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**The new populism and fake news on the Internet: how populism along with  
Internet new media is transforming the Fourth Estate**

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# **The new populism and fake news on the Internet: how populism along with Internet new media is transforming the Fourth Estate**

Matteo Monti

## **Abstract**

Since the 20<sup>th</sup> century, the press has been considered “the bible of democracy” and the “watchdog of democracy”: This role of the press requires respect for the truth. The aim of this paper is to understand how the populist movements have undermined that pillar of democracy through the use of fake news as a political weapon, and whether and how constitutional democracies can react to this phenomenon. In the first part, the paper will explore the phenomenon of the spread of fake news on the Internet and its connection with populist movements, analysing the Italian scenario and the American one. In the second part of the paper, the problem of the transformation of democratic theory in the field of public discourse and of the press as the watchdog of democracy will be analysed, looking at the means that have allowed the populist movements to lead this transformation. Some technological solutions and paths for the regulation of the new Internet media are suggested.

## **Key - words**

Fake News; Populism; New Internet Media; Fourth Estate; Democratic theory; Freedom of Information; Freedom of expression; Social networks; Facebook; Search Engines; Google; Algorithms.

## **The new populism and fake news on the Internet: how populism along with Internet new media is transforming the Fourth Estate**

Matteo Monti\*

### **Introduction: the press, the truth and the new Internet media**

Twentieth century democratic theory considers the press to be an important pillar of democracy. In mature democracies,<sup>1</sup> the role that media and journalists have assumed is that of the watchdog of democracy, granting “greater transparency and accountability in governance” and contributing to the public discourse by “providing a civic forum for multiple voices in public debate, and highlighting problems to inform the policy agenda”.<sup>2</sup> This is the reason why since the 20<sup>th</sup> century, the press has been considered “the bible of democracy, the book out of which a people determines its conduct”.<sup>3</sup> This role of the press requires respect for the truth (i.e. narrating facts/events that actually happened), as claimed by the International Federation of Journalists’ (IFJ) Declaration of Principles on the Conduct of Journalists,<sup>4</sup> and – above all – it prohibits the creation of news: i.e. inventing and describing facts/events that never happened.<sup>5</sup> Ultimately, it is possible to recap all these principles using the case law of the European Court of Human Rights, which “has emphasised

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<sup>1</sup> Wording provided by Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-six Countries* (New Haven: Yale University Press, 1999).

<sup>2</sup> Pippa Norris, *Driving Democracy: Do Power-Sharing Institutions Work?* (Cambridge: Cambridge University Press, 2008), 186-187.

<sup>3</sup> Walter Lippmann, *Liberty and the news* (New York: Harcourt, Brace and Howe, 1920), 47.

<sup>4</sup> “Respect for truth and for the right of the public to truth is the first duty of the journalist”. IFJ Declaration of Principles on the Conduct of Journalists.

<sup>5</sup> This is a very simple concept and a minimalistic one (Cf. Claire Wardle, ‘Fake news: it’s complicated’, First Draft, (2017), available at: <https://medium.com/1st-draft/fake-news-its-complicated-d0f773766c79>), but methodologically speaking, it seems to be the only acceptable definition of fake news, which can accommodate the most modern theory of the narration of facts. Cf. *ex pluribus* Michel Foucault, *L'ordre du discours* (Paris: Gallimard, 1970).

the «essential function the press fulfils in a democratic society» notably its «public watchdog» role. At the same time, the Strasbourg Court has noted that «the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide ‘reliable and precise’ information in accordance with the ethics of journalism»<sup>6</sup>.

This paradigm of the press and of journalism “was largely a 20th century phenomenon. In prior periods, journalism was a branch of activism”.<sup>7</sup>

The different constitutional systems have chosen to guarantee this paradigm in different ways. The European systems<sup>8</sup> – probably because of the more recent character of their constitutions – have enshrined in their constitutional documents and laws the right to be informed<sup>9</sup> or the need to respect the truth<sup>10</sup>. On the contrary, older constitutional systems, such as that of the United States of America, formulated this idea without the use of legal tools.<sup>11</sup>

The aim of this paper is to understand how the populist movements have undermined that pillar of democracy through the use of fake news as a political weapon, and whether and how constitutional democracies can react to this phenomenon. In doing so, two legal systems were analysed: the United States of America and Italy. Both legal systems, given the differences in their forms of government and in their party systems, must deal with the problem of fake news – especially during electoral campaigns – and its use by populist movements: Donald Trump, on the one hand, and the

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<sup>6</sup> High level Group on fake news and online disinformation, *A multi-dimensional approach to disinformation. Report of the independent High Level Group on fake news and online disinformation*, 2018, available at <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation>, 18.

<sup>7</sup> Michael C. Dorf and Sidney Tarrow, ‘Stings and Scams: “Fake News”, the First Amendment, and the New Activist Journalism’, *Cornell Legal Studies Research Paper No. 17-02* (2017): 8. “When we look back to the 18th century, the idea of journalists as objective reporters looks like a brief 20th century interlude in a much longer story of the inseparability of journalism, activism, and social movements”. Dorf and Tarrow, 22. Think about the press during the French revolution or the so-called “yellow journalism” in the US.

<sup>8</sup> *Ex pluribus* “Whilst the First Amendment addresses mainly the active dimension to the right to express freely one’s own thoughts, Article 10 of the European Convention (but also Article 11 of the Charter of Fundamental Rights of the European Union) emphasises the passive dimension to the right to be pluralistically informed. In this respect, it could be argued that fake news is not constitutionally covered by the European vision view of the US Supreme Court”. Oreste Pollicino, ‘Fake News, Internet and Metaphors (to be handled carefully)’, *MediaLaws Review*, no. 1 (2017): 25.

<sup>9</sup> See article 5 of the German Constitution. Regarding the Italian legal system in several occasions the Constitutional Court claimed that the freedom of information is ‘co-essential’ to the system of freedoms guaranteed by the Constitution and for democracy, and it is composed by an active feature (freedom to inform) and a passive one (right to be informed). *Ex pluribus* Constitutional Court, judgment no. 348/1990 and no. 1/1981.

<sup>10</sup> See *ex pluribus* the art. 20 of the Spanish Constitution that explicitly states: “the right to freely communicate or receive *truthful* information by any means of dissemination whatsoever” (italic mine).

<sup>11</sup> The so-called objective journalism – wherein objective does not mean impartial or absence of bias (Cf. American Press Institute, *The lost meaning of ‘objectivity’*, available at <https://www.americanpressinstitute.org/journalism-essentials/bias-objectivity/lost-meaning-objectivity/>) – was born in the US with Adolph S. Ochs at the end of the 20th century and it became dominant model during the 20th century. See David T.Z. Mindich, *Just the Facts: How Objectivity Came to Define American Journalism*, (New York: New York University Press, 1998) and cf. W. Lance Bennett, *News: the politics of illusion* (New York: Longman, 2016), 161.

Five Star Movement (Movimento Cinque Stelle, *in Italian*),<sup>12</sup> on the other. The working definition of populism<sup>13</sup> used here is based on anti-establishment narratives, hostility against traditional media and the type of political communication practiced. Both Trump's movement and the Five Star Movement can be framed in this category.

As will be discussed, the use of fake news as political speech was and is possible thanks to the huge change that has occurred in the media landscape<sup>14</sup> linked to the advent of the new Internet media: "Our news ecosystem has changed more dramatically in the past five years than perhaps at any time in the past five hundred".<sup>15</sup> "As the role of information gatekeeper starts to pass from journalists at legacy news organizations to engineers, coders, and designers, the very nature of the Fourth Estate and the news it produces is changing. While their aspirations may be sweeping, platform executives have not indicated a desire to be a Fourth Estate".<sup>16</sup>

From a methodological point of view, the choice of these two legal systems is correlated with two different comparative logics.

On one hand, these two legal systems could be considered as prototype cases,<sup>17</sup> keeping in mind that they are the only western democratic countries in which populist movements have won the elections<sup>18</sup> and considering also that neither country frames the new Internet media as publishers or press.<sup>19</sup> On the other hand, they can be considered as legal systems pertinent to the "most different case logic",<sup>20</sup> enshrining two very different approaches concerning the freedom of information and

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<sup>12</sup> For a very interesting analysis of the Five Star Movement model see: Andrea De Petris and Thomas Poguntke, *Anti-Party Parties in Germany and Italy. Protest Movements and Parliamentary Democracy* (Roma: Luiss University Press, 2015) and Marco Bassini, 'The Rise of Populism and the Five Star Movement Model: the Italian Case Study' (2017), available at [http://www.academia.edu/36052266/rise\\_of\\_populism\\_and\\_the\\_five\\_star\\_movement\\_model\\_an\\_italian\\_case\\_study](http://www.academia.edu/36052266/rise_of_populism_and_the_five_star_movement_model_an_italian_case_study). Cf. Fabio Bordignon and Luigi Ceccarini, 'Five stars and a cricket. Beppe Grillo shakes Italian politics', *South European Society and Politics* 18, no. 4 (2013).

<sup>13</sup> Cf. Jan-Werner Müller, *What is Populism?* (Philadelphia: University of Pennsylvania Press, 2016); Ernesto Laclau, *On Populist Reason*, (London and New York: Verso, 2005); Yves Mény and Yves Surel, 'The constitutive ambiguity of populism', in *Democracy and the populist challenges*, eds. Yves Mény and Yves Surel (London: Palgrave, 2002); Marco Tarchi, 'Italy: the promised land of populism?', *Contemporary Italian Politics* 7, no. 3 (2015).

<sup>14</sup> "[T]he communication environment that has been developing with the expansion of the Internet and of digital technology has impressively changed the rules of the game and has made available to political actors an unprecedented abundance of communication tools: new platforms, new outlets, social media with potentially huge publics". Gianpietro Mazzoleni and Roberta Bracciale, 'Socially mediated populism: the communicative strategies of political leaders on Facebook', *Palgrave Communications* 4, no. 50 (2018): 3.

