RESPONDING TO "FAKE NEWS": IS THERE AN ALTERNATIVE TO LAW AND REGULATION?

David Goldberg∗

INTRODUCTION

Discussion and debate about the origin and meaning of the term "fake news" is complicated, complex and dynamic.[1]   A selection of quotes underpins this point:

- The ability to distinguish good information from bad is a solution to the problem of fake news that must be adopted by the individual user. Another solution would be to attempt to police those who originate the fake news. Yet another would look into the medium through which fake news is disseminated – the social media networks themselves.[2]

- [T]he "very smart people" and "experts" have concluded the problem is with the voter, as opposed to the terrible candidates on offer or the corrupt system itself. This is the real reason for the current obsession

1. Perhaps inevitably, the very phrase has now been called into question. *See* Hossein Derakhshan & Claire Wardle, *Ban the Term "Fake News"*, CNN (Nov. 27, 2017), http://edition.cnn.com/2017/11/26/opinions/fake-news-and-disinformation-opinion-wardle-derakhshan/index.html; *see also* Claire Wardle, *Fake News. It's Complicated.*, FIRST DRAFT NEWS (Feb. 16, 2017), https://firstdraftnews.com/fake-news-complicated/; *About: Fake News*, EURACTIV, https://www.euractiv.com/topics/fake-news/ (last visited Feb. 11, 2018).

2. Paul Gatz, *The Use and Abuse of Social Media in the Post Truth Era*, LLRX (Nov. 19, 2017), https://www.llrx.com/2017/11/the-use-and-abuse-of-social-media-in-the-post-truth-era/.

with "fake news" and dangerous social media echo chambers. The elites are simply frustrated that their methods of propaganda no longer work as more and more people talk to each other online.[3]

- But no one – let alone the government – should be able to decide what 'fake news' is. It's a slippery slope to censorship and authoritarianism. Is 'fake news' a problem? The more pertinent question would be: for whom is it a 'problem', who is making a big deal out of it and why?[4]

The paper will engage to a limited degree with this notion, bearing in mind that the origin(s) of any word/phrase is usually contested and there is a distinction between the existence of a specific word/phrase vs. the phenomenon it seeks to capture.[5] Robert Darnton suggests that "the concoction of alternative facts is hardly rare, and the equivalent of today's poisonous, bite-size texts and tweets can be found in most periods of history, going back to the ancients."[6] And the Huffington Post reports that Merriam-Webster "sees no need to even consider it for entry in the dictionary as a separate term."[7] Apparently, it is "self-explanatory and straightforward."[8] So why didn't it exist before? Well, Merriam-Webster has the answer to that, too: "the word fake is also fairly young. Fake was little used as an adjective prior to the late 18th century."[9] Prior to the late

3. Michael Krieger, *Bitcoin, Terence McKenna and the Future of the Internet*, LIBERTY BLITZKRIEG, (Nov. 29, 2017, 2:58 PM), https://libertyblitzkrieg.com/2017/11/29/the-internets-impact-on-humanity-is-just-getting-started/.

4. Elias Hazou, *2016: Why is Fake News Suddenly an Issue?*, CYPRUS MAIL ONLINE (Jan. 1, 2017), http://cyprus-mail.com/2017/01/01/2016-fake-news-suddenly-issue/?hilite=%27fake%27%2C%27news%27.

5. Even if the current use is perceived as a "Trumpism", the implications and consequences are more widespread. *See* Jason Schwartz, *Trump's "Fake News" Mantra a Hit with Despots*, POLITICO (Dec. 8, 2017, 05:03 AM),
https://www.politico.com/story/2017/12/08/trump-fake-news-despots-287129.

6. Robert Darnton, *The True History of Fake News*, THE N.Y. REVIEW OF BOOKS (Feb. 13, 2017, 1:22 PM), http://www.nybooks.com/daily/2017/02/13/the-true-history-of-fake-news/; *see also* Linda Kiernan, *"Frondeurs" and Fake News: How Misinformation Ruled in 17th-Century France*, THE CONVERSATION (Aug. 1, 2017, 10:33 AM), https://theconversation.com/frondeurs-and-fake-news-how-misinformation-ruled-in-17th-century-france-81196; David Uberti, *The Real History of Fake News*, COLUMBIA JOURNALISM REVIEW (Dec. 15, 2016), https://www.cjr.org/special_report/fake_news_history.php; Andrew Guess et al., *"You're Fake News!" The 2017 Poynter Media Trust Survey* (Nov. 29, 2017), https://poyntercdn.blob.core.windows.net/files/PoynterMediaTrustSurvey2017.pdf.

7. Claire Fallon, *Where Does the Term "Fake News" Come From? The 1890s, Apparently*, HUFFINGTON POST (Mar. 24, 2017, 1:54 PM), https://www.huffingtonpost.com/entry/where-does-the-term-fake-news-from_us_58d53c89e4b03692bea518ad.

8. *Id.*

9. *Id.*

19th century, English speakers used an obvious alternative to refer to what we now call fake news, namely, "false news."[10]

The question posed in this paper, whether enhancing (critical) media literacy skills (a.k.a. digital media literacy)[11] would offer a distinctive and arguably more promising approach and response to the phenomenon of fake news rather than – or in conjunction with – deploying law or regulation, certainly raises a distinctive approach; however, whether it is more promising may be open to question – how would an answer be evaluated, especially when viewed through the prism of short-term vs. medium/long-term time frames?

Even more radically: in some quarters, it is being asserted that current inquiries, investigations, writings, etc., are too slow-moving and are in fact behind the times because the very term, fake news, may have had its day!

> [L]et's retire the dreaded moniker in favor of more precise choices: misinformation, deception, lies. Just as the media has employed "fake news" to discredit competitors for public attention, political celebrities and partisan publications have used it to discredit the press wholesale. As hard as it is to admit, that's an increasingly unfair fight.[12]

Another framework has been proposed by Claire Wardle and Hossein Derakhshan – "a framework for policy-makers, legislators, researchers, technologists and practitioners working on challenges related to mis-, dis- and malinformation – which together we call information disorder."[13]

With regard to the notion of critical media literacy (CML), as with fake news, there are a plethora of definitions and accounts on offer. According to the Center for Media Literacy: "The definition most often cited in the U.S. is a succinct sentence hammered out by participants at the 1992 Aspen Media Literacy Leadership Institute: 'Media Literacy is the ability to access, analyze, evaluate and create media in a variety of forms.'"[14]

However, CML acknowledges that:

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10. *Id.* Arguably, the term "fake" originates from the late 18th Century German word *fegen*, originally slang, which means to sweep or brush. *See Fake*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/word/fake (last visited Feb. 26, 2018).

11. *See The Role of Media Literacy in the Promotion of Common European Value and Social Inclusion*, ALL DIGITAL 2, http://all-digital.org/wp-content/uploads/2017/11/Media-literacy-for-social-inclusion-Position-paper_FINAL.pdf (last visited Feb. 11, 2018).

12. *See* Uberti, *supra* note 6.

13. CLAIRE WARDLE & HOSSEIN DERAKHSHAN, INFORMATION DISORDER: TOWARD AN INTERDISCIPLINARY FRAMEWORK FOR RESEARCH AND POLICYMAKING, FIRST DRAFT NEWS 10 (Sept. 27, 2017), https://firstdraftnews.com/wp-content/uploads/2017/11/PREMS-162317-GBR-2018-Report-de%CC%81sinformation-1.pdf?x21114.

14. *Media Literacy: A Definition and More*, CTR. FOR MEDIA LITERACY, http://www.medialit.org/media-literacy-definition-and-more (last visited Feb. 11, 2018).

