

LAW STUDENT UNLEASHES BOMBSHELL ALLEGATION YOU WON'T BELIEVE!: "FAKE NEWS" AS COMMERCIAL SPEECH

Advertising may be described as the science of arresting the human intelligence long enough to get money from it.

—Stephen Butler Leacock¹

INTRODUCTION

During the 2016 election cycle, WTOE 5 News released an article proclaiming, "Pope Francis Shocks the World, Endorses Donald Trump for President, Releases Statement."² According to Facebook, this article received 960,000 engagements, making it one of the most widely circulated articles of 2016.³ The revelations in this article were especially enticing because, just a few months earlier during a speech in Mexico, Pope Francis said, "[A] person who thinks only about building walls . . . is not Christian."⁴ This story was a reversal from the Vatican's longstanding refusal to comment on political issues.⁵ Ultimately, the "news" was unbelievable because the article and the site hosting the article were both fabricated.⁶

The phenomenon of intentionally fraudulent, faux-journalistic content rose to national attention after the 2016 presidential election, but intentionally misleading or false "news" articles predate this election cycle and transcend political subject matter.⁷

1. STEPHEN LEACOCK, *THE GARDEN OF FOLLY* 123 (1924).

2. Sydney Schaedel, *Did the Pope Endorse Trump?*, FACTCHECK.ORG (Oct. 24, 2016), <http://www.factcheck.org/2016/10/did-the-pope-endorse-trump/>.

3. See Hannah Ritchie, *Read All About It: The Biggest Fake News Stories of 2016*, CNBC (Dec. 30, 2016, 2:04 AM), <https://www.cnbc.com/2016/12/30/read-all-about-it-the-biggest-fake-news-stories-of-2016.html> (discussing an empirical analysis of the timing and frequency of fake election stories' "engagements," which include shares, likes, reactions, and postings).

4. Daniel Burke, *Pope Suggests Trump 'Is Not Christian,'* CNN (Feb. 18, 2016, 10:47 PM), <http://www.cnn.com/2016/02/18/politics/pope-francis-trump-christian-wall/index.html>.

5. See Yamiche Alcindor, *Despite Timing, Bernie Sanders Says, Accepting Vatican Offer Was a Must*, N.Y. TIMES (Apr. 14, 2016), <https://www.nytimes.com/2016/04/15/us/politics/bernie-sanders-vatican.html>.

6. Schaedel, *supra* note 2.

7. See Amanda Z. Naprawa, *Don't Give Your Kid That Shot!: The Public Health Threat Posed by Anti-Vaccine Speech and Why Such Speech is Not Guaranteed Full Protection under the First Amendment*, 11 CARDOZO PUB. L. POL'Y & ETHICS J. 473, 507 (2013) (discussing implications for misleading anti-vaccine advocacy).

However, this cycle was altogether unique because the use of social media has accelerated the ability for misleading or fraudulent “news” articles to spread, especially when nearly one-fifth of adults using social media in the United States get news from sites such as Reddit, Facebook, and Twitter.⁸ In fact, the most popular fake news stories were shared more often on Facebook than popular stories from mainstream news outlets.⁹ Amidst this surge, opportunists began to intentionally create misleading or false news articles in the hopes of generating site traffic.¹⁰ Many of these articles have the potential to enrich the individual purveyor but also have the potential to disrupt the online advertising industry. This traffic could drastically increase the interest in advertising on a site and thus the cost of advertising space.¹¹

This Comment proposes that governmental actors could intervene to regulate “Fake News” as commercial speech because the purveyor’s economic incentives encourage producing intentionally false content. Part I distinguishes the term “Fake News” from other outwardly similar forms of speech and popular usages to create a uniform definition for this Comment and beyond. With this definition in mind, Part II outlines commercial speech doctrines—which afford diminished First Amendment protection to economic speech, especially when the speech is intentionally false—and the heavy emphasis placed on investigating the intent of the speaker. Part III explores how Fake News operates as advertising and discusses Congress’s broad grant of authority to the Federal Trade Commission (“FTC”) to regulate intentionally misleading or false advertising of such nature. Finally, Part IV advocates for using such regulatory power under the Federal Trade Commission Act to create a three-pronged standard that can address the harms Fake News causes while allaying fears of infringing speech

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

9. Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook*, BUZZFEED (Nov. 16, 2016, 5:15 PM), https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm_term=.ju0JaxPpp#.qpZw8x044. In this study, the author used data from Alexa, which tracks site traffic, to chart the rise in Fake News popularity surrounding the election. *Id.* The study used key words to uncover and track searches of hyperpartisan and fake news content. *Id.*

10. See, e.g., Samantha Subramanian, *Inside the Macedonian Fake-News Complex*, WIRED (Feb. 15, 2017), <https://www.wired.com/2017/02/veles-macedonia-fake-news/> (discussing how a young teen abroad greatly profited from Google ads as a result of his fake news story regarding the Trump campaign).

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

protected under the First Amendment. This test and definition of Fake News is narrowly tailored to avoid infringing political speech, only identifying content that (1) mimics journalistic content (2) in an intentionally misleading way (3) for the purpose of generating advertising revenue.

I. A UNIFORM DEFINITION OF FAKE NEWS

Fake News does not fit squarely into any existing category of speech¹² because it is often political in appearance yet commercial in its purpose and thus demands a clear definition for the purposes of this Comment. In many respects, Fake News is an age-old phenomenon made distinct through innovations in advertising practices and technology. In the late nineteenth and early twentieth centuries, "yellow journalism" was defined by a unique style, which included prominent headlines, "lavish use of pictures," and "faked" interviews and [news] stories."¹³ Advances in technical innovation allowed for a cheaper and more widespread publication.¹⁴ In the same way, Fake News has resulted from the internet's liberalization of access to content production.¹⁵ Social media gives these quickly made Fake News articles and websites a platform to spread rapid falsity through virtual networks.¹⁶ However, as this Comment presents, Fake News—unlike yellow journalism—is entirely and intentionally commercial and does not include speech that the First Amendment was designed to protect.¹⁷

Traditional commercial speech is typically economically motivated, rather than politically motivated, and therefore receives lower scrutiny.¹⁸ Core political speech,¹⁹ on the other hand, is the most highly protected category of free speech under the First

12. See Edward J. Eberle, *The Architecture of First Amendment Free Speech*, 2011 MICH. ST. L. REV. 1191, 1191–92 (2011).

13. FRANK LUTHER MOTT, *AMERICAN JOURNALISM: A HISTORY OF NEWSPAPERS IN THE UNITED STATES THROUGH 260 YEARS: 1690–1950*, at 539 (rev. ed. 1950).

14. Trevor D. Dryer, "All the News That's Fit to Print": *The New York Times*, "Yellow" Journalism, And The Criminal Trial 1898-1902, 8 *NEV. L.J.* 541, 547 (2008).

15. Sapna Maheshwari, *How Fake News Goes Viral: A Case Study*, N.Y. TIMES, <https://www.nytimes.com/2016/11/20/business/media/how-fake-news-spreads.html?mcubz=1> (last visited Nov. 28, 2017).

16. *Id.*

17. See *infra* notes 18–23 and accompanying text.

18. See Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 *WM. & MARY L. REV.* 1633, 1645 (2013).

19. *Core Political Speech*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Conduct or words that are directly intended to rally public support for a particular issue, position, or candidate; expressions, proposals, or interactive communication concerning political change.").

