FREE SPEECH, FAKE NEWS, AND DEMOCRACY[1]

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Sect. 1: Introduction.

It would be hard to select two more intensely discussed topics in contemporary political and legal theory than democracy and freedom of speech. Nonetheless, there are comparatively few treatments of the two topics in a single work, and fewer yet that discuss their relationships to one another in depth and detail. This is hardly surprising given the history, scope, and importance of each of them. Contributors to these subjects usually write an essay or book on one of these topics and touch on the other only tangentially. The present paper tries to ameliorate the situation a bit by assessing various proposals about the relationship between freedom of speech and democracy. The most prominent question is how freedom of speech promotes democracy – or whether it accomplishes this task as effectively as the standard story contends. Although the original aim of the First Amendment was certainly to impede tyranny and thereby protect and advance democracy, some contemporary writers now suggest that it has lost its way, or gone down paths that increasingly seem more like conflict than support. Does free speech, as currently interpreted, lend firm and robust support to our democracy, and if so

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what is the evidence to show this? However, this is not the only question that will occupy our attention.

I begin in section #2 with some examples of doubts and challenges to orthodox free speech doctrine that have been raised by major figures and commentators in the field of jurisprudence. These sample concerns will not be explored in depth. Although I share their concerns, I won't attempt to "establish" or "prove" the merits of the objections. I use them partly to suggest that the free speech doctrine is not the simple and unchallengeable doctrine that laypeople often suppose. This paves the way to my alternative approach that may help us tackle some pressing problems in the domain of discourse. Sections #3-6 confront the question of how to address the problem of "fake news" and its serious threats to democracy. Sections #7-9 will address the definition of "lying" and an assortment of relations between democracy and alternative conceptions of free speech.

Sect. 2. Citizens United and First Amentment Ambiguity.

As early as 1905 the need for campaign finance reform was recognized by President Theodore Roosevelt, who called legistlation to ban corporate contributions for political purposes. Heeding this call, Congress enacted several statutes to this end in 1907 and 1966. An independent regulatory agency, the Federal Election Commission, was created that was charged with administering and enforcing the federal campaign finance law. The reach of the FEC, however, was substantially weakened by the Supreme Court's 5/4 decision in *Citizens United v. Federal Election Commission,* 558 U.S., 310,339 (2010). This decision gave corporations and unions the right to make unlimited

contributions of money -- understood as specimens of "speech" -- to political campaigns, and thereby express their political views.

This was an extremely controversial decision. For example, President Barack Obama said, "This ruling strikes at our democracy itself," and "I can't think of anything more devastating to the public interest." The prominent Constitutional scholar Lawrence Tribe, discussing *Citizens United,* complained of "the very real injustice and distortion entailed by the phenomenon of some people, i.e., managers and directors of corporations, using other people's (investors'] money to support candidates they have made no decision to support or to oppose candidates they have made no decision to oppose."[2] As this line of critique suggests, it is highly questionable whether this *Citizens' United* interpretation of the First Amendment adds strength to democracy.

The standard rationale for allowing corporations to sponsor political speech is that such speech, like any speech, may convey new information and/or viewpoints from which citizens could learn useful things. On this view "more speech" is always good. This is a view I shall challenge shortly.

Let us now turn to other sources of concern. Cass Sunstein is a prominent skeptic of the directions taken by Free Speech jurisprudence. In his book *Democracy and the Problem of Free Speech (1993)* Sunstein writes: "[W]e must now doubt whether, as interpreted, the Constitutional guarantee of free speech is adequately serving democratic goals. It is past time for a large-scale reassessment

[2] http://www.scotusblog.com/2010/01/what-should-congress-do-about-citizens-united/

of the appropriate role of the First Amendment in the democratic process." (1993, xi)

Sunstein argues that many interpretations of the First Amendment are weak because the crucial document – the First Amendment itself -- is highly ambiguous. He writes:

> "Consider the infamous Sedition Act of 1798, which broadly prohibited 'false, scandalous, and malicious writings against the government of the United States… In contemporary textbooks, as well as in modern Supreme Court opinions, the Sedition Act is commonly described as an act of evil and unquestionably unconstitutional censorship. But it is highly revealing that soon after the founding period, many -- perhaps most -- people thought that the Act was constitutionally acceptable. If many of the founders did not think that the Sedition Act offended the First Amendment, we cannot now claim that the constitutional protection of free speech, understood in its original context, is a self-applying, rigid protection of expression. All this means that there is much ambiguity in the seemingly clear text. The text of the First Amendment is not rigid and it is not absolute… However tempting it is to pretend otherwise, the hard First Amendment cases cannot plausibly be resolved simply by invoking the text or history of the First Amendment. As a guide to our current dilemmas, insistence on the text is basically unhelpful, and even fraudulent." (1993: xiv-xv)

These passages were penned in 1993, but contemporary developments in the free speech field continue to expand in scope, raising new ambiguities and further skepticism.

A principal source of contemporary skepticism is the vast expansion of types of activity that have gradually been brought under the "protection" of the First Amendment. Types of activities very remote from ordinary speech, and often having little to do with political speech, are now classified and treated under the First Amendment. Here is a descriptive passage by one current writer on the First Amendment, Leslie Kendrick (2017):

> "Over roughly the last half-century, the scope of the freedom of speech in the United States has vastly expanded. The law now protects not only sexual content, profanity, commercial speech, and campaign spending, but also violent video games, depictions of animal cruelty, and medical data…. Other litigants … claim that the First Amendment protects cake bakers and wedding photographers …. This expansion is both notable and conceptually troubling. The more activities crowd under the umbrella of free speech, the more difficult it becomes to distinguish them from activities outside of it…. Both the conceptual and the legal versions of this line-drawing problem have engendered free speech skepticism. On this view, free speech is not a special right, and both law and philosophy err in treating it as though it is." (2017: 87-89)

Kendrick herself thinks that the problem is soluble. But many other legal scholars have their doubts.