<sup>15</sup> Emily Bell, 'Facebook is eating the world', *Columbia Journalism Review* (2016).

<sup>16</sup> Erin C. Carroll, 'Making News: Balancing Newsworthiness and Privacy in the Age of Algorithms', *Georgetown Law Faculty Publications and Other Works* (2017): 2-3.

<sup>17</sup> Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014), 256 and ff.

<sup>18</sup> This is true also if the Five Star Movement is not the first coalition, but it is largely the first party of Italy, which has received more than 30 per cent of the vote.

<sup>19</sup> In Italy, this is made clear by the exclusion from the SIC (Sistema integrato delle comunicazioni - the Integrated System of Communications), which is managed by the AgCom (Authority for Communications Guarantees), while in the US, the same thing is required by the provisions of the Communication Decency Act 47 U.S.C. § 230.

<sup>20</sup> R. Hirschl, 253 and ff.

the problem of fake news, although they share the same ideas of the press as the watchdog of democracy and truth as the foundation of journalism. Indeed, in analysing the two legal systems subject to this analysis in more depth, it must be stressed that although in the Italian constitutional context, the Constitutional Court has claimed – in obiter dictum – that the press must be in compliance with the respect for truth<sup>21</sup> in order to consider its “news” protected by art. 21 of the Constitution, the US Supreme Court has considered false information as an expression protected by the First Amendment.<sup>22</sup> Contrary to the Italian (and European) paradigm, the US Supreme Court case law has not distinguished the freedom of expression from the freedom of information.<sup>23</sup> This has caused difficulty in setting particular limits on the free press regarding the spread of fake news. In a way, every type of speech/discourse in the US is a sort of political speech, and thus – as in Italy – it cannot be banned or limited merely based on its content.

This pattern is important in understanding the space of action in the two legal systems and in elaborating solutions that are “affordable” and consistent with the two different ideas of freedom of expression. Indeed, if false news created with actual malice is not protected under article 21 of the Italian Constitution,<sup>24</sup> the same cannot be said for the US system.<sup>25</sup> This is also quite important in understanding the degree to which liberal democracies can choose different paths – just as they do

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<sup>21</sup> Following the declarations of the World Congress of the International Federation of Journalists of Bordeaux (May 1954), the Constitutional Court claimed that “the right to obtain, to publish and to submit news to the public opinion must be compliant with the (substantial) truth of the facts” (translation mine). Constitutional Court, judgment no. 16/1981.

<sup>22</sup> “Even when considering some instances of defamation and fraud (...) falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood”. *United States v. Alvarez*, 132 S. Ct. 2537, 2542–43 (2012). An interesting case about fake news was the case of Oprah’s show and “Mad Cow Disease”. In that show, Oprah Winfrey edited out some important issues and interviews in order to show how the so-called “Mad Cow Disease” was a problem not only in Britain but also in the United States. It was not a totally false statement, but a manipulation created by the unscrupulous editing of the broadcast and with knowledge of the falsity. It was marginally a way to create fake news using some experts’ distorted opinions. The Court seems not to have held the defendant liable only because “[s]o long as the factual underpinnings remained accurate, as they did here, the editing did not give rise to an inference that knowingly false information was being disseminated” *Texas Beef Group v. Winfrey*, 201 F.3d 680, 682–84 (5th Cir. 2000). Despite the discharge, this argument shows that in the United States the problem is also sometimes perceived by the courts. It should be underlined that some scholars have tried to argue the lack of protection of fake news: Cass R. Sunstein, *On Rumors: How Falsehoods Spread, Why We Believe Them, and What Can Be Done* (Princeton: Princeton University Press, 2014), 108.

<sup>23</sup> Sonja R. West, ‘Press Exceptionalism’, *Harv. L. Rev.* 127 (2014): 2439.

<sup>24</sup> Italian constitutional scholars are always unanimous in considering fake news disseminated with actual malice of its falsity as an unprotected expression: see Paolo Barile, *Il soggetto privato nella Costituzione Italiana* (Padova: Cedam, 1953), 121; Carlo Esposito, *La libertà di manifestazione del pensiero nell’ordinamento italiano* (Milano: Giuffrè, 1958), 37; Alessandro Pace, *Commentario della Costituzione. Art. 21* (Bologna-Roma: Zanichelli, 2006), 89; Sergio Fois, *Principi costituzionali e libera manifestazione del pensiero* (Milano: Giuffrè, 1957), 210-211.

<sup>25</sup> In the US, instead, the dominant idea is that the “marketplace of ideas” is always able to bring the truth to light and that an excessively strict form of liability, even in a civil matter, could have a dangerous chilling effect: “dissemination of information, even if false, is protected for fear of harassment of those expressing unpopular viewpoints. Taken together, these two principles make it relatively difficult for activist journalists to uncover the truth about the targets of their dissatisfaction and relatively easy for them to disseminate falsehoods about those targets”. Dorf and Tarrow, 18. The attempt made by some scholar to censor seem destined to fail (Sunstein, *On Rumors*, 108).

regarding the matter of hate speech<sup>26</sup> – and in elaborating different ideas of what constitutes free speech, or better, the freedom of information.

From this starting point, in the first part, the paper will explore the phenomenon of the spread of fake news on the Internet and its connection with populist movements. In that part, after a brief introduction, the Italian and the American scenarios will be examined.

In the second part of the paper, the problem of the transformation of democratic theory in the field of public discourse and of the press as the watchdog of democracy will be analysed, looking at the means that have allowed the populist movements to lead this transformation. Some technological solutions and paths for the regulation of the new Internet media are suggested to try to solve or contain the problem.

In the Final Remarks, some critical considerations are proposed, and the limits of the legal approach are highlighted.

### **1. Populism and fake news: fake news as a new logic of political communication?**

The Internet has caused radical changes in the media landscape. Today, news circulates not only in the traditional media, but also on the Internet, and this has had a big impact on the news system and the public discourse: Internet media have become very important distributors of the news.<sup>27</sup> This is a very positive phenomenon, because it allows us to know some news that has been neglected by the traditional media or news that concerns distant countries. Everyone “becomes an active stakeholder in the information chain by not only selecting information, but also, in many cases, by producing it”.<sup>28</sup> However, there is a dark side to this new media system: the spread of fake news. By bypassing the traditional media, traditional tools of control over the truth of information have disappeared.<sup>29</sup> In the Western World, editors and professional journalists have traditionally had a controlling position over the public distribution of news. Accordingly, they could check its trustworthiness and ensure the truthfulness of the facts about which they were going to write. Today,

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<sup>26</sup> Cf. E.Stradella, ‘Hate speech in the background of the security dilemma’, *German Law Journal* 9, no. 1 (2008).

<sup>27</sup> For Italy see XIV Rapporto Censis-Ucsi (2017): 60,6% of Italians watch news broadcasts, and 22,4% listen to radio bulletins, 21,8% of Italians also use search engines to find information and 35,0% are in the habit of using Facebook as well; For US see Kristen Bialik and Katerina Eva Matsa, *Key trends in social and digital news media*, Pew Research Center (2017): 43% of Americans get news online, 50% watch news broadcasts, 25% listen to radio bulletins and 18% are in the habit of reading newspaper.

<sup>28</sup> Report of the Committee on Culture, Science, Education and Media, *Online media and journalism: challenges and accountability*, Doc. 14228, Parliamentary Assembly of the Council of Europe, 3. Cf. Oren Bracha and Frank Pasquale, ‘Federal Search Commission: Fairness, Access, and Accountability in the Law of Search’, *Cornell L. Rev.* 93 (2008): 1152 and ff.

<sup>29</sup> Cf. Luciano Floridi, ‘Brave.Net.World: the Internet as a disinformation superhighway?’, *The Electronic Library* 14, no. 6 (1996).

the new media, such as the search engines and the social networks, are not doing this verification. The lack of control over the truthfulness of the facts leads to the spread of fake news: Moreover, many websites diffuse mostly fake news with knowledge of its falsity.

There are two types of fake news: Some individuals create it in order to make money.<sup>30</sup> Other “fake news providers seek to advance candidates they favor”<sup>31</sup> (and a combination of the two aims is possible). In this paper, the second one is analysed, i.e. the political use of fake news by populist actors.

This paper, following Judis’s theory about the impossibility of defining what a populist movement is<sup>32</sup> from a legal point of view, will address the issue of *mediated populism*,<sup>33</sup> that is, how populist movements have changed political communications<sup>34</sup> and could perhaps be enriched by the use of fake news.

In this way, starting from the very minimalistic and simplistic definition given in the introduction,

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<sup>30</sup> Consider the production of fake news made by teenagers in Macedonia during the American political campaign (Samanth Subramanian, ‘Inside the Macedonian Fake-News Complex’, *Wired* (2017), available at: <https://www.wired.com/2017/02/veles-macedonia-fake-news/>) or the American producer of fake news Paul Horner, who was not a Trump’s supporter, but produced pro-Trump fake news (Caitlin Dewey, ‘Facebook Fake-News Writer: ‘I Think Donald Trump is in the WhiteHouse because of Me’’, *Washington Post* (2016), available at <https://www.washingtonpost.com/news/the-intersect/wp/2016/11/17/facebook-fake-news-writer-i-think-donald-trump-is-in-the-white-house-because-of-me/>). See Andrew Higgins, Mike McIntire, and Gabriel J.X. Dance, ‘Inside a Fake News Sausage Factory: “This Is All About Income”’, *New York Times* (2016), available at <https://www.nytimes.com/2016/11/25/world/europe/fake-news-donald-trump-hillary-clinton-georgia.html>.

