

# The Epistemology of the Internet and the Regulation of Speech in America

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## ABSTRACT

*The Internet is the epistemological crisis of the 21st century: it has fundamentally altered the social epistemology of societies with relative freedom to access it. Most of what we think we know about the world is due to reliance on epistemic authorities, individuals, or institutions that tell us what we ought to believe about Newtonian mechanics, evolution by natural selection, climate change, resurrection from the dead, or the Holocaust. The most practically fruitful epistemic norm of modernity, empiricism, demands that knowledge be grounded in sensory experience, but almost no one who believes in evolution by natural selection or the reality of the Holocaust has any sensory evidence in support of those beliefs. Instead, we rely on epistemic authorities—biologists and historians, for example. Epistemic authority cannot be sustained by empiricist criteria, for obvious reasons: salient anecdotal evidence, the favorite tool of propagandists, appeals to ordinary faith in the senses, but is easily exploited given that most people understand neither the perils of induction nor the finer points of sampling and Bayesian inference. Sustaining epistemic authority depends, crucially, on social institutions that inculcate reliable second-order norms about whom to believe about what. The traditional media were crucial, in the age of mass democracy, with promulgating and sustaining such norms. The Internet has obliterated the intermediaries who made that possible (and in the process, undermined the epistemic standing of experts), while even the traditional media in the U.S., thanks to the demise of the “Fairness Doctrine,” has contributed to the same phenomenon. I argue that this crisis cries out for changes in the regulation of speech in cyberspace—including liability for certain kinds of false speech, incitement, and hate speech—but also a restoration of a version of the Fairness Doctrine for the traditional media.*

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## TABLE OF CONTENTS

I.	INTRODUCTION . . . . .	904
II.	EPISTEMIC AUTHORITY . . . . .	906
III.	THE COLLAPSE OF EPISTEMIC AUTHORITY IN THE UNITED STATES: FROM THE DEMISE OF THE FAIRNESS DOCTRINE TO THE INTERNET . . . . .	908
	A. <i>The Fairness Doctrine</i> . . . . .	908
	B. <i>The Traditional Media After the Demise of the Fairness         Doctrine</i> . . . . .	916
	C. <i>The Internet's Contribution to the Epistemic Crisis</i> . . . . .	918
II.	SOME FREE SPEECH PRINCIPLES . . . . .	921
III.	WHAT IS TO BE DONE? . . . . .	922
	A. <i>How to Filter—The Internet</i> . . . . .	926
	B. <i>How to Filter—Traditional Media</i> . . . . .	931
	C. <i>Can We Trust the Government to Filter Correctly?</i> . . . . .	932
IV.	ARE THINGS REALLY WORSE NOW? . . . . .	933
V.	CONCLUSION . . . . .	934

## I. INTRODUCTION

The Internet is the epistemological crisis of the twenty-first century: it has fundamentally altered the social epistemology of societies with relatively free access. By “social epistemology,” I mean the ways in which a society tries to inculcate in people knowledge about the world, and about what is purportedly true, real, etc. Social epistemology’s domain includes the mass media, the courts, the educational system, and so on. What the vast majority believe to be true about the world is obviously crucial for social peace and political stability, whether or not the society is democratic.

In developed capitalist countries, these social mechanisms have, until recently, operated in predictable ways: they ensured most people accepted the legitimacy of the existing state of affairs, acquiesced to the economic hierarchy in which they found themselves, accepted the official results of elections, and acquired a range of true beliefs about the causal structure of the natural world and the regularities discovered by physics, chemistry, the medical sciences, and so on. Although ruling elites throughout history (*vide* Thucydides, Machiavelli, Marx)

have always aimed to inculcate moral and political beliefs in their subject populations conducive to these elites' continued rule, it has also been true, especially in the world after the scientific revolution, that the interests of ruling elites often depended on a true understanding of the causal order of nature. One cannot extract wealth from nature, let alone take precautions against physical or biological catastrophe, unless one understands how the natural world actually works: what earthquakes do, how disease spreads, where fossil fuels are and how to extract them, and so on. In the half-century before the dominance of the Internet in America (roughly, since WWII), the primary mechanisms of social epistemology generally helped ensure that a world of causal truths was the common currency of at least some parts of public policy and discourse in the relatively free, relatively democratic societies.<sup>1</sup>

The Internet has upended this state of affairs (although it has had significant help in America, as we will see below, from the traditional media after the demise of the "Fairness Doctrine"). To be sure, social epistemologists never celebrated the epistemic quality of the pre-Internet social mechanisms of belief inculcation,<sup>2</sup> but in the Internet era, earlier doubts may seem trivial. The Internet is the social-epistemological event of our time, locking into place mechanisms that ensure tens or hundreds of millions of people will have false beliefs about the causal order of nature—about climate change, the effects of vaccines, the role of natural selection in the evolution of species, and biological facts about race—even when there is no controversy among those with expert knowledge. Indeed, a distinguishing and dangerous achievement of the Internet era has been to discredit the idea of "expertise," the idea that *if experts believe something to be the case, that is a reason for anyone else to believe it*. Experts, in this parallel cyber-world, are disguised partisans, conspirators, and pretenders to epistemic privilege, while the actual partisans and conspirators are supposed to be the purveyors of knowledge. We shall return to the collapse of epistemic authority, below, and its alarming consequences. Donald Trump as President of the United States was only the most vivid symptom of the catastrophe, and perhaps of what is yet to come. This epistemological crisis, I argue, cries out for a change in the regulation of speech—especially, but not only, speech on the Internet—in order to avert worse outcomes. At the same time, we should not succumb to the illusion that the Internet is the *root cause* of problems like Trump: it is more likely that the epistemological disarray, which I document below, is also fueled by fundamental socio-

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1. There were, of course, exceptions: the panic over fluoridation of water in the 1950s is the most obvious example, but it was also anomalous. Even false claims about race and gender (that were very widespread in the traditional media until the 1950s) were met with more resistance from the pre-Internet media, especially from the 1960s onwards.

2. See, e.g., ALVIN I. GOLDMAN, *KNOWLEDGE IN A SOCIAL WORLD* 161–88 (1999) (discussing the media); LARRY LAUDAN, *TRUTH, ERROR AND CRIMINAL LAW* (2006) (discussing the courts and rules of evidence).

economic pathologies, even if the Internet has exacerbated the resulting confusion.<sup>3</sup> Even so, we may at least ask whether the dam of dysfunction can be plugged in the short-term through changed regulation of the Internet and other media before the floodwaters submerge us all. This is my limited question here.

## II. EPISTEMIC AUTHORITY

I will borrow Joseph Raz's analysis of the concept of "authority" since it illuminates what we mean when we appeal to the idea of "authority" in contexts where we want to know what we ought to believe (or what we have reason to believe).<sup>4</sup> An epistemic (or theoretical) authority, on this account,<sup>5</sup> is someone who tells people what they ought to believe, and in so doing, makes it much more likely that those people will believe what is true (i.e., they will believe what they ought to believe, *ceteris paribus*) than if they were left to their own devices in trying to figure out for themselves what they have reason to believe.

Suppose, for example, I want to understand the "Hubble constant," which captures the rate of expansion of the universe. I could try reading various technical articles in scientific journals in order to figure out what I ought to believe. It is unlikely I could make very good sense of this material given my lack of background in the relevant mathematics and astrophysics. Alternatively, I could consult the University of Chicago astronomer Wendy Freedman, an eminent scientist who has done seminal work on the Hubble constant. I am confident Freedman is an epistemic authority about the Hubble constant and about cosmology generally, vis-à-vis me: I am more likely to hold correct views about these matters by attending her lectures (for undergraduates no doubt!) than if I tried to figure these matters out for myself. Why am I confident that she is an epistemic authority? It is obviously *not* because I have undertaken an evaluation of her research and published results—something I am not competent to do (if I were, I would not need to consult an epistemic authority on this topic). I rely, rather, on the opinions of others we might call meta-epistemic authorities, i.e., those who can provide reliable guidance as to who has epistemic authority on a subject. So, for example, in the case of Freedman, I am relying on the facts of her appointment as a professor at a leading research university and her election to the National Academy of Sciences, as well as guidance from a philosopher of science with whom I have worked and in whom I have particular confidence with regard to his meta-epistemic authority based on past experience.

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3. In the absence of massive economic distress and its attendant disruption of life prospects, would the Internet be such a cesspool of misinformation? Perhaps, but it is hard to believe the problem would be as extreme.

4. It has been disputed as an analysis of the kind of authority law claims. For one kind of doubt (but not the only one), see Brian Leiter, *Legal Positivism as a Realist Theory of Law*, in *THE CAMBRIDGE COMPANION TO LEGAL POSITIVISM* 79 (Torben Spaak & Patricia Mindus eds., 2021).

5. See Joseph Raz, *Authority, Law and Morality*, 68 *MONIST* 295, 296 (1985). Raz's main concern is practical authority, which aims to tell people what they ought to do, but that is not what is most important for my purposes.

Epistemic authority is always relative. Professor Freedman is an epistemic authority on the expansion of the universe vis-à-vis me but would not be vis-à-vis the Nobel Laureate and cosmology expert Steven Weinberg, for example. Similarly, I am an epistemic authority on Raz's view of authority vis-à-vis my students and my colleagues, but not vis-à-vis Raz himself or my friend, the legal philosopher Leslie Green. Epistemic authority is relative both to what the purported authority knows and what the subjects of his or her authority would be able to know on their own. Epistemic authorities, in short, help their subjects believe what is true (or more likely to be true), and without that help, those subjects would be more likely to end up believing falsehoods or partial truths.

Here is the crucial social-epistemological point: *almost everything we claim to know about the world generally—the world beyond our immediate perceptual experience—requires our reliance on epistemic authorities.* This includes our beliefs about Newtonian mechanics (true with respect to mid-size physical objects, false at the quantum level), evolution by natural selection (the central fact in modern biology, even though it may not be the most important evolutionary mechanism), climate change (humans are causing it), resurrection from the dead (it does not happen), or the Holocaust (it happened). Most scientific education, apart from some simple lab experiments students actually perform, is a matter of accepting what epistemic authorities report about the nomic and causal structure of the world. The same is true of most education about history as well.

Empiricism, the most practically fruitful epistemic norm of the modern era, demands that knowledge be grounded—at some (inferential) point—in sensory experience, but almost no one who believes in evolution by natural selection or in the reality of the Holocaust has any sensory evidence in support of those beliefs: hardly anyone has seen the perceptual evidence supporting the evolution of species through selectionist mechanisms, or the perceptual evidence of the gas chambers. Instead, most of us, including most experts, rely on epistemic authorities: biologists and historians, for example.<sup>6</sup> The dependence on epistemic authority is not confined to ordinary persons. Most trained engineers, for example, rely on epistemic authorities for their beliefs about the age of the universe, just as most lawyers rely on epistemic authorities for their beliefs about who wrote the United States Constitution and why.

Epistemic authority cannot be sustained by empiricist criteria, which is an equally important point about its role in our social epistemology. Salient anecdotal empirical evidence, the favorite tool of propagandists, appeals to ordinary faith in the senses but is easily exploited given that most people understand neither the perils of induction nor the finer points of sampling and Bayesian inference. *Sustaining epistemic authority depends, crucially, on social institutions that inculcate reliable second-order norms about whom to believe; that is, it depends on the existence of recognized meta-epistemic authorities.* The media of

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6. Historians sometimes rely on testimonial evidence about what the testifier or others have perceived, but they must credit those offering testimony as epistemically reliable.

mass communication have been essential, in the modern age of popular democracy, to promulgating and sustaining such norms.

Consider the most important newspaper in the United States, the *New York Times*, which, despite certain ideological biases,<sup>7</sup> has served as a fairly good mediator of epistemic authority with respect to many topics: it has provided a bulwark against those who deny the reality of climate change or the human contribution to it, debunked those who think vaccinations cause autism, gives no comfort to creationists and other religious zealots who would deny evolution, and treats genuine epistemic authorities about the natural world—for example, members of the National Academy of Sciences in America—as epistemic authorities in its journalism. Recognition of genuine epistemic authority cannot exist in a population absent epistemic mediators like the *New York Times*.