Amendment.²⁰ The First Amendment and related precedents place extreme protections on core political speech because it is historically understood as essential to political discourse.²¹ When the government restricts free speech, there is the possibility that the majority will suppress minority or unpopular viewpoints.²² Free speech relates to the ability of a citizenry to govern itself and create a societal image through a diversity of available beliefs and opinions.²³ Some fear that allowing courts to subcategorize speech weakens the integrity of the First Amendment and will lead to a more liberal creation of other less protected categories of speech.²⁴ However, the Supreme Court recognizes a “common-sense distinction between speech proposing a commercial transaction” and other types of speech which fall under governmental regulation.²⁵ Across many legal disciplines, courts recognize the difference between the appearance and the function of documents,²⁶ and Fake News should be no different. The Court has even addressed hybrid expression that has both commercial and noncommercial elements.²⁷ Thus, courts are able to craft a definition surrounding speech that does not contain any notion of political advocacy or expression.

Creating a definition of Fake News is crucial to set narrow parameters around what speech can be regulated to avoid violating First Amendment protections. An appropriate definition of Fake News for the purposes of this Comment is critical in distinguishing Fake News from sloppy or hyper-partisan journalism. As discussed previously, many American citizens and legal scholars would fear any new restriction on a category of speech containing the word

20. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) (“Core political speech occupies the highest, most protected position; commercial speech . . . [is] regarded as a sort of second-class expression . . .”).

21. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 301 (1964) (Goldberg, J., concurring) (quoting *De Jong v. Oregon*, 299 U.S. 353, 365 (1937)).

22. See, e.g., *N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 778 (N.J. 1994) (“Some may not be worth hearing, but . . . the core value of free speech—the belief that the unpopular views of a minority, if heard, can in time become the majority view. We are a poorer nation when these small groups are silenced.”).

23. Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1209 (2012).

24. Charles Fischette, *A New Architecture of Commercial Speech Law*, 31 HARV. J.L. & PUB. POLY 663, 705 (2008) (addressing concerns over subcategorization and the potential for new categories of speech to erode the First Amendment).

25. *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993).

26. See, e.g., *NetJets Aviation, Inc. v. LHC Commc'ns, LLC*, 537 F.3d 168, 176 (2d Cir. 2008) (demonstrating that in the business-organizations field an entity may appear to be an LLC but function as a private investment vehicle for an individual).

27. See, e.g., *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 795–96 (1988).

“news.”²⁸ Furthermore, the definition of words and phrases are malleable, and the colloquial meaning of “fake news” may continue to transform as it is adopted and coopted.²⁹ “Fake News,” for the purposes of this Comment, can be understood as intentionally misleading content drafted to mimic journalistic content for the primary purpose of generating revenue. Part IV will further elaborate on how this meaning could be translated into a legally cognizable, three-pronged test.

Satire cases demonstrate the ability to derive intent, even when the purpose of the speech is to subvert expectations about truth.³⁰ For example, Fake News, as understood in this Comment, does not include satirical sources such as the Daily Show³¹ or The Onion.³² Satire meets the literal requirement of falsity, but its intent is derived from its context, which is typically a desire to convey a critical message through underlying pretense.³³ This prevailing motivation would be undercut by a countervailing, and more pressing, economic motivation found in many Fake News articles. Again, economic intent required under commercial speech doctrines³⁴ safely distinguishes it from these types of noncommercial and core speech.

Critics of any new use of commercial speech doctrines express apprehension that the same rationales behind commercial speech will infiltrate rulings about noncommercial speech.³⁵ For instance, among the scientific community, there was concern that commercial speech would slowly grow to encompass incorrect scientific claims used in advertising.³⁶ However, this does not appear to have

28. See *supra* notes 21–24 and accompanying text.

29. See Will Oremus, *Stop Calling Everything “Fake News,”* SLATE (Dec. 6, 2016, 6:58 PM), http://www.slate.com/articles/technology/technology/2016/12/stop_calling_everything_fake_news.html (discussing the over inclusive nature of the term “fake news,” which has been used to include hyper-partisan opinions, unintentional false claims, or marginally misleading information).

30. See, e.g., *Farah v. Esquire Magazine*, 736 F.3d 528, 537 (D.C. Cir. 2013) (discussing that a satire piece, although literally false, must be assessed in appropriate context to determine the message).

31. See, e.g., *The Daily Show*, COMEDY CENTRAL, <http://www.cc.com/shows/the-daily-show-with-trevor-noah> (last visited Nov. 27, 2017); see also Joe Hale Cutbirth, *Satire as Journalism: The Daily Show and American Politics at the Turn of the Twenty-First Century* (2011) (unpublished Ph.D. dissertation, Columbia University), <https://doi.org/10.7916/D8W66SQC>.

32. See, e.g., THE ONION, <http://www.theonion.com/> (last visited Nov. 28, 2017); see also Ben Hutchison, *“The Onion” Founder: We Do Satire, Not Fake News*, WISN (Feb. 15, 2017, 10:38 PM) <http://www.wisn.com/article/the-onion-founder-we-do-satire-not-fake-news/8940879>.

33. *Farah*, 736 F.3d at 537.

34. See, e.g., *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1143 (D.C. Cir. 2009).

35. Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 107–08 (1999).

36. *Id.* at 94 n.284.

occurred.³⁷ There is little evidence that lesser protection of commercial speech has reduced traditional forms of expression that the First Amendment protects,³⁸ especially while the trend is to further protect political speech.³⁹ The Supreme Court has been able to silo commercial speech and noncommercial speech protections,⁴⁰ which should provide comfort to those who would wish to protect Fake News for the sake of protecting noncommercial expression. In fact, commercial speech is more likely experiencing dwindling safeguards rather than an expansion of protection to erode noncommercial speech.⁴¹

Any restriction on Fake News must target those who intentionally disseminate false information for some monetary gain, even though false statements still merit First Amendment protection because they are inevitably part of open civic expression.⁴² False statements often exert a negative influence on public speech because they “interfere with the truth-seeking function of the marketplace of ideas”⁴³ but are tolerated because of the necessity of preserving the liberties that generally underlie freedom of speech.⁴⁴ Primarily, the Supreme Court is concerned with whether the government is seeking to restrict speech simply because it does not agree with the message, even when the speech is commercial.⁴⁵ However, as discussed in Part II, this protection applies more forcefully to truthful messages, not those that are intentionally misleading.⁴⁶ Any government restriction on Fake News is, naturally, more likely to be content neutral because the government is targeting the vehicle of the speech rather than the content of the speech.⁴⁷ As long as the regulation applies broadly, which a situation-blind objective test can accomplish more readily, a restriction on Fake News would not infringe on protected core speech nor discriminate based on content.

37. *Id.* at 94.

38. *Id.* at 109.

39. *See, e.g.*, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010); *Texas v. Johnson*, 491 U.S. 397, 412 (1989).

40. Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1282 (1984).

41. *See* Jon M. Garon, *Beyond the First Amendment: Shaping the Contours of Commercial Speech in Video Games, Virtual Worlds, and Social Media*, 2012 UTAH L. REV. 607, 608 (2012).

42. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964).

43. *Hustler Magazine, Inc., v. Falwell*, 485 U.S. 46, 52 (1988).

44. R. George Wright, *Lying and Freedom of Speech*, 2011 UTAH L. REV. 1131, 1132 (2011).

45. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 565 (2011).