In the Italian scenario, consider Francesco Costa’s report, which explained that fake news enables its creators to earn thousands of Euros per day (Francesco Costa, ‘Questa notizia è clamorosa (ma falsa): è la bufala bellezza’, *IlSole24Ore* (2015), available at <http://www.ilssole24ore.com/art/cultura/2015-04-25/e-bufala-bellezza-183754.shtml?uuid=AB2eOxVD>).

<sup>31</sup> Hunt Allcott and Matthew Gentzkow, ‘Social Media and Fake News in the 2016 Election’, *Journal of Economic Perspectives* 31, no. 2 (2017): 217.

<sup>32</sup> “there is no set of features that exclusively defines movements, parties, and people that are called populist” (John B. Judis, *The Populist Explosion* (New York: Columbia Global Reports, 2016)). There is a “constitutive ambiguity” in the word populism (Yves Mény and Yves Surel; cf. Cesare Pinelli, ‘The populist challenge to constitutional democracy’, *European Constitutional Law Review* 7, no. 1 (2011)). Indeed, the purpose of populism could be very different: Populism and also mediated populism “can be easily combined with very different (thin and full) other ideologies, including communism, ecologism, nationalism or socialism” (Ben Stanley, ‘The Thin Ideology of Populism’, *Journal of Political Ideologies* 13, no. 1 (2008)). Cf. Cas Mudde, ‘The Populist Zeitgeist’, *Government & Opposition* 39, no.3 (2004).

In the Italian scenario, consider that Revelli claims that there are three main examples of populism: Silvio Berlusconi’s ‘video-populism,’ Beppe Grillo’s ‘cyberpopulism’ and Matteo Renzi’s populism ‘from the top.’ (Marco Revelli, *Populismo 2.0* (Turin: Einaudi, 2017).

<sup>33</sup> “‘Mediated populism’ means the outcome of the close connection between media-originated dynamics and the rise of populist sentiments, and eventually of populist movements. Comparative research points out the existence of a sort of complicity between the news media and political populism. The increasing commercialization of the news industry has further intensified the media’s natural search for mass audiences, and their craving for → sensationalism, scandal, and conflict (→ Commercialization of the Media). This inclination of the media has been also identified as ‘media populism.’ In various countries the media – “by engaging with people’s moods, catering to their entertainment needs and harping on negative stories that might spread social and political malaise” (Stewart et al. 2003) – have objectively created widespread sentiments and opinion climates on controversial issues like immigration, unemployment, and crime that have been promptly exploited by populist movements”. Gianpietro Mazzoleni, ‘Mediated populism’, *The International Encyclopedia of Communication* (Hoboken: Blackwell Publishing, 2008).

<sup>34</sup> Jan Jagers and Stefaan Walgrave, ‘Populism as political communication style: An empirical study of political parties’ discourse in Belgium’, *Eur J Political Res* 46, no. 3 (2007).

the paper does not discuss the nature of populism, but only the consequences of the use of fake news as one of the “new logics of political communication”.<sup>35</sup>

Indeed, it should be stressed that the use of fake news by populist movements does not mean their political ideas are wrongful or bad –in fact, they often consider requests ignored by other parties.<sup>36</sup> It merely means that they are using a tool (the news) that has been built into the democratic forum to perform different tasks, i.e. the accountability of the government and the narration of facts and events that can be of interest to the public debate. Indeed, in the past, but not only then, populist movements such as, according to some scholars,<sup>37</sup> the Italian Communist party or Jeremy Corbyn’s Labour Party, have confronted the hostility of the media without the use of fake news in the same way as some “right-wing populism”.<sup>38</sup> Populism could be a communicative strategy to address the hostility of the media system,<sup>39</sup> but the practice of fake news as a political weapon has had a deep impact on the press, the public discourse and the democratic system.

Before continuing, it is necessary to make a clarification. It would obviously be naïve to think that, in the past, journalism has been the *ancilla veritatis* (the handmaiden of truth) or the guardian of objective truth. All news can be reported in different ways, and every fact can be described differently in order to support a specific ideological and political agenda (just think of the subjectivity exercised in the selection of facts or parts of the facts). The method of reporting the news or of describing a fact derives from a political choice. The decision to tell or not to tell something is a political choice as well. Journalism was and is strictly connected to political thought, but there is a considerable difference between commenting (or choosing not to comment) on facts and creating fake facts (i.e. creating fake facts with actual malice). The core of modern journalism (*rectius* the modern freedom of information) has indeed been respect for the facts as they happened.<sup>40</sup> In the past (particularly during the second part of the 20<sup>th</sup> century), the diffusion of fake news by the press occurred only rarely, both in Italy and in the US, as in the other Western

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<sup>35</sup> Cf. Paula Chakravarty and Srirupa Roy, ‘Mr Modi goes to Delhi: mediated populism and the 2014 Indian elections’, *Telev New Media* 16, no. 4 (2015).

<sup>36</sup> “instead of treating populism as an irrational impulse buttressed by a group of ‘crazy’ folks, we have to accept that more often than not there is some truth in the claims advanced by those who adhere to the populist set of ideas”. Cristóbal Rovira Kaltwasser, ‘Populism vs. Constitutionalism? Comparative Perspectives on Contemporary Western Europe, Latin America, and the United States’, *The Foundation for Law, Justice and Society* (2013).

<sup>37</sup> Michael Higgins, ‘Mediated populism, culture and media form’, *Palgrave Communications* 3, no. 3 (2017): 2.

<sup>38</sup> “It is, therefore, useful to think of populism not as a political doctrine, but as an underlying relational attitude that is manifest in primarily oppositional forms of political rhetoric that can be directed against or in tactical collaboration with media”. Higgins, 2.

<sup>39</sup> Cf. *Id.*, 3.

<sup>40</sup> In the European context, consider the Journalistic Codes of Ethics (from the Italian one to the Azerbaijani one), which require respect for the truth as journalists’ first duty (See Tiina Laitila, ‘Journalistic Codes of Ethics in Europe’, *European Journal Of Communication* 10, no. 4 (1995)). See also IFJ Declaration of Principles on the Conduct of Journalists, (adopted by 1954 World Congress of the International Federation of Journalists - IFJ. Amended by the 1986 World Congress). Finally cf. Bill Kovach and Tom Rosenstiel, *The Elements of Journalism: What Newspeople Should Know and the Public Should Expect* (New York: Crown Publishers, 2007).

democracies.

The political spread of fake news is not a new phenomenon: From the age of Augustus,<sup>41</sup> fake news has been used to fight political battles, but in the 20<sup>th</sup> century, particularly after WWII, such fake news was censured and unmasked by the press as the watchdog of democracy. Today, thanks to the interaction between the new Internet media and the rise of populism, the phenomenon has been revived. The use of fake news by the populist movements seems to have created a bench of activists in the new Internet media. This has happened because of different instruments: search engines and social networks. “Search engines and social media, which are widely available and used among citizens (..) would have a strong influence on how they find, consume, and share information, which would lead them to form a certain political opinion that leads to a certain vote”.<sup>42</sup>

### **1.1. The Trump phenomenon and the problem of fake news**

During the electoral campaign in the more recent presidential elections, the role played by fake news was quite evident. According to one scholar, “[i]n truth, a Trump presidency is – in part – a reflection of the status and evolution of the media and tech industries in 2016”<sup>43</sup>: Fake news is just one of the phenomena that could have helped President Trump.

The actual impact of fake news in the election is uncertain, but what is clear is that the public discourse was deeply corrupted by the circulation of fake news. Hunt Allcott and Matthew Gentzkow started their analysis of fake news and the elections by underlining some facts “1) 62 percent of US adults get news on social media (..); 2) the most popular fake news stories were more widely shared on Facebook than the most popular mainstream news stories (..); 3) many people who see fake news stories report that they believe them (..); and 4) the most discussed fake news stories tended to favor Donald Trump over Hillary Clinton”,<sup>44</sup> but they concluded that the impact of fake news was not as extensive as has been described by other authors.<sup>45</sup>

Regardless of the actual effect of fake news on the elections, what is addressed in this paper is its

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<sup>41</sup> According to historians, it is highly probable that Marco Antonio’s last will and testament diffused by Augustus to bring the Roman Senate to his side was fake news invented by Augustus himself.

<sup>42</sup> William H. Dutton, Bianca Reisdorf, Elizabeth Dubois, and Grant Blank, ‘Search and Politics: The Uses and Impacts of Search in Britain, France, Germany, Italy, Poland, Spain, and the United States’, *Quello Center Working Paper No. 5-1-17* (2017): 112.

<sup>43</sup> Damian Radcliffe, ‘Ten Ways the Tech Industry and the Media Helped Create President Trump’, in *Brexit, Trump and the Media*, eds. John Mair, Tor Clark, Neil Fowler, Raymond Snoddy, and Richard Tait (London: Abramis Academic Publishing, 2017), 30.

<sup>44</sup> Allcott and Gentzkow, 212.

<sup>45</sup> Id., 232 and ff.

use in the techno-populist era and whether it has distorted the paradigm of the press as a pillar of the current democratic theories.

Indeed, some of Trump's supporters, including some from abroad, created fake news to discredit the contender of the Democratic Party, Hillary Clinton.<sup>46</sup> This contributed to moving the debate toward certain matters (immigrants, Muslims and terrorism, and so on) and to putting some candidates in a defensive position. The inability of the traditional press to stem the spread of fake news and to hold the Trump movement accountable for fake news has deep roots both in the loss of credibility of the traditional media and in the power of the new Internet media, such as Facebook, Twitter, Google and so on. The lack of regulation of these new media has led to their abuse by the populist movements in a broader sense. Indeed, social networks and search engines have allowed fake news websites to prosper. According to some scholars,<sup>47</sup> fake news is one of the toxic elements of American politics, and it is connected with i) the new Internet media; ii) a sort of inability of the public to distinguish true news from fake news; iii) the weight of fake news on the integrity of elections and iv) the extensive use of it by the winner of the election, President Trump.