### III. THE COLLAPSE OF EPISTEMIC AUTHORITY IN THE UNITED STATES: FROM THE DEMISE OF THE FAIRNESS DOCTRINE TO THE INTERNET

Beginning in the early 1990s, hyper-partisan media, devoted to an alternative (and often false) view of reality and the debunking of epistemic authority, became widespread in America: Rush Limbaugh on radio, then Fox News on television.<sup>8</sup> This development was only possible because of a legal change: the demise of the “Fairness Doctrine” during the administration of President Ronald Reagan in 1987. Because this event was so consequential, I want to say a bit more.

#### A. *The Fairness Doctrine*

The “Fairness Doctrine” was originally promulgated by the Federal Communications Commission (“FCC”) in 1949 to ensure balance in the coverage of political topics, although it had antecedents going back to the competition for radio-wave access in the 1920s.<sup>9</sup> In the 1930s, the Nazi sympathizer Father

7. The biases now generally involve favoring the centrist factions of the more prudent wing of the ruling class political party in America (the Democrats) (e.g., supporting, even in its “news” reporting, the neoliberal Hillary Clinton against a social democratic challenger for the 2016 Democratic nomination for President); historically, when there was more elite consensus, the *New York Times* generally tracked that (e.g., support for the Vietnam War).

8. In later years, Fox was matched by the “liberal” (in the American sense) MSNBC, which has also contributed to ignorance and confusion, although not on the scale of Fox. There is no symmetry here, although there are offenders on both sides of the narrow political spectrum in the U.S. The proposals below would impose restrictions on all parties.

9. In response to substantial disruption in programming and frequent static, Congress passed the Radio Act of 1927, which created a licensing scheme for broadcasting. The Radio Act of 1927, Pub. L. 69-632, ch. 169, 44 Stat. 1162. See Thomas J. Houser, *The Fairness Doctrine—An Historical Perspective*, 47 NOTRE DAME L. REV. 550, 552–53 (1972). Congress also created a five-member Federal Radio Commission (“FRC”) to select among radio applicants for limited licenses. Under the Radio Act, the FRC was to license those who met a standard of “public convenience, interest, or necessity.” 44 Stat. at 1166. See *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 376 n.5 (1969) (noting that Congressman White, a sponsor the Radio Act of 1927, remarked, that “licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art. . . . [T]he broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served.”) (quotation omitted). In 1934,

Charles Coughlin rose to fame on the airwaves,<sup>10</sup> leading the FCC Chairman to say in 1938: “Should there ever be an attempt here by any one so to debase radio as to use it as an instrument of racial or religious persecution, the Federal Communications Commission would employ every resource it has to prevent any such shocking offense.”<sup>11</sup> The FCC, however, never took direct action against Coughlin.<sup>12</sup> He was finally driven off the airwaves by the combined actions of the National Association of Broadcasting (“NAB”) and the Catholic Church.<sup>13</sup>

The FCC’s “Mayflower Doctrine” of 1940<sup>14</sup> effectively prohibited broadcasting advocacy; the target was a Boston station that had also been airing Father Coughlin.<sup>15</sup> The FCC stated: “[W]ith the limitations in frequencies inherent in the nature of radio, the public interest can never be served by a dedication of any broadcast facility to the support of his own partisan ends.”<sup>16</sup> In short, “the broadcaster cannot be an advocate.”<sup>17</sup> Perhaps unsurprisingly, many broadcasters simply ceased to discuss controversial issues altogether, creating a concern that arose later in connection with the “Fairness Doctrine.”<sup>18</sup> In 1945, in response to a challenge to radio license renewal in Ohio because of refusal to sell airtime for the discussion of controversial subjects like race, religion, and politics,<sup>19</sup> the FCC articulated a “duty of each station licensee to be sensitive to the problems of

Congress passed the Communications Act, which abolished the FRC in favor of the seven member Federal Communications Commission, which had broader duties. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C.A. §§ 151–63, 201–31, 251–62, 271–76, 301, 302a, 303–27, 329–43, 351–53, 353a, 354, 355–63, 381–86, 390–93, 393a, 394–99, 399a, 399b, 401–16, 501–05, 507–11, 521, 522, 531–37, 541–44, 544a, 545–49, 551–55, 555a, 556–62, 571–73, 601, 604–14, 616–20, 622–24, 641–46).

10. See Heather Hendershot, *God’s Angriest Man: Carl McIntire, Cold War Fundamentalism, and Right-Wing Broadcasting*, 59 AM. Q. 373, 375 (2007) (“[T]he Fairness Doctrine[] can be traced back to the days of Father Charles Coughlin.”). See also Victor Pickard, *The Strange Life and Death of the Fairness Doctrine: Tracing the Decline of Positive Freedoms in American Policy Discourse*, 12 INT’L J. COMMUN. 3434, 3438 (2018).

11. James A. Brown, *Selling Airtime for Controversy: NAB Self-Regulation and Father Coughlin*, 24 J. BROADCAST. 199, 206–07 (1980) (quoting complaint letters to the F.C.C., F.C.C. File #44-3, “Envelope #7” Dec. 1, 1938–Dec. 9, 1939).

12. FCC Chairman Fly was called by one paper “known to believe that radio propagandists must be dealt with somehow, and it is understood that, if the [NAB] code breaks down, the F.C.C. will consider transforming the code rules into binding commission regulations.” Brown, *supra* note 11, at 208 (quotation omitted).

13. Representatives within the Catholic church issued multiple statements throughout the period, escalating to the point of threatening to defrock Father Coughlin in 1942. See Ronald Modras, *Father Coughlin and Anti-Semitism: Fifty Years Later*, 31 J. CHURCH & STATE 231, 239–40 (1989).

14. See *In re Mayflower Broad. Corp.*, 8 F.C.C. 333, 339 (1940).

15. The station had been broadcasting “so-called editorials from time to time urging the election of various candidates for political office or supporting one side or another of various questions in public controversy.” Thomas W. Hazlett & David W. Sosa, “Chilling” the Internet? *Lessons from FCC Regulation of Radio Broadcasting*, 4 MICH. TELECOMM. & TECH. L. REV. 35, 44 (1998) (quoting *In re Mayflower Broad. Corp.*, 8 F.C.C. at 339). The station was also notable for airing Father Coughlin commentary and resisting the NAB code’s application to Coughlin. See Brown, *supra* note 11, at 213–14.

16. *In re Mayflower Broad. Corp.*, 8 F.C.C. at 340.

17. *Id.*

18. See Houser, *supra* note 9, at 557 n.51.

19. See *In re United Broad. Co. (WHKC)*, 10 F.C.C. 515, 516–17 (1945).

public concern in the community and to make sufficient time available, on a non-discriminatory basis, for full discussion thereof.”<sup>20</sup>

The Fairness Doctrine was codified in the FCC report *In re Editorializing by Broadcast Licensees* issued in 1949.<sup>21</sup> It consisted essentially of two requirements:

1. [T]hat every licensee devote a reasonable portion of broadcast time to the discussion and consideration of controversial issues of public importance; and
2. [T]hat in doing so, [the broadcaster must be] fair—that is, [the broadcaster] must affirmatively endeavor to make . . . facilities available for the expression of contrasting viewpoints held by responsible elements with respect to the controversial issues presented.<sup>22</sup>

These obligations created an affirmative duty of broadcasters to determine when there were controversial issues, what the “responsible” opposing viewpoints were, and who should present them.<sup>23</sup> In 1959, Congress amended Section 315 of the Communications Act<sup>24</sup>—the act the FCC treated as “specific statutory recognition” of the Doctrine.<sup>25</sup> The Supreme Court lent it further legitimacy in its 1969 *Red Lion* decision.<sup>26</sup> There, the Court held the Fairness Doctrine was a constitutional exercise of congressional policy and rejected First Amendment attacks on several grounds—most importantly, that the “scarcity of radio frequencies” permitted the government to limit licensees in favor of the First Amendment rights of the public as a whole.<sup>27</sup>

Although the Fairness Doctrine was rarely enforced, a proto-Limbaugh did lose his license because of it.<sup>28</sup> Carl McIntire’s “Twentieth Century Reformation

20. *Id.* at 517. See also Steven J. Simmons, *Fairness Doctrine: The Early History*, 29 FED. COMM’NS BAR J. 207, 261 (1976) (citations and quotations omitted).

21. 13 F.C.C. 1246, 1246 (1949).

22. KATHLEEN ANN RUANE, CONG. RESEARCH SERV., R40009, FAIRNESS DOCTRINE: HISTORY AND CONSTITUTIONAL ISSUES 2 (2011) (citing Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10426 (1964)).

23. See *id.* at 2. See also *In re Editorializing*, 13 F.C.C. at 1251–52.

24. The amendment stated:

Nothing in the foregoing sentence [creating exemptions from equal time requirements] shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

47 U.S.C. § 315 (2002).

25. Simmons, *supra* note 20, at 292.

26. 395 U.S. 367 (1969).

27. See *id.* at 390 (citations omitted).

28. See Hendershot, *supra* note 10, at 374.



Hour” was a nationally syndicated radio program that debuted in 1955.<sup>29</sup> By 1958, over 600 stations nationwide carried McIntire’s daily, thirty minute program.<sup>30</sup> The radio show—which featured Bible teachings coupled with diatribes attacking targets like communism, the NAACP, the Anti-Defamation league, and later the FCC itself—was one of several right-wing programs McIntire controlled.<sup>31</sup> In the mid-1960s, McIntire indirectly purchased WXUR, a Philadelphia-area station, in order to broadcast his programming.<sup>32</sup> The FCC consented to the transfer application in 1965, but, unusually, used the opportunity to warn the station about Fairness Doctrine obligations.<sup>33</sup> This warning was not idle; the station’s reapplication was challenged by seventeen civic and religious groups and a pastor.<sup>34</sup> “At the heart” of the reapplication proceeding was compliance with the Fairness Doctrine.<sup>35</sup> The Commission denied WXUR’s license renewal, citing several shows and detailing some objectionable content.<sup>36</sup> The Commission’s final reasoning for denial specifically noted that the show “failed to provide reasonable opportunities for the presentation of contrasting views on controversial issues of public importance,” that it “ignored the personal attack principle of the Fairness Doctrine,” and that “no adequate efforts were made to keep the station attuned to the community’s or area’s needs and interests.”<sup>37</sup> Obviously, Rush Limbaugh would not have survived the first two articulated standards. Much of Fox News would not have survived either.

Writing in 1994, Professors Thomas Krattenmaker and L.A. Powe Jr. described the two main problems with the doctrine as trying: “(1) to foist upon broadcast

29. See John Fea, *Carl McIntire: From Fundamentalist Presbyterian to Presbyterian Fundamentalist*, 72 AM. PRESBYTERIANS 4, 253, 262 (1994).

30. See *id.* at 262.

31. See Hendershot, *supra* note 10, at 379.

32. See *generally In Re Applications of Brandywine-Main Line Radio, Inc. for Renewal of Licenses of Stations Wxur & Wxur-Fm, Media, Pennsylvania*, 24 F.C.C.2d 18 (1970).

33. See Thomas G. Krattenmaker & L.A. Powe, *The Fairness Doctrine Today: A Constitutional Curiosity and An Impossible Dream*, 151 DUKE L.J. 151, 172 (1985).

34. See *In Re Applications of Brandywine-Main Line Radio, Inc. for Renewal of Licenses of Stations Wxur & Wxur-Fm, Media, Pennsylvania*, 24 F.C.C.2d 18, 18–19 (1970).

35. *Id.* at 21.

