. *See, e.g.*, Hope Yen, *AP Fact Check: Yes, Trump Lost Election Despite What He Says*, AP NEWS (May 6, 2021), https://apnews.com/article/donald-trump-michael-pence-electoral-college-elections-health-2d9bd47a8bd3561682ac46c6b3873a10.

226. *See Civic Integrity Positions and Policies*, TWITTER, https://about.twitter.com/en/our-priorities/civic-integrity (last visited Mar. 21, 2022).

227. Ben Collins & Brandy Zadrozny, *Facebook Bans QAnon Across Its Platforms*, NBC NEWS (Oct. 6, 2020), https://www.nbcnews.com/tech/tech-news/facebook-bans-qanon-across-its-platforms-n1242339.

228. Taylor Telford, *YouTube Removes 8,000 Channels Promoting False Election Claims*, WASH. POST (Dec. 9, 2020), https://www.washingtonpost.com/business/2020/12/09/youtube-false-2020-election-claims/.

229. *See* Craig Timberg & Elizabeth Dwoskin, *Silicon Valley is Getting Tougher on Trump and His Supporters Over Hate Speech and Disinformation*, WASH. POST (July 10, 2020), https://www.washingtonpost.com/technology/2020/07/10/hate-speech-trump-tech.

230. *See* Ben Collins & Brandy Zadrozny, *Some QAnon Followers Lose Hope After Inauguration*, NBC NEWS (Jan. 20, 2021), https://www.nbcnews.com/tech/internet/some-qanon-followers-struggle-inauguration-day-n1255002.

use military force to prevent it.[231] And, some private parties attacked by propaganda fought back effectively using the court system. For example, propaganda targeted Dominion Voting Systems, a firm that produces voting machines, as part of a baroque conspiracy intended to rig the 2020 presidential election.[232] Dominion used the threat of legal action[233] to compel retractions by a number of its accusers,[234] and is moving forward with lawsuits against others.[235]

Results from these interventions are mixed at best. Fake news retains its grip on a significant share of Americans. An NPR/Ipsos poll found that 40% of those surveyed believed the novel coronavirus was created in a Chinese laboratory, 39% agreed that there is a "Deep State" opposing then-President Trump from within the U.S. government, and one-third were convinced that electoral fraud enabled President Biden to win the presidential election.[236] Each of these falsehoods has been thoroughly debunked, but the poll results accord with most other measures of popular views.[237] Misinformation about COVID-19 is widespread, affecting both Democrats and Republicans, and has had negative effects on policies that could combat transmission and improve

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231. *See id.*; Camila Domonoske, *The QAnon "Storm" Never Struck. Some Supporters Are Wavering, Others Steadfast*, NPR (Jan. 20, 2021), https://www.npr.org/sections/inauguration-day-live-updates/2021/01/20/958907699/the-qanon-storm-never-struck-some-supporters-are-wavering-others-steadfast.

232. Jack Nicas, *No, Dominion Voting Machines Did Not Delete Trump Votes*, N.Y. TIMES (Nov. 11, 2020), https://www.nytimes.com/2020/11/11/technology/no-dominion-voting-machines-did-not-delete-trump-votes.html.

233. *See, e.g.*, Alison Durkee, *'Conduct Yourself Accordingly': Dominion Warned MyPillow CEO Twice of "Imminent" Litigation Over Election Conspiracy*, FORBES (Jan. 18, 2021), https://www.forbes.com/sites/alisondurkee/2021/01/18/dominion-voting-warned-mypillow-ceo-mike-lindell-of-imminent-litigation-over-election-conspiracy/?sh=35f5c54589c1.

234. *See, e.g.*, Thomas Lifson, *Retraction*, AM. THINKER (Jan. 15, 2021), https://www.americanthinker.com/blog/2021/01/statement.html.

235. *See, e.g.*, Alan Feuer, *Dominion Voting Systems Files Defamation Lawsuit Against Pro-Trump Attorney Sidney Powell*, N.Y. TIMES (Jan. 8, 2021), https://www.nytimes.com/2021/01/08/us/politics/dominion-voting-systems-files-defamation-lawsuit-against-pro-trump-attorney-sidney-powell.html.

236. Joel Rose, *Even If It's "Bonkers," Poll Finds Many Believe QAnon and Other Conspiracy Theories*, WBUR NEWS (Dec. 30, 2020), https://www.wbur.org/npr/951095644/even-if-its-bonkers-poll-finds-many-believe-qanon-and-other-conspiracy-theories.

237. *See, e.g.*, Christopher Keating, *Quinnipiac Poll: 77% of Republicans Believe There Was Widespread Fraud in the Presidential Election; 60% Overall Consider Joe Biden's Victory Legitimate*, HARTFORD COURANT (Dec. 10, 2020), https://www.courant.com/politics/hc-pol-q-poll-republicans-believe-fraud-20201210-pcie3uqqvrhyvnt7geohhsyepe-story.html; Laura Santhanam, *Most Americans Blame Trump for Capitol Attack but are Split on His Removal*, PBS NEWS HOUR (Jan. 8, 2021), https://www.pbs.org/newshour/politics/most-americans-blame-trump-for-capitol-attack-but-are-split-on-his-removal; Li Zhou, *About Half of Republicans Don't Think Joe Biden Should Be Sworn in as President*, VOX (Jan. 11, 2021), https://www.vox.com/2021/1/11/22225531/joe-biden-trump-capitol-inauguration; *see generally* David M. Mayer, *The Psychology of Fairness: Why Some Americans Don't Believe the Election Results*, CONVERSATION (Dec. 21, 2020), https://theconversation.com/the-psychology-of-fairness-why-some-americans-dont-believe-the-election-results-152305.

treatment, such as wearing a mask in public.[238] Informational interventions, such as providing people with accurate graphics from the World Health Organization about preventing COVID-19 infections, mitigated some false beliefs, but not all of them.[239] Any progress is a welcome development, though.