Also, after the winning the election, Trump's movement has not stopped using fake news. In addition, the new elected president has begun to accuse his opponents, and above all, the traditional media, of using fake news, in a broader sense. This improper use of the term fake news is contributing to a change in the semantic meaning of the term and is creating a strange climate of confusion between news, political opinions, misinformation, and so on.<sup>48</sup>

The Trump's supporters – as stated above – have created many fake news websites through which they spread fake news about their political opponents; in addition, they have diffused fake news from these websites by sharing them on social networks such as Facebook and Twitter. This influenced the presidential campaign, but today, it is also having an impact on the public discourse and on the role of the press in the democratic system.

## **1.2. The Five Star Movement and the problem of fake news**

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<sup>46</sup> Craig Silverman, 'This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook', *Buzzfeed* (2016), available at [https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm\\_term=.isyYe3ZN2#.hi09QN16J](https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm_term=.isyYe3ZN2#.hi09QN16J).

<sup>47</sup> Anthony J. Gaughan, 'Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration', *Duke Journal of Constitutional Law & Public Policy* 12, no. 3 (2017), 64 and ff.

<sup>48</sup> "Meanwhile, the term 'Fake News' risks becoming devoid of meaning, as many people, including President Trump, have attached the label to any news or reporting with which they disagree. Trump used the term at least 70 times on Twitter, such as in a June 2017 tweet, 'The Fake News Media has never been so wrong or so dirty. Purposely incorrect stories and phony sources to meet their agenda of hate. Sad!'", Richard L. Hasen, 'The 2016 U.S. Voting Wars: From Bad to Worse', *UCI Research Papers Series* (2017):19.

The Italian scenario does not seem to differ from the American one. Given the necessary differences from Trump's populism, which developed inside the Republican Party (and also because of the particular party mobility and fluency in the American political scenario and because of a presidential system characterised by a run between – *de facto* – only two parties), Beppe (Giuseppe) Grillo's movement (not party!) made substantial use of the weapon of fake news, gaining advantages from it.<sup>49</sup> Indeed, BuzzFeed<sup>50</sup> underlined that there may be websites that are politically close to the Movement (and Lega Nord) that have diffused fake news against immigrants and the establishment. In addition, through the social network accounts of its supporters and sometimes its members, the Movement shared (perhaps in good faith, but perhaps not) fake news that deeply influenced many electoral campaigns, including the last one, i.e. the national elections. For example, during the constitutional referendum, the most frequently shared news on Facebook was fake news according to which half a million ballots were faked to enable a win by the side of the Democratic Party that wanted to approve the constitutional law.<sup>51</sup> Also, in the last election, the role of fake news seems to have favoured the populist movements.<sup>52</sup>

The reaction of the Five Star Movement, after the Buzzfeed and New York Times<sup>53</sup> reports, was to accuse its opponents of spreading fake news about the Movement,<sup>54</sup> and Grillo has repeatedly attacked the traditional press<sup>55</sup> and its role.<sup>56</sup>

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<sup>49</sup> Between other reasons: "Several factors have contributed to the rise and consolidation of populist parties and movements in Europe and other countries. Among others, the spread of fake news on the Internet, the educational divide, the adverse effects of financial crisis, and more recently, the emergence of international terrorism are often ranked among the causes for the populist surge". Bassini, 6.

<sup>50</sup> Alberto Nardelli and Craig Silverman, 'Italy's Most Popular Political Party Is Leading Europe In Fake News And Kremlin Propaganda', *Buzzfeed* (2016), available at [https://www.buzzfeed.com/albertonardelli/italys-most-popular-political-party-is-leading-europe-in-fak?utm\\_term=.aibKgJZrY9#.bdga16njeM](https://www.buzzfeed.com/albertonardelli/italys-most-popular-political-party-is-leading-europe-in-fak?utm_term=.aibKgJZrY9#.bdga16njeM) and Id., 'One Of The Biggest Alternative Media Networks In Italy Is Spreading Anti-Immigrant News And Misinformation On Facebook', *Buzzfeed* (2017), available at [https://www.buzzfeed.com/albertonardelli/one-of-the-biggest-alternative-media-networks-in-italy-is?utm\\_term=.ourQWLr0n1#.ohZvMkYzAy](https://www.buzzfeed.com/albertonardelli/one-of-the-biggest-alternative-media-networks-in-italy-is?utm_term=.ourQWLr0n1#.ohZvMkYzAy).

<sup>51</sup> Consider that the most frequently shared news on social networks during the Italian referendum was fake news alleging that there would be a falsification of 500 000 electoral ballots. See Pagella Politica, 'La notizia più condivisa sul referendum? È una bufala', *pagellapolitica.it* (2016), available at <https://pagellapolitica.it/blog/show/148/la-notizia-pi%C3%B9-condivisa-sul-referendum-%C3%A8-una-bufala>.

<sup>52</sup> Filippo Trevisan, "In Italy, fake news helps populists and far-right triumph", *The Conversation* (2018), available at <https://theconversation.com/in-italy-fake-news-helps-populists-and-far-right-triumph-92271>

<sup>53</sup> Jason Horowitz, 'Italy, Bracing for Electoral Season of Fake News, Demands Facebook's Help', *New York Times*, (2017), available at

[https://www.nytimes.com/2017/11/24/world/europe/italy-election-fake-news.html?module=WatchingPortal@ion=c-](https://www.nytimes.com/2017/11/24/world/europe/italy-election-fake-news.html?module=WatchingPortal@ion=c-column-middle-span-)

[column-middle-span-](https://www.nytimes.com/2017/11/24/world/europe/italy-election-fake-news.html?module=WatchingPortal@ion=c-column-middle-span-region&pgType=Homepage&action=click&mediaId=thumb_square&state=standard&contentPlacement=14&version=internal&contentCollection=www.nytimes.com&contentId=https%3A%2F%2F)

[region&pgType=Homepage&action=click&mediaId=thumb\\_square&state=standard&contentPlacement=14&version=internal&contentCollection=www.nytimes.com&contentId=https%3A%2F%2F](https://www.nytimes.com/2017/11/24/world/europe/italy-election-fake-news.html?module=WatchingPortal@ion=c-column-middle-span-region&pgType=Homepage&action=click&mediaId=thumb_square&state=standard&contentPlacement=14&version=internal&contentCollection=www.nytimes.com&contentId=https%3A%2F%2F)

<sup>54</sup> Jessica Phelan, 'Italy's Five Star Movement hits out at New York Times and Buzzfeed over 'fake news'', *The Local*, (2017), available at <https://www.thelocal.it/20171127/italy-five-star-movement-new-york-times-buzzfeed-fake-news>

<sup>55</sup> "The other 'caste' targeted by Grillo is that of journalists, daily newspapers and television companies. His criticism of the news media mirrors that of the parties: they are accused of being in cahoots with big political and economic interests, of hiding the truth and of dulling the consciousness of citizens". Bordignon and Ceccarini, 433. See the video posted by the newspaper Corriere della sera: <http://video.corriere.it/beppe-grillo-contro-giornalisti-vi-mangerei-il-gusto-vomitarvi/be9643fc-9d2f-11e7-bc32-abadbc125b15>.

In addition, regarding the attempts made by the Italian Parliament to enact a law that would have regulated the Web and the declarations of the President of the Italian Competition Authority (AGCM) about fake news, the reaction of the Five Star Movement was highly disappointing. Beppe Grillo<sup>57</sup> commented that they were trying to act as “the new inquisitors of the Web”, and that they wanted to create “a court to control and condemn [those] who disgrace them”, which showed a disbelief that fake news is a problem in the public debate.

## **2. The *vexata quaestio* of the change of democracy and some possible solutions**

Thus, the paradigm of the press – as developed in the second part of the 20th century<sup>58</sup> – seems to have been deeply distorted by the advent of the mix between the unregulated new media, i.e. the Internet social media, and the rise of populism. Indeed, in past years, this march of the populist movements would not have been possible through the use the tools of fake news. On the one hand, the press – because of its aforementioned developed character as a distributor of truthful news after WWII – would have never borrowed this means of diffusion to spread fake news; on the other hand, the autonomous use of fake news by political parties or movements would have been detected and politically “censored” by the same press as the watchdog of democracy. The role of the press was also to hold political actors accountable, and to do so, the diffusion of truthful news was central. Think about the Watergate affair or the Lewinsky incident in the US or about the role played by the Italian press during the 1992 political crisis. Cases in which the press, in a broader sense, used fake news after WWII were very rare, and they were often censored by the same public opinion: The metaphor of the marketplace of ideas seemed to work at that time.

The changing of this paradigm is producing deep effects on the democratic theories and on constitutional democracy. As discussed above, this seems to be due to two phenomena that are connected: populism and the Internet. Having analysed the first one of these factors in section 1, the following will examine the second tool of the change in the press: i.e. the Internet.

### **2.1. The inevitable transformation of the press and of the public discourse?**

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<sup>56</sup> One of the main topics of the Movement is the media: Luca Manucci and Michi Amsler, ‘Where the wind blows: Five Star Movement’s populism, direct democracy and ideological flexibility’, *Italian Political Science Review* 48, no. 1 (2018).

<sup>57</sup> Redazione, ‘Antitrust, stop alle bufale sul web. Grillo: 'Volete l'inquisizione'', *Ansa* (2016), available at [http://www.ansa.it/sito/notizie/politica/2016/12/30/antitrust-stop-bufale-web.-grillovolete-inquisizione\\_66ed11a3-67df-4714-b96b-882e14d4f7d8.html](http://www.ansa.it/sito/notizie/politica/2016/12/30/antitrust-stop-bufale-web.-grillovolete-inquisizione_66ed11a3-67df-4714-b96b-882e14d4f7d8.html) (translations mine).