36. The Commission cites the following:

Thus, for example, while disagreement with the negro civil rights movement was expressed without interruption on ‘The World, the Bible and You’ (Int. Exh. 1-F, p. 75), a spokesman on the other side faced such hostile comments by the moderator on Delaware County Today as, ‘Why is it that negroes can talk about the white people but a white person cannot talk about a negro?’; ‘\* \* \* do you think you acted like an American when you led a group of people and broke all of the windows in the school?’; ‘\* \* \* the population of Broadmeadows Prison is 95% negro male, and 75% female. How will you answer that one?’; or ‘Getting back to South Media, basically what do you people want? A hand-out?’

*Id.* at 23 (citation omitted).

37. The Commission’s conclusion also stated, “Any one of these violations would alone be sufficient to require denying the renewals here, and the violations are rendered even more serious by the fact that we carefully drew the Seminary’s attention to a licensee’s responsibilities before we approved transfer of the stations to its ownership and control.” *Id.* at 34–35.

licensees the FCC's view of what are significant public issues and what are important positions on those issues and (2) to reduce incentives among broadcasters to compete for listeners' and viewers' attention by offering programs that address controversial issues.<sup>38</sup> Yet, "systematic monitoring of compliance with the Fairness Doctrine is impossible, given the relative size of the industry and resources of the agency . . . and competition among broadcasters and with other media for the public's attention and trust are likely to force broadcasters to cover many sides of significant public issues."<sup>39</sup> The latter supposition—that market competition would lead broadcasters to cover competing views on significant issues—turned out to be spectacularly wrong as the rise of hyper-partisan media after its demise made clear.

Although the first serious attempt for repeal of the Fairness Doctrine came from a Democrat, Senator Proxmire, in 1975,<sup>40</sup> political pressure for repeal really gained momentum during the Reagan Administration in the 1980s. Republican Senator Packwood, who became chairman of the Commerce Committee in 1981,<sup>41</sup> established the Freedom of Expression Foundation in 1982 with the mission of repealing the Fairness Doctrine and received backing from major broadcasting networks.<sup>42</sup> In 1985, the FCC issued a report addressing whether the doctrine was constitutionally permissible "under current marketplace conditions and First Amendment jurisprudence," concluding that the Doctrine had a "chilling effect."<sup>43</sup> The report cited numerous instances of broadcasters' decisions not to air content based on possible legal costs from a Fairness Doctrine challenge.<sup>44</sup>

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38. THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., *REGULATING BROADCAST PROGRAMMING* 260 (1994).

39. *Id.* Notably, Krattenmaker and Powe held this view after the rise of Rush Limbaugh, and explicitly raised his talk show in the context of misinformation:

[I]f there were no fairness regulations, the most a broadcaster could hope to gain from misinforming or misleading its listeners is the allegiance of those already ideologically committed to the broadcaster's point of view. That allegiance, probably depending on the issue addressed, may or may not counterbalance the loss of viewers who are not ideologues. But, in the absence of the doctrine, broadcasters would have almost no incentive to provide erroneous or one-sided information to those who do not want it or refuse all coverage of issues that interest many viewers or listeners. . . . To use an obvious example, Rush Limbaugh's talk show is more likely to appeal to conservatives and those disenchanted with the scale of the federal government than to liberals.

*Id.* at 246.

40. See Craig R. Smith, *The Campaign to Repeal the Fairness Doctrine*, 2 *RHETORIC & PUB. AFFS.* 3 481, 483 (1999).

41. See *id.* at 481.

42. See *id.*

43. In the Matter of Inquiry into Section 73.1910 of the Comm'n's Rules & Regs. Concerning the Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d 142, 145 (1985).

44. For example, the report discussed a California radio station that cancelled its series on religious cults after assessing the costs of a Fairness Doctrine filing. See *id.* at 172; RUANE, *supra* note 22, at 6.

The FCC, however, elected not to repeal the doctrine “at this time” and instead expressed interest in the congressional and judicial response.<sup>45</sup>

In 1986, a 2-1 D.C. Circuit opinion (Judges Bork and Scalia affirming in part) stated that Congress’s 1959 amendment had *not* actually “made the fairness doctrine a binding statutory obligation.”<sup>46</sup> “[T]he obligation recognized and preserved was an administrative construction, not a binding statutory directive.”<sup>47</sup> The Supreme Court denied certiorari without comment.<sup>48</sup> An effort to codify the Fairness Doctrine in 1987 passed in the House and Senate with bipartisan support,<sup>49</sup> but was vetoed by President Reagan.<sup>50</sup> Reagan stated: “In any other medium besides broadcasting, such federal policing of the editorial judgment of journalists would be unthinkable.”<sup>51</sup> The FCC officially repealed the Fairness Doctrine in a 1987 report—the *Syracuse Peace Council*—noting that “the fairness doctrine chills speech and is not narrowly tailored to achieve a substantial government interest. We therefore conclude, under existing Supreme Court precedent, as set forth in *Red Lion* and its progeny, that the fairness doctrine contravenes the First Amendment and thereby disserves the public interest.”<sup>52</sup> On review, the Court of Appeals upheld the decision without reaching the constitutional issues.<sup>53</sup> The Supreme Court once again denied certiorari.<sup>54</sup>

Rush Limbaugh was one of the main beneficiaries of the demise of the Fairness Doctrine, as other right-wing pundits have noted.<sup>55</sup> Limbaugh launched *The Rush Limbaugh Show* into national syndication with 56 stations in 1988—a

45. “[W]e have questioned the permissibility of the doctrine as a matter of both policy and constitutional law. . . . Notwithstanding these conclusions, we have decided not to eliminate the fairness doctrine at this time.” In re Matter of Inquiry into Section 73.190, 102 F.C.C.2d at 246–47.

46. Telecommunications Rsch. & Action Ctr. v. F.C.C., 801 F.2d 501, 517 (D.C. Cir. 1986).

47. *Id.* at 517.

48. See Telecommunications Rsch. & Action Ctr. v. F.C.C., 482 U.S. 919 (1987).

49. The bill had twenty-four Republican cosponsors, including Newt Gingrich. See All Info–H. R.1934–100th Congress (1987–1988): Fairness in Broadcasting Act of 1987, H.R.1934, 100th Cong. (1987), <https://www.congress.gov/bill/100th-congress/house-bill/1934/all-info> [https://perma.cc/8ZVM-FAQ5].

50. *Id.* See also Smith, *supra* note 40, at 498.

51. He went on: “[T]he growth in the number of available media outlets does indeed outweigh whatever justifications may have seemed to exist at the period during which the doctrine was developed.” Penny Pagano, *Regan’s Veto Kills Fairness Doctrine Bill*, L.A. TIMES (June 21, 1987), <https://www.latimes.com/archives/la-xpm-1987-06-21-mn-8908-story.html> [https://perma.cc/7946-HXBE].

52. Syracuse Peace Council, 2 F.C.C. Rcd. 5043, 5057 (1987).

53. See Syracuse Peace Council v. F.C.C., 867 F.2d 654, 669 (D.C. Cir. 1989).

54. See Syracuse Peace Council v. F.C.C., 493 U.S. 1019 (1990).

55. For example, in an opinion piece written shortly after Limbaugh’s death, conservative radio show and podcast host Ben Shapiro wrote:

[I]n 1987, the Federal Communications Commission finally rejected the ill-advised and ridiculous fairness doctrine, which required those with a broadcast license to present controversial issues in a ‘balanced’ way – a standard that, in practice, allowed for the domination of broadcast media by liberals, with sporadic commentary by conservatives. The end of the fairness doctrine opened the market for ideas. And consumers would have their say. Enter Rush Limbaugh.

Ben Shapiro, *The House That Rush Built*, N.Y. TIMES (Feb. 20, 2021), <https://www.nytimes.com/2021/02/20/opinion/politics/rush-limbaugh-conservative-media.html> [https://perma.cc/R33W-XWZ6].

year after the repeal of the Fairness Doctrine.<sup>56</sup> He soon became a dominant force on the radio, with an audience of 13.5–20 million listeners, and a significant political influence.<sup>57</sup> Like Carl McIntire before him, Limbaugh decried the Fairness Doctrine, particularly in the context of a 1993 congressional attempt to codify, yet again, the doctrine.<sup>58</sup> Staunch opposition to the “Hush Rush” campaign, as the bill was called by the *Wall Street Journal*<sup>59</sup> and later by Limbaugh himself,<sup>60</sup> ended that attempt.<sup>61</sup> By reframing the discourse on the doctrine as an effort to silence “conservative” speech, the doctrine lost all popularity.<sup>62</sup> Instead of the bipartisan support the Fairness Doctrine once held, there was now bipartisan opposition.<sup>63</sup> Even Barack Obama, years later, distanced himself from the doctrine during his campaign, with a top aide stating on the record, “Sen. Obama does not support reimposing the Fairness Doctrine on broadcasters.”<sup>64</sup>

Fox News emerged from a partnership between the Australian media magnate Rupert Murdoch and the veteran Republican media consultant Roger Ailes in 1996. Murdoch, befitting his class position, had long been disgruntled with what he perceived to be “the liberal bias” in mainstream news in the United States,<sup>65</sup> while Ailes had previously produced the syndicated *Rush Limbaugh Show*, his friend Rush Limbaugh’s foray into television.<sup>66</sup> Together, Murdoch and Ailes launched the Fox News Channel on October 7, 1996, establishing bureaus in nine major cities.<sup>67</sup> At the launch party, the Murdoch-Ailes duo billed the channel as “fair and balanced,” the phrase that became the channel’s mantra despite the fact that the channel was neither.<sup>68</sup> By late 2000, Fox was reaching tens of millions of

56. See *America’s Anchorman* (July 11, 2021), <https://www.rushlimbaugh.com/americas-anchorman/> [<https://perma.cc/2PBP-G8GV>].

57. For example, in 1994, House Republicans named Limbaugh an honorary member of their class, attributing his influence for their success in gaining a majority. See Kathleen Hall Jamieson & Joseph N. Cappella, *ECHO CHAMBER: RUSH LIMBAUGH AND THE CONSERVATIVE MEDIA ESTABLISHMENT* 46 (2010).

58. See Roland F.L. Hall, *The Fairness Doctrine and the First Amendment: Phoenix Rising*, 45 *MERCER L. REV.* 705, 707 (1994).

59. *The Hush Rush Law*, *WALL ST. J.*, Sep. 1, 1993, at A14.

60. “They [Liberals] do not know how to fight a cultural challenge—the explosion of talk radio—except to try to regulate it out of existence (as in their attempts to revive the Fairness Doctrine, dubbed the ‘Hush Rush Bill’ by the *Wall Street Journal*.” Rush Limbaugh, *Voice of America: Why Liberals Fear Me*, 70 *POL’Y REV.* 4 (1994).

61. See Allison Pearlman, *Whitewashing Diversity: The Conservative Attack on the “Stealth Fairness Doctrine,”* 13(4) *TELEVISION & NEW MEDIA* 353, 359 (2012).

62. *Id.*

63. See Pickard, *supra* note 10, 3444–45.

64. Dick Polman, *Is Obama Plotting to Hush Rush? (No)*, *PHIL. INQUIRER* (Nov. 21, 2008), [https://www.inquirer.com/philly/blogs/americandebate/Is\\_Obama\\_plotting\\_to\\_hush\\_Rush\\_No.html](https://www.inquirer.com/philly/blogs/americandebate/Is_Obama_plotting_to_hush_Rush_No.html) [<https://perma.cc/4SPP-63FR>].

65. See DAVID MCKNIGHT, *MURDOCH’S POLITICS: HOW ONE MAN’S THIRST FOR WEALTH AND POWER SHAPES OUR WORLD* 139 (2013).

66. See NICOLE HEMMER, *MESSENGERS OF THE RIGHT: CONSERVATIVE MEDIA AND THE TRANSFORMATION OF AMERICAN POLITICS* 262 (2016).

67. See *id.* at 227. See also Lawrie Mifflin, *At the New Fox News Channel, the Buzzword is Fairness, Separating News from Bias*, *N.Y. TIMES*, Oct. 7, 1996.