If the scope of freedom of speech is so ill-defined, do we really know what we are talking about? Can we even sensibly ask whether a principle of free speech is good for democracy if we hardly know what freedom of speech consists in? If the concept or meaning of democracy

is similarly opaque, can we hope to answer the question of how much free speech contributes to democracy? At a minimum we should ask: Where do our doctrines concerning freedom of speech do too little or go too far? How should they be tweaked or overhauled to do a better job of enhancing democracy, or of improving any alternative political system that seems promising?

Section 3: Free Speech and the Marketplace of Ideas

A general rationale for widespread freedom of speech – i.e., exclusion of government regulation of speech – is the so-called "marketplace of ideas" rationale. The rationale starts from the assumption that society aims to get the truth, the more truth the better. The argument then proceeds by claiming that the best way for society to get the truth is to let everyone express their viewpoints to others. When government stays out of the picture, and lets everybody expound and defend their views, others will get a wider range of evidence and will profit from that by garnering more truth.

This theme has been endorsed by famous writers of many eras. John Milton wrote: "Let Truth and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter (Milton 1644)." And Justice Oliver Wendell Holmes, in a famous (dissenting) opinion wrote: "[W]hen 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." (Abrams v. United States 1919: 630) Other courts have also echoed this theme. For example, "It is the purpose of the First

Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail" (*Red Lion Broadcasting Co. v. FCC* 1969:390). Society's gaining the truth (about various questions of political concern) may well be one of the main purposes for which the First Amendment was adopted. But is the marketplace of ideas the best method, or institution, for leading us to the truth? A common idea is that when confronted with some "problematic" speech activity that threatens to generate false beliefs, the best way to combat this activity is not to regulate or prohibit such acts but to encourage *more speech* (of a relevant type). The key idea is that more speakers, bearing more evidence and contributing their ideas to society (or a sub-group of society) will do the best job of generating true beliefs. No doubt, there is much merit to this approach. But is it always the best possible solution? This is what I examine in the remainder of this section.

What is meant by speech "regulation" in this context is adopting policies and taking actions designed to reduce the prevalence of one or more classes of speech. Hence it amounts to an attempt to reduce or diminish the number of those types of speech. The polar opposite of such reduction is speech "maximization". "Maximization" of speech might be defined more precisely in various ways. But I will simply use the term loosely, without specifying what exactly gets maximized (speech tokens, speech types, etc.) Our question now becomes: Is speech maximization the best way to help society acquire the relevant class of truths, as the marketplace of ideas thesis contends? I begin by discussing a variety of cases in which experience suggests – and workers in appropriate arenas agree – that speech maximization is not the best route to truth acquisition.

In 1980 a reporter for the Washington Post fabricated a story about an eight-year-old heroin addict. The story won a Pulitzer Prize before the fabrication was uncovered. But in the aftermath it became a general rule among newspapers that not every proffered story will be published. Editors must oversee stories and verify the identity of confidential sources. The resulting editorial practice is, in effect, the opposite of what the marketplace of ideas endorses. Editorial gatekeeping is used to avoid the promulgation of, and false belief in, inaccurate stories. Unsupervised story publication is rejected as sub-optimal from the standpoint of truth acquisition.

The regulation of speech is similarly promoted in a wide array of other professional arenas, including arenas close to the heart of the judiciary. For example, a host of government regulations concerning speech originated with the New Deal, as Sunstein (1993:33) points out. The Securities and Exchange Commission restricts what people may say while selling stocks and bonds. The Federal Communication Commission oversees the broadcasting system under a vague "public interest" standard. (Even if some of these practices have since been modified, it doesn't mean that they weren't good ideas in the first place.)

The next class of examples draws from other realms concerning the judiciary. Laws against perjury and suborning perjury are obviously aimed at deterring witnesses from giving false testimony. They are intended to *reduce the incidence* of certain types of false speech that would lead (if condoned) to false beliefs by relevant parties (e.g., jurors, the public). Again, this clearly indicates that the practice of encouraging *more* speech is not systematically regarded as the optimal path to true belief and error avoidance. Similarly, which individuals are

allowed to testify during a trial, and on precisely which topics, is scrupulously overseen by the judge. For example, decisions are made to disallow certain speech acts so as to exclude hearsay evidence. This is clearly premised on the notion that allowing hearsay testimony at trials does not promote truth-getting. The *Federal Rules of Evidence* has similar aims and clearly states that this is intended "*to the end that the truth may be ascertained "* (*Federal Rules of Evidence* 1989). Thus, even by its own tacit admission, the judicial system does not view speech maximization as the optimal road to *true*-belief promotion. Instead, certain types of speech are systematically avoided or impeded.

Is this selective overview fair to the marketplace-of-ideas theory? Isn't it one of the most prominent and compelling theories of social and economic forces that has been generated in the past millennium? Surely it must have more to offer than I have thus far acknowledged. I shall make two additional stabs at showing -- not that the theory is fundamentally bankrupt -- but that it lacks the implications commonly invoked by free-speech enthusiasts.[3]

Although the marketplace-of-ideas (MI) defense of free speech invokes an analogy between speech activity and *economic markets,* economic theory does not really support the analogy required for purposes of free speech theory. Here is how one might try to develop the analogy. Competitive markets, let us suppose, lead to the production and consumption of superior economic products. Many theorists who discuss the laissez-faire underpinning of economic theory hint at such a general thesis. It would also accord with the Darwinian

[3] Although I have gone along with the practice of speaking of "true belief" as the sole relevant desideratum, that is really an oversimplification. The real epistemic desideratum in question is a combination of true belief AND ERROR AVOIDANCE, not merely true belief alone. In other words, what is sought is a high RATIO of true beliefs to false beliefs (or true beliefs to false beliefs and indecisions).

idea that competition encourages "survival of the fittest," where the fittest are in some sense superior creatures or products. Similarly, Adam Smith's invisible hand is thought to ensure that the "best" products emerge from free competition. Finally, perhaps this applies equally to the intellectual arena, where it is understood that the "best products" are true beliefs. However, does economic theory really imply that the best, products are produced and consumed? No. Although economic theory implies that the *level* of outputs for each type of good will reach efficient levels, it makes no prediction about the *quality* of goods (e.g., true as opposed to false beliefs) will be produced. So the crucial analogy is not available for deployment by free-speech theorists (Goldman and Cox, 1996; Goldman 1999a, pp. 196-7).