46. KATHLEEN ANN RUANE, *FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT* 17 (2014), <https://fas.org/sgp/crs/misc/95-815.pdf>.

47. *See* Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 108–09 (1986) (arguing that false advertising statutes will be allowed based on the neutrality of their content).

II. COMMERCIAL SPEECH DOCTRINES

While certain protections of the First Amendment do extend to commercial speech, "the precise bounds of the category of expression that may be termed commercial speech" are more subject to doubt.⁴⁸ These bounds have applied to both the methods⁴⁹ and content⁵⁰ of commercial communication and have evolved over time.⁵¹ Fake News is precisely the type of misleading commercial instrument the Court has allowed governmental action to address. Initially, commercial speech was defined as speech that does "no more than propose a commercial transaction"⁵² and provides information necessary to entice customers to buy goods or services.⁵³ The Court quickly found it necessary to elaborate on this definition due to the numerous, yet narrow, technical differences between various forms of commercial speech.⁵⁴ The Court largely focuses on the intent behind the speech,⁵⁵ which would be important when distinguishing hyper-partisan or satirical news from the Fake News that is merely capitalizing on these forms, without an underlying, noncommercial purpose.

48. *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 637 (1985).

49. *See, e.g.*, 15 U.S.C. §§ 7704–7706 (2012) (authorizing the FTC to regulate the practice of mass commercial emailing, also known as "spamming," as part of the CAN-SPAM Act).

50. In addition to regulating certain alcohol and tobacco advertisements, some circuits also allow regulation of fortune-teller advertisements. *See* Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1272 (1983) ("Some fortune-tellers have raised first amendment arguments, only to meet the brisk refrain that charlatans and quacks who engage in fraud are not entitled to the protection of the Constitution.").

51. *Compare* *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (holding that a state's promotion of temperance by completely banning the advertisement of retail liquor prices violated the First Amendment because it did not represent a substantial government interest), *with* *Posados de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341–44 (1986) (upholding a law completely banning gambling advertisements directed towards Puerto Rican citizens, because the Territory had a substantial government interest in reducing the demand for gambling).

52. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rel.*, 413 U.S. 376, 385 (1973).

53. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 780 (1976).

54. *See generally* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (discussing the history of commercial speech analysis); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (acknowledging the debate about whether commercial speech should receive increased protection).

55. *See, e.g.*, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) ("Young's informational pamphlets . . . cannot be characterized merely as proposals to engage in commercial transactions. . . . The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech.").

A. Defining "Commercial Speech"

In *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*,⁵⁶ the Supreme Court ruled on the constitutionality of a ban on electric utility companies' promotional advertisements. The Court found that the government may ban commercial communications that are "more likely to deceive the public than to inform it."⁵⁷ Protections of commercial speech only exist if the speech is not false or misleading.⁵⁸ Political speech, however, is constitutionally protected regardless of its falsity, with an exception for libel in some cases.⁵⁹ When commercial speech is not found to be misleading, the Court will require that the government have a substantial interest in restricting the speech that is directly related to advancing this interest.⁶⁰ Finally, the restriction must be narrowly tailored to ensure it does not exceed what is necessary to accomplish the government's end.⁶¹ The *Central Hudson* Court left the definition broad, not granting commercial speech full First Amendment protection simply because the speech touched on public issues.⁶²

In *Bolger v. Youngs Drug Products Corp.*,⁶³ the Court elucidated a clearer definition of when commercial speech was constitutionally protected when it included commercial and noncommercial speech.⁶⁴ The Court found that a federal law prohibiting the mailing of unsolicited advertisements for contraceptives was unconstitutional because the government lacked a substantial interest.⁶⁵ The mailings at issue featured information about the benefits of contraceptive devices intermingled with advertisement of the defendant's selection of contraceptives.⁶⁶ The Court ultimately found the advertisement was commercial speech based on three nonexclusive factors: (1) the appellee's pamphlets were in a traditional advertising form that proposed a commercial transaction; (2) the advertisements referenced specific products; and (3) the presence of an economic motivation.⁶⁷ Ultimately, the Court stated that "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply

56. 447 U.S. 557 (1980).

57. *Id.* at 563.

58. *Id.* at 563-64.

59. JOHN D. ZELEZNY, COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA 365 (3d ed. 2001).

60. *Cent. Hudson*, 447 U.S. at 564.

61. *Id.*

62. *See Stern, supra* note 35, at 80 (quoting *Cent. Hudson*, 447 U.S. at 563 n.5).

63. 463 U.S. 60 (1983).

64. *Id.* at 68-69.

65. *Id.* at 69.

66. *Id.* at 75.

67. *Id.* at 66-68.

by including references to public issues.”⁶⁸ Put differently, “the State does not lose its power to regulate commercial activity deemed to be harmful to the public whenever speech is a component of that activity.”⁶⁹ The Court’s continued reticence in *Bolger* to afford strict scrutiny to commercial speech emphasizes the effects that misleading speech has on the consumer over the commercial entity’s right to seek economic gain.⁷⁰

If Fake News were to be classified as commercial speech, it would immediately fail the first prong of the *Central Hudson* test because of its inherent falsity.⁷¹ Therefore, the commercial speech would not trigger the protection commercial speech could receive under *Central Hudson*.⁷² However, despite these landmark cases, the definition of “commercial speech” remains somewhat ambiguous. Even the Court, which has undertaken decades of commercial speech questions, recognizes the difficulty of describing the outer bounds of commercial speech.⁷³ Likely, the Court has intentionally left the definition of commercial speech vague in order to avoid restricting the doctrine to certain commercial settings.⁷⁴ Commercial speech and advertising, in particular, have a unique ability to adapt to new technological platforms, driven by a speaker’s desire to realize economic gain.⁷⁵ In this way, the commercial speech doctrine functions as a spectrum, allowing courts greater adaptability as they encounter new forms of commercial speech.

B. Courts are Equipped to Determine Economic and Truthful Intent

Implicit in commercial speech doctrines are two intentionality requirements: (1) speech intended for a commercial purpose; and (2) speech intended to mislead.⁷⁶ Historical examples of commercial speech restrictions seek to prohibit advertising a good or service.⁷⁷ Fake News distributors, who seek to benefit financially from its

68. *Id.* at 68.

69. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (listing instances when regulation of speech is necessary).

70. *Bolger*, 463 U.S. at 68.

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

72. *Id.* at 575–76.

73. *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 419 (1993).

74. *Stern*, *supra* note 35, at 87–88.

75. *See* Mark Bartholomew, *Advertising and the Transformation of Trademark Law*, 38 N.M. L. REV. 1, 44 (2008).

76. *See, e.g., Discovery Network*, 507 U.S. at 419 (supporting the first prong concerning the commercial purpose of speech); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) (supporting the second prong of the commercial speech doctrines); *Cent. Hudson*, 447 U.S. at 563 (supporting the two prongs of examining commercial speech, first based on its purpose and second based on its ability to mislead).