68. *Id.*

homes and, financially, broke even much earlier than expected.<sup>69</sup> The September 11th terrorist attacks bolstered all news outlets, but it helped Fox News more than double its average daily audience from 2001 to 2002.<sup>70</sup> A paper on “The Fox News Effect” used data from over 9,000 towns and found Republican candidates gained 0.4 to 0.7 percentage points in towns where Fox News had entered the cable market before 2000.<sup>71</sup> In an election as close as the 2000 election, this was a non-trivial difference.<sup>72</sup>

Although Fox arrived on the scene not quite a decade after the demise of the Fairness Doctrine, it was a clear beneficiary of its absence. As one commentator put it, “second generation” conservative media saw their “entry into the world “guide[d]” and “ease[d]” by the new regulatory landscape.<sup>73</sup> Fox’s troubles in the United Kingdom, which has something like the Fairness Doctrine, are instructive in this regard. The UK’s impartiality regulations are governed by the Office of Communications, or Ofcom.<sup>74</sup> Created by the Communications Act of 2003, Ofcom is charged with “further[ing] the interests of citizens in relation to communications matters.”<sup>75</sup> The realization of this charge for television is Ofcom’s Broadcasting Code, which includes, most relevantly here, a section dedicated to “Due Impartiality and Due Accuracy and Undue Prominence of Views and Opinions.”<sup>76</sup> Fox News came into conflict with these regulations in 2017.<sup>77</sup> The network had been on the air in the UK for over a decade, before withdrawing,

69. See Ken Auletta, *Behind Rupert Murdoch’s Urge to Merge*, NEW YORKER, July 18, 2014.

70. See Jim Rutenberg, *Audience for Cable News Grows*, N.Y. TIMES, Mar. 25, 2002.

71. Stefano DellaVigna & Ethan Kaplan, *The Fox News Effect: Media Bias and Voting*, Q.J. ECON., 1187, 1187 (2007).

72. *Id.* at 1228.

73. HEMMER, *supra* note 66, at 266. Because Fox News began as a cable network, the legal landscape was a bit different than for Rush Limbaugh. A 1975 regulation, titled “Fairness doctrine; personal attacks; political editorials,” provided that “[a] cable television system operator engaging in origination cablecasting shall afford reasonable opportunity for the discussion of conflicting views on issues of public importance.” 47 C.F.R. § 76.209, *repealed by* Broadcast Applications and Proceedings; Fairness Doctrine and Digital Broadcast Television Redistribution Control; Fairness Doctrine, Personal Attacks, Political Editorials and Complaints Regarding Cable Programming Service Rates, 76 FR 55817-01. It now seems clear that the Fairness Doctrine could not apply to cable, primarily because of a 2000 Supreme Court case holding content-based restrictions on cable television programs are subject to strict scrutiny. See *generally* United States v. Playboy Ent. Grp., Inc., 529 U.S. 803 (2000). In 1996, the Fairness Doctrine was dead anyway.

74. See Colin Vandell, *Words Signifying Nothing? The Evolution of Section 315(a) in an Age of Deregulation and Its Effect on Television News Coverage of Presidential Elections*, 27 HASTINGS COMM’NS & ENT. L.J. 443, 465 (2005).

75. Communications Act 2003, c. 21, § 3, <https://www.legislation.gov.uk/ukpga/2003/21/section/3>, [<https://perma.cc/TX57-9DEB>]. See also Communications Act 2003, c. 21, §§ 319–28 <https://www.legislation.gov.uk/ukpga/2003/21/part/3/chapter/4/crossheading/programme-and-fairness-standards-for-television-and-radio> [<https://perma.cc/M349-WPTC>] (the relevant provision to the Broadcasting Code).

76. OFCOM, THE OFCOM BROADCASTING CODE, 2021, § 5, [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0024/86307/bc2015-07-section\\_5\\_due\\_impartiality.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0024/86307/bc2015-07-section_5_due_impartiality.pdf) [<https://perma.cc/AVU6-42W7>].

77. See OFCOM, 341 OFCOM BROADCAST AND ON DEMAND BULLETIN 1, 5 (2017), [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0028/107569/issue-341-broadcast-on-demand-bulletin.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0028/107569/issue-341-broadcast-on-demand-bulletin.pdf) [<https://perma.cc/62GS-47PS>].

claiming lack of profitability.<sup>78</sup> Many suspect that reason was pretextual,<sup>79</sup> which became clear when Ofcom published its decision on Fox’s breach of its regulations.<sup>80</sup> The decision found both *Hannity* and *Tucker Carlson Tonight*, two major Fox offerings, to have breached rules regarding adequate representations of alternative views, due impartiality on major political matters, and inclusion of an appropriately wide range of significant views when covering major political matters.<sup>81</sup> This was equivalent to saying that Fox violated the old U.S. Fairness Doctrine.

### B. *The Traditional Media After the Demise of the Fairness Doctrine*

Even before the rise of Internet in the early 2000s, the two serial debunkers of epistemic authority that the demise of the Fairness Doctrine made possible—Fox News and Rush Limbaugh—already had deleterious effects on the epistemic condition of the population. I provide just a couple of examples here, although they barely scratch the surface.

In March 2003, the United States launched an illegal war of aggression against Iraq; hundreds of thousands died as a result, and millions more were displaced. The war was facilitated, domestically, by rampant false beliefs about connections between Iraq under the dictator Saddam Hussein and the terrorist group al Qaeda, which carried out the 9/11 attacks on the U.S., among other crimes. Two months before the war began, a poll found that 68% of Americans held the false belief that Iraq was involved in the 9/11 attacks, with 13% even claiming that “conclusive” evidence of Iraq’s involvement had been found.<sup>82</sup> This presumably resulted from the Bush Administration’s strategy of linking Saddam Hussein’s Iraq to Osama bin Laden’s al Qaeda—occasionally explicitly, often implicitly, but generally unmistakably.<sup>83</sup> By summer and early fall of 2003, 45 to 52% of

78. Stu Woo, *21st Century Fox Pulls Plug on Fox News in the U.K.*, WALL ST. J. (Aug. 29, 2017, 2:46 PM), <https://www.wsj.com/articles/21st-century-fox-pulls-plug-on-fox-news-in-the-u-k-1504032395> (quoting a spokesman, “We have concluded that it is not in our commercial interest to continue providing Fox News in the U.K.”). See Adam Taylor, *Why Donald Trump Can’t Watch Fox News in Britain*, WASH. POST (June 3, 2019), <https://www.washingtonpost.com/world/2019/06/03/why-donald-trump-cant-watch-fox-news-britain/> [<https://perma.cc/YTN6-A3TV>].

79. See Julia Horowitz, *Why You Won’t Find Sean Hannity and Tucker Carlson on British TV*, CNN BUS. (Jan. 18, 2021, 12:28 PM), <https://www.cnn.com/2021/01/16/media/fox-news-uk-ofcom/index.html> [<https://perma.cc/Z7YW-KYCJ>] (explaining substantial penalties for breaching Ofcom regulations, such as the £200,000 (\$272,000) fine given to a Russian funded news channel for repeated impartiality violations). See also Matthew Garrahan, *Ofcom Rules Fox News Breached UK Broadcasting Standards*, FIN. TIMES (Nov. 6, 2017), <https://www.ft.com/content/d3d721ac-c30c-11e7-a1d2-6786f39ef675> (“Investor concerns about Rupert Murdoch’s latest bid for Sky were revived when Ofcom, the media regulator, revealed that the mogul’s Fox News Channel twice breached UK broadcasting standards before it was pulled from the airwaves this summer.”).

80. OFCOM, 341 OFCOM BROADCAST AND ON DEMAND BULLETIN 1, 5–7 (2017) (noting “Ofcom has decided that publication of this short form decision is appropriate to ensure there is a complete compliance record and to facilitate public understanding of the Code”).

81. *Id.*

82. Steven Kull, et al., *Misperceptions, the Media, and the Iraq War*, 118 POLI. SCI. Q. 569, 572 (2003/2004).

83. Excellent accounts are given in Richard M. Pious, *WHY PRESIDENTS FAIL: WHITE HOUSE DECISION MAKING FROM EISENHOWER TO BUSH II* 222–23 (Rowman & Littlefield 2008) and Chaim

Americans said that they believed—again falsely—that the U.S. had “found clear evidence in Iraq that Saddam Hussein was working closely with the al-Qaeda [*sic*] terrorist organization.”<sup>84</sup> Researchers examining this incidence of false belief found, among other things, that watching Fox News was “the most consistently significant predictor of misperceptions.”<sup>85</sup> For example, those who primarily watched Fox were twice as likely to believe that links between Hussein and al Qaeda had been discovered. By contrast, those who generally watched or listened to public TV or public radio were 3.5 times less likely to believe that links to al Qaeda were discovered.<sup>86</sup> In other words, treating Fox News as a reliable epistemic mediator, as opposed to other news sources, drastically reduced the epistemic competence of viewers.

Rush Limbaugh had a similarly deleterious effect on the epistemic condition of his listeners. Multiple studies have documented the effect of his show on voters’ opinions<sup>87</sup> and beliefs.<sup>88</sup> A 1999 study by political scientists documented in detail his show’s deleterious impact on the knowledge Limbaugh listeners had about the world around them.<sup>89</sup> This study defined “misinformation” as erroneous understandings and holding incorrect beliefs “with confidence.”<sup>90</sup> The misinformed are distinguished from the merely uninformed, who lack understanding of, or are ignorant about, the relevant issues. In other words, the misinformed

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Kaufmann, *Threat Inflation and the Failure of the Marketplace of Ideas: The Selling of the Iraq War*, 29 INT’L SEC. 5, 16–19 (2004).

84. See Kull, et al., *supra* note 82, at 572.

85. *Id.*

86. *Id.* at 589–90. Even the consumers of public TV and radio news still had false beliefs. There are, of course, many other topics on which the American public has been ill-served epistemically by the robust protections for free speech, including false speech. There is no scientific controversy, for example, about the theory of evolution by natural selection—as the U.S. National Academy of Sciences correctly put it, “No other biological concept has been more extensively tested and more thoroughly corroborated than the evolutionary history of organisms”—yet in 2012, 46% of Americans believed God created humans in their familiar form in the last 10,000 years. Frank Newport, *In U.S., 46% Hold Creationist View of Human Origins*, GALLUP (June 1, 2012), <http://www.gallup.com/poll/155003/Hold-Creationist-View-Human-Origins.aspx> [<https://perma.cc/ERV7-NKVN>]. Only 15% of the population held the correct view that human beings evolved without divine intervention. See *id.* False beliefs about biology have pernicious effects on science education, but usually do not kill people. Robust protections for freedom of speech in the United States facilitated these catastrophic errors that undermine the putative value of democratic self-government.

87. A study measured whether and how much listening to Limbaugh helped to predict the direction and strength of opinions about particular political figures, like President Clinton and Vice President Gore, and political issues, like taxes and welfare policy, finding predictions were augmented if the issue was emphasized by Limbaugh in the majority of his broadcasts. See David C. Barker & Kathleen Knight, *Political Talk Radio and Public Opinion*, 64 PUB. OP. Q. 149, 154–64 (2000).

88. One study examining the 1996 presidential election found Limbaugh listeners were more likely to discount substantive reasons that Clinton won, such as his good first term record or that his ideas were preferable to opposing candidate Bob Dole, even in comparison to listeners of other conservative political talk shows. See Alice Hall & Joseph N. Cappella, *The Impact of Political Talk Radio Exposure on Attributions About the Outcome of the 1996 U.S. Presidential Election*, J. COMM’NS 332, 341 (2002).

89. See C. Richard Hofstetter, et al., *Information, Misinformation, and Political Talk Radio*, 52 POLI. SCI. Q. 353, 355 (1999).