Market enthusiasts might reply as follows: "The reason that existing markets for speech are unsuccessful as mechanisms for truth acquisition is that they are extremely poor markets. Specifically, they lack the requisite competition-inducing structures. A few super-powerful speakers -- commonly associated with powerful companies -- act as speech "monopolistts". If our market structures were better than they are the prospects for good epistemic products (true beliefs) would be much brighter."[4] However, this claim about the content of economic theory was disputed in the preceding paragraph.[5]

Section 4: Free Speech, Social Media, and A Threat to Democracy

[4] Thanks to Alex Guerrero for suggesting this line of response.

[5] For a different but nicely compact argument against the argument from truth (another label for the "marketplace of ideas") is found in the following passage from Frederick Schauer: "Does truth prevail when placed side-by-side with falsity? Does knowledge triumph over ignorance? Are unsound policies rejected when sound policies are presented? The question is whether the theory accurately portrays reality. It does not follow as a matter of logical entailment that truth will be accepted and falsehood rejected when both are heard. There must be some justification for assuming this to be an accurate description of the process, and such a justification is noticeably absent from all versions of the argument from truth." Schauer (1982, p. 25).

We turn now to the relationship between the First Amendment, democracy, and contemporary modes of communication. The unqualified endorsement of freedom of speech in the First Amendment is an inspiring vision that may well have made lots of sense in the 18th and 19th centuries, perhaps even in the first half of the 20th century. But as we move deeper into the 21st century, the Internet and its innumerable applications to modern forms of communication have brought momentous changes. It is no secret that these applications present hazards for the conduct of political debate. An op-ed piece in the New York Times (Sept. 8, 2017) tells the relevant details of what transpired a year earlier and reflects on its ramifications for democracy. The Times account, headlined "Facebook Wins, Democracy Loses," by Siva Vaidhyanathan, ran in part as follows:

> "On Wednesday, Facebook revealed that hundreds of Russia-based accounts had run anti-Hillary Clinton ads precisely aimed at Facebook users whose demographic profiles implied a vulnerability to political propaganda…. The ads … were what the advertising industry calls "dark posts," seen only by a very specific audience, obscured by the flow of posts within a Facebook News Feed and ephemeral….
>
> "The potential for abuse is vast. An ad could falsely accuse a candidate of the worst malfeasance a day before Election Day, and the victim would have no way of even knowing it happened. Ads could stoke ethnic hatred and no one could prepare or respond before serious harm occurs…. Unfortunately, the range of potential responses to this problem is limited. *The First Amendment grants broad protections to publishers like Facebook."* {Italics added]

The author then draws the following conclusions about the impact of these practices on democracy:

> We are in the midst of a worldwide, internet-based *assault on democracy* …. We now know that agents in Russia are exploiting the powerful Facebook advertising system directly. In the 21st-century social media information war, *faith in democracy is the first casualty.* (Vaidhyanathan, 2017; italics added).

Vaidhyanathan claims that misuses of the internet comprise an "assault" on democracy. But exactly what notion of democracy is he appealing to in making this claim? Before agreeing with his conclusion, we should ask for more details. How exactly is democracy assaulted? If there are such assaults, perhaps they would apply equally to any type of government. Finally, how exactly is free speech implicated in this "assault"? Should the free speech doctrine be forced to shoulder any of the blame?

Another op-ed contributor to the NY Times, Zeynep Tufekci, presents the Facebook story with an additional example that may be helpful here ("Zuckerberg's Preposterous Defense of Facebook," Sept. 29, 2017). Tufekci describes the same (or a similar) case in which a Facebook post featured outrageous claims about Hillary Clinton, for example, the claim that Clinton had some F.B.I. agents murdered. Assume that this egregious falsehood was indeed posted, and then let us imagine a new character, Arnold, and add further details to the story for purposes of illustration. Arnold is an American voter who reads this post about Clinton's murders, believes the tale, and concludes that she (Clinton) would be a terrible president. So Arnold changes his mind and votes for Trump rather than Clinton.

Our case, then, is one in which a lie is "told" to Arnold (among many others) and this influences his vote. How should a good government handle the case? Two categories of "action" might be contemplated. One consists of attempts to eliminate or reduce these kinds of postings, especially on platforms with a readership in the multi-million range. A second is to take punitive action against some actor – either the purchaser of the Facebook ad or Facebook itself. In other words, action might be taken against one or both of these actors for creating or distributing "fake news." Assuming there is sufficient evidence that these events actually transpired, should government make a criminal or civil case of it? Should there be statutes that enable the state to take punitive action in the (hypothetical) case in question?

A crucial point here is that the First Amendment, as interpreted by the Court, is inimical to the idea that the mere falsity of a conveyed message is grounds for taking action against the speaker. In *Ashcroft v. American Civil Liberties Union* (2002), the Court said that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." In other words, anything recognizable as a conception of freedom of expression must entail a requirement that government, at least in its capacity as regulator, maintain a stance of evaluative neutrality vis-à-vis messages.[6] Or, as Justice Jackson put the point in *West Virginia State Board of Education v. Barnette:* "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 … matters of opinion…."[7]

[6] See Larry Alexander, *Is There a Right of Freedom of Expression*. Cambridge: Cambridge University Press (2005), p. 11).

[7] 319 US 624, 642 (1943).