77. *See Cent. Hudson*, 447 U.S. at 562–64.

distribution, are providing a means to a commercial end, which involves a misleading path to legitimate advertisement. Fake News sites often feature an advertisement for a commonly recognized and legitimate product imbedded into the text of an intentionally false article.⁷⁸ *Bolger* does not explicitly require intentionality, only that the sales technique be “false, deceptive, or misleading.”⁷⁹ However, because it only covers speech made for an economic purpose, the Court may be suggesting the mindset of the speaker is a relevant, but not an exclusive, characteristic.⁸⁰ Therefore, the lessened scrutiny for commercial speech would only extend to Fake News that is intentionally false and intentionally made for an economic purpose. Thus, the lessened value given to intentionally false speech plus the lessened value given to economically motivated speech would combine to render Fake News with little, if any, value as commercial speech.

The purveyor’s intention in creating and distributing Fake News therefore becomes the lynchpin on whether regulators may redress the product. Taking an intention-based approach to commercial speech would aid courts in distinguishing Fake News from sloppy, hyper-partisan, or tongue-in-cheek journalism. This approach already exists outside of the commercial speech context in defamation statutes.⁸¹ Two foundational defamation cases, *New York Times Co. v. Sullivan*⁸² and *Gertz v. Robert Welch, Inc.*,⁸³ shed light on the Court’s ability to interpret the veracity of news and the author’s intention in perpetuating misinformation. In both cases, the Court was capable of crafting a functioning test that balanced safeguards on free speech and redressed the victim of a false statement.⁸⁴ The *Sullivan* Court decided that the constitutional guarantees in the First Amendment require defamatory falsehoods relating to official conduct be made with actual malice.⁸⁵ A fact finder must discern whether the declarant of the defamatory statement acted “with knowledge that it was false or with reckless disregard of whether it was false or not.”⁸⁶

Gertz distinguished this standard for private individuals under a less-demanding showing.⁸⁷ The factual background of *Gertz* is a

78. See, e.g., Jack Nicas, *Fake-News Sites Inadvertently Funded by Big Brands*, WALL ST. J. (Dec. 8, 2016, 11:18 AM), <http://www.wsj.com/articles/fake-news-sites-inadvertently-funded-by-big-brands-1481193004>.

79. See *Bolger*, 463 U.S. at 69.

80. See *id.* at 67 (stating that an economic motivation is not dispositive of defining commercial speech); see also Kendrick, *supra* note 18, at 1645.

81. As used here, “defamation” refers to libel, slander, or similar claims alleging false speech caused damages. See 28 U.S.C. § 4101 (2012).

82. 376 U.S. 254 (1964).

83. 418 U.S. 323 (1974).

84. *Id.* at 349; *Sullivan*, 376 U.S. at 264–65.

85. *Sullivan*, 376 U.S. at 279–80.

86. *Id.* at 280.

87. *Gertz*, 418 U.S. at 348.

"fake news" case in its own right. After a policeman killed a young man in Chicago, the youth's family hired an attorney who drew the attention of an anti-Communist publication concerned with a perceived conspiracy to delegitimize the police force.⁸⁸ The publication wrongly claimed the attorney had previously advocated for the violent overthrow of the government.⁸⁹ The Court held that states may decide on their own what degree of fault was necessary to prove defamation, so long as there was "a showing of knowledge of falsity or reckless disregard of the truth."⁹⁰ In each defamation context, the fact finder is charged with determining the speaker's intent, and, in both cases, the subject matter was highly political in nature.⁹¹ There is little to suggest that requiring the fact finder to determine the speaker's intent and misleading subject matter eroded non-defamatory free expression protection. In the same way, a fact finder could use a bright-line legal standard to identify a Fake News purveyor's dual motive to intentionally disseminate false information for an intentionally economic motive.

However, while defamation statutes may be analogous, they are insufficient vehicles for regulating economically motivated Fake News. Defamation actions allow private and public individuals redress for false statements against them,⁹² but these actions would do little to aid the wider array of Fake News victims. The victim of a Fake News story is often not the subject of the article, but the unwary viewer or automatically implicated yet legitimate advertiser.⁹³ For example, the Fake News article "Pope Francis Shocks the World, Endorses Donald Trump,"⁹⁴ which was the most shared story on Facebook this election cycle,⁹⁵ is about two public figures but does not present a cognizable defamation claim. The defamation may illicit punitive damages,⁹⁶ but only if there was a causal connection between the impact of the claim and some

88. *Id.* at 325.

89. *Id.* at 326.

90. *Id.* at 346–47.

91. *Id.* at 325–32; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 257–65 (1964).

92. See RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977).

93. See *infra* Subpart IV.B.

94. The Fake News site that created this article, WTOE 5, no longer exists, but the archived version contains blank space where native advertising content sponsored by Revcontent, which functions similarly to Google AdSense, was once situated. *Pope Francis Shocks World, Endorses Donald Trump for President, Releases Statement*, WTOE 5 NEWS, <https://web.archive.org/web/20161115024211/http://wtoe5news.com/us-election/pope-francis-shocks-world-endorses-donald-trump-for-president-releases-statement/> (last visited Nov. 9, 2017).

95. *Mark Zuckerberg Addresses Fake News on Facebook*, NPR (Nov. 19, 2016, 5:21 PM), <http://www.npr.org/2016/11/19/502717970/mark-zuckerberg-addresses-fake-news-on-facebook> (presenting a conversation between David Folkenflik and Linda Wertheimer).

96. See *Sullivan*, 376 U.S. at 284.

tangible reputational harm.⁹⁷ The same characteristic economic intent that leads to Fake News is unlike the typical situations of intent to harm in many defamation cases.⁹⁸ The Fake News purveyor does not seek to harm the candidate written about, but, rather, the intent is targeted towards the viewer who they hope to lure away from the initial social media site or search engine.⁹⁹

Economic intent does play a prevalent role, an “escape clause” of sorts, in restricting other forms of speech. The Stolen Valor Acts¹⁰⁰ and subsequent related cases illustrate that restricting fraudulent speech solely because of its falsity is not sufficient but, instead, that there must also be some ill motive. The Stolen Valor Act of 2005 allowed imprisonment for anyone who “falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States.”¹⁰¹ However, the original statute stopped short of requiring harm to another or material advantage in order to constitute a violation.¹⁰² The Court quickly deemed this statute a violation of the First Amendment in *United States v. Alvarez*.¹⁰³ The majority noted the statute suppressed all false statements “entirely without regard to whether the lie was made for the purpose of material gain.”¹⁰⁴ Subsequently, Congress rewrote the statute in the Stolen Valor Act of 2013, amending 18 U.S.C. § 704 to include those who fraudulently hold themselves out to be a decorated veteran “with intent to obtain money, property, or other tangible benefit.”¹⁰⁵ Essentially, Congress was able to pass the amended statute because it had supplemented the falsity requirement with intent of monetary gain, which could then address the harm they sought to discourage.¹⁰⁶ In the same way, requiring an economic intent behind journalism-mimicking content would allow government redress of another form of disfavored speech, without blatantly infringing on speech that is disfavored yet constitutionally dubious to restrict.

III. FAKE NEWS AND THE FTC

While the definition of commercial speech has been crafted in the courts, the FTC has been tasked with calling balls and strikes

97. *Id.* at 271–72.

98. *See, e.g.*, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346–47 (1974); *Sullivan*, 376 U.S. at 379–80.

99. *See infra* Subpart IV.B.

100. Stolen Valor Act of 2005, Pub. L. No. 109-437, 120 Stat. 3266–67 (2006).

101. *Id.*

102. Wright, *supra* note 44, at 1135.

103. 132 S.Ct. 2537 (2012); *id.* at 2551.

104. *Id.* at 2547.

