

CHEAP SPEECH, FREEDOM OF SPEECH, AND THE WAR AGAINST DISINFORMATION

William P. Marshall*

A central axiom in first amendment jurisprudence is that the remedy for bad speech is more speech.¹ More speech, it is argued, enables truth to prevail over falsity in the marketplace of ideas² and thereby avoids the need (and the risk) of government suppression of purportedly harmful speech. More speech, it is contended, also fosters self-governance, as exposure to a wide range of views enables citizens to make informed democratic decisions.³

Professor Richard Hasen's book *CHEAP SPEECH: HOW DISINFORMATION POISONS OUR CULTURE AND HOW TO CURE IT*⁴ (hereinafter "CHEAP SPEECH") presents a follow-up inquiry to the more speech/bad speech theorem. What happens when more speech becomes the problem and not the solution?⁵ The question is well worth asking. In a world where the new information technologies have burst open the entrance to the marketplace of ideas to anyone with internet access, the assertion that truth will inevitably prevail over falsity seems hopelessly old-fashioned. Rather, as recent events have abundantly

*Kenan Professor of Law, University of North Carolina.

¹ The "more speech" maxim was first formulated by Justice Brandeis who famously wrote in *Whitney v. California*, "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

² *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).

³ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948). The search for truth rational associated with *Abrams* and *Whitney* and the self-governance rationale associated with Meiklejohn are often set forth as two distinct justifications for freedom of speech. See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 1180–83 (6th ed. 2020). But although there may be some variation at the edges, the two theories substantially overlap in recognizing the importance of free speech to a healthy democracy. See Daniel P Tokaji, *Truth, Democracy, and the Limits of Law*, 64 ST. LOUIS U. L.J. 569, 586–87 (2020) (arguing that the truth and self-governance rationales were once "joined at the hip" in the early decisions of Justices Holmes and Brandeis in the *Abrams* and *Whitney* decisions).

⁴ RICHARD P. HASEN, *CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS—AND HOW TO CURE IT* (2022).

⁵ See Philip M. Napoli, *What If Free Speech is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM'NS L.J. 55, 60 (2018) (contending that the more speech/bad speech axiom should be reconsidered in light of technological changes).

demonstrated, the proliferation of so-called ‘cheap speech’⁶ via the new information technologies has inundated the marketplace of ideas with waves of disinformation and vitriol that undermine democratic institutions, facilitate demagoguery, manipulate elections, and provoke violence.⁷ In this new world, free speech, and particularly cheap speech, can be understood as an enemy of democracy rather than its facilitator.

CHEAP SPEECH is an effort to grapple with the challenges posed by this flood of disinformation to democratic governance. Its author, Richard Hasen, is well up to the job. As a leading authority on both election law and first amendment law, he is uniquely positioned to understand the relationship between the two. Moreover, as a political observer and a gifted writer, he is well-skilled in using contemporary events to illustrate his points in a manner that makes his discussion urgent and accessible. For anyone who is interested in understanding the challenges that cheap speech poses to our democracy and/or who is looking for possible solutions to the current crisis, CHEAP SPEECH is worth every penny.

CHEAP SPEECH has three complementary sections. The first demonstrates the dangers cheap speech poses to democracy. Drawing primarily (but not exclusively) from examples from the 2016 and 2020 presidential elections,⁸ Hasen graphically illustrates how dire is the threat posed by cheap speech to the democratic process.⁹ The account is chilling and persuasive.

Second, Hasen suggests possible legal reforms that might serve to address some of the concerns raised by cheap speech. These include measures as diverse as improving election administration, requiring more disclosure, taking measures to limit foreign interference with elections, limiting platform power, outlawing certain kinds of verifiable false statements

⁶ Hasen defines cheap speech as speech that is “both inexpensive to produce and often of markedly low social value.” HASEN, *supra* note 4, at 21. For a more optimistic (and early) take on the potential effects of cheap speech, see Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

⁷ For a general account of the many concerns raised by internet speech, see Dawn C. Nunziato, *The Marketplace of Ideas Online*, 94 NOTRE DAME L. REV. 1527, 1528–29 (2019).

⁸ Hasen also presents several examples of disinformation disseminated by Democrats in the 2017 special Senate election between Roy Moore and Doug Jones. HASEN, *supra* note 4, at 53.

⁹ *Id.* at 30–76.

about voting requirements and procedures, and banning data driven micro-targeting.¹⁰ Many of these ideas are not novel taken piece by piece; but Hasen is to be applauded for his understanding of the interrelationships between the multi-varied ways cheap speech destabilizes democratic governance and the need to construct comprehensive solutions. He is also to be congratulated for candidly grappling with the first amendment objections that might be raised in response to his particular proposals.

Third, recognizing that law reforms alone can only accomplish so much, Hasen proposes non-legal initiatives that might be undertaken to combat the problems created by cheap speech. These include pressuring platforms to take a greater role in combatting disinformation, buttressing journalism and especially local journalism, strengthening intermediary institutions such as courts, rebuilding professional norms among attorneys and elected officials, and inculcating the values of truth, science, and the rule of law.¹¹ As with his proposals for legal reforms, Hasen's suggestions for non-legal initiatives are thoughtful and wide-ranging.