So, just because some individual or group conveys a message to Facebook readers in which it is falsely asserted that Hillary Clinton murdered FBI agents, this is not grounds for legal action. As Harry Kalven, an esteemed legal theorist, wrote: "The state is not to umpire the truth or falsity of doctrine; it is to remain neutral." (*A Worthy Tradition*, 1948, p. 10) Thus, a core principle of freedom of speech is the protection of speakers' rights to speak as they please. The speakers in the present case, presumably, are those who created and paid for the Facebook ad and, perhaps secondarily, Facebook itself. So it seems that the First Amendment commits the state to protect the rights of speakers to say what they like, including to *lie* as they like. The state's job is not to determine whether particular propositions that people assert are true or false, or to take action against speakers who assert some of the false ones.[8]

There is some recent "movement" in First Amendment interpretation that might indicate a "softening" of its stance on the protection of false speech. For one thing there are currently seventeen states with statutes prohibiting false campaign speech, and none has yet been overthrown at the Supreme Court level. Still, this doesn't guarantee much softening. Here is an evaluation of the situation as offered by Staci Lieffring (2013), in a wide-ranging survey of the current state of play: "Based on Court precedent, current state statutes, and the above-discussed proposals, the most likely outcome would be for the [Supreme] Court to find any attempt to regulate false, non-defamatory statements of political speech *unconstitutional* [italics added]. The Court made it clear in *Alvarez* (2012) that purely false

[8] We shall revisit this issue in section X below.

speech is a protected category under the First Amendment." (2013, p. 1076)

My own view is that the Court's interpretation of the First Amendment is a flawed doctrine. I shall endeavor to sketch a somewhat different approach aimed at the law of campaign speech but in the context of the nation's commitment to democratic government.

Return now to the first New York Times op-ed piece (by Vaidhyanathan). This essay describes the Facebook episode and its upshot(s) in terms of the headline "Facebook Wins, Democracy Loses." It features the claim that democracy is a "casualty" of this episode. (This is no exercise in fiction, of course, given what American investigators (in February 2018) revealed about the Russian influence in the 2016 election, plus the clear threat to democracy posed by the Trump Administration.) These phrases obviously imply that things went *badly* here for democracy. They didn't turn out the way they should have by the lights of democracy. I shall assume here that this is the consensus view, at least among democrats. Exactly *why* this qualifies as a "loss" for democracy, however, is a tricky question, and I won't attempt to resolve it fully. What seems clear, however, is that existing legal resources for handling false speech are poorly equipped to "advance" democratic outcomes in this sort of case. Democracy stands to "lose" here in part because of the free speech principle, which bars (or at least constrains) government from restricting what people may say on account of its message, its ideas, or its content. The upshot is that, for a certain range of activities, freedom of speech as currently interpreted and handled may not provide "support" or "underpinning" for democracy. Instead, different kinds of speech *regulation* may do better at advancing the cause of democratically generated outcomes.

Section 5. Lies, Epistemic Harms, and Political Harms

What is "fake news"? To keep it simple, it's a bunch of *lies.* The (partly) hypothetical Facebook post described earlier was a set of lies, presented verbally or non-verbally, where lies are statements known or believed by the speaker to be false or misleading, and framed with the intent of deceiving or misleading one or more receivers. Lying is widely regarded, in almost all parts of the world and systems of government, as objectionable and problematic (even if widespread). When a government lies to its citizens -- especially repeatedly -- this is considered a top-level threat to its legitimacy. The rationale for discouraging the practice of lying, however, emerges in early childhood. As the Scottish philosopher Thomas Reid said, "The wise author of nature hath planted in the human mind a propensity to rely on human testimony before we can give a reason for doing so. This … puts our judgments almost entirely in the power of those who are about us in the first period of life." In short, people's default response to testimony is credulity. Credulity puts us at risk, however, to the false statements of others. This is what makes the telling of lies a serious threat, which all societies try to discourage.

Ways to deter lying range from informal peer pressure to the level of the law. In the legal setting fraud is a species of tort, which is treated as a separate division of the law. One definition of fraud offers the following five elements:

> (1) Misrepresentation (by the accused) of a material fact.
>
> (2) Knowledge on the part of the accused that he/they were misrepresenting the fact.

(3) The misrepresentation was made purposefully, with the intention of fooling the victim.

(4) The victim believed the misrepresentation.

(5) The victim suffered damages as a result of the misrepresentation.

If a legal system embraces fraud as a prosecutable offense, would this deprive that system of qualifying as a democracy? Surely there are many governments with credible claims to being democracies that recognize fraud as a respectable kind of tort. And I see no reason, intuitively, why there couldn't be cases like the Facebook case that would fit the foregoing definition of fraud, so that the U.S. government (or one of its states) might prosecute the creators of the Facebook ad under the relevant statute. There seems to be no *intuitive* reason (apart from existing First Amendment jurisprudence) why such legal doings would threaten a government's *democratic* status. On the other hand, given what was said earlier about the standard interpretation of the First Amendment, the law of fraud as sketched above would seem to be inconsistent with the First Amendment. There seems to be a serious conflict, then, between free speech under the current Constitutional interpretation and democracy as ordinarily conceived. This is a very pressing problem, because the "speech" in question in the Facebook case is clearly *political* speech. And political speech is traditionally viewed by the Court as possessing the highest value, thereby entitling it to the highest level of protection. This is why, under current American-style freedom of speech, governmental "interference" might conflict with what ordinary conceptions of democracy would allow.

Clarification is needed, however, about how the Facebook case should be interpreted. First, who is the victim" in that case? In an obvious sense, Hillary Clinton was the victim of the episode, because she lost the Presidential election. (And I am assuming that this was partly influenced by the Facebook ad). But Clinton, let us assume, wasn't one of the "receivers" or readers of the ad. So, plausibly, she wouldn't have been *defrauded* by the message (though she was arguably defamed by it). Instead, we might assume that the fraud victims (if there were any) are people who read the ad and were taken in by it. But could such people satisfy the required conditions of the law of fraud? Certainly, why not? One major misrepresentation was Clinton's having had F.B.I. agents murdered. That could have been read by any of these fraud victims, who then believed it to be true. Here we encounter a different problem. Would people who read the ad and believed its false contents satisfy the fifth and final element in the foregoing definition of "fraud"? Did they suffer *damages* or *harms,* as a result of the misrepresentation? What harms might this be?

I shall follow the discussion here of Joel Feinberg (1984). According to Feinberg, a person suffers harm if and only if s/he has some "interest" that is "reduced," or "set back," by another person's intrusion or violation. Interests, and hence harms, come in many varieties. Presumably our Facebook readers suffered neither physical, nor monetary, nor emotional harm (the three main types that figure in fraud). But these don't exhaust the class of harms or damage.