105. Stolen Valor Act of 2013, 18 U.S.C. § 704 (2012).

106. H.R. REP. NO. 113-84, at 1 (2013).

regarding commercial speech that is misleading or altogether false.¹⁰⁷ Fake News imperfectly fits into the FTC's regulation capacity, but could be understood as false advertising if its producer knows it to be false and intentionally disseminates it for economic gain. Through the Federal Trade Commission Act, the FTC is "empowered and directed to prevent . . . unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."¹⁰⁸ Specifically, Congress gives the Commission the power to regulating deceptive advertising, making it

unlawful for any person, partnership, or corporation, to disseminate, or cause to be disseminated, any false advertisement . . . by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce, of food, drugs, devices, [or] services.¹⁰⁹

This statute has largely been used to address telemarketing fraud since the early 1990s.¹¹⁰ Congress gives the FTC expansive authority to regulate commercial speech because of such speech's tendency to mislead the public, which can lead to dangerous results.¹¹¹ The Federal Trade Commission Act was drafted broadly, affording the Commission vast deference to address "practices that [they] determine[] are against public policy for other reasons."¹¹² The FTC has the ability to seek injunctions or civil penalties to remedy misleading commercial material.¹¹³

Fake News is analogous to spam, or commercial electronic mail sent "with the intent to deceive or mislead recipients, or any Internet access service, as to the origin of such messages."¹¹⁴ The regulation of spam as commercial speech explicitly requires an intent to mislead.¹¹⁵ However, whereas the claims made in most spam advertising can be scientifically verified as false by the FTC,

107. Keith R. Fentonmiller, *Reflections on the Mirror Image Doctrine: Should the Federal Trade Commission Regulate False Advertising for Books Promising Wealth, Weight Loss, and Miraculous Cures?*, 110 W. VA. L. REV. 573, 574 (2008).

108. 15 U.S.C. § 45(a)(2) (2012).

109. *Id.* § 52(a)(2).

110. See H.R. REP. NO. 108-8, at 2 (2003) (giving examples of laws passed in the 1990s under the authority of the Federal Trade Commission Act that have regulated telemarketers).

111. See Amanda Z. Naprawa, *Don't Give Your Kid That Shot!: The Public Health Threat Posed by Anti-Vaccine Speech and Why Such Speech is Not Guaranteed Full Protection Under the First Amendment*, 11 CARDOZO PUB. L. POL'Y & ETHICS J. 473, 507 (2013).

112. *Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986).

113. 15 U.S.C. § 45(m).

114. 18 U.S.C. § 1037(a)(2) (2012).

115. See *id.*

the claims of a Fake News article are much more difficult to disprove.¹¹⁶ In cases of spam or other false advertising tactics, the FTC may issue a trade rule that clarifies an industry-wide interpretation, setting out what types of advertising constitutes improper advertising methods.¹¹⁷ The difficulty in promulgating a trade rule for Fake News is that it does not fit into a well-defined industry. However, Fake News generates enough profits to qualify as its own industry¹¹⁸ and contributes to the channel of commerce within the multibillion-dollar online advertising industry.¹¹⁹

Often, Fake News is automatically inserted into the stream of online advertising. AdSense, also known as “Ads by Google,” is one example of a revenue-generating program that many websites use.¹²⁰ AdSense allows website managers to place empty advertising space directly on their webpages, which will be filled with the highest bidding advertiser.¹²¹ When these “ads are seen or clicked, [the owner] will automatically earn money” in the form of a check from Google.¹²² AdSense is designed to be user-friendly and automated in order to generate advertising revenue at scale.¹²³ Advertising revenue programs, such as AdSense, auto-populate based on the key words, demographics, and affinity audience descriptors that advertisers identify.¹²⁴ Google has already begun to restrict advertising services to certain sites in an effort to combat Fake News.¹²⁵ However, private monitoring of Fake News will

116. See Richard M. Schmidt, Jr. & Robert Clifton Burns, *Proof or Consequences: False Advertising and the Doctrine of Commercial Speech*, 56 U. CIN. L. REV. 1273, 1288 (1988) (quoting *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 n.24 (1976)).

117. *Id.* at 1290.

118. There are no exact figures on how much Fake News has generated for purveyors, but it is likely enough to incentivize its creation yet not enough to bother Facebook or Google enough to eliminate it completely.

119. See *Q3 2016 Internet Ad Revenues Hit \$17.6 Billion, Climbing 20% Year-Over-Year, According to IAB*, INTERACTIVE ADVERT. BUREAU (Dec. 28, 2016), <https://www.iab.com/news/q3-2016-internet-ad-revenues-hit-17-6-billion-climbing-20-year-year-according-iab/>.

120. Amy Tracy, *Technology Law—Great Google-Y Moogley: The Effect and Enforcement of Click Fraud and Online Advertising*, 32 U. ARK. LITTLE ROCK L. REV. 347, 352 (2010).

121. *How It Works*, GOOGLE ADSENSE, <https://www.google.com/adsense/start/how-it-works/> (last visited Nov. 28, 2017).

122. *Id.*

123. See *id.*

124. *Display Ads*, GOOGLE ADWORDS, <https://adwords.google.com/home/how-it-works/display-ads/> (last visited Nov. 28, 2017).

125. Nick Wingfield et al., *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>.

likely create a vacuum for new companies to profit from allowing their advertising content on Fake News websites.¹²⁶

Fake News, as defined in this Comment, functions as an advertisement, not journalism. Advertisements are "item[s] of published or transmitted matter with the intention of attracting clients or customers."¹²⁷ Fake News certainly is designed to attract clients but not in the traditional sense of directly inviting a customer to purchase a product through an exchange of consideration.¹²⁸ Rather, Fake News uses false, sensationalist content to attract customers to another company's products, hosted through automatically generated advertisements.¹²⁹ The Fake News purveyor receives the advertising revenue, but the viewer receives free content that is intended to deceive them. In many cases the FTC considers "fake news" sites as an advertising vehicle similar to native content, infomercials, or sponsored posts.¹³⁰ Native content are "advertisements that are seamlessly integrated into editorial content, and are therefore 'native' to their digital context."¹³¹ This content is a boon to marketers who hope to link the product they are advertising to the reputation of the publication.¹³²

The FTC's ability to regulate deceptive advertising is much more expansive than a simple action for fraud.¹³³ Fraudulent speech, which is also not afforded full First Amendment protection,¹³⁴ typically requires intent to mislead a consumer and the consumer actually being misled.¹³⁵ The FTC is concerned that consumers will be unable to critically evaluate the claims made in advertisements because the line between commercial and noncommercial is blurred.¹³⁶ Producers of Fake News and native

126. See Pagan Kennedy, *How to Destroy the Business Model of Breitbart and Fake News*, N.Y. TIMES (Jan. 7, 2017), https://www.nytimes.com/2017/01/07/opinion/sunday/how-to-destroy-the-business-model-of-breitbart-and-fake-news.html?_r=1 (explaining that companies can decide whether to advertise on Fake News websites).

127. *Advertisement*, BLACK'S LAW DICTIONARY (10th ed. 2014).

128. See, e.g., @McDonalds, TWITTER (Aug. 1, 2017, 8:00 AM), <https://twitter.com/McDonalds/status/892399588308652033> (inviting customers to purchase limited-edition Sriracha sauce).