<sup>58</sup> Dorf and Tarrow, 21 and ff.. Cf. W. Lance Bennett, *News: The Politics Of Illusion* (Chicago: University of Chicago Press, 2016).

The advent of the Internet has caused the birth of new actors in the field of news: the Internet corporations. Both search engines and social networks are gaining more and more influence over the spread of news in the public discourse. It is true that neither search engines nor social networks directly *produce* news: They merely collect and disseminate it; but as is quite clear in the US legal system, this is just another way to arrange the diffusion of news with an editorial role.<sup>59</sup>

In this section, the two main tools of the new Internet social media are analysed, i.e. the search engines' algorithms and the social networks, above all, the most diffused ones (Google, among the search engines, and Facebook, among the social networks).

Concerning the first topic, i.e. the algorithms of search engines, it is largely known that the algorithms of search engines, and thus, the website indexing, favour certain websites over others.<sup>60</sup>

This *editorial* role<sup>61</sup> is currently unregulated and allows search engines to decide what type of websites to show on the first pages of the interface. The most used algorithm – for example, by Google<sup>62</sup> – is the personalised one, which is the algorithm that offers users content based on their own past searches.<sup>63</sup> It is a sort of *pre-selected personalisation*<sup>64</sup> about which the user is not aware.

This leads to the very well-known problem of filter bubbles: “personalization filters serve up a kind of invisible autopropaganda, indoctrinating us with our own ideas, amplifying our desire for things that are familiar and leaving us oblivious to the dangers lurking in the dark territory of the unknown”.<sup>65</sup>

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<sup>59</sup> After the first decisions in which the Internet was considered as a “vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services” (*Reno v. ACLU* 521 U.S. 844, 853(1997)), it was quite clear in the *Baidu* case (*Zhang v. Baidu.Com Inc.*, 10 F.Supp.3d 433 (S.D.N.Y. 2014)) that the US courts are now beginning to consider algorithms as political editorial criteria. Cf. also decisions such as *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011), *Search King, Inc. v. Google Tech., Inc.*, No. 02-1457, 2003 WL 21464568, at \*4 (W.D. Okla. May 27, 2003), 52, *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007) et cetera.

<sup>60</sup> Cf. about the fake news problem: Olivia Solon and Sam Levin, ‘How Google's search algorithm spreads false information with a rightwing bias’, *theguardian* (2016), available at <https://www.theguardian.com/technology/2016/dec/16/google-autocomplete-rightwing-bias-algorithm-political-propaganda>

<sup>61</sup> These editorial judgements are quite different from those of the press: Tarleton Gillespie, ‘The relevance of algorithms’, in *Media Technologies: Essays On Communication, Materiality, And Society*, eds. Tarleton Gillespie, Pablo J. Boczkowski, and Kirsten. A. Foot (Cambridge: The MIT Press, 2014).

<sup>62</sup> However, Google, as some other search engines, uses a lot of others content-based criteria such as the bad reputation of a website, the uselessness, the similarity, the “length of service” of a page and so on (see Engin Bozdag, *Bursting the filter bubble: Democracy, design, and ethics* (Zutphen: CPI Koninklijke Wöhrmann, 2015), 21-23). In addition, Google, like Bing, promotes its own pages (Benjamin Edelman, ‘Bias in Search Results?: Diagnosis and Response’, *Indian Journal of Law and Technology* 7 (2011)).

<sup>63</sup> “Google uses various “signals” in order to personalize searches including location, previous search keywords and recently contacts in a user’s social network”. Bozdag, 17.

<sup>64</sup> “Pre-selected personalisation concerns personalisation driven by websites, advertisers, or other actors, often without the user’s deliberate choice, input, knowledge or consent”. Frederik J. Zuiderveen Borgesius, Damian Trilling, Judith Moeller, Balázs Bodó, Claes H. de Vreese, and Natali Helberger, ‘Should We Worry About Filter Bubbles?’, *Internet Policy Review* 5, no. 1 (2016): 3.

<sup>65</sup> Eli Pariser, *The Filter Bubble: How the New Personalized Web is Changing What We Read and How We Think* (New York: The Penguin Press, 2011), 13. For more scholars’ references see Seth Flaxman, Sharad Goel, and Justin M.Rao, ‘Filter Bubbles, Echo Chambers, and Online News Consumption’, *Public Opinion Quarterly* 80, Special Issue (2016):

The other main editorial criteria, i.e. the ‘most viewed pages’, favour news from the more *mainstream* media at the expense of so-called counter-information, although they sometimes can facilitate its dissemination.<sup>66</sup> The dark side of this system is the spread of fake news. Indeed, by promoting the ‘most requested’ pages, Google facilitates the spread of fake news when the fake news websites are the most clicked.

Thus, this type of aggregator of news websites favours the spread of fake news because of a lack of control over the most viewed websites and because the personalised algorithm leads single users to view fake news websites more and more once they have begun to read them. It is a vicious cycle.

This happens because programmers “may not self-identify as journalists”, and thus, they do not adhere to the values of journalists despite the fact that “they define the conditions under which news is created and circulated”.<sup>67</sup>

As stressed, the populist movements have sponsored fake news websites by creating them, by giving them visibility through their own websites or social networks accounts, and by discrediting the “traditional” press. Also, several social factors seem to have had an influence on this phenomenon, for example, prior convictions,<sup>68</sup> a general collective credulity that operates on the Web<sup>69</sup>, and the so-called social cascade.<sup>70</sup>

Therefore, algorithms, but more importantly, the lack of control over them, play a very important role in the diffusion of fake news; however, the biggest problem seems to be role of the ‘megaphone’ for (fake) news on the social networks. This is the second issue which will be discussed. However, the problem of the algorithms of Facebook will not be analysed, although many of the considerations made for the algorithms of search engines could be applied to them.<sup>71</sup>

The role of social networks in the diffusion of news is very clear from the data of the Italian and American citizens who use Facebook and other social networks to get news: “Facebook operates at a scale hitherto unseen. No publisher in the history of journalism has enjoyed the same kind of influence over the news consumption of the world”.<sup>72</sup>

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298 and ff.

<sup>66</sup> Cf. Lucas D. Inrona and Helen Nissenbaum, ‘Shaping the Web: Why the Politics of Search Engines Matters’, *The Information Society* 16, no. 3 (2000).

<sup>67</sup> Kate Crawford and Mike Ananny, Journalism + Silicon Valley Conference, YOUTUBE (Nov. 13, 2015), available at <https://www.youtube.com/watch?v=0Qftw6VkdKQ>.

<sup>68</sup> Sunstein, *On Rumors*, 75 and ff..

<sup>69</sup> Delia Mocanu, Luca Rossi, Qian Zhang, MartonKarsai, and Walter Quattrociocchi, ‘Collective attention in the age of (mis)information’, *Computers in Human Behavior* 51 (2015).

<sup>70</sup> Sunstein, *On Rumors*, 36-45.

<sup>71</sup> Although Mark Zuckerberg declares that he wants to transform Facebook as the “perfect personalized newspaper”. Eugene Kim, ‘Mark Zuckerberg Wants to Build the ‘Perfect Personalized Newspaper’ for Every Person in the World’, *Business Insider* (2014), available at <http://www.businessinsider.com/mark-zuckerbergwants-to-build-a-perfect-personalized-newspaper-2014-11>

<sup>72</sup> Emily Bell and Taylor J. Owen, ‘The Platform Press: How Silicon Valley Reengineered Journalism’, *Tow Center for*

The problem is that while news circulates freely on Facebook or Twitter, there has also been a very disturbing dissemination of fake news. Indeed, several social phenomena described as prior convictions,<sup>73</sup> *virality*,<sup>74</sup> the so-called social cascade,<sup>75</sup> and the *Echo Chambers*<sup>76</sup> increase the weight of fake news on social networks. Some bots, some users or some pages can promote the aforementioned websites that diffuse fake news or create fake news through Facebook articles/notes/pictures and so on by sharing them. The social networks enable fake news to reach millions of users, thereby misinforming them. The lack of regulation of Facebook – the main social network in the world – and the weak solutions proposed by the social network itself have been strongly exploited by the populist movements. Many supporters (alone or in Facebook groups) and even politicians and leaders of these movements have shared fake news reaching a very large number of users (and voters). The debunking attempts used to correct fake news have failed because of the mechanisms of social networks and the unidirectional flow of news.<sup>77</sup> If single users try to correct fake news, they would probably be ignored by users who have previously seen the fake news or their comments, and their attempts would be lost in the *mare magnum* of interactions on the social networks.

Thus, as shown, the Internet's unregulated market of news is the perfect habitat for populist movements intending to use fake news as a political weapon to destroy the reputations of their opponents or to orient the public debate toward their major political points.

The abuse of the new Internet media by populist movements – but not only them – leads to the necessity to preserve the role of the press as a pillar of the democratic order. Indeed, if it is true that “constitutions and public law generally are best understood as devices for regulating and managing

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*Digital Journalism* (2017): 18. In this matter, the Committee on Culture, Science, Education and Media of the Parliamentary Assembly of the Council of Europe claimed that «social media such as Facebook and online platforms for user-generated content such as Twitter and YouTube have emerged with market prominence as new online media (..) become the primary contact point for users seeking news». Committee on Culture, Science, Education and Media of the Parliamentary Assembly of the Council of Europe, Report doc. 14228, 09 January 2017, 5. See in general Eytan Bakshy, Itamar Rosenn, Cameron Marlow, and Lada Adamic, ‘The role of social networks in information diffusion’, *Proceedings of the 21st international conference on WorldWideWeb*, eds. Michael Rabinovich, Steffen Staab (New York: ACM Press, 2012); Bozdag, 38.

<sup>73</sup> Sunstein, *On Rumors*, 75 and ff.