90. *Id.* at 354.

were treating Limbaugh et al. as reliable epistemic mediaries, when they were not.<sup>91</sup> A phone survey was conducted of 810 San Diego adults, close to 43% of whom reported listening to talk radio. A large portion of those who listened to “conservative” talk radio listened to Limbaugh (and/or a Limbaugh imitator in the local San Diego market). Others listened to more neutral radio hosts in the San Diego market like Tom Leykis<sup>92</sup> and Ray Suarez.<sup>93</sup> The study found that,

frequency of exposure to conservative talk radio displays a significant negative correlation with political information, indicating that although conservative talk radio listeners are more interested in politics, read the newspaper more often, and are more likely to vote, they are less likely to hold accurate beliefs even regarding non-ideological facts (such as which branch of government determines the constitutionality of a law) when other items such as political activity are controlled. . . . [L]istening to conservative talk radio was positively associated with misinformation . . . regarding ideologically charged facts. Thus, it appears that not only are conservative talk radio listeners in the sample less knowledgeable about general information than non-listeners, the conservative talk devotees tend to be more misinformed as well, likely drawing false inferences from show content about political facts (such as whether the budget deficit has increased or decreased under President Clinton, and whether the President has been indicted for illegal activities in Arkansas).<sup>94</sup>

Of course, the Fairness Doctrine by itself would not guarantee that these falsehoods and the associated skepticism about other purported epistemic authorities would not have taken hold. However, it is easy to see why it would be much harder to mislead people if television and radio programs would be required to concurrently air those with an opposing view. The Fairness Doctrine does not stop falsehood or epistemic debunking from enjoying media time, but it does prevent unchallenged airings. And that, of course, is why Limbaugh vigorously opposed the revival of the Fairness Doctrine in the early 1990s.

### C. *The Internet's Contribution to the Epistemic Crisis*

The assault on knowledge—and especially on who counts as an epistemic authority—has been exacerbated by the rise of the Internet. The Internet, after all, is the great eliminator of intermediaries, i.e., precisely those who determine who has epistemic authority and thus deserves to be believed. This was its virtue for all those excluded, justly or unjustly in the past, from public discourse. But as

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91. *See id.*

92. Syndicated host Leykis was quoted calling himself, “the only talk radio host who is not a right-wing wacko or a convicted felon.” Timothy Egan, *Triumph Leaves Talk Radio Pondering Its Next Targets*, N.Y. TIMES, Jan. 1, 1995 (§ 1), at 1.

93. Ray Suarez hosted a two-hour program on National Public Radio called “Talk of the Nation,” which claimed to have more than a million listeners in 1994. Michael Wines, *A Radio Talk Show That Doesn't Run on Vitriol*, N.Y. TIMES, Feb. 6, 1994 (§ 2), at 28.

94. Hofstetter, *supra* note 89, at 363, 365.



cyberspace, with its lack of mediators and filters, has become a primary source of information, its ability to undermine both epistemic authority and, as a result, knowledge, has become alarmingly evident: it magnifies ignorance and stupidity and is now leading tens (maybe hundreds) of millions of people to act on the basis of fake epistemic authorities and the fantasy worlds they construct. Consider just a few examples.

Tens of millions of people continue to believe that Hillary Clinton and other Democrats were running a child sex abuse ring out of a pizza parlor in Washington, DC; one deluded soul even showed up with a gun at the parlor.<sup>95</sup> In a recent survey, 17% still believe that “a group of Satan-worshipping elites who run a child sex ring are trying to control our politics.”<sup>96</sup>

A man who murdered dozens of Muslims at two mosques in New Zealand was “steeped in the culture of the extreme-right internet,” with “[h]is choice of language [in his online manifesto], and the specific memes he referred to, suggest[ing] a deep connection to the far-right online community.”<sup>97</sup> His manifesto explained that he had done research and developed his racist worldview on “[t]he internet, of course. . . . You will not find the truth anywhere else.”<sup>98</sup> The latter assertion would seem to involve a rather serious mistake about epistemic authority.

In the United States, many are foregoing a vaccine for COVID because of misinformation shared widely on the Internet by a crackpot osteopath in Florida:<sup>99</sup>

An internet-savvy entrepreneur who employs dozens, Dr. Mercola has published over 600 articles on Facebook that cast doubt on Covid-19 vaccines since the pandemic began, reaching a far larger audience than other vaccine skeptics, an analysis by The New York Times found. His claims have been widely echoed on Twitter, Instagram and YouTube.<sup>100</sup>

95. Matthew Haag & Maya Salam, *Gunman in ‘Pizzagate’ Shooting is Sentenced to 4 Years in Prison*, N.Y. TIMES (June 22, 2017), <https://www.nytimes.com/2017/06/22/us/pizzagate-attack-sentence.html>. [https://perma.cc/FZU8-U4M9].

96. Mallory Newall, *More Than 1 in 3 Americans Believe a ‘Deep State’ is Working to Undermine Trump*, IPSOS (Dec. 30, 2020), <https://www.ipsos.com/en-us/news-polls/npr-misinformation-123020> [https://perma.cc/5C6D-CAUC]. See generally, Kevin Roose, *QAnon Followers Are Hijacking the #SaveTheChildren Movement*, N.Y. TIMES (Aug. 12, 2020), <https://www.nytimes.com/2020/08/12/technology/qanon-save-the-children-trafficking.html?referringSource=articleShare> [https://perma.cc/552B-DWPL]. See also Giovanni Russonello, *QAnon Now as Popular in U.S. as Some Major Religions, Poll Suggests*, N.Y. TIMES (May 27, 2021), <https://www.nytimes.com/2021/05/27/us/politics/qanon-republicans-trump.html?referringSource=articleShare> [https://perma.cc/9TKD-YPR4].

97. Daniel Victor, *In Christchurch, Signs Point to a Gunman Steeped in Internet Trolling*, N.Y. TIMES (Mar. 15, 2019), <https://www.nytimes.com/2019/03/15/world/asia/new-zealand-gunman-christchurch.html?action=click&module=Top%20Stories&pgtype=Homepage> [https://perma.cc/W6BJ-XZ8U].

98. *Id.*

99. Sheera Frenkel, *The Most Influential Spreader of Coronavirus Misinformation Online*, N.Y. TIMES (July 24, 2021), [https://perma.cc/V4L9-WVNY] (last updated Oct. 6, 2021).

100. *Id.*

Unlike those online inspiring mass murder, the causal connection between this misinformation and harm to human beings is more indirect, but the possible causal chain seems clear: ignorant, gullible, or disturbed people come to believe that the vaccine is dangerous, rather than helpful. These people forego vaccination, some fall ill, and some die, while others become infected because of exposure to other infected individuals. The fiction that “autonomous” agents intervene<sup>101</sup> precludes liability for the purveyor of falsehoods, even in cases where there is no doubt that a particular purveyor was the source that inspired the fatal decision. Although epistemic authorities are united in rejecting this misinformation, the Internet makes it available to millions while undermining the credibility of the actual epistemic authorities.

The problem, unfortunately, is worse than only misguided vaccine skepticism. Crank remedies for COVID thrive on the Internet too. The most recent was ivermectin, an anti-parasite (*not* anti-viral) drug used in livestock, as well as to treat certain parasites in humans (but with much lower doses). A pro-Trump and purportedly medical website has been promoting it as a treatment for COVID (it is not), and has “become well-known in the Facebook groups and Reddit communities where anti-vaccination sentiment thrives.”<sup>102</sup> In Texas, where this fake remedy caught on, there was a 550% spike in calls to poison control centers by people ingesting too much of the version of the drug intended for livestock.<sup>103</sup> Of course, the usual culprits have been implicated:

Fox News hosts have pushed the drug as an effective treatment for COVID-19. A non-peer reviewed study that appeared to show a strong benefit was retracted, because of issues with plagiarism and manipulated data. Phil Valentine, a conservative radio host in Tennessee, had told his audience he found a doctor to prescribe him ivermectin. Valentine later died of COVID-19.<sup>104</sup>

As one Iowa physician observed: “It’s hard to understand why people would turn down an FDA-approved Covid preventative in favor of a treatment that’s not only unapproved but has a large body of evidence showing it doesn’t work.”<sup>105</sup> The answer, of course, is that the epistemic authority of the FDA has been undermined by ignorant people on Facebook and Reddit, aided and abetted by partisan media like Fox News and “conservative” talk radio.

101. See Brian Leiter, *The Case Against Free Speech*, 38 SYDNEY L. REV. 407, 416 (2016).

102. Ben Collins & Brandy Zadrozny, *Clamoring for Ivermectin, Some Turn to a Pro-Trump Telemedicine Website*, NBC NEWS (Aug. 26, 2021), <https://www.nbcnews.com/tech/tech-news/ivermectin-demand-drives-trump-telemedicine-website-rcna1791> [<https://perma.cc/HY6D-DPF2>].

103. William Joy, *Texas Sees 550% Spike in Poison Calls for Horse and Cow Dewormer, Despite FDA Warning*, WFAA 8 ABC (Aug. 25, 2021, 8:30 PM), <https://www.wfaa.com/article/news/health/coronavirus/texas-sees-spike-in-poison-calls-for-horse-and-cow-dewormer-ivermectin-despite-fda-warning/287-57a97ba4-ea7a-42b7-adda-e8618b35d9fd> [<https://perma.cc/BQZ3-JMMV>].

104. *Id.*

105. Collins & Zadrozny, *supra* note 102.

Consider the following:

A new Pew survey tested Democratic and Republican trust in 30 different media sources, ranging from left to right. Democrats trusted 22 of the 30 sources, including center-right outlets like The Wall Street Journal. Republicans trusted only seven of the 30 sources, with PBS, the BBC and The Wall Street Journal the only mainstream outlets with significant trust. . . . [The Republicans'] other trusted sources . . . were Fox News, Sean Hannity, Rush Limbaugh and Breitbart.<sup>106</sup>

This survey is fairly clear evidence that epistemic authority is now in freefall in the United States among large segments of the population.

## II. SOME FREE SPEECH PRINCIPLES

I will presuppose a variety of theses about free speech and its justification that I have argued for elsewhere.<sup>107</sup> I will not argue for them here but will take them for granted in considering regulation of the Internet and traditional media, given their threat to the social epistemology of reasonably free countries. In summary form, here are the key theses:

1. Free, i.e., unfettered, speech is like free action: it has benefits (especially, but not only, to speakers) and costs (e.g., inspiring mass murder, spreading falsehoods that endanger well-being). The normative framework for analysis of speech I employ is a consequentialist one.
2. The benefits of free speech are *epistemic* and *eudaemonic*: speech can produce useful knowledge (although most speech produces no knowledge, and much speech reduces knowledge); and speaking contributes to the happiness or well-being of speakers, sometimes hearers, and sometimes polities, at least in cases of successful democratic self-government. Epistemic failures of speech often impede its contribution to the well-being of hearers and polities.
3. There are no cognizable “autonomy” interests in free speech, since no one is autonomous in the relevant sense. We are all primarily products of external causal forces, social and economic.
4. Some exceptional people (think Mill or Nietzsche) are less of a mere vector for causal forces than others, but no rules about free speech can be designed

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106. Ezra Klein, *Why Democrats Still Have to Appeal to the Center, But Republicans Don't*, N.Y. TIMES (Jan. 24, 2020), <https://www.nytimes.com/2020/01/24/opinion/sunday/democrats-republicans-polarization.html?action=click&module=Opinion&pgtype=Homepage>, [https://perma.cc/M78B-4WZU].

107. See generally Brian Leiter, *Cleaning Cyber-Cesspools: Google and Free Speech*, in THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION 155 (Saul Levmore & Martha C. Nussbaum eds., 2010). See also Leiter, *The Case Against Free Speech*, *supra* note 101; Brian Leiter, *Justifying Academic Freedom: Mill and Marcuse Revisited*, in MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER 113 (Heidi M. Hurd ed., 2019).

around such exceptional cases. Opportunities for exceptional people to express themselves are both *epistemic* goods and *eudaemonic* ones.