129. See, e.g., CNN, <http://www.cnn.com/> (last visited Nov. 28, 2017) (sometimes showing under the "paid content" section shocking headlines that then link to fake sites).

130. Edith Ramirez, Welcome Remarks at Blurred Lines: Advertising or Content? An FTC Workshop on Native Advertising 6 (Dec. 4, 2013), https://www.ftc.gov/system/files/documents/public_events/171321/final_transcript_1.pdf.

131. Lili Levi, *A "Faustian Pact"? Native Advertising and the Future of the Press*, 57 ARIZ. L. REV. 647, 649 (2015).

132. RAMIREZ, *supra* note 130, at 7–8.

133. Fentonmiller, *supra* note 107, at 589.

134. *Illinois v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003).

135. Fentonmiller, *supra* note 107, at 589.

136. RAMIREZ, *supra* note 130, at 6.

advertising take advantage of this middle ground, disguising the commercial incentive with language that would otherwise achieve strict speech protections.¹³⁷

The FTC has already addressed the vehicle of Fake News, largely with false claims surrounding dietary supplements.¹³⁸ In *FTC v. LeadClick Media, LLC*,¹³⁹ the FTC and the State of Connecticut filed a claim against LeadClick Media, an affiliate-marketing-network operator, who would arrange for its clients' products to appear on affiliate sites in order to generate advertising traffic.¹⁴⁰ Some of LeadClick Media's affiliates operated fake sites designed to mimic legitimate sites, complete with logos, pictures of supposed reporters, and fabricated comments from consumers.¹⁴¹ LeadClick Media argued that it could not be liable for deceptive acts because they did not create the deceptive content,¹⁴² but the Second Circuit held that a defendant may be liable for engaging in deceptive practices if "it either directly participates in a deceptive scheme or has the authority to control the deceptive content at issue."¹⁴³

Fake News would be second-degree advertising because it is one step removed from the actual product the site sells in the advertisements on the host site. Typically, as in cases of fraudulent nutritional advertisements, the benefits claimed in the advertisement are compared to the actual results of the advertised product.¹⁴⁴ *LeadClick Media* demonstrates that regulation of deceptive advertising practices does not only refer to the product at issue but also to whether the overall system used to sell the product was misleading to consumers.¹⁴⁵ Similarly, in the case of product endorsements, the FTC's position reflects a concern with the method's effect on what the consumer believes, not necessarily the truth or falsity of the information.¹⁴⁶ The FTC has the authority to intervene when products are sold in a deceptive manner, even if the purveyor is removed from the product itself.¹⁴⁷ Therefore, the FTC's position demonstrates that Fake News may be regulated, even when

137. Levi, *supra* note 131, at 686–87.

138. Fentonmiller, *supra* note 107, at 576.

139. 838 F.3d 158 (2d Cir. 2016).

140. *Id.* at 162.

141. *Id.* at 163–64.

142. *Id.* at 168.

143. *Id.*

144. See, e.g., *P. Lorillard Co. v. Fed. Trade Comm'n*, 186 F.2d 52, 56 (4th Cir. 1950).

145. *LeadClick Media*, 838 F.3d at 168 ("A defendant may be held liable for engaging in deceptive practice or acts if, with knowledge of the deception, it either directly participates in a deceptive scheme or has the authority to control the deceptive content at issue.").

146. Robert Sprague & Mary Ellen Wells, *Regulating Online Buzz Marketing: Untangling a Web of Deceit*, 47 AM. BUS. L.J. 415, 428 (2010).

147. *Truth in Advertising*, FTC, <https://www.ftc.gov/news-events/media-resources/truth-advertising> (last visited Nov. 28, 2017).

the content of the "article" does not directly relate to the advertisements on its site.

Fake News does not look like traditional advertising because it is often intentionally veiled in the sacred raiment of political speech and does not directly require a commercial transaction. However, the Supreme Court's broad interpretation of commercial speech and Congress's broad grant of regulatory authority to the FTC¹⁴⁸ could allow the FTC to regulate Fake News as part of an advertising scheme that survives on deceiving consumers.

IV. CREATING A TEST FOR FAKE NEWS TO ADDRESS ECONOMIC HARMS

While false speech is constitutionally disfavored and Fake News is disruptive, it must present some cognizable harm to lose all First Amendment protections.¹⁴⁹ Any substantial governmental interest in regulating Fake News will come from the potential that deliberately false stories have to impact the public space.¹⁵⁰ There is little evidence that Fake News shared through social media materially altered the 2016 presidential election,¹⁵¹ although there were instances of boards of elections responding to Fake News articles claiming specific instances of voter fraud.¹⁵² While critics of Fake News roundly condemn its ability to corrupt political discourse and voting integrity,¹⁵³ this occurrence alone would not create a substantial governmental interest.¹⁵⁴ The Court is loath to hold

148. FTC, *PRIVACY & DATA SECURITY UPDATE: 2016*, at 1 (2016), https://www.ftc.gov/system/files/documents/reports/privacy-datasecurity-update-2016/privacy_and_data_security_update_2016_web.pdf; David C. Vladeck, *Lessons from a Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1059 (2004).

149. Lyrisa Barnett Lidsky, *Where's the Harm?: Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. REV. 1091, 1092 (2008).

150. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980) ("The government may ban forms of communication more likely to deceive the public than to inform it.").

151. Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSPS. 211, 232 (2017).

152. Press Release, Franklin Cty. Bd. of Elections (Oct. 1, 2016), <http://files.constantcontact.com/b01249ec501/58eeb35a-7d61-4807-b168-765d27ca11cf.pdf>.

153. *See* Jules Witcover, *Fake News is No Joke*, CHI. TRIB. (Dec. 30, 2016, 2:30 PM), <http://www.chicagotribune.com/news/columnists/sns-201612291430--tms--poltodayctnyq-a20161230-20161230-column.html> ("To one such soul who has persevered for nearly seven decades in the trenches of print journalism striving to adhere to the basic ground rules of seeking out and reporting what is actually said and done, 'fake news' is an abominable cancer on that undertaking.").

154. *United States v. Alvarez*, 567 U.S. 709, 722–23 (2012) (invoking George Orwell's *1984* to pit the constitutional prerogative of open expression against allowing the government to regulate which information is true and which is false).

that pursuing truthful discourse is a sufficient end to sustain a ban on speech.¹⁵⁵ However, the government retains the power to regulate speech when it creates danger to the public.¹⁵⁶ This interest is the reason incitement of imminent lawless action is not protected¹⁵⁷ and why the FTC regulates misleading advertisement about foods and drugs.¹⁵⁸ In a similar way, Fake News has the potential to cause harms to a variety of interested parties. Ultimately, regulating Fake News highlights the tension between the disfavored posture towards commercial speech and the strict protections afforded to noncommercial speech.¹⁵⁹ Therefore, because the harm the speech causes dictates whether it can be addressed through government action, Fake News can be regulated when it interferes with commerce but not when it can be causally linked to violence.