Definitions, however, evolve over time and a more robust definition is now needed to situate media literacy in the context of its importance for the education of students in a 21st century media culture. CML now uses this expanded definition: Media Literacy is a 21st century approach to education. It provides a framework to access, analyze, evaluate, create and participate with messages in a variety of forms — from print to video to the Internet. Media literacy builds an understanding of the role of media in society as well as essential skills of inquiry and self-expression necessary for citizens of a democracy.[15]

Some give pride of place in the definitional stakes to Kellner and Share's 2007 paper, "Critical media literacy is not an option," within which CML is defined as:

[A]n educational response that expands the notion of literacy to include different forms of mass communication, popular culture, and new technologies. It deepens the potential of literacy education to critically analyze relationships between media and audiences, information, and power. Along with this mainstream analysis, alternative media production empowers students to create their own messages that can challenge media texts and narratives.[16]

[And]

The benefit of a critical media literacy approach is that audiences engage with and analyze dominant readings and codes within media and contribute to a better understanding of the world's "social realities". Instead of taking a mediated image at face value, the reader can understand the history and the characteristics of the image and make meaning in various ways.[17]

As stated by Douglas Kellner in *Cultural Studies, Multiculturalism, and Media Culture*, "The gaining of critical media literacy is an important resource for individuals and citizens in learning how to cope with a seductive cultural environment. Learning how to read, criticize, and resist sociocultural manipulation can help one empower oneself in relation to dominant forms of media and culture."[18]

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15.   *Id.*

16.   Douglas Kellner & Jeff Share, *Critical Media Literacy is Not an Option*, (Jan. 10, 2007), https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.542.9664&rep=rep1&type=pdf.

17.   *Media Literacy*, WIKIPEDIA, https://en.wikipedia.org/wiki/Media_literacy (internal citations omitted) (last visited Feb. 11, 2018).

18.   Douglas Kellner, *Cultural Studies, Multiculturalism, and Media Culture*, https://pages.gseis.ucla.edu/faculty/kellner/papers/SAGEcs.htm (last visited Feb. 11, 2018). There is a lot going on in this field. *See, e.g.*, Steven Funk, et al., *Critical Media Literacy as Transformative Pedagogy*, in HANDBOOK OF RESEARCH ON MEDIA LITERACY IN THE DIGITAL AGE 1, 1-2 (Melda N. Yildiz & Jared Keengwe eds., 2016*); see also* 2d International Media

I.   THE LEGAL APPROACH

As has been alluded to, a general question is whether fake news is either a coherent notion and/or a really recent phenomenon? Thus, for example, the U.K. Ofcom Broadcasting Code Section 2.2 states that "Factual programmes or items or portrayals of factual matters must not materially mislead the audience."[19] There are increasing numbers of actual or proposed legal instruments relating to fake news, and a few are itemised below.[20]

Perhaps the one that attracts the most attention is that adopted in Germany, the *Netzwerkdurchsetzungsgesetz* (Social Network Enforcement Law). Whilst mainly aimed at so-called "hate speech," fake news (a.k.a. misinformation) is also implicated:

> From October, Facebook, YouTube, and other sites with more than two million users in Germany must take down posts containing hate speech or other criminal material within 24 hours. Content that is not obviously unlawful must be assessed within seven days. The new law is one of the toughest of its kind in the world. Failure to comply will result in a 5m euro penalty, which could rise to 50m euros depending on the severity of the offence.[21]

Freedom of expression and media rights activists have been critical of the law[22] as well as the United Nation's Special Rapporteur on Freedom of Opinion and Expression, David Kaye.[23]

Literacy Research Symposium, MEDIA LITERACY RESEARCH SYMPOSIUM, https://medialiteracyresearchsymposium.wordpress.com/ (last visited Feb. 12, 2018).

19.   OFCOM, THE OFCOM BROADCASTING CODE §2 (Apr. 2017), https://www.ofcom.org.uk/__data/assets/pdf_file/0005/100112/broadcast-code-april-2017-section-2.pdf. This specific issue is currently under consideration regarding (former First Minister of Scotland) Alex Salmond's show on RT. *See generally*, Holly Watt, *Ofcom Investigates Alex Salmond's TV show on Kremlin-Backed Channel*, THE GUARDIAN (Dec. 18, 2017, 8:57 EST), https://www.theguardian.com/world/2017/dec/18/ofcom-investigates-alex-salmonds-tv-show-kremlin-backed-network.

20.   Pertinent, but beyond the scope of this paper, are a couple of items appraising the notion of fake news and its legality. *See* David O. Klein & Joshua R. Wueller, *Fake News: A Legal Perspective*, 20 J. INTERNET L. 1, 6-13 (2017); Tom Hagy, *A Little Truth About Fake News—and the Law*, LEXISNEXIS, https://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2017/09/08/a-little-truth-about-fake-news-and-the-law.aspx (last visited Feb. 12, 2018).

21.   Joe Miller, *Germany Votes for 50m Euro Social Media Fines*, BBC (June 30, 2017), http://www.bbc.co.uk/news/technology-40444354.

22.   *See, e.g.*, Maryant Fernandez Perez, *Germany: Will 30 June be the Day Populism Killed Free Speech?*, EDRi (June 29, 2017), https://edri.org/germany-will-30-june-be-the-day-populism-killed-free-speech/.

Other jurisdictions contemplating laws are as follows.

(i) In Ireland, the proposal – introduced by a Private Member – is entitled the Online Advertising and Social Media (Transparency) Bill 2017.[24]

(ii) Singapore is likely to bring forward such a law during 2018, driven by the government. The Minister responsible has been quoted as saying:

> In some way, (the legislation has) got to achieve working with technological platforms to de-legitimise fake news, to help people identify what is fake news. And then where it is done with malice or for-profit, or deliberately spreading fake news, we have to find ways in which it is dealt with and the people who spread such fake news are also dealt with.[25]

(iii) Cyprus is yet another jurisdiction in the running for such a law, and, as with Singapore, the matter is being piloted by the government:

> A government bill aiming to regulate media operations is underway which would help also tackle the spreading of fake news, government spokesman Nicos Christodoulides said. . . . During a conference on the issue, Christodoulides said that the dissemination of fake information greatly affects politics, journalism and social life. He said that the government bill, which is expected to be tabled to the plenum to vote early 2018, would also help tackle the spread of fake news.[26]

The *Cyprus Mail* is very cautious about the proposed law:

> The government is preparing a bill to regulate media operations and tackle the spread of fake news . . . . This seems a very peculiar bill indeed . . . .

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23.   *See* Special Rapporteur on the Promotion and Protection of the Right of Freedom of Opinion and Expression, Letter dated June 1, 2017 from the Special Rapporteur to the Federal Government of Germany, U.N. Doc. OL/DEU/1/2017 (June 1, 2017).

24.   Online Advertising and Social Media (Transparency) Bill 2017 (Bill No. 150/2017) (Ir.), http://www.oireachtas.ie/documents/bills28/bills/2017/15017/b15017d.pdf. However, progress is dependent on Private Members' Bill time being made available. *See* 962 Dáil Deb. (Dec. 6, 2017) col. 7 (Ir.), http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes /dail2017120600020?opendocument#S00900.

25.   *See* Chan Luo Er, *New Laws on Fake News to be Introduced Next Year: Shanmugam*, CHANNEL NEWSASIA (June 19, 2017, 11:27 AM), http://www.channelnewsasia.com/news/ singapore/new-laws-on-fake-news-to-be-introduced-next-year-shanmugam-8958048; *see also, Fakes News: Finding the Truth in an Avalanche of Lies*, THE SMU BLOG, http://blog.smu.edu.sg/academic/fake-news-finding-truth-avalanche-lies/ (last visited on Feb. 14, 2018); P.N Balji*, Will Fake News Law be an Overkill*, THE INDEPENDENT (Nov. 7, 2017), http://www.theindependent.sg/will-fake-news-law-be-an-overkill/. The article poses the following questions: 1. Is the intention malicious and/or mischievous? 2. What about propaganda that is put out by organizations and officialdom? 3. How do you draw the line between a news item that is the result of a genuine mistake and an honest error? 4. To what extent should we leave the reading public to expose fake news?

26.   Evie Andreou*, Fake News, the Scourge of our Times, Conference Told*, CYPRUS MAIL ONLINE (Nov. 27, 2017), http://cyprus-mail.com/2017/11/27/fake-news-scourge-times-conference-told/.