5. The primary reason to be skeptical of regulation of speech is the unreliability of regulators who often have bad motives for suppressing speech, as opposed to suppressing speech that lacks epistemic or eudaemonic value.

Readers who disagree with the argument that follows probably disagree with one or more of the preceding theses. Since there is no arguing for first principles in normative theorizing,<sup>108</sup> those who do not accept the first principles may find what follows to be unpersuasive.

### III. WHAT IS TO BE DONE?

Human beings are “discursive” creatures in a thin sense: they are often prompted to action by discourse—by what others say. Humans respond continuously to speech, arguments, ideas, and “reasons,” even when (as is the norm) their response satisfies few normative demands of reasonableness as conceived by philosophers or logicians. Their discursiveness means that what others say often figures causally in what they do, even if the mechanisms controlling this behavior are typically non-conscious and non-rational, and the agents themselves often do not understand them. And sometimes, of course, what humans do in response to speech is very, very bad.

Speech which results in bad conduct has been a longstanding problem for the law. One could adopt a blanket prohibition on advocacy of bad conduct, but democratic countries with robust conceptions of civil liberties have avoided such an approach in recent decades, proposing instead to limit such prohibitions to advocacy that poses an “imminent” or “immediate” threat of unlawful conduct. Mill’s famous example of the speaker inciting an angry mob in front of the corn dealer’s house by declaring that corn dealers starve the poor is the paradigm for this liberal approach:<sup>109</sup> the speaker could be prohibited from the incitement in that context, but he should not be prohibited from publishing that opinion in the newspaper.

The choices for speech in Mill’s day were often stark: the soapbox agitator inciting the mob in person, at one extreme, or, at the other, writing an essay in the *Times of London*, which would be read by hardly anyone—except perhaps by corn dealers and other capitalist elites!<sup>110</sup> Inciting mobs in real time to lawless action is an easy case, even for those otherwise committed to very strong free speech protection. Incitement is perhaps too easy, since it rarely gets prohibited,

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108. All normative theory proceeds on the basis of normative intuitions that have no special cognitive or epistemic status. This is one thing we learn from Nietzsche, although not only from him. See BRIAN LEITER, *MORAL PSYCHOLOGY WITH NIETZSCHE* 34–35 (2019).

109. JOHN STUART MILL, *ON LIBERTY* 107–08 (Ticknor and Fields 1863).

110. Of course, pamphlets and broadsheets were also in circulation; as media of communication, they are perhaps a bit like the current Internet, but less omnipresent.

given that it happens in real time.<sup>111</sup> However, the media for speech is not so simple today. There remain, to be sure, speakers inciting mobs in real time in front of proverbial corn dealers' houses; and then there are pundits and talking heads on radio and TV speaking to thousands or millions whom they can't see, but some of whom might be mobs menacing corn dealers; and then there are those uploading YouTube videos and podcasts, potentially reaching thousands or millions of the alienated, the disturbed, the marginalized, the "highly incitable." Mill's distinction is less directly applicable in our Internet world.

After horrific bombings in Sri Lanka by Islamic terrorists in 2018, the government shut down social media for fear that it would incite anti-Muslim violence. Here is how a Sri Lankan journalist described this move (I quote it at length because it seems to me she has it exactly right):

This is the ugly conundrum of the digital age: When you traffic in outrage, you get death.

So when the Sri Lankan government temporarily shut down access to American social media services like Facebook and Google's YouTube after the bombings there on Easter morning, my first thought was "good."

Good, because it could save lives. Good, because the companies that run these platforms seem incapable of controlling the powerful global tools they have built. Good, because the toxic digital waste of misinformation that floods these platforms has overwhelmed what was once so very good about them. And indeed, by Sunday morning so many false reports about the carnage were already circulating online that the Sri Lankan government worried more violence would follow.

. . . [I]t has become clear to me with every incident that the greatest experiment in human interaction in the history of the world continues to fail in ever more dangerous ways.

....

. . . [W]hile social media had once been credited with helping foster democracy in places like Sri Lanka, it is now blamed for an increase in religious hatred. That justification was behind another brief block a year ago, aimed at Facebook, where the Sri Lankan government said posts appeared to have incited anti-Muslim violence.

"The extraordinary step reflects growing global concern, particularly among governments, about the capacity of American-owned networks to spin up violence," The Times reported on Sunday.

Spin up violence indeed. Just a month ago in New Zealand, a murderous shooter apparently radicalized by social media broadcast his heinous acts on

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111. *Cf.* *Brandenburg v. Ohio*, 395 U.S. 444, 450 (1969) (Douglas, J., concurring) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."). *See also* *Hess v. Indiana*, 414 U.S. 105, 107–09 (1973) (holding "[w]e'll take the fucking street later" as unlikely to produce "imminent disorder").

those same platforms. Let's be clear, the hateful killer is to blame, but it is hard to deny that his crime was facilitated by tech.

....

... [S]ocial media has blown the lids off controls that have kept society in check. These platforms give voice to everyone, but some of those voices are false or, worse, malevolent, and the companies continue to struggle with how to deal with them.

In the early days of the internet, there was a lot of talk of how this was a good thing, getting rid of those gatekeepers. Well, they are gone now, and that means we need to have a global discussion involving all parties on how to handle the resulting disaster, well beyond adding more moderators or better algorithms.<sup>112</sup>

These concerns are articulated within the traditional “speech causing harmful behavior” framework familiar to the law of incitement inspired by Mill’s example. And they identify the two crucial problems the Internet presents to this paradigm, which we may summarize as follows:

1. Because there are no gatekeepers, the Internet can easily become awash in the “toxic waste of misinformation.” Without gatekeepers, the Internet “give[s] voice to everyone, but some of those voices are false or, worse, malevolent.”<sup>113</sup>
2. This “toxic waste of misinformation” can then “spin up violence,” and these crimes are “facilitated by tech.”<sup>114</sup>

The first issue is one of social epistemology. The absence of gatekeepers means everyone can get through the Internet gate (as long as they have technological access, which is less and less of an obstacle), and there is no check on a user’s honesty, their accuracy, or their sanity. The result is that the Internet is often an unreliable mechanism for generating true beliefs about the world. The second issue concerns the consequences of this failure of social epistemology, although “spin up” and “facilitated” are obviously a bit vague for legal purposes. Telephones, for example, may have “facilitated” lots of Mafia hits, i.e., they provided the medium by which crime bosses communicated instructions to hit men. No one thinks the telephone company should be liable for Mafia hits or responsible for regulating the content communicated.

The Sri Lanka case, of course, is different in crucial respects: the worry was not that someone in Sri Lanka would use the medium to communicate an *imperative*, directly or obliquely (e.g., “kill Joe” or “Joe needs to sleep with the fish”).

112. Kara Swisher, *Sri Lanka Shut Down Social Media. My First Thought Was ‘Good.’*, N.Y. TIMES (Apr. 22, 2019), <https://www.nytimes.com/2019/04/22/opinion/sri-lanka-facebook-bombings.html> [<https://perma.cc/5R6H-GHYG>].

113. *Id.*

114. *Id.*

Instead, the worry was that the medium would be used to communicate a “toxic digital waste of misinformation” that *could* incite its consumers to commit unlawful violence. Telephones are not typically used in this latter fashion, although they could be, to be sure, by a discreet Mafia boss, but with nothing like the effect of the Internet with its worldwide audience. Television or radio broadcasts are more effectively used to convey misinformation to a wide audience (e.g., the role of radio in the Rwandan genocide<sup>115</sup>), but it is often harder due to gatekeepers (although they were absent in the Rwandan case). But on the Internet, it is easiest of all: ordinarily, neither government nor editor stands in the way of toxic misinformation to inflame violence via the Internet. The crucial difference is the expansive availability of the message.

Incitement has two components: there are the (potentially inciting) words spoken in a particular context, and then there is the reception of the words by hearers. Some words are *very inciting* to normal hearers, *under the right conditions* (that is Mill’s case of the mob in front of the corn dealer’s house, which was presumably the rationale of the Sri Lankan government). But equally important is that some hearers are *highly incitable*, regardless of the context. Some hearers are, to be sure, non-incitable, even in front of the corn dealer’s house. The law, however, does not craft its responses around the non-incitable. Should the law consider the fact that there are people who are, by contrast, highly incitable?

In Mill’s day, it would have resulted in a total collapse of free expression to regulate speech based on the possibility that the highly incitable might be triggered: we would have had to shut down the newspapers, the pamphleteers, and the soapbox agitators. However, the Internet has again changed this equation, because Internet speech is not like the firebrand agitating the mob in front of the corn dealer’s house. Content on the Internet is everywhere, always available to the highly incitable, wherever they are. It would be as if the agitator against the corn dealer could deliver his message not just to the mob in front of him, but to anyone, anywhere, in front of any corn dealer’s house. In the Internet era, and with the collapse of epistemic authority it represents, we need to think about the highly incitable (indeed, we should probably think about the moderately incitable too).<sup>116</sup>

In the Internet era, unlike Mill’s, we can take a precaution that still permits free expression: we can, as the Sri Lankan government did, shut down the Internet; shut down the “toxic digital waste of misinformation” that might incite normal hearers, and will almost certainly trigger the highly incitable; and yet speakers can still stand on street corners and submit opinion pieces to the newspapers. In principle, I suspect the consequentialist balance will often favor doing this, at least in time-restricted ways.<sup>117</sup> Some speakers, to be sure, will be unhappy at not

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115. See generally Christine L. Kellow & H. Leslie Steeves, *The Role of Radio in the Rwandan Genocide*, 48 J. COMM’N 107 (1998).

116. The highly incitable are susceptible to malign influence from the traditional media too, although the presence of gatekeepers often eliminates the most inflammatory speech. I return to the question of how to regulate the traditional media, below.

117. See the caveats, below, at the first two paragraphs of § III.A.

being able to reach as many people and some epistemic value might be lost at the margins. But speaker contributions to eudaemonic and epistemic values will still have many other outlets, albeit ones with gatekeepers.

The real worry about such proposals, in my view, is not “in principle” but rather “in practice.” How precisely do we filter out the relevant speech, and is there any reason to think government actors will do so well? Let us take these up in turn.

#### A. *How to Filter—The Internet*

The Sri Lankan approach—shutting down the whole Internet in an emergency—is obviously one ripe for abuse that would be hard to regulate against in advance. That certainly does not mean the Sri Lankan government was wrong in the case described by the journalist above, but regulations authorizing generic “emergency Internet shutdowns” are plainly risky when it comes to the epistemic and eudaemonic values of speech, along with the bad incentives governments have to shut down communication.

The Internet, however, is large and has many sites. One possibility would be to authorize regulators<sup>118</sup> to close *particular Internet sites* during emergencies: e.g., Google, YouTube, Instagram, Facebook. The list would change over time, depending on what the most common sources of incitement are. Since Google searches are an instrument of mischief,<sup>119</sup> shutting them down is particularly important: Internet users will still be able to find all their regular websites without the benefit of Google (or other search engines), and they should still be able to access the news sites featuring content filtered through gatekeepers (e.g., the *New York Times* or the *BBC*). (As an alternative, perhaps the government could block certain search terms on Google for a short period of time, depending on the emergency.) Like the Roman Republic’s provision for dictatorial powers, such emergency shutdowns should be temporally limited: in the case of Internet sites, say, one week, subject to judicial review of a requested extension. One thing we know is that the passage of time cools the passions, including (we hope!) the passions of the highly incitable.

A more important approach to filtering is one that would reduce the number of places on the Internet that offer incitement in the first place. This would require a significant change to First Amendment jurisprudence in the United States. My proposal would apply only to what I will call “pure” Internet sites, and it would involve, in the first instance, creating analogues of existing “fighting words” and “incitement to imminent illegal action” doctrines. By “pure” Internet sites, I mean websites that do not have analogues in the *traditional* (or “legacy”) media—print

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118. Which regulators is an important question, which I leave to another occasion or to those more expert on institutional design questions. The FCC seems an unlikely candidate. Perhaps the Secretary of Homeland Security, or the President directly, or a majority of the President’s Cabinet? The bar should be set reasonably high, with judicial review there to cure any mistakes.