Hasen's legal and non-legal proposals all deserve serious consideration. The one I will focus upon here, however, is the inculcation of truth. I do so for three reasons. First, inculcating the value of truth is the most important of Hasen's offerings. Democracy depends on truth.¹² Second, inculcating the value of truth is the building block upon which Hasen's other proposals rest. If the public does not value truth, then measures to preserve it and protect it from disinformation would prove futile or ineffective. Third, and unfortunately, of all of Hasen's proposals, inculcating the value of truth may be the most challenging to achieve.

Consider the story that Hasen relates about the intentional fabrication that Newsmax propagated about the 2020 election:

¹⁰ *Id.* at 77–133.

¹¹ *Id.* at 134–165.

¹² As Daniel Tokaji states, “Democracy cannot function without a common belief in truth.” *See Tokaji supra* note 3, at 569 (citing TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 65–71 (2017)).

Christopher Ruddy, a Trump friend and the head of Newsmax, gave an extraordinary interview in the midst of the 2020 election controversy to Ben Smith, a media columnist for the New York Times, in which Ruddy admitted Trump had lost the election but claimed Newsmax was just feeding audience demand. “In this day and age, people want something that tends to affirm their views and opinions,” he told Smith.¹³

Hasen uses this story primarily as an example of the cynical use of disinformation for financial profit but there is another lesson to be learned here. People are not always searching for truth when they ‘shop’ the marketplace of ideas.¹⁴ In fact, truth may be further down the shopping list than first amendment theory would want us to believe. Let me offer two examples.

The first item that seemingly supersedes the demand for truth in the marketplace of ideas is evident in the Ruddy story itself. As Ruddy’s statement suggests and Hasen concludes, “[s]ome people want[] affirmance, not truth.”¹⁵ And unfortunately, however, this desire for affirmation rather than truth is not limited to the viewers of Newsmax. Instead, it reflects a so-called “post-truth” world in which, as described by commentators, evidence does not matter, people believe what they want to believe, and there is no normative distinction between truth and lies.¹⁶

This quest for affirmation,¹⁷ moreover, is not, as some might suspect, merely a new development brought on by a recent Presidency. Rather, there is considerable evidence that suggests the search for affirmation is an inextricable part of the human

¹³ HASEN, *supra* note 4, at 135.

¹⁴ Hasen, of course, well-recognizes this point. See Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a “Post-Truth” World*, 64 ST. LOUIS U. L.J. 535, 537–38 (2020) (“Emotions often drive views more than evidence.”).

¹⁵ HASEN, *supra* note 4, at 136.

¹⁶ See, e.g., LEE MCINTYRE, *POST-TRUTH* 5 (2018); Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. 1351, 1357–59 (2019) (noting that truth matters less than it used to and is secondary to emotion, intuition and belief in shaping public opinion).

¹⁷ The search for affirmation of pre-existing beliefs is sometimes referred to as confirmation bias. See Jonathan Maloney, *Confirmation Bias & Motivated Reasoning*, INTELLIGENT SPECULATION (April 16, 2019), <https://www.intelligentspeculation.com/blog/confirmation-bias-amp-motivated-reasoning>.

condition and that it more powerfully influences how individuals process information than does exposure to what is actually true. The point is made in a recent Atlantic Magazine article by Julie Beck aptly titled *This Article Won't Change Your Mind: The Facts on Why Facts Alone Can't Fight False Beliefs*.¹⁸ As that article explains, adherence to beliefs may depend more on how those beliefs interact with our self-identity and/or our relationships with our communities than upon the 'truth' of those beliefs.¹⁹

The second item on the shopping list that appears to generate greater demand in the marketplace of ideas than does the search for truth is the pursuit of entertainment. Over thirty-five years ago, Neil Postman in his landmark book, *AMUSING OURSELVES TO DEATH*, warned that public discourse had become increasingly trivialized through the dominance of television.²⁰ Snippets of information presented in a video format, he argued, were inherently hostile to serious discourse and had undermined our ability to work through complex issues and ideas. As Postman explained, television "speaks in only one persistent voice—the voice of entertainment."²¹

To be sure, Postman laid the blame for the demeaning of public discourse on the nature of the television medium.²² According to Postman, there could be no such thing as serious television because television is inherently trivializing and

¹⁸ Julie Beck, *This Article Won't Change Your Mind: The Facts on Why Facts Alone Can't Fight False Beliefs*, THE ATLANTIC (March 13, 2017), <https://www.theatlantic.com/science/archive/2017/03/this-article-wont-change-your-mind/519093/>; see also Elizabeth Kolbert, *Why Facts Don't Change Our Minds: New Discoveries About the Human Mind Show the Limitations of Reason*, THE NEW YORKER (February 27, 2017), <https://www.newyorker.com/magazine/2017/02/27/why-facts-dont-change-our-minds>.