As for freedom of the press, it operates very well in Cyprus and needs no legal framework. Any legal framework would impose some form of restriction, which is no good thing, and will not eliminate or control fake news, one of the bill's objectives . . . . The real problem is not the mainstream media but online platforms and social media which are the main sources of fake news and stirrers of public hysteria. Social media, in particular, have become agents of repression and intimidation, but can they be brought under control by legislation. It is an impossible task and Christodoulides [the Spokesperson] acknowledged there would always be fertile ground for fake news, propaganda and conspiracy theories. So what would be the point of passing a law? In the end, the law might impose unnecessary restrictions and place bureaucratic demands on mainstream media, which are already registered with the authorities, while doing nothing to regulate the online platforms. Unfortunately, very little, if anything, can be done about fake news, which is an inevitable abuse of freedom of speech. No legal restrictions can be placed on freedom of speech in order to control the irresponsible spread of lies and misinformation. The output of every news medium is judged by the public and not by the state authorities. If the public enjoys fake news and conspiracy theories, there will be online platforms, broadcasters and newspapers providing it and no legislation can stop this. Perhaps Christodoulides has not heard the sociological observation that the media of a country always reflects the society it serves.[27]

To recapitulate the German law, the main concern of the Reporters Committee for Freedom of the Press is that:

Perhaps one of the most troubling consequences of the NetzDG is not for German journalists, however, but for journalists in other countries. Countries with less democratic political cultures are using the NetzDG and global discourse about the dangers of fraudulent news as a ruse to clamp down on the free press.[28]

Notably, an attempt to introduce such a Bill, AB 1104, in the California Assembly was withdrawn. The EFF stated: "For [Assemblyman] Chau, A.B. 1104 is an attempt to address the issue of 'fake news' that many believe plagued the 2016 election: websites publishing false stories and

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27.   *Our View: We Can't Tackle Fake News by Limiting Freedom of Speech*, CYPRUS MAIL ONLINE (Dec. 2, 2017), http://cyprus-mail.com/2017/12/02/view-no-government-think-tackling-fake-news-limiting-freedom-speech/.

28.   Emma Lux, *Efforts to Curb Fraudulent News Have Repercussions Around the Globe*, REPORTERS COMMITTEE (Dec. 6, 2017), https://www.rcfp.org/browse-media-law-resources/news/efforts-curb-fraudulent-news-have-repercussions-around-globe. See also a report by Pen America, which points to the globalization of the reaction to "fake news". FAKING NEWS FRAUDULENT NEWS AND THE FIGHT FOR TRUTH, PEN AMERICA 4, 11, 12, 17 (2017), https://pen.org/wp-content/uploads/2017/10/PEN-America_Faking-News-Report_10.17.pdf.

promoting them over social media. No law, and certainly not A.B. 1104, will remedy this problem."[29]

However, it is also pertinent to mention the global response by the four Special Rapporteurs on freedom of expression, the Joint Declaration, "On Freedom of Expression and 'Fake News', Disinformation and Propaganda."

> On 3 March 2017, the UN Special Rapporteur on Freedom of Opinion and Expression, David Kaye, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information issued a Joint Declaration on freedom of expression, focusing on "fake news", disinformation and propaganda. The declaration identifies the human rights standards that should apply to any efforts to deal with disinformation and propaganda, encourages the promotion of diversity and plurality in the media, and emphasizes the particular roles played by digital intermediaries as well as journalists and media outlets.[30]

It is a key provision of the Joint Statement that "General prohibitions on the dissemination of information based on vague and ambiguous ideas, including 'false news' or 'non-objective information', are incompatible with international standards for restrictions on freedom of expression, as set out in paragraph 1(a), and should be abolished."[31]

It is also noteworthy that the Rapporteurs are not wedded to the phrase "fake news" or even "false news", instead stating that they take note of "*the growing prevalence of disinformation (sometimes referred to as 'false' or 'fake news')* and propaganda in legacy and social media, fuelled by both States and non-State actors, and the various harms to which they may be a contributing factor or primary cause."[32]

Finally, lest it be thought that the fake/false news phenomenon is a child of 2016/2017 and specifically the progeny of President Trump, it is worth recalling two now largely forgotten statutes and cases from 1999. The first is from Zimbabwe and the second is from Uganda.   The

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29.   Dave Maass, *California Bill to Ban "Fake News" Would be Disastrous for Political Speech*, ELECTRONIC FRONTIER FOUNDATION (Mar. 27, 2017), https://www.eff.org/deeplinks/ 2017/03/california-bill-ban-fake-news-would-be-disastrous-political-speech.

30.   The U.N. Special Rapporteur on Freedom of Opinion & Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression & the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda*, COUNCIL OF EUROPE (Mar. 3, 2017), https://www.coe.int/en/web/media-freedom/-/joint-declaration-on-freedom-of-expression-and-fake-news-disinformation-and-propaganda. The text is reproduced in Appendix 1 to this paper.

31.   *Id.*

32.   *Id.* (emphasis added).

Zimbabwean case involved the false news provision in Section 50(2)(a) of the Zimbabwean Law and Order (Maintenance) Act; the Ugandan case – coincidentally also Article 50 – involved the Uganda Penal Code. Both situations were the subject of extensive Written Comments by the international organisation Article 19, assessing the provision in the light of international and constitutional guarantees of freedom of expression.[33] The Zimbabwe provision states:

> Section 50 (1) In this section – "statement" includes any writing, printing, picture, painting, drawing or other similar representation. (2) Any person who makes, publishes or reproduces any false statement, rumour or report which – (a) is likely to cause fear, alarm or despondency among the public or any section of the public; or (b) is likely to disturb the public peace; shall be guilty of an offence and liable to imprisonment for a period not exceeding seven years, unless he satisfies the court that before making, publishing or reproducing, as the case may be, the statement, rumour or report he took reasonable measures to verify the accuracy thereof.[34]

The Ugandan provision states:

> (1) Any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace is guilty of a misdemeanour. (2) It shall be a defence to a charge under subsection (1) if the accused proves that, prior to publication, he took such measures to verify the accuracy of such statement, rumour or report as to lead him reasonably to believe that it was true.[35]

These two Comments are (unsurprisingly) almost identical. Both state, for example, that:

> [C]ourts around the world have consistently held that false statements are positively protected by guarantees of freedom of expression. The reasons for this are captured poetically in the following quotation by James Madison: Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth than, by

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33. *See* Written Comments Submitted by Article 19, The International Centre Against Censorship, Chavunduka v. Zimbabwe, (2000) ZLR 1 [SC] (Zam.) (No. 2000 JOL 6540 (ZS)) http://www.msu.ac.zw/elearning/material/1284026546zimbabwe-chavunduka-and-choto-v.-zimbabwe.pdf. [hereinafter Article 19's Written Comments for Zimbabwean Case]; Written Comments Submitted by Article 19, The International Centre Against Censorship, Onyango-Obbo v. Att'y Gen., Const. Pet. No. 15 of 1997 (Const. Ct. Uganda July 21, 2000), https://www.article19.org/data/files/pdfs/cases/uganda-onyango-obbo-v.-uganda.%20Uganda [hereinafter Article 19's Written Comments for Ugandan Case]. Both were principally drafted by Toby Mendel.

34. Article 19's Written Comments for Zimbabwean Case, *supra* note 33.

35. Article 19's Written Comments for Ugandan Case, *supra* note 33.

pruning them away, to injure the vigour of those yielding the proper fruits.[36]

Both Written Comments conclude that:

> Perhaps the most serious problem with Section 50 [in both situations] prohibiting the publication of false news is its massive overbreadth. Even when restrictions are otherwise legitimate, the Oakes test [*sic*] requires them to impair the right to freedom of expression as little as possible. In essence, this requirement places an obligation on the State, when pursuing legitimate aims, to have due regard to constitutional rights by tailoring restrictions as narrowly as possible . . . . The continued use of false news provisions as we approach the turn of the millennium is an anachronism and an unjustifiable restraint on freedom of expression and free political debate. A close analysis shows that false news provisions breach almost every element of the test for restrictions on freedom of expression. At least in the form found in Section 50 of the Ugandan Penal Code, they are unacceptably vague, they serve no legitimate aim, they bear no rational connection to any aim one might posit for them, they are massively overbroad and they disproportionately limit the right to freedom of expression.[37]

Finally, Thailand's recent initiative is interesting. The Ministry of Public Health has launched a "Media Watch" app to combat fake news: "Thailand's Ministry of Public Health has launched a new smartphone app called 'Media Watch' to allow the public to report any fake news or complaints about misleading information they come across on the Internet."[38]

II.   NON-LEGAL APPROACHES

A.   *UK Parliament Inquiries*

Whilst it might well be the *precursor* to legislation, the U.K. Parliament, through its Select Committee on Digital, Culture, Media and Sport, instituted a pre-legislative inquiry into fake news on 30 January 2017.   It stated that it understood the notion to mean "the growing phenomenon of widespread dissemination, through social media and the

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36.   *Id.* (quoting Near v. Minnesota, 283 U.S. 697, 718 (1931)); Article 19's Written Comments for Zimbabwean Case, *supra* note 33 (quoting Near v. Minnesota, 283 U.S. 697, 718 (1931)).

