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2007

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### Recommended Citation

Ashley Messenger, *The Epistemic and Moral Dimensions of Fake News and the First Amendment*, 16 FIRST AMEND. L. REV. 328 (2017).

Available at: <https://scholarship.law.unc.edu/falr/vol16/iss2/8>

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## THE EPISTEMIC AND MORAL DIMENSIONS OF FAKE NEWS AND THE FIRST AMENDMENT

Ashley Messenger\*

“Fake news”<sup>1</sup> is a concept that has garnered a lot of attention. It is faulted for creating a variety of social problems, contributing to political divisions in the U.S., and interfering with elections in the U.S. and abroad.<sup>2</sup> And as such, there have been calls for regulation.<sup>3</sup>

With respect to the legal aspects of fake news, there are two important points: (1) much of what is called fake news is probably constitutionally protected speech. First Amendment protection is not conditioned upon whether speech is helpful or good. The Founders had other priorities in mind. But by making a broad grant of freedom to the public, the Founders also expected the public to behave responsibly. That means, (2) the law must accommodate the broad conception of free speech and also limit liability for those who attempt to engage in good faith corrections of the record. In essence, the law must be consistent with the epistemic and moral positions in which the Founders placed government and citizens.

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<sup>1</sup>“Fake news” is a term that has been applied to many different things, including satire and genuine news reports that turn out to be incorrect. *See, e.g.*, Mark Verstraete, Derek E. Bambauer, & Jane R. Bambauer, *Identifying and Countering Fake News* 5–7 (Ariz. Legal Studies Discussion Paper No. 17-15, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3007971](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007971) (describing the various categories under which fake news may fall); Edson C. Tandoc Jr., Zheng Wei Lim, & Richard Ling, *Defining “Fake News”: A Typology of Scholarly Definitions*, 6 DIGITAL JOURNALISM 137, 141–47 (2017) (providing that fake news includes satire, parody, fabrication, photograph manipulation, and propaganda). However, for purposes of this article, I am using the term to refer to speech that purports to be a true journalistic news report but in fact is intentionally falsified and/or simply made up, and it is neither presented as nor intended to be taken as merely satirical. In other words, it is an intentional lie that deceives the public. The motive may be to make money, to support or oppose a political candidate or cause, or simply to fool people. For these purposes, the precise motive is irrelevant insofar as the purpose is not to promote the truth or attempt to inform the public.

<sup>2</sup> *See, e.g.*, Morgan Chalfant, *Denmark, Sweden Team up to Counter Russian ‘Fake News’*, THE HILL (Aug. 31, 2017, 11:03 AM), <http://thehill.com/policy/cybersecurity/348693-denmark-sweden-team-up-to-counter-russian-fake-news>.

<sup>3</sup> *See, e.g.*, Daniel Chaitin, *Reporter: FTC Can Regulate What's Real News, What's 'Fake News'*, WASH. EXAM’R (Jan. 30, 2017, 4:14 PM), <http://www.washingtonexaminer.com/reporter-ftc-can-regulate-whats-real-news-whats-fake-news/article/2613392>; Andrew Rettman & Aleksandra Eriksson, *Germany Calls for EU Laws on Hate Speech and Fake News*, EUOBSERVER (Apr. 6, 2017, 9:29 AM), <https://euobserver.com/foreign/137521>.

The purpose of this Essay is simply to acknowledge that the First Amendment is structured in such a way that leaves citizens responsible for upholding certain moral and epistemic duties. In short, it does no good to call for regulation of “fake news” because the Constitution makes the citizenry the regulators. Our system requires the good faith participation of citizens, and works only when they, in fact, participate in good faith. To the extent that we are suffering the consequences of fake news, we are suffering the consequences of the failure of citizens to uphold the duties imposed by our Founders.