<sup>74</sup> Lee W Howell, ‘Digital wildfires in a hyperconnected world’, *Report Global Risks 2013* (2013); Farida Vis, ‘The rapid spread of misinformation online’, *Outlook on the Global Agenda 2014* (2014). About the misinformation: Alessandro Bessi, Fabio Petroni, Michela Del Vicario, Fabiana Zollo, Aris Anagnostopoulos, Antonio Scala, Guido Caldarelli, and Walter Quattrociocchi, ‘Viral Misinformation: The Role of Homophily and Polarization’, *Proceedings of the 24th International Conference on World Wide Web* (2015). Cf. Mocanu, Rossi, Zhang, Karsai, and Quattrociocchi.

<sup>75</sup> Sunstein, *On Rumors*, 40 and 48.

<sup>76</sup> Cass R. Sunstein, *Republic.com 2.0*. (Princeton: Princeton University Press, 2007). Echo Chambers are connected with the concept of *self-selected personalization*. Zuiderveen Borgesius, Trilling, Moeller, Bodó, de Vreese, and Helberger, 3. Cf. Id, 7. “In its press outreach, Facebook has emphasized that ‘individual choice’ matters more than algorithms do” (Bozdag, 5). Cf. Dutton, Reisdorf, Dubois and Blank, 127 e Dimitar Nikolov, Diego F. M. Oliveira, Alessandro Flammini, and Filippo Menczer, ‘Measuring Online Social Bubbles’, *PeerJ Computer Science* 1 (2015).

<sup>77</sup> Cf. Fabiana Zollo, Alessandro Bessi, Michela Del Vicario, Antonio Scala, Guido Caldarelli, Louis Shekhtman, Shlomo Havlin, and Walter Quattrociocchi, ‘Debunking in a world of tribes’, *PLoS ONE* 12, no. 7 (2017).

political risks”,<sup>78</sup> which can also derive from technology, it may be necessary to regulate these new media in order to try to maintain the democratic theory which embraces the press as the watchdog of democracy.

## 2.2. The regulation of the new Internet media as a possible solution

Looking at the current situation of the market of news online, it seems necessary to consider solutions that could help to prevent the spread of fake news on the Internet, particularly in search engines’ results and on social networks.

In this prescriptive and normative section, some workable solutions are proposed that are consistent with the different paradigms of free speech. Solutions compatible with both legal systems could be very useful, considering the worldwide nature of the Internet. In addition, developing solutions for the tools through which fake news is diffused seems easier than changing the minds of the producers of fake news.

A preliminary clarification is necessary at this stage: The type of solutions proposed should be consistent with the constitutional law of both countries, but they cannot be developed in the same way. Indeed, in the Italian scenario, they could be imposed by the government,<sup>79</sup> but this regulation could only be applied by private Internet corporations in the US scenario<sup>80</sup>: In the latter legal system, any form of regulation of speech which is not considered to be commercial speech, but rather to be political speech, such as a regulation for algorithms,<sup>81</sup> must pass the strict scrutiny test.<sup>82</sup>

Regarding the legal techniques which could be applied in order to combat the spread of fake news,

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<sup>78</sup> Adrian Vermeule, *The Constitution of Risk* (New York: Cambridge University Press, 2013).

<sup>79</sup> For a deep analysis of the matter see Matteo Monti, ‘Perspectives on the Regulation of Search Engine Algorithms and Social Networks: The Necessity of Protecting the Freedom of Information’, *Opinio Juris In Comparatione* 1, no.1 (2017). Consider that in its case law the Constitutional Court has stated the necessity to regulate, in a more timely and complete manner, the mass media that are the most pervasive and ‘influential’ for public discourse. “[I]t is well known and consistent in the case law of this Court, the acknowledgment of the peculiar diffusion and pervasiveness of the television message (judgment No 225 of 1974, No 148 of 1981, No 826 of 1988), so as to justify the adoption, strictly of broadcasting station, of a rigorous discipline capable to prevent any inappropriate conditioning in the formation of the will of the voters” (Constitutional Court, judgement no. 155/2002 (My own translation, MM)).

<sup>80</sup> The constitutional protection of an unregulated market granted by the First Amendment in the Internet field assumes, according to some scholars, a dimension similar to that of the Lochner Era. See Amanda Shanor, ‘The New Lochner’, *Wis. L. Rev.* 133 (2016). See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011). See what stressed in the Workshop Report, ‘Fighting Fake News’ hosted by The Information Society Project the Floyd Abrams Institute for Freedom of Expression, available at [https://law.yale.edu/system/files/area/center/isp/documents/fighting\\_fake\\_news\\_-\\_workshop\\_report.pdf](https://law.yale.edu/system/files/area/center/isp/documents/fighting_fake_news_-_workshop_report.pdf), 7 and ff.

<sup>81</sup> As the *Baidu* case (*Zhang v. Baidu.Com Inc.*, 10 F.Supp.3d 433 (S.D.N.Y. 2014)) seems demonstrate. See note 100.

<sup>82</sup> Regarding the speech on the Internet in all its forms and its protection from a descriptive and normative point of view, cf. Andrew Tutt, ‘The New Speech’, *Hastings Constitutional Law Quarterly* 14, no. 2, 2014, in particular 294.

the application of a legal institute present in Italy, the legal tool of *rectification*,<sup>83</sup> could be very interesting.

In Italy, the legal discipline of the rectification of fake news is complex, and it can be applied under three different circumstances: rectification as the duty of a journalist as imposed by law no. 69/1963 (The Journalists' Code of Ethics),<sup>84</sup> a correction as a consequence of a judicial decision, and a correction in the media after a request of an individual. The latter was applicable originally to broadcasting pursuant to law no. 223/1990<sup>85</sup> and to print papers pursuant to law no. 47/ 1948<sup>86</sup>. The two instruments have partially different disciplines.

The first case requires the verification of the so-called *objective truth*, i.e. verifying that the facts contested were actually fake, with the possibility of an appeal to the *Authority for Communications Guarantees* in order to verify the fake news in the case of a refusal of the correction by the broadcasting media. The independent authority could check the nature of the news and force the broadcasting media to rectify the fake news. Refusals are rare because newscasts are managed by journalists who are bound by law no. 69/1963 (deontological code) to correct fake news, both autonomously and when they discover the falsity of the fact. The second case is based, instead, on the *subjective truth*: It is a sort of right to reply, and it is less interesting for this matter.

For both disciplines, the rectification must be in the same *locus* where the fake news was diffused so that it can be read/watched by the same audience: Thus, it must be made on the same paper pages or broadcasting programme.

In any case of rectification, it has to be held that although the correction made by the journalist responds only to the necessity for objectivity in the news, and thus, to a public interest, truth correction processes started by individuals are linked both to human fundamental rights and to the public interest in the objectivity of the news, as claimed by Constitutional Court.<sup>87</sup>

A similar discipline could be used to correct fake news on Internet platforms, obviously adapting the institution to the new Internet media and taking note that these new media are not managed by journalists, and thus, are not bound by the deontological code.

Concerning the first topic of that analysis, the search engines' algorithms, the editorial and

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<sup>83</sup> In order to translate this very particular legal instrument into English, it is used the same terminology provided by the article 16 of Regulation (EU) 2016/679, which seems aimed at achieving a very similar purpose.

<sup>84</sup> Article 2 of law no. 69/1963 (The Journalists' Code of Ethics) requires respect for the truth: Journalists of newscasts, newspapers and so on shall scrupulously endeavour to report the truth and rectify falsehoods.

<sup>85</sup> See Art. 10 of law no. 223/1990. The individual has the right to ask for the correction of reported falsehoods. If the television/television channel/newscast does not correct the falsehood, the individual has the right to appeal to the *Authority for Communications Guarantees*, which can require the correction.

<sup>86</sup> See Art. 8 of the no. 47/ 1948.

<sup>87</sup> Constitutional Court, judgment no. 133/1974.

published nature of these new media should be recognised.<sup>88</sup>

Indeed, regarding the algorithms of the search engines, the Internet corporations could be forced to develop some tools for de-indexing fake news websites after their nature is checked by independent authorities or fact-checking and bipartisan agencies. This seems to be quite similar to the solution proposed by the president of the Italian Competition and Market Authority,<sup>89</sup> but it is also what search engines companies are trying to do by de-indexing fake news websites<sup>90</sup> or websites without an identification of the place<sup>91</sup> or by using some type of “fact checked” tag to describe websites<sup>92</sup> after they have undergone scrutiny by fact-checking agencies; however, this does not seem to be working completely.<sup>93</sup> In addition, it will be possible to preclude fake news websites from receiving advertisement income in order to make the generation of fake news websites not economically convenient.<sup>94</sup>

Surely the most efficient solution would be the de-indexing of fake news websites after their nature has been checked by independent authorities, judges or bipartisan fact-checking agencies. In addition, it could be possible to show the reason for the index in a sort of rectification, explaining why the website was obscured (i.e. it is a fake news website). This assumes that fake news websites are entirely composed of fake news; if this is not so, it may be possible to apply an instrument for rectification aimed solely at requiring the websites to correct the fake news in articles with the same visibility and to give them adequate publicity.

Looking at the legal validity of this operation, it can be argued that in the US, this would be consistent with the idea that Internet corporations are free agents and editors<sup>95</sup>, and that they can

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<sup>88</sup> This nature can no longer be denied: «Social media and search companies are not purely neutral platforms, but in fact edit, or “curate,” the information they present». Bell and Owen, 15.

<sup>89</sup> James Politi, ‘Italy antitrust chief urges EU to help beat fake news’, *Ft.com* (2016), available at <https://www.ft.com/content/e7280576-cddc-11e6-864f-20dcb35cede2>.