37.   Article 19's Written Comments for Zimbabwean Case, *supra* note 33; Article 19's Written Comments for Ugandan Case, *supra* note 33.

38.   Shawn Lim, *Thailand Launches "Media Watch" App to Combat Fake News*, THE DRUM (Dec. 1, 2017, 2:44 AM), http://www.thedrum.com/news/2017/12/01/thailand-launches-media-watch-app-combat-fake-news.

internet, and acceptance as fact of stories of uncertain provenance or accuracy."[39] But, due to the unexpected, snap general election on 8 June 2017, the Committee had to complete/conclude this particular phase of the inquiry on the dissolution of Parliament.[40] Now, the inquiry has been re-opened under the newly constituted Committee, post the General Election.[41] There is a rich seam of approaches and positions to be mined, culled from the written submissions.[42]

This paper also highlights a second, rather less noticed, inquiry also launched under the aegis of the U.K. Parliament, namely, the All-Party Parliamentary Group on Literacy. It has a unique focus.[43] The inquiry follows from the setting-up of the Commission on Fake News and the Teaching of Critical Literacy Skills in Schools.[44] It is based on a report – *Fake News and Critical Literacy*. The main conclusion is that children and young people in England do not have the critical literacy skills they need to identify fake news.[45]

So, the question (naturally?) arises: would encouraging, fostering and implementing a policy to enhance literacy skills (a.k.a. *digital* media literacy) offer a more promising approach and response (i.e., as compared to the law/regulation route) to the phenomenon of fake news? This could be contrasted with what might be – at the time of writing – the most egregious example of the *legal* approach in Europe, which was introduced above, that of Germany: the Act to Improve Enforcement of The Law in Social

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39.	*See "Fake News" Inquiry Launched*, UK PARLIAMENT (Jan. 30, 2017), https://www.parliament.uk/business/committees/committees-a-z/commons-select/culture-media-and-sport-committee/news-parliament-2015/fake-news-launch-16-17/.

40.	*See Fake News Inquiry*, UK PARLIAMENT, https://www.parliament.uk/business/committees/committees-a-z/commons-select/culture-media-and-sport committee/inquiries/parliament-2015/inquiry2/ (last visited Feb. 26, 2018).

41.	*See Fake News*, PARLIAMENT.UK, http://www.parliament.uk/business/committees/committees-a-z/commons-select/digital-culture-media-and-sport-committee/inquiries/parliament-2017/fake-news-17-19/ (last visited Feb. 16, 2018).

42.	*See infra.*

43.	An APPG is an informal, unofficial cross-party group which may also invite individuals and organizations as members. *See All-Party Parliamentary Groups*, PARLIAMENT.UK, http://www.parliament.uk/about/mps-and-lords/members/apg/ (last visited Feb. 16, 2018). For the APPG on Literacy, see *All-Party Parliamentary Group on Literacy*, NATIONAL LITERACY TRUST, https://literacytrust.org.uk/policy-and-campaigns/all-party-parliamentary-group-literacy/ (last visited Feb. 16, 2018). The website is maintained by the National Literacy Trust acting as the group's secretariat.

44.	*See Commission on Fake News and the Teaching of Critical Literacy Skills in Schools*, NAT'L	LITERACY	TRUST,	https://literacytrust.org.uk/policy-and-campaigns/all-party-parliamentary-group-literacy/fakenews (last visited Mar. 4, 2018).

45.	*Id.*

Networks (NetzDG).[46] Note, though, that a "legal approach" might also consider ruling out/deploying a (new) law. In this regard, Eugene Volokh has written that:

> [L]awsuits and prosecutions for lies about the government are forbidden, and I think the same should apply to lies about current events, history, science and the like (at least so long as no particular person or business is targeted). It's not that the lies are constitutionally valuable as such, generally speaking; but threatening to punish them unduly deters even true statements, as well as expressions of opinion.[47]

In the U.K., it is not just the two Committees already mentioned that have been busy. Linking the phenomenon of fake news to the internet/social media, the UK Government has published the Internet Safety Strategy green paper.[48]

> The consultation covers various aspects of online safety, including: [1] the introduction of a social media code of practice, transparency reporting and a social media levy, [2] technological solutions to online harms, [3] support for parents and carers, [4] adults' experience of online abuse, and [5] young people's use of online dating websites/applications.[49]

Significantly, another element in the consultation is *developing children's digital literacy*:

> Digital literacy helps give children the tools they need to make smart choices online . . . . It is important for children and young people to be aware that not everything they see and read online is real. Being able to distinguish between factual and fabricated content is a critical skill. In an age where children and young people predominantly get their news from social media outlets it is important that they are given the skills to critically evaluate the content they are consuming. In a 2016 Ofcom

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46. *See* Katy O'Donnell et al., *Germany's New Online Hate Speech Code Pushes Big Fines and Debate*, POLITICO (Oct. 2, 2017, 10:00AM), https://www.politico.eu/article/hate-speech-germany-twitter-facebook-google-fines/.

47. Eugene Volokh, *Fake News and the Law, From 1798 to Now*, WASH. POST (Dec. 9, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/09/fake-news-and-the-law-from-1798-to-now/?utm_term=.1460522d2887.

48. *See* DEPARTMENT FOR DIGITAL, CULTURE, MEDIA AND SPORT, INTERNET SAFETY STRATEGY – GREEN PAPER, 2017, (UK). The consultation website also refers to SONIA LIVINGSTONE, ET AL., CHILDREN'S ONLINE ACTIVITIES, RISKS AND SAFETY: A LITERATURE REVIEW BY THE UKCCIS EVIDENCE GROUP (2017), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/650933/Literature_Review_Final_October_2017.pdf.
UKCCIS is The U.K. Council for Child Internet Safety. *See also* CHILDREN'S COMMISSIONER FOR ENGLAND, GROWING UP DIGITAL: A REPORT OF THE GROWING UP DIGITAL TASKFORCE (2017), https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/06/Growing-Up-Digital-Taskforce-Report-January-2017_0.pdf.

49. *Internet Strategy Green Paper*, GOV.UK (Oct. 11, 2017), https://www.gov.uk/government/consultations/internet-safety-strategy-green-paper.

survey more than one in four of the children surveyed (across the full age range surveyed, 8–15) agreed that "if Google lists information then the results can be trusted". Further qualitative research revealed that some children had a limited understanding of the source of search results, assuming an authoritative human fact checker was involved in their selection. UK adults' critical awareness was also shown to be lacking in a Channel 4 "fake news" survey in 2017. The survey found that only 4% of respondents were able to identify all three true new stories in a selection of six they were presented with, and 49% of respondents thought at least one of the three fake news stories was true. That is why we will be working with DfE to ensure that children's critical thinking skills are enhanced as part of increased digital literacy training so that young people are better able to recognise "fake news" and intentionally misleading information on the Internet.[50]

B. *European-Level Intergovernmental Initiatives*

Apart from the U.K. initiatives mentioned, two European intergovernmental organisations have also weighed into the issue. First, the European Union's European Commission has announced a public consultation into fake news, emerging from its Digital Single Market strategy, specifically the Media Convergence and Social Media Unit.[51] As well as the public consultation, a so-called High-Level Expert Group is being established, and the combined outputs will inform an EU-level strategy to be presented during Spring 2018. Actually, the Commission's initiatives are the result of the European Union Parliament's earlier consideration of the issue.[52] This culminated in the adoption by the Parliament of a text, *Online Platforms and the Digital Single Market* (15 June 2017).[53] Paragraphs 35 and 36 read:

50. *See* DEPARTMENT FOR DIGITAL, CULTURE, MEDIA AND SPORT, *supra* note 48, at 48.

51. *See* European Commission Press Release IP/17/4481, Next Steps Against Fake News: Commission Sets Up High-Level Expert Group and Launches Public Consultation (Nov. 13, 2017). The Commission also has a media literacy expert group which last met in December 2015: "We understand that 'media literacy' is an umbrella expression that includes all the technical, cognitive, social, civic and creative capacities that allow a citizen to access, have a critical understanding of the media and interact with it. . . . However, *a key pillar in all possible definitions of media literacy is the development of critical thinking by the user.*" *See Meeting of the Media Literacy Expert Group*, at 1, 2 (Dec. 1, 2015), http://ec.europa.eu/newsroom/dae/docum ent.cfm?action=display&doc_id=13700 (emphasis added).