¹⁹ Beck, *supra* note 18. Indeed, some social scientists suggest that cognitive bias has been effectively pre-programmed in us through evolution. Quoting the anthropologist Pascal Boyer, Beck writes that "[h]aving social support, from an evolutionary standpoint, is far more important than knowing the truth about some facts that do not directly impinge on your life." *Id.*; see also HUGO MERCIER & DAN SPERBER, *THE ENIGMA OF REASON*, 176–86 (2017).

²⁰ NEIL POSTMAN, *AMUSING OURSELVES TO DEATH* 92 (1985); see also David M. Skover & Ronald K. L. Collins, *The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087, 1088 (1990) (contending that first amendment understanding should reflect that entertainment has become the "the paradigm for most public discourse" and overshadows serious dialogue).

²¹ POSTMAN, *supra* note 20, at 92.

²² In analyzing the relationship between medium and message, Postman's work follows from previous writing of Marshall McLuhan. See MARSHALL MCLUHAN, *UNDERSTANDING MEDIA* 7–21 (1994).

incoherent.²³ Yet Postman's critique also foreshadowed the internet, which had yet to arrive. After all, snippets of information consumed for entertainment is the virtual definition of internet communication. Indeed, that we look to the marketplace of ideas for amusement rather than truth may even explain the phenomenon of why lies tend to spread faster than facts over the internet.²⁴ Lies are more entertaining.²⁵

This all leads to a troubling conclusion. If the search for truth is only of secondary or tertiary demand in the marketplace of ideas, then efforts that seek to curb or call out disinformation will likely not have the desired effects. The marketplace of ideas metaphor presumes that people are in the market for truth. But if people are seeking affirmation and/or entertainment over truth, then reforms designed to correct the market for truth will have missed the point. Truth is not what the marketplace consumers want most.

This is not to deny that the various measures Hasen proposes would have beneficial effects. Clearly they would. Some persons (or perhaps most persons at some times) actually do search for truth in the marketplace of ideas and efforts to combat the spread of false information would assist their enterprise. Further, because the plethora of false information online "exacerbates the natural human tendency toward confirmation bias,"²⁶ any step taken to combat the spread of false information might constrain that tendency, even if it cannot wholly overcome it.

The most significant takeaway from CHEAP SPEECH, however, may be less in its specific proposals than in its underlying imperative. Truth must be protected for the sake of democracy – even if to do so faces a steep uphill climb. It is a message that needs to be constantly repeated and reinforced as

²³ POSTMAN, *supra* note 20, at 92–93.

²⁴ See, e.g., Nunziato *supra* note 7, at 1529 (noting that during the 2016 election cycle "fake election news stories on Facebook generated more engagements than the top stories from major news outlets.").

²⁵ Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCI. 1146, 1149 (2018) (explaining that lies may spread faster than truth because they are more novel), cited in Cass R. Sunstein, *Falsehoods and the First Amendment*, 33 HARV. J.L. & TECH. 387, 390 (2020).

²⁶ Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & POL'Y 57, 68–69 (2017).

we move through a post-truth world.²⁷ Otherwise, as Dan Tokaji warns, we will effectively “concede democracy to its adversaries.”²⁸ Hasen is to be commended for offering us a full arsenal to continue the fight.

I would only add one final suggestion to Hasen’s agenda. As Hasen points out, courts serve an important truth-telling function in society;²⁹ and he therefore calls upon them to continue their role in preventing the uncontrolled spread of disinformation.³⁰ I completely agree with this sentiment; but I would also submit that there is one court in particular that should take up Hasen’s directive – the United States Supreme Court. It is time for the Court to stop pretending that “[t]he remedy for speech that is false is speech that is true.”³¹ Certainly there may be good reasons to protect false speech, at least in some circumstances;³² but claiming that falsity should be protected because truth will eventually triumph in the marketplace of ideas is not one of them. Given its disconnect from modern reality,³³ that assertion should be called out for what it actually is -- cheap speech.

²⁷ See *supra* note 4 and authorities cited therein.

²⁸ Tokaji, *supra* note 3, at 593; see also Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 442 (2019) (arguing that capitulation to post-truth would only worsen the crisis).

²⁹ HASEN, *supra* note 4, at 157.

³⁰ *Id.* at 158.

³¹ *United States v. Alvarez*, 567 U.S. 709, 727 (2012).

³² One reason for protecting false speech, for example, is to avoid the danger of empowering the government to decide what is true. See *id.* at 723 (plurality opinion) (raising the specter of something akin to an Orwellian Ministry of Truth if the government were allowed to adjudicate falsity) (citing GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (Centennial ed. 2003) (1949)).

³³ See Napoli, *supra* note 5, at 60. It is noteworthy, however, that Justice Gorsuch has signaled that he might be ready to reappraise first amendment doctrine in light of technological changes. See *Berisha v. Lawson*, 141 S. Ct. 2424, 2425 (2021) (Gorsuch, J., dissenting in denial of certiorari.)