<sup>90</sup> As reported by Redazione, ‘Google, nuovo algoritmo contro le fake news’, *ansa.it* (2017), available at [http://www.ansa.it/sito/notizie/tecnologia/internet\\_social/2017/04/25/google-nuovo-algoritmo-contro-fake-news\\_f648a676-0fea-45bd-887c-6e758ad28138.html](http://www.ansa.it/sito/notizie/tecnologia/internet_social/2017/04/25/google-nuovo-algoritmo-contro-fake-news_f648a676-0fea-45bd-887c-6e758ad28138.html)

<sup>91</sup> Redazione, ‘Google contro le fake news, stop a siti che nascondono l'origine’, *LaRepubblica* (2017), available at [http://www.repubblica.it/tecnologia/2017/12/18/news/google\\_contro\\_fake\\_news\\_stop\\_a\\_siti\\_che\\_nascondono\\_origine-184488662/](http://www.repubblica.it/tecnologia/2017/12/18/news/google_contro_fake_news_stop_a_siti_che_nascondono_origine-184488662/)

<sup>92</sup> Stan Schroeder, ‘Google takes on fake news with 'fact check' tags in search and news’, *mashable.com* (2017), available at [https://mashable.com/2017/04/07/google-fake-news-fact-check/?utm\\_cid=mash-com-Tw-main-link#nxklff1Rsqqm](https://mashable.com/2017/04/07/google-fake-news-fact-check/?utm_cid=mash-com-Tw-main-link#nxklff1Rsqqm)

<sup>93</sup> Daisuke Wakabayashi and Linda Qiu, ‘Google Serves Fake News Ads in an Unlikely Place: Fact-Checking Sites’, *New York Times* (2017), available at <https://www.nytimes.com/2017/10/17/technology/google-fake-ads-fact-check.html>

<sup>94</sup> As continues to be done by some online platforms: see High level Group on fake news and online disinformation, 15.

<sup>95</sup> Eugene Volokh and Donald M. Falk, ‘First Amendment Protection For Search Engine Search Results’, available at <http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf> (2012); Cf. Stuart M. Benjamin, ‘Algorithms and Speech’, *University of Pennsylvania Law Review* 161, no. 6 (2013); *Contra*: Tim Wu, ‘Machine Speech’, *University of Pennsylvania Law Review* 161, no. 6 (2013).

choose to develop the solution they prefer.<sup>96</sup> In the US, the problem is that such a policy probably cannot be imposed by statutory law, which would risk being declared unconstitutional. However, it can be imposed – as has happened – by the Internet corporations themselves<sup>97</sup> after being pressured by public opinion.

Of course, this is a big problem because it forces the government to wait for the auto-responsibility process of certain private actors. Further, it leads to a second problem: Who will make sure that search engines are not removing partisan websites along with fake news websites? And – more importantly – what are the precise characteristics of fake news websites? Starting with the definition given in this paper, fake news websites should be identified as websites that produce a large amount of fake news with *actual malice*, using a category well known in US defamation law.<sup>98</sup> It is clear that without the participation of an impartial actor in the checking process, the risk posed to political thought and speech is high. However, the American idea of algorithms as editorial criteria leads to the necessity to consider search engines as free agents, which should be free not to share political articles in addition to fake news. Although some scholars have tried to argue that the algorithm results are not protected speech,<sup>99</sup> this position does not seem to have been applied by the courts.<sup>100</sup>

Ultimately, the solution of de-indexing fake news websites could be a good attempt both to prevent the phenomenon of the spread of fake news and to transform the search engines into US media corporations. The only way for this to comply with the US First Amendment<sup>101</sup> seems to be through self-regulation, which could be necessitated by public opinion: Pressure by the government, society and companies seems to be working, as Google is attempting to fix the problem. Thus, it is possible that this solution could be applied.

In the Italian constitutional system, a type of law requiring the de-indexing of fake news websites would be completely coherent with the Italian paradigm of freedom of information, because the creation of fake news cannot be considered as protected speech under article 21 of the Constitution. Italian constitutional scholars, both the adherents to the *individualistic theory* of free speech and to

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<sup>96</sup> The modification of algorithms seems to be one of the most appreciated solution: Fighting Fake News – Workshop Report - Yale Law School, 10.

<sup>97</sup> “Because these Internet providers are not state actors, they are free to impose content-based restrictions on access to the Internet without implicating the First Amendment”. *Sanger v. Reno*, 966 F. Supp. 151, 163(E.D.N.Y. 1997).

<sup>98</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). Sunstein, *On Rumors*, 106.

<sup>99</sup> By saying in algorithms there is not a “substantive message” (Benjamin, 1451) or by saying that the first Amendment would be applied just to human beings and not IA (Wu, 1501).

<sup>100</sup> «Allowing plaintiffs to sue Baidu for what are in essence editorial judgments about which political ideas to promote would run afoul of the First Amendment». *Zhang v. Baidu.Com Inc.*, 10 F.Supp.3d 433 (S.D.N.Y. 2014).

<sup>101</sup> Frank Pasquale, stressing the control over data and the bottleneck of search engines, has proposed the creation of a public search engine. Frank A. Pasquale, ‘Dominant Search Engines: An Essential Cultural and Political Facility’, in *The next digital decade: essays on the future of the internet*, eds. Berin Szoka and Adam Marcus (Washington, DC: TechFreedom, 2010), 416.

the *functionalist theory*, do not consider falsehoods created with actual malice as expressions protected by article 21.<sup>102</sup> In addition, in the field of the press – as noted earlier - the Constitutional Court has claimed the necessity of spreading true news.

In Italy, there are many tools for removing and de-indexing a website from a page ranking,<sup>103</sup> and a law could require the search engines to de-index fake news websites after they have been evaluated by a third-party, impartial arbiter (The Order of Journalists, a court or an independent agency). In addition, the same aforementioned considerations could be made: The de-indexing process could be applied only to websites composed entirely of fake news, while in addition or *a latere* making use of the so-called tool of rectification.

By avoiding the use of the criminal law, it is possible to contain the epidemic diffusion of fake news websites without the risk of censorship.

This solution would be consistent with article 21 of the Italian Constitution, which protects the right to be informed without using the criminal cudgel to accomplish this aim,<sup>104</sup> and with the First Amendment, not by enacting a law, but simply by encouraging legitimate changes in the policies of the search engines.<sup>105</sup>

The only problem could be in the US, where it is important that the agency that is in charge of checking the nature of the websites – i.e. of websites whose only purpose is to spread fake news – should not be partisan.

This solution could help the paradigm of the press to be restored, at least to some degree, by transforming search engines into a new form of press with responsibilities and duties concerning the news diffused.

Regarding the second topic of this article, the role of social networks seems to be very important in the spread of fake news. As a consequence, actual solutions cannot ignore the regulation of social networks. The solutions developed by Facebook seem to have failed in the task of fighting fake news: The so-called *Fact-check partnership* of Facebook<sup>106</sup> or its questions testing the credibility of

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<sup>102</sup> See note 24.

<sup>103</sup> See Swiss Institute of Comparative Law, Council of Europe, *Comparative study on blocking, filtering and take-down of illegal internet content*, 2016 (Excerpt, pages 773-800).

<sup>104</sup> Concerning the criminal provision regarding the “publication or spread of fake news” (article 656 of the Italian Criminal Code), the Constitutional Court declared this provision to be constitutionality legitimate, although with some specifications (i.e. the presence of an actual danger). Constitutional Court, judgment no. 19/1962, no. 199/1972 and no. 210/1976.

<sup>105</sup> For example, consider that Google, like some other search engines, uses many other content-based criteria, such as the bad reputation of a website, the uselessness, the similarity, the “length of service” of a page, and so on (see Bozdag, 21-23). The bad reputation could be extended to fake news websites.

<sup>106</sup> Adam Mosseri, ‘News Feed FYI: Addressing Hoaxes and Fake News’, *Newsroom, Facebook* (2016), available at <http://newsroom.fb.com/news/2016/12/news-feed-fyi-addressinghoaxes-and-fake-news/>. See Mike Isaac, ‘How

sources of news<sup>107</sup> have not worked very well. The former has had problems with, inter alia, slowness. The latter is a strange way to try prevent fake news: It seems to merely be aimed at testing the credibility of sources of news, but it is carried out by users, making it quite dubious.

The former, which could be the foundation for a similar but more effective (self) regulation, has not been able to avoid virality or to reach every user that has been wrongly informed. Indeed, after the warning about fake news by some users of Facebook, the social network must redirect the contested news to certain fact-checking agencies which are deputised to indicate whether or not the news signaled is fake news. In the case of a green light (i.e. if the news is fake), Facebook must warn users of the nature of the fake news by highlighting it with the tag of “disputed” content. Unfortunately, this solution is plagued by two big problems. The first one is due to the *pro futuro* nature of the solution (because it can only alert users who will read the news in the future). It provides no opportunity to inform all the users who have read and believed that specific fake news in the past (i.e. before the fact checking and the warning tag); this aspect is aggravated by the slowness of the process (during the fact-checking process, the fake news could become viral).<sup>108</sup> The second controversial point is the “independence” of the fact-checking agencies, which has been contested by some journalists.<sup>109</sup>

Concerning the spread of fake news on Facebook, some regulations must be taken by the governments or by Facebook itself. Again, the differences between the two paradigms seem to lead to different solutions.

A good solution for responding to the spread of fake news on Facebook could be derived from the Italian law regarding the rectification/correction of fake news.