### I. THE FRAMEWORK ESTABLISHED BY THE FOUNDERS

America’s Founders included the freedoms of speech and press in the First Amendment because they wanted to ensure that the Government would not attempt to control what could be deemed “truth;” they feared the establishment of some political orthodoxy that allowed some views to be expressed while others were censored.<sup>4</sup> The First Amendment, therefore, removes such power from the Government:

“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”<sup>5</sup>

Over time, as the Supreme Court has had opportunities to interpret the First Amendment, it has made clear that neither truth nor morality are prerequisites for protection under the law. Truth is certainly not required for protection: *United States v. Alvarez*<sup>6</sup> explicitly provided First Amendment protection for lies (in the absence of some heightened form of harm), and *New*

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<sup>4</sup> See *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

<sup>5</sup> *Id.* at 638; see also, Thomas Jefferson, 3rd U.S. President, First Inaugural Address (Mar. 4, 1801) (transcript available at [http://avalon.law.yale.edu/19th\\_century/jefinau1.asp](http://avalon.law.yale.edu/19th_century/jefinau1.asp)) (“Sometimes it is said that man cannot be trusted with the government of himself. Can he, then, be trusted with the government of others?”).

<sup>6</sup> 567 U.S. 709 (2012).

*York Times Co. v. Sullivan*<sup>7</sup> provided protection to false statements about public officials in libel cases (unless the plaintiff could prove a heightened standard of fault).<sup>8</sup> The law also protects much speech that many consider morally problematic: hate speech,<sup>9</sup> indecency,<sup>10</sup> and violence.<sup>11</sup> In short, the First Amendment is epistemically and morally neutral. Fake news has flourished in this environment.

What's important to remember, though, is that even though the Founders wanted to limit the Government's power to control content or declare certain views to be "truth," they in no way intended for individual citizens to be epistemically or morally neutral. On the contrary, the purpose of the First Amendment is precisely to allow individuals to have access to a wide range of views so that they can determine what to believe, and the Founders assumed that citizens would strive to be moral, rational, and truth-seeking. In fact, the framers of the constitution explicitly stated that truth, science, morality, and the sharing of ideas for the purpose of forming a common understanding of the world and good government were primary goals of press freedom:

"The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or

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<sup>7</sup> 376 U.S. 254 (1964).

<sup>8</sup> *Alvarez*, 567 U.S. at 724 (plurality opinion); *Sullivan*, 376 U.S. at 279–80.

<sup>9</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 444–45 (1969) (providing constitutional protection to speech at a KKK rally); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (providing constitutional protection to cross burning); *Snyder v. Phelps*, 562 U.S. 443, 448, 460 (2011) (providing constitutional protection to protesters with signs saying "God Hates Fags"); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 867 (E.D. Mich. 1989) (holding that university regulations against hate speech were unconstitutionally vague).

<sup>10</sup> *Miller v. California*, 413 U.S. 15, 36–37 (1973) (granting constitutional protection to sexual material that is not "obscenity" and establishing a high bar for determining what constitutes "obscenity"); *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (finding a constitutional right to possess obscenity in the privacy of one's own home).

<sup>11</sup> *United States v. Stevens*, 559 U.S. 460, 482 (2010) (striking down a law that prohibited the depiction of cruelty to animals); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 805 (2011) (striking down law that banned the sale of violent video games to minors).

intimidated into more honourable and just modes of conducting affairs.”<sup>12</sup>

With respect to finding truth, the Founders believed in reason. Perhaps they were overly optimistic, but they assumed that people wanted to know the truth and would examine facts and ideas carefully. A free press was valued and privileged in large part because of the confidence they had in the ability of persons to discern the truth. They were familiar with *Aeropagitica*, a 1644 speech given by John Milton, arguing for the freedom of print materials without a license from the British government. He famously stated:

“Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter.”<sup>13</sup>

Such sentiments were echoed numerous times by the Founders<sup>14</sup> and have influenced the Supreme Court’s reasoning in favor of a free press.<sup>15</sup>

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<sup>12</sup> Continental Congress to the Inhabitants of Quebec (Oct. 26, 1774) in *JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789* 108 (Worthington C. Ford et al. eds. 1904).

<sup>13</sup> JOHN MILTON, *AREOPAGITICA, WITH A COMMENTARY BY SIR RICHARD C. JEBB AND WITH SUPPLEMENTARY MATERIAL* 58 (1918).

<sup>14</sup> See, e.g., *THE PAPERS OF THOMAS JEFFERSON, VOLUME 33: 17 FEBRUARY TO 40 APRIL 1801* 148–52 (Barbara B. Oberg, ed. 2006) (“[E]rror of opinion may be tolerated, where reason is left free to combat it”).