Let us introduce here the notion of an *epistemic harm.*[9] An epistemic harm occurs when a person's doxastic attitude toward a

[9] I I do not mean to imply that current law of fraud countenances merely epistemic harm as a sufficient component of fraud. I am inclined to think that it would not be illegitimate to countenance this. But my upcoming

proposition (belief, disbelief, or no opinion) deteriorates rather than improves or stays fixed. Assume there are exactly three possible doxastic stances one can take toward a proposition – the three just mentioned. Then if a proposition P is actually true, the best doxastic attitude toward it is belief; the second best is no opinion; and the third (the worst) is disbelief. (These statuses bear no simple relation to justification or rationality, which are distinct epistemic statuses.)

Now return to the Facebook case and the possibility of its being subsumed under the heading of fraud or a similar actionable offense. In the Facebook case, assume that the Facebook posting persuades Arnold that Clinton had some F.B.I. agents murdered, something Arnold did not previously believe. By hypothesis, Arnold suffers epistemic harm at the hands of the ad creators. The increase in Arnold's strength of belief in the false proposition that Clinton was responsible for certain murders is an epistemic harm to him. This is because it moves Arnold's credence vis-à-vis the proposition *farther* from the truth. So, this counts as an epistemic harm; but it's not the only harm Arnold suffers in this story.

Suppose that Arnold begins with a preference for candidate Clinton. However, the misinformation he encounters about Clinton leads Arnold to switch his preference to Trump. Later, however, as things turn out, Trump's Presidential tenure is markedly inferior to what Clinton would have produced had she won. Similarly, other readers of the Facebook post undergo a similar preferential switch, and vote accordingly. Jointly these preference switches lead to a Trump victory. Then Arnold suffers "damage" to his *preference-satisfaction*

interpretation of cases will not depend on the assumption that purely epistemic harm would or should suffice as part of the harm component for fraud.

interest. His preference satisfaction (vis-à-vis this electoral matter) is harmed, or "reduced," by comparison with what he would have experienced had Clinton won.

6. Harm to the Body Politic, or Democratic Value

Drawing on the preceding discussion, let us now turn to the relation between electoral disinformation (or lying) and democracy. Democracy is often said to be government of the people, for the people, and by the people.[10] Here we concentrate on the "*for* the people" element. A plausible interpretation of that element is that democracy aims to generate outcome-sets that are relatively preferred by a majority of the electorate -- or by as large a plurality as possible. Let me elaborate this idea and link it to acts of electoral disinformation of the kind considered in the Arnold case.

For simplicity, we focus attention on political races with two candidates. The winning candidate holds office for a given term, and her decisions generate outcomes that affect the citizenry. The outcomes might include the values of assorted variables, such as cost of living, quality of the environment, employment opportunities, etc. We focus here on possible *outcome-sets*, i.e., combinations of outputs of the sorts just mentioned. We don't assume that voters consciously or explicitly reflect on all such outcome-sets, only that each has a *preference-ordering* over them. (This can be thought of as a *disposition* to prefer one outcome-set over another -- *if* the voter is asked.)

In deciding how to vote in a given contest, each voter asks herself what I shall call her "*core voter question"* (CVQ). A CVQ is the question,

[10] The themes developed here originated in Goldman (1999a), pp. 320-330.

"Which candidate in this contest would produce an outcome-set that is better – by *my* criteria -- than the alternative candidate's outcome-set?" The CVQ question asked by voter Smith (about a specified race) is a different question than the CVQ asked by voter Jones (referring to the same contest). Hence the two questions might well have different true answers. So each CVQ should be indexed to a particular voter. I shall now argue that democracy is "successful" -- in a sense to be specified -- when the electorate has *full core voter knowledge.* By "*full* core voter knowledge" I mean a situation in which every voter knows (i.e. believes) the true answer to his/her core question.

In an earlier work (Goldman 1999a, chap. 10) I advanced the following thesis about the relation between democratic success (in a sense to be specified) and the "knowledge state" of the electorate. In this context, "knowledge" is understood in a *weak* sense, in which "S knows that P is true" just in case P IS true and S believes it. In other words, true belief suffices for knowledge (even if justification is lacking). A central thesis to be advanced now is the following:

> (DS) Democracy is successful when the electorate has *full core voter knowledge.*

What is meant here by "democratic success"? Consider only elections with two competing candidates. Success here simply means that the winning candidate is the one whose policy results are most preferred from the perspective of the largest number of voters. "Core" voter knowledge is knowledge about which candidate would bring about better outcomes, if elected. *Full* core voter knowledge means that *all* voters have core voter knowledge. Although different voters will tend to have different outcome-set preferences, each voter knows which of

the two candidates would do better at bringing about his/her more-preferred outcome-sets.

Why is DS true? If everyone believes the correct answer to their own CVQ and everyone casts her vote accordingly, the answer that is correct for the largest number of voters will receive the most votes. This may be considered a species of "democratic success."

Notice how this approach differs from much of "classical" political theorizing. It dispenses with the classical assumption that there exists a *voter-independent truth* as to which candidate (in a two-candidate election) is *best simpliciter*, i.e., best for *everybody.* It thereby makes no appeal to the assumption that a given outcome-set possesses a specific sum-total of goodness, which can be meaningfully and objectively compared with the goodness of a different outcome-set. Such assumptions are hard to defend, partly in light of the intractability of interpersonal comparisons of utility.

In place of interpersonal comparisons of utility, or similar notions of dubious tractability, I work with a less demanding assumption. This is the assumption that, for any given *voter,* with an assumed set of political preferences, a particular candidate is best *relative to that voter's preferences* because the outcome-sets that would be produced by that candidate (if elected) would be preferred by the voter to the outcome-set that would be produced by the second candidate. Although I make no assumption of a unique voter-independent truth (as to which candidate is best), the profile of voter-specific truths

"induces" an overall derivative truth as to which candidate is best *from the perspective of the largest number of voters.*[11]

Thesis (DS) implies that if the electorate has *full core knowledge*, then the candidate that is best from the perspective of the largest number of voters will attract the most votes (and therefore win). This is a kind of "democratic success." However, if too many voters have core-voter *error* – i.e., falsely believe of the worse candidate (by her criteria) that he/she is better than the opponent – then a majority vote will produce a *democratic* failure. Harm will be done not just to the individual citizens, but to the *body politic.* If such false beliefs are the result of fake news (or the like), then the system will not only have failed to generate a "successful" political outcome (despite using a "democratic" procedure, i.e., majoritarian voting), but the system -- including the fake news -- will have inflicted political harm. (Doesn't this describe what apparently happened in the 2016 election due to Russian intervention?) Moreover, to the extent that freedom of speech *fails* to deter or inhibit political lies, democratic failure will be promoted.