52. Naja Bentzen, *At a Glance: "Fake News" and the EU's Response*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE (Apr. 2017), http://www.europarl.europa.eu/RegData/ etudes/ATAG/2017/599384/EPRS_ATA(2017)599384_EN.pdf

53. *See* Henna Virkkunen & Philippe Juvin (Special Rapporteurs), Comm. on the Industry, Research and Energy and Comm. on the Internal Market and Consumer Protection, Rep. on Online Platforms and the Digital Single Market, U.N. Doc. A8-0204 (2017); *see also* European

35. Stresses the importance of taking action against the dissemination of fake news; calls on the online platforms to provide users with tools to denounce fake news in such a way that other users can be informed that the veracity of the content has been contested; points out, at the same time, that the free exchange of opinions is fundamental to democracy and that the right to privacy also applies in the social media sphere; highlights the value of the free press with regard to providing citizens with reliable information;

36. Calls on the Commission to analyse in depth the current situation and legal framework with regard to fake news, and to verify the possibility of legislative intervention to limit the dissemination and spreading of fake content.[54]

The text was adopted by 393 votes to 146 with 74 abstentions.[55] Interestingly, and perhaps significantly, the summary of the text does not use the term "fake" and reads "platforms should provide users with **tools to report false news** so that other users are informed: the Commission should analyse the possibility of legislative intervention to limit the spread of false content."[56]

Second, the (completely separate) Council of Europe has commissioned a report, entitled *Information Disorder*. It lays out a new definitional framework for thinking about information disorder, provides an overview of current responses, and summarizes key academic studies on how people consume information, particularly fact-checks and debunks.[57] It ends with 35 recommendations, targeted at technology companies, national governments, media organizations, civil society, education ministries and funding bodies.[58]

Fed'n of Journalists, *European Parliament Discusses the Political and Legal Challenges for Fake News,* EFJ (Aug. 9, 2017), https://europeanjournalists.org/blog/2017/09/08/european-parliament-discusses-the-political-and-legal-challenges-for-fake-news/; Guy Berger, *Fake News and the Future of Professional and Ethical Journalism*, UNESCO, https://en.unesco.org/sites/default /files/fake_news_berger.pdf (last visited Feb. 8, 2018).

54. Virkkunen & Juvin, *supra* note 53, at 11.

55. Summary of European Parliament Resolution of June 15, 2017 on Online Platforms and the Digital Single Market, EUROPEAN PARLIAMENT, http://www.europarl.europa.eu/oeil/popups/ printsummary.pdf?id=1494421&l=en&t=E (last visited Mar. 3, 2018).

56. *Id.*

57. *See* WARDLE & DERAKHSHAN, *supra* note 13.

58. *Id.* at 80-85; *see generally* Claire Wardle & Hossein Derakhshan, *One Year On*, *We're Still Not Recognizing the Complexity of Information Disorder Online*, FIRST DRAFT (Oct. 31, 2017), https://firstdraftnews.com/coe_infodisorder/; Jan Kleijssen, Dir., Info. Soc'y and Action Against Crime Directorate, The Royal Neth. Soc'y of Int'l Law (KNVIR) Spring Meeting: Fake News and National Sovereignty (June 13, 2017), https://www.coe.int/en/web/human-rights-rule-of-law/jan-kleijssen/speech-the-hague-2017-06-13.

C.   *The DCMS Inquiry in Detail*

As already noted, the Digital Culture Media and Sport Select Committee (DCMS) launched an inquiry into fake news on 30 January 2017.[59]   By this phrase, it said it meant "the growing phenomenon of widespread dissemination, through social media and the internet, and acceptance as fact of stories of uncertain provenance or accuracy."[60]   It called for written submissions with a closing date of 3 March 2017. The Committee gave itself a wide-ranging brief "looking at ways to respond to the phenomenon of fake news" arising out of answers to the following questions:

> What is "fake news"?   Where does biased but legitimate commentary shade into propaganda and lies?   What impact has fake news on public understanding of the world, and also on the public response to traditional journalism?   If all views are equally valid, does objectivity and balance lose all value?   Is there any difference in the way people of different ages, social backgrounds, genders etc. use and respond to fake news?   Have changes in the selling and placing of advertising encouraged the growth of fake news, for example by making it profitable to use fake news to attract more hits to websites, and thus more income from advertisers.   What responsibilities do search engines and social media platforms have, particularly those which are accessible to young people?   Is it viable to use computer-generated algorithms to root out "fake news" from genuine reporting?   How can we educate people in how to assess and use different sources of news?   Are there differences between the UK and other countries in the degree to which people accept "fake news", given our tradition of public service broadcasting and newspaper readership?   How have other governments responded to fake news?[61]

The background to the Inquiry was stated to be a concern at the perception over growing public distrust towards traditional news sources, e.g., newspapers, broadcasters and a turning to social media and the Internet – and this "despite the fact that the source of the stories is often unclear and it is not known whether the reports are factually accurate."[62]   Arising from suggestions that the U.S. electorate may have been subjected to "unprecedented" amounts of fake news during the 2016 Presidential election, which may have impacted the democratic processes, there is a fear

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59.   *See "Fake News" Inquiry Launched*, *supra* note 39. For the status of such a Committee, see *Select Committees*, UK PARLIAMENT, http://www.parliament.uk/about/how/committees/select/ (last visited Feb. 9, 2018).

60.   *"Fake News" Inquiry Launched*, *supra* note 39.

61.   *Id.*

62.   *Id.*

of the public being "fed propaganda and untruths."[63]   Launching the Inquiry, the Chair of DCMS, Damian Collins MP, said,

> The growing phenomenon of fake news is a threat to democracy and undermines confidence in the media in general.   Just as major tech companies have accepted they have a social responsibility to combat piracy online and the illegal sharing of content, they also need to help address the spreading of fake news on social media platforms. Consumers should also be given new tools to help them assess the origin and likely veracity of news stories they read online.   The Committee will be investigating these issues, as well as looking into the sources of fake news, what motivates people to spread it, and how it has been used around elections and other important political debates.[64]

More than 70 written submissions have been received and continue to be published.[65] Oral evidence will be offered at future evidence sessions.[66] A random example, which highlights the scale of the phenomenon and what needs to happen to contain it, may be gleaned from the conclusion to one item of written evidence:

> Fake news is a serious and complex problem that has complex societal causes and threatens to undermine democracy. There are no technological fixes and superficial measures that can overcome fake news culture. Challenging fake news culture requires legal, political, economic and media innovations that foster a culture of slow media, public service Internet platforms, fact checking, and new forms of political engagement and debate.[67]

Conveniently, an analysis of the submissions to the fake news inquiry (at least up until June 2017) has been carried out.[68]

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63.   *Id.*

64.   *Id.*

65.   *See "Fake News" Inquiry – Publications*, UK PARLIAMENT, http://www.parliament.uk/ business/committees/committees-a-z/commons-select/culture-media-and-sport-committee/inquiries/parliament-2015/inquiry2/publications/ (last visited Feb. 9, 2018); *Guidance on Giving Evidence to a Select Committee of the House of Commons*, UK PARLIAMENT, http://www.parliament.uk/get-involved/have-your-say/take-part-in-committee-inquiries/commons-witness-guide/ (last visited Feb. 9, 2018) (setting out the criteria about written submissions including the possibility of "requesting" non-publication).

66.   Digital, Culture, Media and Sport Committee, Oral Evidence: Fake News, 2018, HC 363 (UK).

67.   Christian Fuchs, *Submission of Written Evidence*, UK PARLIAMENT (Nov. 2017), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/digital-culture-media-and-sport-committee/fake-news/written/73970.html. Christian Fuchs is a professor at the University of Westminster, in the Communication and Media Research Institute & Westminster Institute for Advance Studies.