<sup>15</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269–72 (1964) (“[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions, . . . and this opportunity is to be afforded for ‘vigorous advocacy’ no less than ‘abstract discussion’ . . . The First Amendment, said Judge Learned Hand, ‘presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection . . . Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials . . . Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker . . . The constitutional protection does not turn upon ‘the truth, popularity, or social utility of the ideas and beliefs which are offered’ . . . As Madison said, ‘Some degree of abuse

Moreover, the Founders expected citizens to *participate*, to engage with one another in good faith for the purpose of discerning truth and developing a civil society. As the Court has noted:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that, in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; *that public discussion is a political duty* and that this should be a fundamental principle of the American government.<sup>16</sup>

The Founders also believed strongly in the importance of personal virtue, noting that it was crucial to the functioning of the Republic. State constitutions acknowledged that the blessings of liberty were contingent on the good behavior of citizens and officials alike. For example, the Constitution of Virginia declared, “That no free government, nor the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue; and by frequent recurrence to fundamental principles.”<sup>17</sup> And Pennsylvania’s constitution stated:

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is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.’ . . . ‘In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields, the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.’ . . . . That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”) (citations omitted).

<sup>16</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (emphasis added).

<sup>17</sup> VA. CONST. art. 1, § 15.

“That a frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry, and frugality are absolutely necessary to preserve the blessings of liberty, and keep a government free: The people ought therefore to pay particular attention to these points in the choice of officers and representatives, and have a right to exact a due and constant regard to them, from their legislatures and magistrates, in the making and executing such laws as are necessary for the good government of the state.”<sup>18</sup>

Massachusetts had strikingly similar language in its state constitution.<sup>19</sup>

The Founders’ assumptions that citizens would strive to be thoughtful, rational, and moral may not have been explicitly emphasized in the U.S. Constitution—presumably because they were taken for granted—but those assumptions were nevertheless built in to the idea of granting freedoms to individuals. Although the Founders certainly anticipated instances of abuse,<sup>20</sup> they nevertheless chose a system where the Government may not establish legally enforceable standards with respect to speech and press. It is, instead, incumbent upon the rational agents in the community to consider the epistemic and moral dimensions of speech. In short, the Founders established a framework that imposes some obligations on citizens to live up to certain moral and epistemic obligations for the sake of good government and a good society.

To miss this is to misunderstand the fundamental faith the Founders had in human beings. They established a government by the people and for the people because they believed that the people, together, could aspire to something great. The Founders had a hopeful trust<sup>21</sup> in citizens—a vision of a rational society that aspires to truth. The law therefore needn’t force any vision of the truth because the people themselves would aspire to it.

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<sup>18</sup> PA. CONST. § XIV (1776).

<sup>19</sup> MASS. CONST. art. III.

<sup>20</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (“As Madison said, ‘Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.’”).

<sup>21</sup> For a discussion of the notion of hopeful trust, see generally Karen Frost-Arnold, *Social Media, Trust, and the Epistemology of Prejudice*, 30 SOCIAL EPISTEMOLOGY 513 (2016) (Hopeful trust is when a person holds out a vision to another of what he can be. It is motivating insofar as the audience aspires to act in accordance with the vision of the kind of person/society he/it can become).

Thus, the notion of government regulation of speech or press fundamentally repudiates the vision of the Founders. Any “regulation” is through the self-government of citizens who bear their responsibilities to speak truthfully, to examine the claims of others, and to correct falsehoods when required.

## II. THE BURDENS OF THE SPEAKER

From a purely legal standpoint, speakers do not bear many burdens. As noted above, the First Amendment has been interpreted to protect a wide range of offensive, immoral speech, including outright lies.<sup>22</sup> Speakers may be liable if their speech satisfies the elements for libel, true threats, fraud, or other crimes or torts, but the degree of protection given to speech is high. Thus, it is rare that speech will have legal repercussions.

But despite the protection from governmental consequences, the Founders nevertheless anticipated that citizens would strive to adhere to rational, epistemic,<sup>23</sup> and moral norms,<sup>24</sup> particularly the norm to tell the truth.<sup>25</sup> Fake

<sup>22</sup> *Supra* notes 6–12 and accompanying text.

<sup>23</sup> Speakers have an obligation, as part of an epistemic community, to adhere to the “norms of assertion,” which requires that a person assert only what they know to be true. TIMOTHY WILLIAMSON, *KNOWLEDGE AND ITS LIMITS* 243 (Oxford Univ. Press 2000). This is to fulfill the epistemic goal of finding the truth. *Id.* Because much of our knowledge comes from what others tell us, it is important that people be truthful in their testimony.