Lastly, fake news is a hardy perennial—the topics change, but the overall configuration of the problem continues. Often, the same sources dispense different information as conditions shift. Political propaganda moves from election fraud to false rumors about the novel coronavirus vaccines.[240] Hoaxes allege that the celebrity of the moment—from Bob Dylan to Britney Spears—has died when they are in fact still quite alive.[241] Outcomes in professional sports lead to new targets for trolls.[242] And the change in presidential administrations leaves satirists searching for new targets.[243] It is for this reason that this Article recommends structural changes to combat fake news rather than ones oriented around a topic or person, no matter how significant either may be for a given period of time. Misinformation is likely impossible to eradicate—8% of Americans still believe that the moon landing was faked.[244] But partial success is success nonetheless.

CONCLUSION

Fake news presents a complex regulatory challenge in the increasingly democratized and intermediated on-line information ecosystem. Inaccurate information is readily created; rapidly distributed by platforms motivated more by financial incentives than by journalistic norms or the public interest; and consumed eagerly by users for whom it reinforces existing beliefs. Yet even as awareness of the problem grew after the 2016 U.S. presidential election, the meaning of the term "fake news" became increasingly disputed. This Article takes up that definitional challenge, offering a useful taxonomy that classifies species of fake news based on their creators' intent to deceive and motivation.

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238. *See* Jonathan Rothwell & Sonal Desai, *How Misinformation is Distorting COVID Policies and Behaviors*, BROOKINGS (Dec. 22, 2020), https://www.brookings.edu/research/how-misinformation-is-distorting-covid-policies-and-behaviors.

239. *See* Emily K. Vraga & Leticia Bode, *Addressing COVID-19 Misinformation on Social Media Preemptively and Responsively*, 27 EMERGING INFECTIOUS DISEASES 396, 396 (2021).

240. *See* Alba & Frenkel, *supra* note 216.

241. *See, e.g.*, Rosemary Rossi, *Celebrity Death Hoaxes: 50 Famous People Who Were Reported Dead… but Weren't (Photos)*, WRAP (Jan. 4, 2021), https://www.thewrap.com/celebrity-death-hoax-jack-black-taylor-swift-drake-bob-dylan.

242. *See, e.g.*, Greg Joyce, *Former Patriots Player Leads Internet's Merciless Trolling of Bill Belichick*, N.Y. POST (Jan. 25, 2021), https://nypost.com/2021/01/25/tom-bradys-conquest-led-to-merciless-bill-belichick-trolling.

243. *See, e.g.*, Frank Pallotta, *How Colbert, Kimmel and Fallon Plan to Adapt to Life After Trump*, CNN (Jan. 25, 2021), https://www.cnn.com/2021/01/24/media/late-night-trump-colbert-fallon-snl/index.html. *But see Joe Biden*, ONION, https://www.theonion.com/tag/joseph-biden (last visited Mar. 21, 2022) (cataloguing satire of now-President Joseph Biden by The Onion for over a decade).

244. *See* Rose, *supra* note 236.

In particular, it identifies four key categories: satire, hoax, propaganda, and trolling. This analytical framework will help policymakers and commentators alike by providing greater rigor to debates over the issue.

The fake news phenomenon has key structural problems that make it difficult to design interventions that can address fake news effectively. These include the ease with which authors can produce user-generated content online, and the financial stakes that platforms have in highlighting and disseminating that material. Authors often have a mixture of motives in creating content, making it less likely that a single solution will be effective. Consumers of fake news have limited incentives to invest in challenging or verifying its content, particularly when the material reinforces their existing beliefs and perspectives. Finally, fake news rarely appears alone: it is frequently mingled with more accurate stories, such that it becomes harder to categorically reject a source as irredeemably flawed.

Despite these challenges, this Article suggests a set of potential interventions grounded in law, architecture, markets, and norms to mitigate the harms from fake news. In particular, it argues for strengthening the immunity provided by Section 230 of the Communications Decency Act; building platforms governed by trusted entities that are not driven solely by advertising revenues; using code to prioritize or deprecate information on sites; and encouraging news outlets and social media applications alike to use their voices to combat fake news directly.

Fake news is not new: it has a long, troubling provenance, stretching from newspaper reports blaming the sinking of the U.S.S. Maine on Spain in 1898 through today.[245] It is a persistent, hardy problem in a world of networked social information. This Article's framework creates a foundation to help advance dialogue about fake news and to suggest tools that might mitigate its most pernicious aspects.

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245. *See* Chris Woolf, *Back in the 1890s, Fake News Helped Start a War*, PRI (Dec. 8, 2016), https://www.pri.org/stories/2016-12-08/long-and-tawdry-history-yellow-journalism-america.

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