68.   Vian Bakir & Andrew McStay, *Three-D Issues 28: Combatting Fake News: Analysis of Submissions to the Fake News Inquiry*, MECCSA (June 3, 2017),

1. Definitions

We analysed, clustered and assessed the Fake News Inquiry's 78 written submissions. Unsurprisingly, there is a wide range of definitions of fake news in use, including misinformation (inadvertent online sharing of false information), disinformation (deliberate creation and sharing of information known to be false), propaganda and satire. *Most agree that to be considered as fake, the news does not have to be 100% false but may simply incorporate deliberately misleading elements within its content or context.*[69]

2. Solutions

Submissions to the Fake News Inquiry recognise the complexity of the fake news phenomenon, with the majority demanding government regulation or self-regulation across six constituent elements. Suggested solutions to fake news variously advocate focusing on:

- Media organisations – to promote a healthy, pluralistic media economy to maintain and improve accuracy and fact-checking; and to encourage journalists to be more transparent about their sources and to tell the truth (30 submissions);
- Education – to increase people's media and digital literacy (27 submissions);
- Digital intermediaries – to divert digital advertising funds to support news outlets; to identify and ban fake news web sites; to be transparent and responsible regarding how they treat news; and to be made liable for hosting provenly false, damaging stories (23 submissions);
- Advertising – to assess the impact on the media landscape of the Google–Facebook duopoly of the digital advertising market; to assess whether the Advertising Standards Authority should set standards on how adverts are operated and regulated by digital intermediaries; and to 'follow the money' to enable behavioral advertisers to identify fake news sites and avoid their adverts appearing there (12 submissions);
- Professional persuaders and PR – to regulate political campaigning to avoid deception (9 submissions);

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http://www.meccsa.org.uk/news/three-d-issue-28-combatting-fake-news-analysis-of-submissions-to-the-fake-news-inquiry/.

69. *Id.* (emphasis added).

- Security – to give signals intelligence agency GCHQ a leading role in tackling propagandistic fake news instigated by other nations (2 submissions).[70]

Thus, according to the submitted responses to the inquiry, the second most numerous group focused on increasing "people's media and digital literacy". What is less clear is if the proposed solutions overlap to some extent.

In their conclusion, the authors sum up their analysis as follows:

Of these regulatory solutions, those concerning education – i.e. increasing people's digital and media literacy – *is perhaps the least contentious* and those concerning security are likely already being enacted, albeit in secret. The other regulatory measures suggested, however, are unlikely to bear fruit in the near future. Regulating media organisations to promote pluralism and to encourage journalists to tell the truth is not a new demand, especially since the 2012 Leveson Inquiry; that it has not yet been implemented does not bode well for fresh demands from the Fake News Inquiry. Regulating political campaigning runs into human rights problems of freedom of speech, as well as resistance from the journalism and PR industries themselves. Regulating digital intermediaries regarding both their treatment of fake news, and their impact on the digital advertising market, faces issues of government will when dealing with powerful, footloose, global media companies which provide platforms and services that are central to the digital economy and modern life. As for self-regulation, that enacted by news organisations and professional persuaders/PR has produced low trust levels in both journalism and in politicians – a situation pre-dating the fake news phenomenon: and the digital environment generates commercial pressures that make it harder for news outlets to support quality news. Further calls for self-regulation of journalism and PR industries, then, is unlikely to be effective. Self-regulation of digital intermediaries is also likely to be limited in scope: Facebook and Google have taken some steps to address fake news, but they are unlikely to self-regulate against the interests of their own business models.[71]

Their ultimate conclusion is to "follow the money":

To conclude, while the issue of regulating professional persuaders/PR and digital intermediaries is ripe for renewed attention, the complex issues involved include human rights obligations to freedom of speech and transnational commercial interests – neither of which are likely to be easily resolvable. Whilst increased regulatory efforts concerning media and digital literacy are less contentious and worthy long-term investments, for

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70. *Id.* (emphasis added).
71. *Id.* (emphasis added).

a more immediate win, it is to digital advertisers' self-regulation that attention should be paid. For brand safety reasons, the ad industry has self-interest in policing its behavioural and programmatic advertising networks to identify and cut off advertisers that support fake news sites. Advertisers – even the most disreputable – are unlikely to want their advertising associated with content that, by its very nature (i.e., fake news), cannot be trusted.[72]

D.   Commission on Fake News and the Teaching of Critical Literacy Skills in Schools

As noted, the Commission on Fake News and the Teaching of Critical Literacy Skills in Schools is based on an August 2017 report, *Fake News and Critical Literacy – an Evidence Review*. Actually, the document is basically a "literature review aim[ing] to provide a brief overview of research relating to critical literacy skills and teaching . . . [which] will inform a subsequent survey of U.K. teachers and pupils."[73] The key points fall into several distinguishable categories:

- Definitions

However so defined, e.g., "completely made up, manipulated to resemble credible journalism and attract maximum attention",[74] the nub of the Report is that "Good critical literacy skills have the potential to provide a strong foundation for identifying fake news. It is increasingly important the children develop effective critical literacy skills to allow them to navigate the digital age."[75]

- The extent of the problem

Globally, one in three internet users were estimated to be under the age of 18 in 2017 . . . and 12 to 15-year-olds spend more than 20 hours online in an average week. [However,] the current computing curriculum does not address several key aspects of online life, including how to critique content and spot fake news (Children's Commissioner for England, 2017) . . . . [T]here is a need for children and young people's critical literacy skills to be updated for the digital age, including improving awareness of the methods and motivations behind fake news production.[76]

- Why fake news is a problem

Concerns about fake news highlight the importance of equipping children and young people with critical thinking skills appropriate for the 21st

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72.   *Id.*
73.   *Id.*
74.   *Id.*
75.   *Id.*
76.   *Id.*

century. For example, while researchers concluded that fake news was unlikely to have had a significant impact on the outcome of the 2016 US general election . . . academics and other commentators have suggested that deliberately misleading news stories have the potential to affect democracy . . . as well as public confidence in evidence-based governance . . . and trust in journalism.[77]

- The school environment

Schools are vital in supporting children and young people to discern truth effectively when searching for information and news online . . . . Indeed, several experts recommend that critical digital literacy should be taught in schools as part of citizenship lessons and throughout the curriculum. The primary school curriculum includes many foundational skills needed to develop critical literacy. The comprehension dimension of reading in particular prepares children to be critically literate. The secondary school curriculum features more specific skills needed to be critically literate . . . . Teacher training is central to the success of any plan to boost critical literacy . . . Plenty of practical guidance is available for teachers across subjects to support teaching critical literacy skills, and several frameworks have been created. Discussion, debate and dialogue in particular feature in many of the practical strategies for supporting critical literacy in the classroom . . . . Strengthening the teaching of critical literacy skills in schools should take place within the context of appropriate action by the digital industry.[78]

The APPG on Literacy does not have a monopoly on its approach. Thus, one response to the DCMS Inquiry states,

With a view to reflecting on the role of education in tackling the problem of fake news, this evidence's question is addressed around the notion of *critical digital media literacy*. This is here conceptualised in a way that contextualises users' ability to evaluate online content reliability as embedded within broader understandings of digital media technologies (i.e. the Internet and social media) as both empowering and constrained with respect to democracy and political participation.[79]

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77. *Id.*

78. *Id.*

79. Gianfranco Polizzi, *Submission of Written Evidence*, UK PARLIAMENT (Mar. 2017), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/culture-media-and-sport-committee/fake-news/written/48186.html (emphasis added). Gianfranco Polizzi is a PhD researcher in the Department of Media and Communications at the London School of Economics and Political Science.

E.   Other Initiatives

With regard to academic and other inputs into the discussion/debate, the prestigious Reuters Institute for the Study of Journalism has published a Fact Sheet, *News you don't believe: Audience perspectives on fake news*.[80] The key findings include:

- People see the difference between fake news and news as one of degree rather than a clear distinction

- When asked to provide examples of fake news, people identify poor journalism, propaganda (including both lying politicians and hyperpartisan content) and some kinds of advertising more frequently than false information designed to masquerade as news reports

- Fake news is experienced as a problem driven by a combination of some news media who publish it, some politicians who contribute to it, and some platforms that help distribute it

- People are aware of the fake news discussion and see "fake news" in part as a politicized buzzword used by politicians and others to criticize news media and platform companies

- The fake news discussion plays out against a backdrop of low trust in news media, politicians, and platforms alike—a generalized scepticism toward most of the actors that dominate the contemporary information environment

- Most people identify individual news media that they consider consistently reliable sources and would turn to for verified information, but they disagree as to which, and very few sources are seen as reliable by all.[81]

Generally,

[F]ake news is only in part about fabricated news reports narrowly defined, and much more about a wider discontent with the information landscape— including news media and politicians as well as platform companies. *Tackling false news narrowly speaking is important, but it will not address the broader issue that people feel much of the information they come across, especially online, consists of poor journalism, political propaganda, and misleading forms of advertising and sponsored content.*

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80.   *See* Rasmus Kleis Nielsen & Lucas Graves, *"News You Don't Believe": Audience Perspectives on Fake News*, REUTERS INST. (Oct. 2017), https://reutersinstitute.politics. ox.ac.uk/sites/default/files/2017-10/Nielsen%26Graves_factsheet_1710v3_FINAL_download.pdf. For numerous references to fake news see also NIC NEWMAN ET AL., REUTERS INSTITUTE DIGITAL NEWS REPORT 2017 (2017), https://reutersinstitute.politics.ox.ac.uk/ sites/default/files/Digital%20News%20Report%202017%20web_0.pdf.