<sup>24</sup> The moral dimensions of speech have been addressed by many of the world religions. The Ten Commandments, for example, contain at least two admonitions regarding speech or communication: to not take the Lord’s name in vain and to refrain from bearing false witness. *Exodus* 20:7, 16 (King James). There are arguably two additional admonitions as well: the prohibition on graven images, *id.* at 20:4, restricts expressive works, and the instruction to honor one’s parents, *id.* at 20:12, may imply a restriction on speaking in a manner that reflects poorly on them. The Quran instructs adherents of Islam to “speak justly.” *Noble Quran* 6:152. Buddhists adhere to an “eightfold path,” which outlines eight major principles for practitioners, one of which is “right speech,” a complicated ethics of speaking with wisdom and compassion. *See* BHIKKHU BODHI, *THE NOBLE EIGHTFOLD PATH* 45 (2006). Traditional Buddhist teachings, like the Abrahamic religions, prohibit profanity and lying, but they also caution against gossip, “idle speech,” and statements that are untimely or unwelcome by the audience. *See id.* at 49–56 (describing prohibited speech). Likewise, Hinduism requires “pure” speech, which entails truthfulness and kindness. LALA BAIJ NATH, *HINDUISM: ANCIENT AND MODERN, AS TAUGHT IN ORIGINAL SOURCES AND ILLUSTRATED IN PRACTICAL LIFE* (1905) 209 (2010). In short, most religions frown upon lying and abusive speech. While the First Amendment certainly stands for the proposition that the government cannot enforce the views of any religion, the Founders in no way required the population to be devoid of religion or amoral. On the contrary, as evidenced by the language of the state constitutions referenced *supra* notes 17–19, the Founders expected citizens to adhere to some moral system.

<sup>25</sup> Scholars have recognized that even apart from moral obligations, truth-telling is fundamental prerequisite to any functioning civil society; trust is integral to social coherence and prosperity, and our society breaks down if the system is compromised by persistent lies. *See generally* FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES*

news presents both epistemic and moral problems, for obvious reasons. If the stories purport to be true but are in fact false, then, from an epistemic standpoint, they do not contribute to either an individual's or society's body of knowledge—and worse, they actually hinder the ability of a person or group to determine what is true by creating doubt in the public's mind about which “facts” to believe. From a moral standpoint, it is not acceptable to make knowingly false statements and present them as true. And yet despite the epistemic and moral issues with fake news, some stories may be wholly protected by the First Amendment.

### III. THE BURDENS OF THE AUDIENCE

Ideally, speakers will be honest in their speech, and many are. But the reality is that we cannot always rely on speakers to uphold their obligations, especially when there are no legal consequences for the failure to do so. This places a much greater burden on the *audience* to evaluate the truth of assertions and to uphold epistemic norms. With respect to fake news, the problem is not only one of the speaker lying, it is also a problem of the audience being willing to accept the assertions without subjecting them to adequate scrutiny.

What would constitute adequate scrutiny? There is a genuine debate in the philosophical community about whether or under what circumstances one should believe something simply because it was reported to them.<sup>26</sup> What is not debated is that there are some minimum standards that must be met before one should believe what is reported.

The kinds of factors an audience might evaluate to determine whether a speaker is credible may include: “how sincere and confident the speaker seemed in the assertion; how well-placed she was to have the knowledge in question[;]” what motives she may have had in speaking; whether the speaker has any motives for insincerity; what pressure the speaker feels to speak responsibly; whether the speaker looked the audience in the eyes or seemed nervous; and whether the assertion made sense or was supported by corroborating known facts.<sup>27</sup>

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AND THE CREATION OF PROSPERITY (1995); SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (2d ed. 1999).

<sup>26</sup> See generally C.A.J. Coady, *Testimony and Observation*, 10 AM. PHIL. Q. 149 (1973) (debating whether one should impose epistemic burdens upon those who hear the testimony of others), see also, e.g., Elizabeth Fricker & David E. Cooper, *The Epistemology of Testimony*, 61 PROC. ARISTOTELIAN SOC., SUPPLEMENTAL VOLUMES 57 (1987).

<sup>27</sup> Sanford C. Goldberg, *Anonymous Assertions*, 10 EPISTEME 135, 142 (2013).