A. *Harms to the Public*

Fake News presents an abstract danger to the public due to its misleading nature, but any connection to noncommercial harms would likely be too attenuated to justify regulation. On December 4, 2016, Edgar Welch entered a Washington, D.C. pizza restaurant with an AR-15 rifle, demanding to see where the restaurant was harboring child sex slaves.¹⁶⁰ Welch cited a compilation of conspiracy theories and “fake news” articles as his inspiration for investigating the restaurant.¹⁶¹ While there is no evidence the websites Welch visited had economic motivation,¹⁶² the incident demonstrates the potential for misleading information—especially information that is incendiary—to encourage readers to take independent action. This result is especially true if the reader believes the objectively false material is subverting the “mainstream media.”¹⁶³ In reality, no media outlet is discussing the story because it is a fabrication, but to the Fake News consumer, the denial of the subject matter becomes further proof that it exists.¹⁶⁴

155. *Id.*

156. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

157. *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969).

158. *Truth in Advertising*, *supra* note 147.

159. *See* Garon, *supra* note 41, at 608–09.

160. *See* Cecilia Kang & Adam Goldman, *In Washington Pizzeria Attack, Fake News Brought Real Guns*, N.Y. TIMES (Dec. 5, 2016), https://www.nytimes.com/2016/12/05/business/media/comet-ping-pong-pizza-shooting-fake-news-consequences.html?_r=0.

161. Adam Goldman, *The Comet Ping Pong Gunman Answers Our Reporter's Questions*, N.Y. TIMES (Dec. 7, 2016), <https://www.nytimes.com/2016/12/07/us/edgar-welch-comet-pizza-fake-news.html>.

162. *See* Merrit Kennedy, *'Pizzagate' Gunman Sentenced to 4 Years in Prison*, NPR (June 22, 2017, 2:13 PM) <http://www.npr.org/sections/thetwo-way/2017/06/22/533941689/pizzagate-gunman-sentenced-to-4-years-in-prison>.

163. *See* Kang & Goldman, *supra* note 160.

164. Lidsky, *supra* note 149, at 1100.

Acts like the "Pizzagate" shooting¹⁶⁵ would seemingly justify protecting the public against Fake News' potential to cause violent action. Fake News is necessarily designed to evoke strong emotive response.¹⁶⁶ Article titles are typically sensationalist, using hyperbole to pique viewer interest.¹⁶⁷ This "clickbait" entices viewers with the promise of some new, incendiary allegation or the enforcement of an existing assumption, which in turn increases the value of the site's advertising space due to increased traffic.¹⁶⁸ However, it would likely be difficult to find a legally cognizable connection between Fake News and a violent act caused by a Fake News site's viewer. The necessary extent of this connection is clarified in *Brandenburg v. Ohio*,¹⁶⁹ where the Court prohibits governmental actors from barring speech advocating some political action "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."¹⁷⁰ As a matter of noncommercial speech, any false news article designed to elicit a violent response in the reader would need to do more than abstractly advocate for violent action.¹⁷¹

There is a dispute as to whether the test laid out in *Brandenburg* applies only to political speech or if the principle extends to commercial speech as well.¹⁷² Inherent in this dispute is that speech created to generate profit does not qualify as commercial speech in the same way as an advertisement for that same material.¹⁷³ Furthermore, the economic intent behind Fake News may disqualify it under a *Brandenburg* analysis. Under *Brandenburg*, the speaker must intend to incite lawless action,¹⁷⁴ it

165. Eric Lipton, *Man Motivated by 'Pizzagate' Conspiracy Theory Arrested in Washington Gunfire*, N.Y. TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/us/pizzagate-comet-ping-pong-edgar-maddison-welch.html?action=click&contentCollection=U.S.&module=RelatedCoverage®ion=EndOfArticle&pgtype=article>.

166. See *Fake News Expert on How False Stories Spread and Why People Believe Them*, NPR (Dec. 14, 2016, 12:31 PM), <http://www.npr.org/2016/12/14/505547295/fake-news-expert-on-how-false-stories-spread-and-why-people-believe-them> (presenting a conversation between Dave Davies and Craig Silverman).

167. See Ritchie, *supra* note 3.

168. See James Hamblin, *It's Everywhere, the Clickbait*, ATLANTIC (Nov. 11, 2014), <https://www.theatlantic.com/entertainment/archive/2014/11/clickbait-what-is/382545/>.

169. 395 U.S. 444 (1969).

170. *Id.* at 447.

171. See *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 242–43 (4th Cir. 1997).

172. John F. Wirenius, *Brigaded with Action: Undirected Advocacy and the First Amendment*, 32 SETON HALL L. REV. 299, 334–35 (2002).

173. See *Rice v. Paladin Enters., Inc.*, 940 F. Supp. 836, 841 (D. Md. 1996), *rev'd*, 128 F.3d 233 (4th Cir. 1997) (holding that a book instructing how readers could become murderers-for-hire is not, by itself, commercial speech merely because it was published for a profit).

174. *Brandenburg*, 395 U.S. at 447.

would not be enough that a result consistent with the article occurs. Hypothetically, a Fake News article titled "Candidate X Supporters are Plotting an Attack on City Y, Here's How You Can Stop Them," may encourage readers to take preemptive action against an impending partisan attack. The intent behind such an article is not to advocate for producing imminent lawless action but instead is to attract enraged or fearful viewers who contribute to the host site's value. Therefore, such an article fails the *Brandenburg* test and cannot be restricted through government action without violating the First Amendment.

Only in extreme cases have courts defined a point where the intent requirement is achieved because of the nature of the speech. In *Rice v. Paladin Enterprises, Inc.*,¹⁷⁵ the Fourth Circuit reviewed a tort claim against the publisher of a book that described how to successfully solicit or commit murders for hire after a man used the book to carry out a triple murder.¹⁷⁶ The Maryland court found the book was protected speech because it merely advocated for murder rather than directly encouraged it.¹⁷⁷ The Fourth Circuit reversed this decision, finding there was not an absolute bar to civil liability under the First Amendment where

Paladin's astonishing stipulations, coupled with the extraordinary comprehensiveness, detail, and clarity of *Hit Man's* instructions for criminal activity and murder in particular, the boldness of its palpable exhortation to murder, the alarming power and effectiveness of its peculiar form of instruction, the notable absence from its text of the kind of ideas for the protection of which the First Amendment exists, and the book's evident lack of any even arguably legitimate purpose beyond the promotion and teaching of murder, render this case unique in the law.¹⁷⁸

This unique case with exceptional facts sets an incredibly high bar for speech that could simultaneously lack a direct encouragement of violence and merit a loss of First Amendment protection.

However, Fake News is extremely unlikely to reach this level of explicit violence and, thus, traditional incitement statutes are ineffective for eliminating Fake News for multiple reasons. First, the online forum of Fake News distances the purveyor from the person who might carry out an act of violence based on the article. Courts are less likely to see non-directed, virtual speech as an incitement to violence because there is a greater measure of separation than speech in a physical capacity, and the imminence

175. *Rice*, 128 F.3d. 233.

176. *Id.* at 240-41.

177. *Rice*, 940 F. Supp. at 849.

178. *Rice*, 128 F.3d at 267.

requirement of *Brandenburg* is harder to obtain.¹⁷⁹ Second, the economic nature of Fake News creates incentives for stories that would be widely shared, and overly-threatening stories are likely to turn away more casual viewers. Ultimately, any regulation of Fake News will not be on the basis of a causal link to some act of violence or any other non-directed harm.