What I am saying here is that even a democratic procedure like majority rule can *sometimes* function so as to generate electoral "failure". This can happen because of the influence of fake news. And the purveyor of fake news would be heavily liable for this inappropriate, and counter-democratic, outcome. And this would be in virtue of the fact that the false news is also *knowingly false* (i.e., a lie).

What about the Trump voters who didn't encounter the Facebook ad, but voted for Trump on other grounds? Do they also bear liability

[11] This formulation is due to Christian List and Kai Spiekermann, "The Condorcet Jury Theorem and Voter-Specific Truth," in McLaughlin and Kornblith, eds., Goldman and His Critics. (2016).

for Trump's election and subsequent tenure? Clearly they do -- though their kind of liability is entirely distinct from that of the Facebook ad creators. Those who voted for Clinton, obviously, would bear no analogous liability at all. Clinton voters causally contributed to the overall event (the Presidential election of 2016), but the "directionality" of their choice would not form a basis for liability.[12] What about the liability of Facebook itself, i.e., its failure to remove the deceptive ad in question from its platform? Clearly there is substantial liability there, although I won't try to assign a label to that variant of liability.

Is one forced to say that all those who voted for Trump (for whatever reason, even being duped by the Facebook ad) are contributors to a "collective fraud"? No. None of those voters did things that count as elements of a fraud. None of them (we assume) misrepresented material facts about the electoral candidates. Nor did any of them say anything with the intention of deceiving other voters.

If the assemblage of voters does not possess enough core voter knowledge – and especially if it has lots of core voter *error* -- it is unlikely that the best candidate from a democratic point of view will win an election. Hence, one threat to the acquisition of core voter knowledge is the activity of liars who feed false electoral "facts" to the electorate. *Ceteris paribus,* the more political liars there are and the greater their deceptive skill, the greater the threat to democratically good outcomes. On the other hand, if there were constitutionally tenable laws that provide an effective deterrent to these practices, this

[12] In a paper entitled "Why Citizens Should Vote: A Causal Responsibility Approach" (Goldman 1999b), I introduce the notions of (1) a "*vectorial* causal system," and (2) the notion of a *conventional* vectorial causal system," Applying the latter notion to cases of voting, the following seems plausible. If a given electoral candidate actually wins, each vote for her is a partial cause of her victory; but neither votes against her nor abstentions from voting are partial causes of her victory. (See the reprinted version of the paper, entitled "A Causal Responsibility Approach to Voting," in D. Estlund, ed., *Democrtacy,* Blackwell (2006), p. 276.

would enhance the prospects for democracy (i.e., for democratically good outcomes, in the sense we have specified.) But it appears that under the present interpretation of the First Amendment, in which even lies are often protected, there are impediments to curbing deception. Is "more speech" the appropriate remedy to solve the threat of lies? This is the traditional response, but is there a body of empirical evidence to support it? Fact-checking, which is arguably a variety of "more speech," is certainly a help. But it isn't clear that it is sufficient for the purposes at hand.

We have intimated that our analysis might provide the background for assigning culpability for the infliction of harm to the body politic, perhaps under the legal heading of "fraud." But is this at all promising? Recall that in the sample definition of the legal notion of fraud, the third requirement read as follows: "The misrepresentation was made purposefully, with the intention of fooling the victim." Could this possibly apply to the case of the Facebook ad? Surely the ad's creators could not have intended their misrepresentations to fool any specific "victims", readers who would come to believe some such claim as that Hillary Clinton had F.B.I. agents murdered. The designers of the ad had no idea who, in particular, might read their ad. However, legal offenses are often so formulated to criminalize a person's acting with **reckless disregard** of inflicting injury (such as a gunman who shoots into a crowd of strangers). Our analysis of the path by which voters formed erroneous answers to their core voter questions makes it extremely plausible that the ad creators, in telling their lies, were indeed guilty of acting with such "reckless disregard".

7. Can Our Treatment of Lying Comport With the First Amendment Doctrine?

Readers of the foregoing rationale for criminalizing selected types of electoral speech might be prepared to concede the pull of the preceding analysis. From a legal point of view, however, they might question its ability to resolve the central problem. Specifically, they might object that I haven't shown how the criminalization in question can be reconciled with existing Constitutional interpretation. Would it be admissible under contemporary First Amendment jurisprudence? The problem arises because of the stricture that government not engage in **content-based** speech regulation. Government should not be allowed to decide what ideas or messages people may express, lest it misuse such power in nefarious ways. According to the decision in *Aschcroft v. ACLU*, "The Constitution demands that content based restrictions on speech be presumed invalid …". (Cited in Schiffrin, 2014, p. 125, fn. 22)

The issue of content-based speech regulation is a huge problem in the theory of free speech. I do not claim to have a general solution to it. Instead let me appeal to a recent attempt by another philosopher to address the problem. Although I am disinclined to give full endorsement to this proposal, it may help us in framing the basis for such a solution, especially as it concerns *lying* speech.