#### IV. THE IMPACT OF ANONYMITY

Fake news is often perpetrated by anonymous (or pseudo-anonymous) individuals. While the First Amendment protects anonymous speech, that doesn't mean that anonymous speech is entitled to the same degree of epistemic respect as speech tied to a known person. If the norms of assertion include an expectation that a person speak truthfully and that one will be held accountable if one fails to do so, then naturally, a person will be aware that he or she may not be held accountable for lying if his or her identity is unknown.<sup>28</sup> A speaker whose identity is hidden is therefore inherently less credible than one who speaks openly. The belief-worthiness of anonymous assertions is inherently diminished.<sup>29</sup>

This is not an argument against anonymity in all cases. Anonymous speech can serve an important purpose, particularly when the speaker is subject to potential threats.<sup>30</sup> There is a strong tradition of anonymous political speech in the U.S.<sup>31</sup> But typically, credible, persuasive anonymous speech comes in the form of analysis or opinion, meaning it discusses a matter of policy or conscience; it is not trying to report or establish facts. The political brochures of the American Revolution were arguments in favor of freedom, not purported news reports. One can judge the merits of an opinion or argument without knowing the speaker. One cannot judge the credibility of a factual assertion without more information about the speakers: are they generally credible? What is their source? Are they in a position to know?<sup>32</sup>

When a speaker is anonymous, the audience lacks the information required to capably assess these factors. Thus, "the assertions themselves no longer convey that the speaker has the sort of epistemic authority that would be needed to warrant outright belief."<sup>33</sup>

<sup>28</sup> See *id.* at 136–37; see also Karen Frost-Arnold, *Trustworthiness and Truth: The Epistemic Pitfalls of Internet Accountability*, 11 *EPISTEME* 1, 63–81 (2014).

<sup>29</sup> See Goldberg, *supra* note 27, at 148.

<sup>30</sup> See Frost-Arnold, *supra* note 21, at 69–70.

<sup>31</sup> See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342–43, 357 (1995) (upholding the right of a citizen to engage in anonymous political speech by distributing unsigned leaflets and discussing the history of anonymous speech, particularly in the context of political dissent).

<sup>32</sup> See Goldberg, *supra* note 27, at 145.

<sup>33</sup> See *id.* at 149.

## V. THE IMPORTANCE OF CREDIBILITY AND THE MODERATION OF BELIEF

It's important to remember that a speaker typically speaks with the aim of getting the audience to believe what one asserted.<sup>34</sup> If that's true, then the speaker should also want to engender credibility, have a good track record for truthfulness, be open about sources, and use one's real name as a form of accountability. This is what most legitimate news organizations do, and these practices are often declared in a statement of principles of journalistic ethics.<sup>35</sup>

Because source credibility is of such great importance, news organizations are often reluctant to grant anonymity to sources, and when they do, the news organization is essentially vouching for the credibility of the source. They are in essence saying, *we have investigated the matter and believe the truth of the assertion; the source is in a position to know, and we are not using their identity to protect them, but we vouch for their credibility.*<sup>36</sup>

One of the most vexing aspects of fake news is that some citizens opt to believe stories or outlets that lack any indicia of reliability, such as identification of verifiable sources, clear standards of journalistic ethics, or long-term enforcement of such ethical standards. The stories presented may align with the audience's personal opinions or political views, but otherwise fail to present the kind of substantiation that should be required before one invests belief in the matters asserted. Often, individuals will complain that supposed "legitimate" news outlets are biased or wrong, but even if one thinks the *New York Times* has not met the requisite epistemic standard for authority, one cannot rationally argue that an anonymous, untested site does. It would be more rational to believe no one and to suspend all judgment than to believe anonymous assertions without transparent sourcing.

If "knowledge" is "true, justified belief," then one who wishes to have knowledge must care about whether that belief is justified. Fake news can create belief, but it's not true. If the

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<sup>34</sup> See *id.* at 139.

<sup>35</sup> See, e.g., *SPJ Code of Ethics*, SOC. OF PROF'L JOURNALISTS, <https://www.spj.org/ethicscode.asp> (last updated Sept. 6, 2014); see also Goldberg, *supra* note 27, at 143.