B. Harms to Commerce

Perhaps the greatest obstacle to regulating Fake News is identifying the "victim." In other instances of false advertising, the consumer is the victim because they are taken advantage of for monetary gain.¹⁸⁰ However, Fake News viewers will likely not suffer harm, beyond a lack of information, after they click on an article link or visit a Fake News website. More likely, the legally recognizable victims of Fake News are the advertisers whose brands are damaged after automated advertisements link their product to the Fake News vehicle. Justice Stevens notes that "[t]he evils of false commercial speech, which may have an immediate harmful impact on commercial transactions, together with the ability of purveyors of commercial speech to control falsehoods, explain why we tolerate more governmental regulation of this speech than of most other speech."¹⁸¹ The FTC would likely be able to regulate the aspects of Fake News as it relates to economic harms because falsities have a direct economic impact.

Fake News presents the potential for a negative commercial impact through the chain of advertising it produces. As mentioned previously, the automated nature of the online advertising space provides a shortcut for placing advertisements in front of customers.¹⁸² However, this mechanism means advertisements often reach sites advertisers do not intend or appear on websites that are counter to the mission of the company.¹⁸³ When a company's clients catch wind of advertising on an inflammatory site, or even a site that they believe promotes hateful speech,¹⁸⁴ the negative reaction may impact the company's brand image or

179. See Margot E. Kaminski, *Incitement to Riot in the Age of Flash Mobs*, 81 U. CIN. L. REV. 1, 80–81 (2012).

180. See, e.g., *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 881 (Cal. 2011) (identifying consumers as victims of deceptive advertising with standing to sue).

181. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring).

182. See *supra* notes 102–24 and accompanying text.

183. Davey Alba, *Meet the Ad Companies Ditching Breitbart and Fake News*, WIRED (Dec. 15, 2016, 7:00 AM), <https://www.wired.com/2016/12/fake-news-will-go-away-tech-behind-ads-wont-pay/>.

184. Abha Bhattarai, *It Wasn't Even a Question: The Simple Calculation for Pulling Advertising Off Breitbart*, WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/news/business/wp/2017/02/23/it-wasnt-even-a-question-the-simple-calculation-for-pulling-advertising-off-breitbart/?utm_term=.816903318ec9.

revenue.¹⁸⁵ Ironically, the online advertising system has created an environment where it is not the consumer that suffers direct harm from this false information but the company placing advertisement.

Regulating only the commercial aspect of Fake News and its effect on the advertising industry and brand identity should allay fears that the government will be able to discriminate against subject matter it disfavors. While false news stories favoring Trump were shared around thirty million times on Facebook compared to eight million favoring Clinton,¹⁸⁶ the test would apply to all that were produced for an economic motivation, so that regulation would be evenly applied across partisan subjects. After identifying this objective, content-neutral harm, a bright-line test can be created as a framework to protect legitimate internet advertisers and viewers, by proxy.

C. *The “Three-Pronged” Definition of Fake News*

The FTC likely has the statutory authority, as granted by Congress, to regulate Fake News and use of such authority would likely be the most appropriate avenue for addressing these economic harms.¹⁸⁷ The FTC could regulate Fake News meeting a three-factor definitional test. First, the material would need to be created to mimic the stylistic appearance of traditional journalistic products. Second, the material would necessarily be created to intentionally deceive viewers about its veracity. Finally, this intentionally false material must have been disseminated for the purpose of generating revenue. This objective test will discourage would-be profiteers from adding to the deluge of noneconomically motivated fraudulent news articles while further distinguishing it from fully protected noncommercial speech. The test will also be proactive in nature to prevent economic harm before it occurs, rather than the reactive in nature like the current judicial limits on nonprotected, noncommercial speech.¹⁸⁸

Creating a legally cognizable, bright-line definition of Fake News could serve to protect First Amendment protections rather than opening the door for abuses. Currently, the colloquial term “fake news” lacks a coherent societal definition, much less a formal legal definition. Recently, the term has become a tool used to delegitimize inaccurate news, without any notion of the intent

185. Mathew Ingram, *Advertising Boycott of Breitbart News Appears to Be Growing*, FORTUNE (Feb. 21, 2017), <http://fortune.com/2017/02/21/advertising-boycott-breitbart/>.

186. Allcott & Gentzkow, *supra* note 151, at 223.

187. *See supra* Part III.

188. *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 32–33 (2000) (stating that prior restraints of most noncommercial speech are presumptively unconstitutional, while prior restraints of commercial speech are presumptively constitutional).

behind the news or the magnitude of the discrepancy.¹⁸⁹ Thus, the tussle over a definition of when news can be considered "fake" is being crafted in the popular vernacular.¹⁹⁰ President Trump is driving much of this definitional conversation, which can be read in conjunction with his desire to lower the definitional bar for libel to generate damages.¹⁹¹ The concern over the legal ramifications of the phrase "fake news" touches every party in American discourse, especially the press itself, which fears a looser definition may be an attempt to undermine their legitimacy.¹⁹² This posited three-pronged definition would silo Fake News under commercial speech, requiring some economic motivation in addition to some degree of intentional falsity. This application would thus safeguard legitimate commercial interests apart from the popular understanding of "fake news." Additionally, this approach will ultimately protect the economic trade practices of legitimate advertisers while providing collateral benefits of promoting healthier discourse and defining a presently ambiguous phrase.

CONCLUSION

Regulations that address intentionally misleading commercial speech are not the ultimate panacea for poisonous civil discourse. Hyper-partisan voices, even those disseminating intentionally false political stories to support their message, will, and should, continue to enjoy the First Amendment protections that safeguard political expression. However, those voices with purely economic incentives to muddy discourse should be held accountable for their product's integrity. Fake News is a constellation of highly disfavored forms of speech: commercial speech, intentionally false speech, and harmful speech. The Court has afforded commercial speech—especially intentionally false commercial speech—minimal First Amendment protection.¹⁹³ In addition to lessened scrutiny, Congress has granted the FTC wide latitude to regulate such intentionally false

189. Aaron Blake, *The White House's Big 'Fake News' Cop-Out*, WASH. POST (Feb. 26, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/26/fake-news-is-a-potent-political-strategy-its-also-a-cop-out/?utm_term=.61afc898b5a0.

190. Danielle Kurtzleben, *With 'Fake News,' Trump Moves From Alternative Facts to Alternative Language*, NPR (Feb. 17, 2017, 8:27 PM), <http://www.npr.org/2017/02/17/515630467/with-fake-news-trump-moves-from-alternative-facts-to-alternative-language>.

191. Hadas Gold, *Donald Trump: We're Going to 'Open Up' Libel Laws*, POLITICO (Feb. 26, 2016, 2:31 PM), <http://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866>.

192. Bente Birkeland, *When a Politician Says 'Fake News' and a Newspaper Threatens to Sue Back*, NPR (Feb. 17, 2017, 12:36 PM), <http://www.npr.org/2017/02/17/515760101/when-a-politician-says-fake-news-and-a-newspaper-threatens-to-sue-back> (detailing a newspaper's threat to sue a politician who called their product "fake news" on Twitter).

193. See *supra* notes 18, 48 and accompanying text.

commercial speech.¹⁹⁴ As Fake News attaches parasitically to avenues of online advertisement, it has far-reaching commercial implications to discourage advertising on legitimate news sites and to negatively impact brand identity. The FTC can easily remedy these economic harms through an intent-based test regulating speech that (1) mimics journalistic content (2) in an intentionally misleading way (3) for the purpose of generating advertising revenue. Fake News is false advertising in core political speech's clothing, and the FTC should have the ability to regulate it as they would any other iteration of commercial speech.

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194. *See supra* Part III.

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