119. Cf. Leiter, *Cleaning Cyber-Cesspools*, *supra* note 107, at 161–62.



(e.g., *New York Times*), radio (e.g., National Public Radio), television (e.g., CNN, ABC, Fox)—and that do not involve serious gatekeepers, who review content for defamation, accuracy, vulgarity, and so on.<sup>120</sup> (I have a separate proposal, below, for the traditional media.) For these pure Internet sites (such as blogs, webzines [probably many of those with alleged editors], Twitter, Instagram, Facebook, etc.), I suggest that we apply the familiar categories of “low value” speech, *but without their temporal conditions*.

Fighting words, as the Supreme Court famously said, are words which “by their very utterance, inflict injury or tend to incite an immediate breach of the peace.”<sup>121</sup> In the case of pure Internet sites, this would mean *words that would, in real life and real time, inflict injury or tend to incite an immediate breach of the peace* are forbidden. So, too, with incitement to unlawful action: the test would be, in essence, whether these words, *if they were said “in front of the corn dealer’s house” (i.e., a temporal context ripe for incitement) they would lead to illegal action*; if so, then they would be forbidden. Stripping out the real-world temporal requirement is justified by the wide reach of the Internet, and its potential to trigger not only the normally incitable, but also the *highly incitable*. The Internet constitutes a “virtual reality,” as is often said, so it deserves “virtual” fighting words and “virtual” incitement doctrines. This categorization will no doubt shut down a lot of Internet ranting, but the loss to human well-being (even allowing for the unhappiness of ranters) will be minimal. Evidence suggests that those who want to spout “fighting words” will be less likely to do so in the actual reality than in the virtual one. It is hard to see how this is a loss to aggregate well-being.<sup>122</sup>

Yet none of the preceding, even if it lowers the risk of incitement and ensuing violence, would touch the problem of false information—e.g., about vaccines or COVID cures—that are peddled continuously, though not only, on the Internet.

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120. It may well be that in the not-too-distant future even the traditional media will be exclusively online, which means the key question will become the quality of the gatekeeping the websites do before publishing. I would suggest that the gatekeeping of the traditional or legacy media should serve as an approximate benchmark.

121. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

122. Although this is slightly orthogonal to my main concerns, we should probably also benefit from a “hate speech” code for the Internet, if not for real life. While the most immediate harms of hate speech are its targets, such speech also degrades the epistemic condition of those influenced by it, who come to believe falsehoods about particular groups, as well as becoming skeptical of the knowledge members of the abused groups want to share. The problem, however, with “hate speech” definitions is that they suffer from being both too vague and too precise. On the vagueness side, they often prohibit language that is not just “threatening,” but simply “abusive” or “degrading,” concepts which admit, shall we say, of interpretation. On the excessive precision side, they limit their protections from threatening, abusive and degrading speech only to specified demographic categories: e.g., race, ethnicity, religion, sexual orientation, gender identity. If you do not fit one of the named categories, you are out of luck. Neither problem can be wholly avoided, which is why limiting hate speech prohibitions to the Internet is the right approach: we regulate out of existence (hopefully) some very bad speech, but the over-inclusiveness of the regulation only affects speech on the Internet. Which demographic categories should count will depend on the local facts on the ground, and that is as it should be, since out-group hatred is fickle from place to place.

Here is where we also need a fundamental rethinking of First Amendment doctrine and how it treats harms caused through the mental or intellectual mediation of a hearer or reader.<sup>123</sup> The problem with current law is illustrated by the fate of the early 1980s proposal by Andrea Dworkin and Catharine MacKinnon to create a cause of action for civil liability for harms suffered due to pornography. One law embodying that proposal was struck down as unconstitutional by the U.S. Court of Appeals for the Seventh Circuit in *American Booksellers Association v. Hudnut*.<sup>124</sup> The court rejected the ordinance's definition of "pornography" as involving an unconstitutional content-based restriction on speech. The court agreed with "the premises of this legislation. Depictions of subordination tend to perpetuate subordination."<sup>125</sup> But that did not mean the law passed constitutional muster; rather, the effectiveness of pornography in subordinating women,

simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation. Pornography affects how people see the world, their fellows, and social relations. If pornography is what pornography does, so is other speech. Hitler's orations affected how some Germans saw Jews. Communism is a world view, not simply a *Manifesto* by Marx and Engels or a set of speeches. Efforts to suppress communist speech in the United States were based on the belief that the public acceptability of such ideas would increase the likelihood of totalitarian government.<sup>126</sup>

A lot of theoretical heavy lifting in this part of the opinion is done by the phrase "mental intermediation": much of that intermediation, as the opinion even acknowledges, is "unconscious," so it is not something the individual could be presumed to exercise control over. Even conscious intermediation, of course, is affected by forces beyond the individual's control.<sup>127</sup> The real question, in my view, should be about the causal chain from "speech" to harm (subject, perhaps, to foreseeability or "reasonableness" requirements).<sup>128</sup> Someone in the Weimar

123. Hearer mediation is not the only issue. The plurality opinion by Justice Kennedy in *United States v. Alvarez*, 567 U.S. 709 (2012), rejected the view that false statements of fact were simply "low value" speech, subject to little constitutional protection, and thus held that the Stolen Valor Act of 2005 (which imposed criminal penalties for lying about receipt of military medals and honors) was a content-based regulation subject to strict scrutiny. Concurring in the result, two Justices (Breyer and Kagan) held that false statements of fact deserved only intermediate scrutiny, but still the Act failed to pass constitutional muster even under this less demanding test. *Id.* at 732–37. The dissent by Justice Alito (joined by Scalia and Thomas) argued that prior cases already stood for the proposition that "the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest." *Id.* at 739. The dissent's view would ultimately have to prevail were regulations like those discussed in the text to be constitutionally viable, in addition to the issues discussed in the text.

124. 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

125. *Id.* at 329.

126. *Id.*

127. On the general philosophical problem, and the relevant psychological evidence, see LEITER, *supra* note 108, at 115–46, 162–80.

128. The major challenge to my proposed shift in focus may come from what David Strauss aptly calls the "persuasion principle"—that the state should not regulate speech that might persuade people in

Republic in 1930 who thought Hitler and the Nazis should be shut down because their speech was very dangerous was in fact correct: Hitler and the Nazis made clear the harm they intended to do, in a way wholly unlike Marx and Engels (assuming someone actually read them). The real issue should be “the likelihood” (to quote the Seventh Circuit) of the harm, and the severity of that harm, not whether there is “mental intermediation.”<sup>129</sup>

That was the real hurdle for the general Dworkin-MacKinnon idea, not the fact of “mental intermediation,” whose role they would not have denied: the causal connection between the “speech” and the harm was not very clear and is even less clear now.<sup>130</sup> The countries with open Internet access are now awash in pornography (“one click away”) to an extent that Catharine MacKinnon never dreamed of. The massive rise in exposure to pornography has not coincided with restrictions on the rights of women or an increase in sex crimes.

The contrast with false speech about COVID and vaccines is instructive. In both cases, the causal connection between those who hear false information and those who forego life-saving vaccines and public health measures is much clearer. NPR listeners and cosmopolitan professionals in major urban areas who

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harmful directions—although this is limited to speech that involves rational persuasion; even on Strauss’s account “the persuasion principle can be overridden if the consequences of permitting the speech are sufficiently harmful.” David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 360 (1991). Interestingly, Judge Easterbrook’s opinion in *American Booksellers Association* does not involve the “persuasion principle,” and on this point, I agree with his approach. Strauss justifies the persuasion principle in part on the grounds that the state should not “interfere with a person’s control over her own reasoning processes.” *Id.* at 354. Strictly speaking, of course, people do not “control” their reasoning processes: what one believes is not a matter of volition, and the best evidence from cognitive science suggests that most “thinking” is unconscious. See, e.g., DAVID ROSENTHAL, *CONSCIOUSNESS AND MIND* (2005); Robert Mark Simpson, *Intellectual Agency and Responsibility for Belief in Free Speech Theory*, 19 LEGAL THEORY 307 (2013). What Strauss has in mind, however, is not really control of reasoning, but rather the worry that reasoning might be distorted by non-rational forces. This puts all the weight on the idea of “rational” persuasion (the putative limit on regulation before we get to rationally persuasive speech that is “sufficiently harmful”). Strauss says only that non-rational persuasion involves “false information” and tries to produce “an ill-considered reaction.” *Id.* at 335. This clearly cannot suffice, however, to demarcate kinds of persuasion for a variety of reasons. Only on the assumption that rational persuasion requires that the premises taken to justify a true conclusion must themselves be true does the first restriction follow. But why does rationality mandate that? On an instrumental conception of reason—and even assuming true belief is the desired end—it is perfectly rational to be led to true belief via falsehoods. But on an instrumental conception of rationality, even true belief is an optional outcome: it depends on what our ends really are. If human happiness depends on false belief (as it probably does), then it is instrumentally rational to get people to believe happiness-inducing false claims, and rational to do so by presenting them with false information, if that is necessary to induce the happiness-inducing states. That suggests that the “persuasion principle” requires some substantive conception of rationality. (Notice that commitment to the logical validity of inferences will not elide the problems already noted with a merely instrumental conception of rationality.) Unfortunately, there are no plausible substantive conceptions of rationality, though it is easy to see how Strauss’s constraints make sense if one shares Kantian intuitions. Indeed, his second constraint—namely, speech that induces “ill-considered action”—is transparently parasitic on a substantive conception of reason that remains unspecified. (Action is only “ill-considered” relative to either an instrumental or substantive conception of rational considerations.)

129. *Am. Booksellers Ass’n*, 771 F.2d at 329.

130. There could, of course, be cases of individualized harm caused by pornography.

read the *New York Times* are not foregoing vaccines and masking;<sup>131</sup> Fox News viewers and “conservative” talk radio listeners are. Of course, not *all* of the latter make bad choices, but some do, and they do so because of the speech to which they have been exposed. What we need for pure Internet sites, *at least*,<sup>132</sup> is tortious liability for harm that a *reasonable person would see as a foreseeable consequence of speech they knew or should have known was false*. We must be mindful that the concept of “harm” has been inflated in recent years to encompass psychological states that would have previously been deemed “offensive” or “hurtful.” “Harm,” for purposes here, should be limited to “injury to physical well-being.” The knowledge requirement on the part of the speaker should be similar to “actual malice” in the defamation context: knowledge of the falsity of the speech or reckless indifference to its truth or falsity. Foreseeability judgments, as we learned from the legal realists, are famously sensitive to situational factors and policy considerations, and that should be welcome: if you peddle nonsense about cures or vaccines during a pandemic and people end up sick or dead, you should suffer the legal consequences if those people (or their estates) can prove the causal role of your speech in the outcome.<sup>133</sup> Prevailing in tort will often be challenging (as it should be), but one may hope that the specter of liability will dissuade some of the worst offenders, even if it becomes a game of “whack-a-mole.” Sometimes, however, whacking (in court) the biggest moles is enough. The crucial point is that “mental intermediation” should be irrelevant, just as it is when the rabble-rouser incites the mob in front of the corn dealer’s house, since “being incited” to unlawful action also depends on “mental intermediation.”

I have not, yet, said anything here about Section 230 of the Communications Decency Act, which I have written about previously.<sup>134</sup> Section 230 shields Internet service providers (ISPs), search engines, and websites from liability in tort for content that others provide.<sup>135</sup> It does not exempt them, however, from liability for copyright violations, or from violations of federal criminal statutes.<sup>136</sup> The exemption for ISPs makes sense: they are more like the phone company than the *New York Times*. But the idea that website owners—who, like me, run some well-known blogs; Facebook; or Twitter—get a free pass on hosting tortious wrongdoing, but not on hosting copyright violations, is *prima facie* dubious. Section 230 is hardly the only approach democratic countries can take towards

131. The Georgetown conference was hosted at the American Enterprise Institute, a conservative think tank, which required proof of vaccination for entry.