<sup>36</sup> See Goldberg, *supra* note 27, at 150. Goldberg calls this the "security wall model" of credible anonymous speech. *Id.* News organizations act as a filter, passing along only those assertions that are credible, substituting their own authoritativeness for the protected source. *Id.* This model preserves the belief-worthiness of the assertion even though the original source is unknown. Obviously, though, this model requires that the filter act sparingly and credibly, as it puts its own credibility on the line each time it vouches for another. And those who do not trust the filter (for whatever reason) will not trust the anonymous assertion.

audience doesn't realize the information isn't true or hasn't evaluated whether the belief is justified, then people may think they have knowledge, but they don't—and that undermines the quality of the decision making in our society.

When Milton talked about Truth grappling with Falsity, he assumed there would be a conclusion to the grappling. In the meantime, Falsity may have the upper hand, and that may cause harm.

Thus, if the audience can't be certain what's true, at least the audience can moderate belief. The audience must maintain a degree of epistemic humility when new information is received. It must be tested against other sources to determine whether believing the information is justified. The audience must account for the fact that some people make up facts. Therefore, belief should be attenuated if one cannot be sure the facts are true. This may mean that in the absence of corroboration or clear evidence, one should suspend judgment. We seem to believe that we must have an opinion about every topic, but from a moral and epistemic standpoint, it may be superior to refrain from forming firm beliefs and instead remain open to new information. As Truth grapples with Falsity, one needn't call the match too soon.

## VI. THE OBLIGATION TO SPEAK UP AND PARTICIPATE

As a corollary to that principle, those who do have knowledge of the facts have an obligation to speak up and to correct the record when necessary to prevent others from believing false assertions. If in fact the Founders believed that public discussion is a political duty, then it is incumbent upon citizens with genuine knowledge to ensure that others are not fooled by lies. One prominent scholar has called this a "duty to object."<sup>37</sup> It may be a social or normative duty, but it is not a legal duty—nor could it be, because of First Amendment protections.<sup>38</sup> Nevertheless, the concept is consistent with the position in which citizens are placed; theirs is the duty to engage in good faith for the sake of civil society and good

<sup>37</sup> Jennifer Lackey, *The Duty to Object*, PHIL. AND PHENOMENOLOGICAL RES. (forthcoming 2018) (manuscript available at [http://www.susannaschellenberg.org/REC/Program\\_2017\\_files/Lackey.pdf](http://www.susannaschellenberg.org/REC/Program_2017_files/Lackey.pdf)) ("If you report something that I know is false or unwarranted, or potentially harmful to others, I may be required to say as much."). In arguing for a "duty to object," Lackey notes that correcting false reports is an imperative with both epistemic and moral dimensions. *Id.* (manuscript at 3). She also notes a moral duty not to be rude or confrontational in doing so. *Id.* (manuscript at 22).

<sup>38</sup> The First Amendment protects the right not to speak as well as the right to speak. *See, e.g.,* *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (protecting the right of a newspaper not to publish a column).

government, and that may mean correcting the record in response to fake news. Moreover, “those who know more about the situation have a greater obligation to weigh in than do those who are ignorant of the matter . . . and those who are regarded as an expert on an issue relevant to the case have a stronger duty than those who aren’t.”<sup>39</sup> I would add that not only must one speak up when one knows a statement is false, one must also speak up when one suspects that an assertion is based on flimsy evidence, is being promoted for short-sighted or self-serving motives, or otherwise may be epistemically flawed. It’s easy to deny responsibility when one can say that they don’t know for sure whether a statement is false, but allowing poorly grounded assertions to circulate without challenge is equally pernicious to the community as allowing false statements to circulate because, in both instances, we fail to uphold the interest in rigorously pursuing truth. Those who purport to be leaders—in journalism, politics, or otherwise—have an obligation to call out statements that are clearly false as well as to call into question statements that require further examination. It is particularly important for leaders to do so when the statement, left unchallenged, would seem to help them or their allies. Studies indicate that one of the greatest indicators of credibility is a correction from a source when the erroneous claim would have been in the source’s favor.<sup>40</sup>

But even if a dutiful citizen were to object to false assertions, there is still an important, lingering question, which is whether other citizens are willing to listen and engage in the process of discerning what is true. We are all members of the moral and epistemic community,<sup>41</sup> but that begs the question of what happens if some members refuse to participate. Our constitutional republic was founded on an ideal of citizen participation, and we place our country—and our freedoms—at great risk when we don’t take seriously the responsibilities that the Founders assumed we would uphold: civil, rational discourse in furtherance of our moral and epistemic obligations.