The proposal is advanced by Seana Shiffrin in her recent book *Speech Matters: On Lying, Morality, and the Law* (2014). Shiffrin writes:

> "To many free speech advocates, the prospect of regulating lies has seemed an immediate nonstarter because it is often framed as the regulation of speech on the basis of its content, a posture

> highly suspect … from a freedom of speech perspective. My contention is that this preliminary objection, though ubiquitous, is mistaken. When framed in a general way, the regulation of lies as such is not clearly a content-based regulation in the sense in which that pejorative classification is typically meant. To regulate the lie is to regulate deliberate misrepresentation by a speaker from presenting something *she believes to be false* as though she believed it to be true. The predicate of regulation is not that the content of the speech is false…. Rather, the predicate of the regulation is the conjunction of the speaker's mental state toward the content, namely, that the speaker believes it to be false, and her presentation of the content, nevertheless, as though it were true and believed by her to be true." (2014: 125-126)

In cases of what Shiffrin calls a "pure lie," the act can be regulated even if there is no harm to the audience and the content of the speech isn't false. What rationalizes the restriction is that the speaker *presents* the content in question *as if* it were true, while *believing* it to be false.

According to Shiffrin "the primary distinctive wrong of lies as such does not inhere in their deceptive effect, if any, on listeners, but instead in their *abuse of the mechanism by which we provide reliable testimonial warrant,* a mechanism we must safeguard if we are to understand and cooperate with one another and to achieve our mandatory moral ends [italics added]. (P)ure lies, like deceptive lies, abuse the mechanism of direct communication and threaten the basis of our testimonial trust with one another." [2014: 116]

I am not persuaded by Shiffrin's rejection of both harm infliction and deceptive intent as primary factors in the wrong of lying.

Moreover, whatever else might be said for her preferred approach, it would be an almost impossible evidentiary burden for a plaintiff to prove that a speaker had the relevant mental attitude toward the specific content in question.[13] Nonetheless, the elements of her account do seem to hold out the welcome prospect of showing how the regulation of lying is a legitimate governmental activity.

8. Other Political Systems and Freedom of Speech

One declared theme of this paper was to discuss the relation between free speech and political desiderata. However, it is only the relation between *democracy* and free speech that has been examined thus far. What about free speech and other forms of government? Is free speech wedded to democracy? Or is freedom of speech – as many people claim -- a general *right* that holds independently of political systems, and might even prosper under some other systems more than it does under democracy?

Earlier sections of this paper posed challenges to the notion that free speech, as interpreted in American Constitutional jurisprudence, is an unproblematic fit with democracy. Of course, there are many different philosophical accounts of democracy.[14] An initial question therefore is: "Which conception of democracy does one have in mind?" Some conceptions might mesh very smoothly with freedom of speech, others less so. However, the range of democratic theories is too wide to survey in this paper. So I shall proceed without fixing a unique conception of democracy for purposes of our discussion.

[13] Thanks to Alex Guerrero for this observation.

[14] My own account is presented in, "What Is Democracy (And What Is Its Raison D'etre?") (Goldman, 2015)

Instead I shall concentrate on the issues already raised in this paper. One challenge to the commonly presumed mesh between democracy and free speech arises (or so it seems) in connection with lies and deceptions that threaten (with impunity) to undercut democratically "successful" elections. This seems to show that democracy and free speech (where the latter is given the standard First Amendment interpretation) are not comfortable bed-fellows. Can one hope for greater consilience under a different political system?

Various political theorists have recently formulated and defended two political systems alleged to be superior to democracy. They are (1) epistocracy and (2) lottocracy. Might either of these approaches be preferable to democracy in terms of their mesh with the presumed desideratum, i.e., freedom of speech?

As presented by Jason Brennan (2016), democracy is acknowledged to have a number of important outcomes, including (a) doing a better job at protecting economic liberties and (b) tending to be richer than non-democracies (2016: ix). On the other hand, says Brennan, democracy is known to have systematic flaws, so we should be open to investigating and possibly experimenting with other alternatives, specifically epistocracy. What is epistocracy? "Epistocratic forms of government," says Brennan, "retain most of the normal features of republican representative government. Political power is widespread rather than concentrated in the hands of the few. But epistocracies do not automatically distribute fundamental political power evenly. Rather, by law, in some way or other, more competent or knowledgeable citizens have slightly more political power than less competent or knowledgeable citizens." (2016: x)

The most salient feature of Brennan's case for epistocracy is the dreadful ignorance of political matters by citizens of democracies (notably, American citizens). This leads to poor policy decisions. Better policy decisions can be expected under epistocracies, in which more knowledgeable citizens are given greater voting power and therefore make better electoral and policy decisions. In addition, if one focuses on such problems as freedom of speech, where the threat of lies, deception, and disinformation is in the forefront, epistocracy might seem like a more attractive system because its more informed and politically alert citizens are less likely to be deceived by fake news than their less alert, democratic cousins. However, the challenge of fake news is just one small basket of problems facing political systems. It would be misguided to select epistocracy over democracy simply because of this single concern.

What might help the democracies or the epistocracies here is some version of the law of fraud that would make false and deceptive political speech (at least some varieties thereof) actionable, in order to deter would-be producers of fake news. As reported in section 4, there are currently twenty-seven states that now have fraud statutes in place.[15] Whether such statutes will pass muster at the constitutional level remains to be seen. But by my lights to overturn such laws by appeal to the First Amendment would hinder rather than advance the cause of democracy. While the retention of such laws may conflict with the currently dominant interpretation of the First Amendment, retention would be helpful to a better-functioning democracy for

[15] California Election Code section18350 reads (in part) as follows: "a person is guilty of a misdemeanor who, with intent to mislead the voters in connection with his or her campaign for nomination or election to a public office … either pretends or implies" [what is not the case]. Thanks to Raphael Goldman for alerting me to the existence of these fraud statutes.

reasons that were indicated above. Challenges posed by modern technology may not be adequately met or resolved by 17th or 18th-century remedies.

I turn next to the lottocratic approach. I shall focus on the most detailed defense of this alternative, one presented by Alexander Guerrero in "Against Elections: The Lottocratic Alternative" (Guerrero 2014). Guerrero's defense of this approach comes in two stages: a detailed account of democracy's weaknesses followed by an account of lottocracy's strengths.