132. It might make sense to extend this liability to the traditional media as well.

133. What kind of causation to require is a harder question: obviously if a website is the exclusive source of the false information that leads to the physical harm, that is an easy case. But what about a case where the website, Tucker Carlson, and Breitbart all contribute to the victim’s false beliefs about vaccines? Perhaps an analogue of the “market share” liability theory from tort law should apply? These are hard questions about which I don’t have firm views.

134. Leiter, *supra* note 107, at 156.

135. The history of Section 230 and its rationale is usefully described in DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 169–70 (2014).

136. *See id.* at 172.

liability on the Internet,<sup>137</sup> and it should clearly be repealed with respect to websites, but that is an issue I have addressed elsewhere.<sup>138</sup> What is important here is that if there is to be tortious liability for false speech on the Internet that is foreseeably harmful (like lies about vaccines), we will need a change to Section 230. Notice and takedown requirements, together with penalties for reckless or baseless notices, are probably the best approach (along with a prohibition on websites permitting waivers), but I will defer to those with more expertise in the alternatives to Section 230 in other jurisdictions.

### B. *How to Filter—Traditional Media*

For the traditional or “legacy” media, we want to permit a wider latitude for speech than for speech on the Internet, counting on gatekeepers to guard against the worst excesses of Internet speech. But as the experience with Limbaugh and Fox New illustrates, not all gatekeepers are reliable: we need a reinstatement of something like the Fairness Doctrine, but with some modifications. Recall that the original Fairness Doctrine had two main requirements:

1. That every licensee devote a reasonable portion of broadcast time to the discussion and consideration of controversial issues of public importance; and
2. That in doing so, [the broadcaster must be] fair—that is, [the broadcaster] must affirmatively endeavor to make . . . facilities available for the expression of contrasting viewpoints held by responsible elements with respect to the controversial issues presented.<sup>139</sup>

The first requirement should be scrapped: if broadcasters want to spend all their time on “reality” shows and Oprah imitators, that would be far less pernicious than giving airtime to Sean Hannity, Rush Limbaugh, and Michael Savage. Even without the first requirement of the old Fairness Doctrine, the public will demand

137. See Ashley Johnson & Daniel Castro, *How Other Countries Have Dealt With Intermediary Liability*, INFO. TECH. & INNOVATION FOUND. (Feb. 22, 2021), <https://itif.org/publications/2021/02/22/how-other-countries-have-dealt-intermediary-liability> [<https://perma.cc/GKA2-26Y5>]. Australia, for example, is proposing legislation that would require social-media companies to have take-down provisions for defamatory content. See, e.g., *Australia to Introduce New Laws to Force Media Platforms to Unmask Online Trolls*, REUTERS (Nov. 28, 2021, 4:47 AM) <https://www.reuters.com/world/asia-pacific/australia-introduce-new-laws-force-media-platforms-unmask-online-trolls-2021-11-28/> [<https://perma.cc/QK7J-5SWZ>].

138. See Leiter, *supra* note 107, at 156. The arguments against this repeal seem to me weak. Professor Citron—commenting on the Autoadmit “chat” board, a notorious “cyber-cesspool” (she adopts my term) of racist and misogynistic abuse that I made deservedly infamous, *cf. id.* at 157—observes that, “Many used the site for its stated purpose: to discuss colleges and graduate schools.” CITRON, *supra* note 135, at 178. Some did, of course, but so what? Lots of tortious and criminal conduct have some positive benefits as well (think of how safe Bensonhurst was when the Mafia boss John Gotti lived there!). It is hard to see how that could justify the kinds of tortious wrongdoing (and hate speech) that flourished on Autoadmit.

139. RUANE, *supra* note 22, at 2 (citing Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10,416, 10,426 (July 25, 1964)).

information about political, social, and economic issues of the moment, and some traditional media will provide this information. But to avoid the problems of the old “Fairness” Doctrine, and to ensure buy-in from the existing political establishment, we should rewrite the second requirement as follows:

Broadcasters who devote time to controversial issues of public importance (including, but not limited to, questions of economic and social policy, foreign affairs, and candidates for public office) must ensure that representatives of the two major political parties in the United States have equal opportunity to present their views on these issues.

This requirement would throw “off the air” Sean Hannity and Rachel Maddow, although I do not mean to suggest a complete equivalence between them.<sup>140</sup> Since the gravest threat to epistemic authority (as well as democracy) in the U.S. comes from the political right, and since any restoration of the Fairness Doctrine must be “bipartisan” to be enacted, we should welcome the elimination of the “unfair” broadcasters on both ends of the (narrow) political spectrum in our benighted country.<sup>141</sup> Of course, it may be naïve to think there could be a bipartisan consensus about this, given the current political winds in the U.S. (and the fact that the Republican Party seems to have been the main beneficiary of the demise of the Fairness Doctrine). If so, then restoring the Fairness Doctrine is the least of our problems, but I make this proposal in an optimistic spirit.

### *C. Can We Trust the Government to Filter Correctly?*

The simple answer to the question whether we can trust the government to make sound filtering decisions is simple: no, of course not.<sup>142</sup> If we are to live together in complex societies, however, we are forced to nonetheless trust the government continuously: to arm the police and authorize them sometimes to shoot and kill; to set taxation policy; to promote public health; to provide crucial public services (water, sanitation, fire control, etc.); and so on. Most governments, including those in democratic societies, do an uneven job at these tasks. Why should the filtering of the Internet be different? It presumably will not be.

140. A revised “Fairness Doctrine” will also confront the obstacle that *Red Lion* will not insulate it from constitutional challenge (even if the current Court would uphold *Red Lion*), given that cable and the Internet do not have anything like the capacity limitations of the old “airwaves.” This is another dimension along which American First Amendment doctrine would have to change. Other countries, which balance free speech values against other important democratic values, would no doubt find it easier to institute something like a Fairness Doctrine were it necessary.

141. As Richard Stillman points out to me, it might be possible, and desirable, to apply a Fairness Doctrine to those Internet platforms like Facebook and YouTube which use algorithms to direct content to users. This is an interesting idea, which I hope Dr. Stillman will develop in his own work.

142. We cannot trust the private markets either, but that is not the issue here, although skeptics about government tend to be gullible when it comes to actors in the private markets and their capacity to fool, mislead, and cajole.

How big a risk is that? A classic “distrust of government” argument against speech regulation appeals, reasonably, to the fact that all the other failures of government can be effectively exposed by unfettered free speech, but not if speech itself can be regulated.<sup>143</sup> That is not, however, what is at issue: the most speech-invasive proposals here are only to regulate the Internet, the one medium without intermediaries. Freedom of speech outside the Internet, freedom of the press, and freedom of assembly would all remain intact on these proposals: the traditional media would be subject *only* to revised Fairness Doctrine requirements. And we know from long experience that public debate survived even under the old Fairness Doctrine: indeed, it brought about the demise of the Fairness Doctrine and gave rise to the epistemological catastrophe we have been discussing! Given the resulting political disaster in the United States since the demise of the Fairness Doctrine, perhaps it is worth the risk to try to do better? Or perhaps the disaster has progressed so far that we truly cannot trust the government to do even a mediocre job in rectifying the epistemic catastrophe that is the Internet? If so, then we have much more to worry about than yahoos with false beliefs about vaccines and elections.

#### IV. ARE THINGS REALLY WORSE NOW?

It is hard to imagine anyone disagreeing that the Internet has unleashed extraordinary ignorance and malice into the world, but that still leaves two rather important questions unanswered: First, are things worse now than in the pre-Internet era? Second, do the epistemic benefits of the Internet outweigh the costs of the epistemic catastrophes it has wrought? The questions are related: if the epistemic benefits of the Internet outweigh its costs, then that affects the assessment of whether things are worse now in the past. “Empirical research” (i.e., running large bits of data through regressions<sup>144</sup>) probably cannot settle this question, given the sheer number of variables.

As noted at the start,<sup>145</sup> there have, of course, been widespread falsehoods (about fluoridation of the water, for example, or differences in intelligence between races), facilitated by the traditional media, even in the time frame I am considering (roughly, the U.S. since World War II).<sup>146</sup> Despite that, it certainly seems like something has changed in the last couple of decades. This paper is, obviously enough, predicated on a striking empirical correlation. The collapse of the Fairness Doctrine changed the traditional media, and the Internet facilitated

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143. Cf. Leiter, *supra* note 101, at 434–35.

144. What we learn from the regression analyses is open to question. See, e.g., John P.A. Ioannidis, *Why Most Published Research Findings Are False*, 8 PLoS MED. 696 (2005); David Colquhoun, *An Investigation of the False Discovery Rate and the Misinterpretation of P-values*, 1 ROYAL SOC’Y OPEN SCI. 140216 (Nov. 1, 2014).

145. See *supra* note 1.

146. I put to the side here the fact that religions promulgate, with the help of the traditional media, falsehoods as well. Most of these are not harmful, and they also implicate other considerations that warrant their toleration. See generally BRIAN LEITER, *WHY TOLERATE RELIGION?* (2012).

the wide reach of the “crazies” (QAnon being the most infamous case, but not the only example), and, lo and behold, a pathological liar and grifter was elected President, and one of the two viable political parties in the United States lined up behind him. There have been “crazies” in modern America before QAnon and Trump—most obviously, the John Birch Society. Yet the Birch Society was completely marginalized from political power, even renounced by many members of the Republican establishment. Something has changed. The question is what, and why it mattered.

All causation may be nothing more than correlation “of the right kind” (as philosophers like David Hume and J.L. Mackie believed, and as the whole “causal inference” literature presupposes), but we can still ask how the causal mechanism that is correlated with the effect actually works. If one cannot explain the mechanism, the correlation is probably specious. In the case of our topic, it is important that we can identify the mechanism: the Internet helped Trump and QAnon by eliminating gatekeepers, undermining epistemic authority, and facilitating the spread of misinformation. That mechanism—described in the preceding parts of the paper—is real, but hardly decisive about causation because so many other events occurred during the same time, and some of them no doubt involve mechanisms relevant to the effect as well.

The Internet also improved the epistemic situation of many people, if not society as a whole. Many think the Internet has helped the spread of progressive political ideas as much or more than it has helped the reactionary right. It has almost certainly helped repressed sexual minorities access information about their identities and find communities of support. Speaking personally, I think I have been a beneficiary of insights from doctors, biologists, and infectious disease experts (many on Twitter) during the COVID catastrophe of the last two years. The Internet has helped me make plans and take precautions, and without it, I would have had to depend on gatekeepers I do not always trust. No doubt others have their own anecdotes about epistemic gain from the Internet. Perhaps the demise of the Fairness Doctrine and the rise of the Internet have improved the epistemic situation for human beings writ large, appearances notwithstanding. Even so, we may still ask whether restrictions on the Internet—like those proposed above—and the restoration of the Fairness Doctrine would deprive us of the benefits just described. I cannot see how they would. On the principle that we should do what we can to forestall very bad outcomes when the costs of doing so are small, and the measures proposed have some (perhaps small) probability of being effective, then we should act accordingly. That is the assumption underlying the proposals in Section V. If most epistemic benefits of the Internet (and even the traditional media) can survive those changes to legal regulation, what is the problem?

## V. CONCLUSION

Most of what we know about the world depends on epistemic authorities: those we turn to when we want to know what we should believe to be true. In addition, we also depend on meta-epistemic authorities, which help us identify those who



are reliable guides to what is true about the world. The Internet, and the demise of the Fairness Doctrine in the United States, has, at worst, eradicated, and at best, undermined the credibility of both the epistemic and meta-epistemic authorities. I have argued that to counteract the bad effects of these developments, we need significant reforms to the regulation of media, including social media, and changes to First Amendment doctrine. As I have also emphasized, these measures may not be adequate to the fundamental socio-economic pathologies that currently afflict the United States, but perhaps they will help.