81.   *Id.*

Other inputs have emerged from the BBC, the Open University, the London School of Economics, and the Brookings Institute.[82]

III. ENDNOTE

This paper has set out what some may regard as a false binary: opposing tackling the phenomenon of fake news from either a legal/regulatory approach or a non-legal, educational approach. This is perhaps an exaggerated view, because, as was suggested above, the approaches might be complementary. A fundamental issue, however, is to reach a consensus on whether or not fake news is, or ever was, a coherent notion. As the Reuters research pointed out:

> Definitions of 'fake news' are fraught with difficulty and respondents frequently mix up three categories: (1) news that is 'invented' to make money or discredit others; (2) news that has a basis in fact, but is 'spun' to suit a particular agenda; and (3) news that people don't feel comfortable about or don't agree with . . . . In our analysis very few people can accurately recall having seen items in category 1, except in the United States. Indeed, respondents in Germany and France routinely use the English phrase 'fake news', suggesting that this is something that has been largely imported rather than a home-grown phenomenon.[83]

The non-legal approach to fake news is the one that, arguably, bypasses or does not engage the focused attention of legislators or legal academics. This is understandable. However, as Volokh and the Article 19 Written

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82. *See* Emma Goodman, *The Evolving Conversation Around Fake News and Potential Solutions*, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE: MEDIA POLICY PROJECT BLOG (Aug. 10, 2017), http://blogs.lse.ac.uk/mediapolicyproject/2017/08/10/the-evolving-conversation-around-fake-news-and-potential-solutions/; *see also* DAMIAN TAMBINI, FAKE NEWS: PUBLIC POLICY RESPONSES (2017), http://eprints.lse.ac.uk/73015/1/LSE%20MPP%20Policy%20Brief%2020-%20Fake%20news_final.pdf; Judith Burns, *Fake News: Universities Offer Tips on how to Spot it*, BBC (Nov. 9, 2017), http://www.bbc.co.uk/news/education-41902914; Darrell M. West, *How to Combat Fake News and Disinformation*, BROOKINGS (Dec. 18, 2017), https://www.brookings.edu/research/how-to-combat-fake-news-and-disinformation/.

> From this analysis, it is clear there are a number of ways to promote timely, accurate, and civil discourse in the face of false news and disinformation. In today's world, there is considerable experimentation taking place with online news platforms. News organizations are testing products and services that help them identify hate speech and language that incites violence. There is a major flowering of new models and approaches that bodes well for the future of online journalism and media consumption. At the same time, everyone has a responsibility to combat the scourge of fake news and disinformation. This ranges from the promotion of strong norms on professional journalism, supporting investigative journalism, reducing financial incentives for fake news, and improving digital literacy among the general public. Taken together, these steps would further quality discourse and weaken the environment that has propelled disinformation around the globe.

Id.

83. NIC NEWMAN ET AL., *supra* note 80, at 19.

Comments show, juristic analysis is still very pertinent, even if it ends up cautioning against adopting a naïve legal approach to the phenomenon.

The so-called non-legal approach urges that "The answer to fake news is not less news through automated blocking, it's more news, educating and informing users how to read the new media."[84] Perhaps the key term (which should also appeal at least to legal academics) is "educating." As the APPG Report states,

> An approach based on increasing regulation presents ethical and technological challenges, however, and commentators have equally questioned whether the responsibility for controlling fake news can, or indeed should, be addressed entirely by voluntary actions and initiatives developed by commercial organisations that might then "by default become 'arbiters' of the truth". It would seem that a little time should be given for voluntary initiatives to emerge and take effect before a regulatory option is more thoroughly explored. *It is within this context that children and young people's critical literacy skills must be strengthened and updated (where necessary) to provide them with the tools they need to engage effectively with information they find online.*[85]

From the point of view of the present author, what has jumped out from all the material presented on the digital critical media literacy approach is the U.K. Literacy Trust's *own* evidence to the DCMS Inquiry.[86] This states,

> [W]e recommend a renewed focus on media literacy in schools, *particularly around emotional self-management and digital 'emotional self-care'.* While applied mostly to the work of activists or researchers, the ability to distance oneself emotionally from material online, personal or political is important in constructing a better understanding of how to be a good digital citizen. Simple lessons relating to thinking before liking or sharing, how to avoid filter bubbles and understanding the threats posed by exposure to information are required now from a young age. Media literacy also needs to provide a basis for assessing the validity of sources, source bias, the role of journalism in society and how to differentiate between different forms of journalism: investigative, editorial or

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84. *See* Joanna Kulesza, *On Fake News, Alternative Facts and the Era of Minority Report*, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE: MEDIA POLICY PROJECT BLOG (June 20, 2017) http://blogs.lse.ac.uk/mediapolicyproject/2017/06/20/on-fake-news-alternative-facts-and-the-era-of-minority-report/.

85. *See* IRENE PICTON AND ANNE TERAVAINEN, FAKE NEWS AND CRITICAL LITERACY AN EVIDENCE REVIEW 23 (2017).

86. Darren G. Lilleker, *Submission of Written Evidence*, UK PARLIAMENT (Mar. 2017), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/culture-media-and-sport-committee/fake-news/written/48231.html. Evidence is submitted by members of the Centre for Politics & Media Research, Faculty for Media & Communication, Bournemouth University, UK.

propagandistic. These are issues that predate and transcend fake news, but are no less important because of that.[87]

Whilst some of the definitions of critical media literacy seem to this author as wildly vague and overly comprehensive, as well as difficult not only to concretize but to implement in any meaningful or sensible manner, the words in the above quote do seem to offer something which is meaningful and doable: to repeat, it is the advice to foster *the ability to distance oneself emotionally from material online, personal or political [which] is important in constructing a better understanding of how to be a good digital citizen.*[88] So, at the very least, let us start with developing, (1) simple lessons relating to thinking before liking or sharing; (2) how to avoid filter bubbles; and (3) understanding the threats posed by exposure to information.

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87. *Id.* (emphasis added); *see* ALL DIGITAL, *supra* note 11, at 2 ("Media literacy includes all technical, cognitive, social, civic and creative capacities that allow a citizen to access, have a critical understanding of the media and interact with it.")

88. Lilleker, *supra* note 86.

APPENDIX

JOINT DECLARATION ON FREEDOM OF EXPRESSION AND 'FAKE NEWS', DISINFORMATION AND PROPAGANDA

The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information,

Having discussed these issues together with the assistance of ARTICLE 19 and the Centre for Law and Democracy *(CLD)*;

Recalling and reaffirming our Joint Declarations of 26 November 1999, 30 November 2000, 20 November 2001, 10 December 2002, 18 December 2003, 6 December 2004, 21 December 2005, 19 December 2006, 12 December 2007, 10 December 2008, 15 May 2009, 3 February 2010, 1 June 2011, 25 June 2012, 4 May 2013, 6 May 2014, 4 May 2015 and 4 May 2016;

Taking note of the growing prevalence of disinformation (sometimes referred to as "false" or "fake news") and propaganda in legacy and social media, fuelled by both States and non-State actors, and the various harms to which they may be a contributing factor or primary cause;

Expressing concern that disinformation and propaganda are often designed and implemented so as to mislead a population, as well as to interfere with the public's right to know and the right of individuals to seek and receive, as well as to impart, information and ideas of all kinds, regardless of frontiers, protected under international legal guarantees of the rights to freedom of expression and to hold opinions;

Emphasising that some forms of disinformation and propaganda may harm individual reputations and privacy, or incite to violence, discrimination or hostility against identifiable groups in society;

Alarmed at instances in which public authorities denigrate, intimidate and threaten the media, including by stating that the media is "the opposition" or is "lying" and has a hidden political agenda, which increases the risk of

threats and violence against journalists, undermines public trust and confidence in journalism as a public watchdog, and may mislead the public by blurring the lines between disinformation and media products containing independently verifiable facts;