On the critical side of democracy he discusses two kinds of outcomes in terms of which a political system can be evaluated: responsiveness and good governance. He contends that representative democracy (the only prevalent type of democracy in our era) has a bad time with making elected official be genuinely responsive to their constituents. First, constituents do not hold their elected officials to a standard of "meaningful accountability." Second, in the absence of such accounting, it is all too easy for such officials to be "captured" by powerful interests (especially financially powerful interests), and therefore not be responsive to the interests of the electorate at large. Analogous problems are posed for the task of good governance. Guerrero therefore proposes a system in which officials are chosen by lot rather than election, and various institutional arrangements are described by which officials who have been chosen at random are trained to have the skills to do their job. There are serious prospects, according to Guerrero, that such a system would be superior to representative democracy.

Guerrero does not discuss freedom of speech in this paper. But we may ask, merely in light of the system described above, what the impact might be on politically relevant outcomes in terms of freedom of speech. One clear difference between lottocracry and democracy is that there are no elections in a lottocracy. As compared with democracy, a large swath of speech – viz., electoral speech – would be eliminated. And a large swath of financial contributions -- often described as "speech" under the democratic system – would also be eliminated. Together these constitute quite a lot of speech that is held -- under the democratic system – to receive the highest level of protection from government regulation. In this very paper we have seen how various kinds of political speech terrain occupy many people, many courts, and much money. Is the legal supervision of all this speech really a valuable facet of political activity? Although Guerrero doesn't mention any of this, one might claim that a distinct advantage of lottocracy over democracy is the absence of free speech issues associated with electoral speech. Of course, this may not be the type of relation we had in mind earlier when we posed questions about the relation between democracy and free speech. But that doesn't make it a wholly uninteresting matter for political theory.

9. Varieties of Free Speech Systems

Until now our discussion has presupposed that "freedom of speech" (or "freedom of expression") denotes a single thing, for example, a certain kind of right to which all humans are entitled. Many countries (especially those that consider themselves democracies) have banded together to pronounce their joint acceptance of various human rights in, for example, the Universal Declaration of Human Rights and the European Convention on Human Rights. In both cases freedom of

expression is listed as one such human right. This certainly encourages the notion that there is a single right that everyone (who thinks about the subject) more-or-less agrees upon. The fact that so many of the world's countries are agreed on this lends credence to the notion that freedom of speech is a single, particular right. It only remains for political or legal theorists to expound exactly what the content of this right is. But there are serious complicating factors here. While numerous countries use similar phrases to designate the right in question, precise accounts of what is or isn't prohibited are not very uniform. Indeed, in some cases there are significant divergences.

For example, the act of denying the Holocaust is an illegal speech act in 16 European countries and Israel. Many countries also have broader laws that criminalize genocide denial. Of the countries that ban Holocaust denial, many also ban elements associated with Nazism, such as the expression of Nazi symbols. By contrast, in several nations such as the United Kingdom and the United States, laws against Holocaust denial have come up in discussion and have been proposed, but the measures have been rejected. The United States protects virtually all kinds of speech, including "hate speech". (Wikipedia, "Laws against Holocaust denial")

Evidently, the people of the world do not share a single notion of "freedom of speech." This significantly complicates our task. When we ask whether – or to what degree – freedom of speech makes positive contributions to democracy, to *which* system of free speech (and which system of democracy) are we referring? Even restricting attention to the (current) American system of free speech, arguments are advanced by respected legal theorists that entail a proliferation of co-legitimate free-speech systems. This complicates not only the task of *answering*

our original questions but even the task of *formulating* them adequately.

To my mind, these are among the puzzles that emerge from the interesting proposal of Erwin Chemerinsky and Howard Gillman, in their book *Free Speech on Campus* (2017). Chemerinsky and Gillman are staunch, long-time advocates of freedom of expression. They are also staunch defenders of the view that free speech is essential for democracies. Here is what they say on these subjects in an early part of their book:

> "Freedom of speech is essential to democratic self-government because democracy presupposes that the people may freely receive information and opinion on matters of public interest and the actions of government officials. The act of voting still occurs in many autocratic societies where speech is severely limited and government officials punish people who criticize the government. Many dictators brag about receiving over 90 percent of the vote, not realizing that such numbers cast doubt on their own validity. It is not the act of voting that creates a self-governing society but rather the people's ability to formulate and communicate their opinions about what decisions or policies will best advance the community's welfare. The right to be informed about matters of public interest is considered so fundamental to democracy that Benjamin Franklin called it the 'principal pillar of a free government'." (2017, p. 25)

This paragraph, which highlights the importance of information, is very compatible with our earlier material (section 5) on the centrality of epistemic matters for democracy.

But let us turn next to a different theme in the Chemerinsky--Gillman book, one that makes a more novel proposal. This is the proposal that we should countenance *two* distinct "zones" of free expression:

> "We should think of campuses as having two different zones of free expression: a *professional* zone, which protects the expression of ideas but imposes an obligation of responsible discourse and responsible conduct in formal educational and scholarly settings; and a larger, *free speech zone*, which exists outside scholarly and administrative settings and where the only restrictions are those of society at large. Members of the campus community may say things in the free speech zones that they would not be allowed to say in the core educational and research environment." (2017: p. 77)

As Chemerinsky and Gillman explain, within the realm of professional academic freedom, colleges and universities must impose extensive regulation on speech. A history department may choose not to hire a person who denies the Holocaust, but it cannot refuse to hire a candidate whose work is otherwise excellent because they learn that he or she is a member of a neo-Nazi party.

The introduction of scholarly and scientific criteria into speech policy has much to be said for it. Why, indeed, not allow our most sophisticated forms of knowledge generation to be incorporated into principles of speech? At the same time the question arises of how the addition of contrasting speech systems should be handled, once at least two systems are endorsed. For every distinct organization, tradition, or business undertaking, participants might propose distinct systems of

speech. How, exactly, are new, diverse systems to be proposed and selected legitimately? If two such systems can be approved, as Chemerinsky and Gillman allow, why not three, four, or a hundred? By what criteria, or standards, should some of these possible systems be chosen over others? Once the door is open to multiple possibilities, identifying a stopping-point threatens to be a bewildering task. If we go down this road, what exactly would it mean when we say -- without further qualification or amplification -- that "free speech" demands X, Y, or Z? Chemerinsky and Gillman do not address this issue at all (or address it very thinly).

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