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<sup>39</sup> Lackey, *supra* note 37.

<sup>40</sup> Neil Levy, *Nudges in a Post-Truth World*, 43 J. MED. ETHICS, 1, 3 (2017) (“Thus, corrections to myths about Obamacare that stem from Republican sources are effective for liberals and conservatives alike; the fact that the claim is contrary to the source’s interests is taken to be evidence in its favour.”); *see also* Lackey, *supra* note 38. Lackey also points out that one has a stronger duty to object to false assertions when that person will be deemed to have more credibility with the audience. *Id.* (manuscript at 30). In other words, Republicans who object to false assertions that other Republicans would otherwise be inclined to believe have a greater duty to speak up. The audience of “other Republicans” will be more likely to believe and respect the word of the “speaking Republican” than they will of Democrats who make the same point.

<sup>41</sup> Lackey, *supra* note 38.

Finally, because the Founders have placed citizens, not government, in the role of discerning the truth, the First Amendment must fully protect efforts to fulfill our obligations.

## VII. THE NEED FOR ADEQUATE CONSTITUTIONAL PROTECTIONS TO FULFILL OUR OBLIGATIONS

I have previously written about why the Supreme Court's jurisprudence on libel law is flawed: the law currently fails to account for situations in which one is advising the public of a potential falsehood, not to perpetuate the falsehood, but to advise the public on the controversy;<sup>42</sup> and the Court's treatment of allegations of "lying" create potential problems for those who are trying to identify falsehoods or correct the record.<sup>43</sup> Both of these flaws are highlighted when one examines how journalists—or citizens—can discuss the problem of "fake news." Courts should account for the need to point out falsehoods (or likely falsehoods) and therefore should grant constitutional protection to speech that either reports on falsehoods or attempts to correct a falsehood.

The realm of fake news makes clear a point I have raised before: that libel law must account for the difference in motivations among speakers. The republication rule—which provides that ANY re-publisher is equally liable as the original publisher—simply does not make sense in the context of fake news. Those who originate or republish false statements for the purpose of persuading the public that they are true should be treated differently from those who republish the statements with the purpose of advising the public that they are or may likely be false.<sup>44</sup> Similarly, the courts should be reluctant to impose liability on a speaker who objects to the assertions of others. There are a slew of libel cases where plaintiffs allege that they are defamed as "liars," because another has deemed their assertions to be untrue.<sup>45</sup> The courts need to provide substantial protection to those who have legitimate motives to question

<sup>42</sup> Ashley Messenger, *The Problem With New York Times Co. v. Sullivan: An Argument for Moving from A Falsity Model of Libel Law to A Speech Act Model*, 11 FIRST AMEND. L. REV. 172 (2012).

<sup>43</sup> Leonard Niehoff & Ashley Messenger, *Milkovich v. Lorain Journal Twenty-Five Years Later: The Slow, Quiet, and Troubled Demise of Liar Libel*, 49 U. MICH. J.L. REFORM 467, 468 (2016).

<sup>44</sup> See Messenger, *supra* note 42, at 470.

<sup>45</sup> See, e.g., *Costello v. Capital Cities Commc'ns, Inc.*, 125 Ill.2d 402 (1988); *McNamee v. Clemens*, 762 F.Supp. 2d 584 (E.D.N.Y. 2011); Daniel Jackson, *Sex-Assault Accusers Turn to Defamation Lawsuits in #MeToo Era*, COURTHOUSE NEWS SERV. (Jan. 25, 2018), <https://www.courthousenews.com/sex-assault-accusers-turn-to-defamation-lawsuits-in-metoo-era/>.

unfounded assertions, or who have personal knowledge of the events in question.<sup>46</sup>

### VIII. CONCLUSION

The Framers of the Constitution set up a system that gives citizens immense power in the realm of speech and press and requires them to adhere to moral and epistemic norms. That system collapses if people don't uphold their end of the deal. The problem of fake news should be a wake-up call—not for more government regulation, but for greater citizen participation in the moral and epistemic community.

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<sup>46</sup> See Niehoff & Messenger, *supra* note 43, at 484; see also Clay Calvert, *Counterspeech, Cosby, and Libel Law: Some Lessons about Pure Opinion & Resuscitation of the Self-Defense Privilege*, 69 FLA. L. REV. 151, 171 (2017).