Stressing that the human right to impart information and ideas is not limited to "correct" statements, that the right also protects information and ideas that may shock, offend and disturb, and that prohibitions on disinformation may violate international human rights standards, while, at the same time, this does not justify the dissemination of knowingly or recklessly false statements by official or State actors;

Highlighting the importance of unencumbered access to a wide variety of both sources of information and ideas, and opportunities to disseminate them, and of a diverse media in a democratic society, including in terms of facilitating public debates and open confrontation of ideas in society, and acting as a watchdog of government and the powerful;

Reiterating that States are under a positive obligation to foster an enabling environment for freedom of expression, which includes promoting, protecting and supporting diverse media, something which has come under growing pressure due to the increasingly difficult economic environment for the traditional media;

Acknowledging the transformative role played by the Internet and other digital technologies in supporting individuals' ability to access and disseminate information and ideas, which both enables responses to disinformation and propaganda, while also facilitating their circulation;

Reaffirming the responsibilities of intermediaries, which facilitate the enjoyment of the right to freedom of expression through digital technologies, to respect human rights;

Deploring attempts by some governments to suppress dissent and to control public communications through such measures as: repressive rules regarding the establishment and operation of media outlets and/or websites; interference in the operations of public and private media outlets, including by denying accreditation to their journalists and politically-motivated prosecutions of journalists; unduly restrictive laws on what content may not be disseminated; the arbitrary imposition of states of emergency; technical controls over digital technologies such as blocking, filtering, jamming and

closing down digital spaces; and efforts to "privatise" control measures by pressuring intermediaries to take action to restrict content;

Welcoming and encouraging civil society and media efforts aimed at identifying and raising awareness about deliberately false news stories, disinformation and propaganda;

Concerned about some measures taken by intermediaries to limit access to or the dissemination of digital content, including through automated processes, such as algorithms or digital recognition-based content removal systems, which are not transparent in nature, which fail to respect minimum due process standards and/or which unduly restrict access to or the dissemination of content;

Adopt, in Vienna, on 3 March 2017, the following Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda:

1. General Principles:

    a. States may only impose restrictions on the right to freedom of expression in accordance with the test for such restrictions under international law, namely that they be provided for by law, serve one of the legitimate interests recognised under international law, and be necessary and proportionate to protect that interest.

    b. Restrictions on freedom of expression may also be imposed, as long as they are consistent with the requirements noted in paragraph 1(a), to prohibit advocacy of hatred on protected grounds that constitutes incitement to violence, discrimination or hostility (in accordance with Article 20(2) of the *International Covenant on Civil and Political Rights*).

    c. The standards outlined in paragraphs 1(a) and (b) apply regardless of frontiers so as to limit restrictions not only within a jurisdiction but also those which affect media outlets and other communications systems operating from outside of the jurisdiction of a State as well as those reaching populations in States other than the State of origin.

    d. Intermediaries should never be liable for any third party content relating to those services unless they specifically intervene in that content or refuse to obey an order adopted in accordance with due

process guarantees by an independent, impartial, authoritative oversight body (such as a court) to remove it and they have the technical capacity to do that.

e. Consideration should be given to protecting individuals against liability for merely redistributing or promoting, through intermediaries, content of which they are not the author and which they have not modified.

f. State mandated blocking of entire websites, IP addresses, ports or network protocols is an extreme measure which can only be justified where it is provided by law and is necessary to protect a human right or other legitimate public interest, including in the sense of that it is proportionate, there are no less intrusive alternative measures which would protect the interest and it respects minimum due process guarantees.

g. Content filtering systems which are imposed by a government and which are not end-user controlled are not justifiable as a restriction on freedom of expression.

h. The right to freedom of expression applies "regardless of frontiers" and jamming of signals from a broadcaster based in another jurisdiction, or the withdrawal of rebroadcasting rights in relation to that broadcaster's programmes, is legitimate only where the content disseminated by that broadcaster has been held by a court of law or another independent, authoritative and impartial oversight body to be in serious and persistent breach of a legitimate restriction on content (i.e. one that meets the conditions of paragraph 1(a)) and other means of addressing the problem, including by contacting the relevant authorities of the host State, have proven to be demonstrably ineffective.

2. Standards on Disinformation and Propaganda:

a. General prohibitions on the dissemination of information based on vague and ambiguous ideas, including "false news" or "non-objective information", are incompatible with international standards for restrictions on freedom of expression, as set out in paragraph 1(a), and should be abolished.

b. Criminal defamation laws are unduly restrictive and should be abolished. Civil law rules on liability for false and defamatory statements are legitimate only if defendants are given a full opportunity and fail to prove the truth of those statements and also benefit from other defences, such as fair comment.

c. State actors should not make, sponsor, encourage or further disseminate statements which they know or reasonably should know to be false (disinformation) or which demonstrate a reckless disregard for verifiable information (propaganda).

d. State actors should, in accordance with their domestic and international legal obligations and their public duties, take care to ensure that they disseminate reliable and trustworthy information, including about matters of public interest, such as the economy, public health, security and the environment.

3. Enabling Environment for Freedom of Expression:

a. States have a positive obligation to promote a free, independent and diverse communications environment, including media diversity, which is a key means of addressing disinformation and propaganda.

b. States should establish a clear regulatory framework for broadcasters which is overseen by a body which is protected against political and commercial interference or pressure and which promotes a free, independent and diverse broadcasting sector.

c. States should ensure the presence of strong, independent and adequately resourced public service media, which operate under a clear mandate to serve the overall public interest and to set and maintain high standards of journalism.

d. States should put in place other measures to promote media diversity which may include, as warranted by the situation, some or all of the following:
    i.   Providing subsidies or other forms of financial or technical support for the production of diverse, quality media content;
    ii. Rules prohibiting undue concentration of media ownership; and
    iii. Rules requiring media outlets to be transparent about their ownership structures.

e. States should take measures to promote media and digital literacy, including by covering these topics as part of the regular school curriculum and by engaging with civil society and other stakeholders to raise awareness about these issues.

f. States should consider other measures to promote equality, non-discrimination, inter-cultural understanding and other democratic values, including with a view to addressing the negative effects of disinformation and propaganda.

4. Intermediaries

a. Where intermediaries intend to take action to restrict third party content (such as deletion or moderation) which goes beyond legal requirements, they should adopt clear, pre-determined policies governing those actions. Those policies should be based on objectively justifiable criteria rather than ideological or political goals and should, where possible, be adopted after consultation with their users.

b. Intermediaries should take effective measures to ensure that their users can both easily access and understand any policies and practices, including terms of service, they have in place for actions covered by paragraph 4(a), including detailed information about how they are enforced, where relevant by making available clear, concise and easy to understand summaries of or explanatory guides to those policies and practices.

c. In taking actions covered by paragraph 4(a), intermediaries should respect minimum due process guarantees including by notifying users promptly when content which they created, uploaded or host may be subject to a content action and giving the user an opportunity to contest that action, subject only to legal or reasonable practical constraints, by scrutinising claims under such policies carefully before taking action and by applying measures consistently.

d. The standards outlined in paragraph 4(b) should, subject only to legitimate competitive or operational needs, also be applied to any automated processes (whether algorithmic or otherwise) run by

intermediaries for taking action either in relation to third party content or their own content.

e. Intermediaries should support the research and development of appropriate technological solutions to disinformation and propaganda which users may apply on a voluntary basis. They should cooperate with initiatives that offer fact-checking services to users and review their advertising models to ensure that they do not adversely impact diversity of opinions and ideas.

5. Journalists and Media Outlets

a. The media and journalists should, as appropriate, support effective systems of self regulation whether at the level of specific media sectors (such as press complaints bodies) or at the level of individual media outlets (ombudsmen or public editors) which include standards on striving for accuracy in the news, including by offering a right of correction and/or reply to address inaccurate statements in the media.

b. Media outlets should consider including critical coverage of disinformation and propaganda as part of their news services in line with their watchdog role in society, particularly during elections and regarding debates on matters of public interest.

6. Stakeholders cooperation

a. All stakeholders – including intermediaries, media outlets, civil society and academia – should be supported in developing participatory and transparent initiatives for creating a better understanding of the impact of disinformation and propaganda on democracy, freedom of expression, journalism and civic space, as well as appropriate responses to these phenomena.