The mechanism could be applied in a version similar to that developed for the broadcasting media,

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Facebook’s Fact-Checking Partnership Will Work’, *New York Times* (2016). Cf. Gordon Pennycook, Tyrone D Cannon, and David G. Rand, *Prior Exposure Increases Perceived Accuracy of Fake News*, available at SSRN: <https://ssrn.com/abstract=2958246> (2017). This operation of Facebook seems coherent with what was suggested by EISPA in Europe: “the European Internet Services Providers Association call on its members which provide social media, search engines and news aggregators: 12.3.3. to voluntarily correct false content or publish a reply in accordance with the right of reply or remove such false content”. Parliamentary Assembly of the Council of Europe, *Online media and journalism: challenges and accountability*, Resolution 2143 (2017), 3. (Provisional version)

<sup>107</sup>Alex Kantrowitz, ‘This Is Facebook’s News Survey’, *Buzzfeed* (2018), available at [https://www.buzzfeed.com/alexkantrowitz/this-is-facebooks-news-survey?utm\\_term=.la0RkwLNY2#.kiG5kb2B0p](https://www.buzzfeed.com/alexkantrowitz/this-is-facebooks-news-survey?utm_term=.la0RkwLNY2#.kiG5kb2B0p)

<sup>108</sup> “One fact-checker said that their work within their own organization was mostly prompted by readers’ questions, but “by the time we answered the question, it was usually days after the [misinformation] had gone viral. We would wait until something had critical mass before we wrote about it, which felt too late.” Many described the need to anticipate virality, with one person seeing it not only as an important way to minimize misinformation’s impact, but also as a way to reduce fact-checkers’ workload”. Mike Ananny, ‘Checking in with the Facebook fact-checking partnership’, *Colum. Journalism Rev.* (2018).

<sup>109</sup> Daniele Scalea, ‘Perché il fact-checking di Facebook resterà politicamente orientato’, *ilfoglio* (2017), available at <https://www.ilfoglio.it/tecnologia/2016/12/18/news/fact-checking-mark-zuckerberg-facebook-fake-news-notizie-false-111535/>. It is true that *fact-checkers* must have subscribed the “Poynter’s non-partisan code of principles”, but this does not seem a good warranty in a so delicate matter.

requiring the correction to be in the same place where the fake news was diffused after a check verifying its falsity. The mechanism should be changed slightly so that it will comply with the new media environment: Indeed, merely correcting the sources of fake news, which are, in many cases, websites, will not affect the sharing of it on social networks. Thus, in addition to a correction on the original website, a law or a self-regulation could require Facebook to advertise the correction to users who have interacted with fake news by sharing, commenting on or liking it. In particular, the solution could be the following. After a warning by users, a law or a self-regulation process could require Facebook to redirect the check to an independent authority, a bipartisan agency or some other agency (for example, the Order of Journalists in Italy), which could determine the truthfulness or falsity of the news (in a very similar way to what now exists in the fact-checking partnership). In the case of a “green light”, the fake news could be marked as fake news so that future readers on social networks could be informed of this. In addition, a notification of the rectification of the fake news (something like “dear user, be aware that you have recently read fake news”) could be sent to users by posting this rectification in the misinformed user’s newsfeed, wall or in the place of Facebook’s “good morning” at the top of the newsfeed. In this way, all the users who have interacted with the fake news will be informed of the rectification of it.<sup>110</sup>

Obviously, in the United States, this method of rectification cannot – as discussed above – be imposed by law, as it would probably be declared unconstitutional. However, the social networks themselves could develop it. Social networks could improve their policies by including this solution (with the exclusion of the rectification of the website sources of fake news). This solution would have the merit of not using criminal tools and censorship but would merely enable the marketplace of ideas to react to fake news and to counterbalance its force.

In addition, a law or a self-regulation could require Facebook to ban the pages used to spread fake news or to force pages that only occasionally disseminate fake news to rectify falsehoods with another post “promoting” the rectification.

This solution seems to be quite consistent with the paradigm of article 21 of the Italian Constitution and – if adopted as a policy by Facebook – with the First Amendment. Concerning this last point, Facebook seems to be quite open – after the Cambridge Analytics scandal – to begin a path toward regulating its role as a media corporation.<sup>111</sup>

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<sup>110</sup> Consider that even where robots operate, for example, on Twitter, it seems to have been proven that the reason for the diffusion of fake news is linked to human users. See Soroush Vosoughi, Deb Roy, and Sinan Aral, ‘The spread of true and false news online’, *Science* 359, no. 6380 (2018).

<sup>111</sup> “As the networked press continues to evolve at the intersections of technology design, editorial production, platform policies, and large-scale, real-time action of people and algorithms, we will continue to see strategic organizational partnerships emerge between news organizations and technology companies. Journalists will continue to wade into computational territory and technologists will increasingly find themselves unable to claim that they are not part of the

Regarding the Italian scenario, given the attempts that have failed in the Parliament, a system seems to be activating to inform the *Polizia postale* (the department of the police deputised to address crimes linked to the Internet)<sup>112</sup> about possible fake news: The police will check the fake news, and in case of falsehoods, they will obscure the news, rectify it with their websites or transfer it to a prosecutor. The legal basis of this procedure seems uncertain.

Finally, it must be stressed that both of the solutions proposed (the removal from the page ranking and the rectification) could be useful and effective from a sociological point of view as well, because as claimed by Cass Sunstein, the “credibility of the source of the correction”<sup>113</sup> (an independent agency, etc.) could be the only method of facilitating the debunking of fake news.<sup>114</sup>

### **3. Final Remarks: the limits of the legal approach.**

The problem of fake news has exploded with the rise of the Internet and populism. As discussed above, it is difficult to see how the political use of fake news can be combatted without a strong and credible press. And, above all, the change in journalism spurred by the Internet and populism is having an impact on one of the most important characteristics of democratic theory: the press and journalism as the watchdogs of democracy and as gatekeepers. The phenomena seem to be, in part, mutually correlated: Some populist movements have taken advantage of the lack of regulation of the Internet media and of the changes in the press landscape. In the past, the political use of fake news would have been “censored” by the watchdog of democracy. However, today, it does not seem to be able to prevent the rise of fake news.

The solutions proposed could help to stem the spread of fake news, but as discussed above, they will require the enactment of a law in Italy and societal pressure in the US.

The problem with the self-regulation perspective – which is also present in Italy<sup>115</sup> – seems to be linked to its real effectiveness: It is not a certainty that Internet corporations will accomplish that request.<sup>116</sup> It seems that the Italian legal system (and the European paradigm of the freedom of

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media”. Mike Ananny, ‘The partnership press: Lessons for platform-publisher collaborations as Facebook and news outlets team to fight misinformation’, *Tow Reports* (2018).

<sup>112</sup> See what has been affirmed on the websites of the Ministry of the Interior: <http://www.interno.gov.it/notizie/progetto-red-button-contro-fake-news>

<sup>113</sup> Sunstein, *On Rumors*, 75 and 80.

<sup>114</sup> A recent poll in Italy has said that the 40% of the population does not recognize fake news ([https://www.termometropolitico.it/1287990\\_sondaggi-politici-fake-news.html](https://www.termometropolitico.it/1287990_sondaggi-politici-fake-news.html)); according to the XIV Rapporto Censis-Ucsi (2017), 52,7% of Italians has sometimes believed to fake news.

<sup>115</sup> “*Tavolo Tecnico per la garanzia del pluralismo e della correttezza dell’informazione sulle piattaforme digitali*” see the decision of the Authority for Communications Guarantees n. 423/17/CONS, 6 november 2017.

<sup>116</sup> Hence, “[t]he people who built these platform companies did not set out to do so in order to take over the responsibilities of a free press. In fact, they are rather alarmed that this is the outcome of their engineering success”.

information) could have a greater opportunity to react due to the broader space for action in the regulation of the press and the media. In Italy and in Europe, the democratic theory of the press as the watchdog of democracy and as a propagator of true news, i.e. facts, coincides with the constitutional theory enshrined in the articles of the constitutions; on the contrary, in the US, it is possible to see a detachment between democratic theory and constitutional theory in this particular situation.

The solutions here proposed could help to regenerate the paradigm of the press as a tool of accountability and to transform the new Internet media into a new watchdog with democratic responsibilities.<sup>117</sup>

This does not mean that the Internet has not profoundly changed the traditional media,<sup>118</sup> which are facing huge problems stemming from its advent: Under the democratic theory of the Fourth Estate, if the traditional media are going to disappear or, more realistically, become less important for the public discourse, this will not present a big problem if the new media assume the same responsibilities.

Obviously, to solve the fake news problem, “internet education” will also be necessary<sup>119</sup> – which has been one of the most publicised solutions – and it could help individuals to be aware of the insidious dangers of the Internet. Regarding “Internet education”, it is highly probable that in the future, we will smile about our worries about the spread of fake news on social media because fake news will be easily recognisable by people and will not be a problem. Currently, however, this is not the perspective. We are seeing a more and more problematic role being played by fake news in contemporary democracies and – above all – the transformation of the paradigm of the press (i.e. the news) due to the use of fake news by populist movements. For this reason, this paper has advanced some normative solutions to avoid changes in the current democracies that would worsen them, with the awareness that “Internet educational solutions” alone will not be optimal, because the benefit of such education will be achieved only over the course of years. However, it is necessary to react now to the problem of fake news.

Of course, the limits of the legal approach are correlated with the effectiveness of the solutions here proposed. If the people no longer believe the news and do not consider journalism and the press to

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Bell.

<sup>117</sup> “If Facebook is going to function as the new social arbiter of trust, replacing a role journalism has, however imperfectly, long served, then they will need to both counter the spread of misinformation and encourage the spread of journalism based in fact. They will simply need to begin making editorial decisions”. Bell and Owen, 77.

<sup>118</sup> Consider the so-called “robot journalism” or “automated journalism” based on the creation of stories by algorithms. Cf. *Guide to Automated Journalism*, Tow Center For Digital Journalism (2016), available at <http://towcenter.org/research/guide-to-automated-journalism/>;

<sup>119</sup> As proposed by some participants in the Fake News – Workshop Report - Yale Law School, 9. Or by the High level Group on fake news and online disinformation, *A multi-dimensional approach to disinformation*.

be tools for the accountability of the government,<sup>120</sup> lawyers will not be able to do anything to change this phenomenon. It will be necessary to think about a new democratic theory that will not involve the press and journalism as we have known them. For example, although it is true that one of the most relevant problems in fact checking is the impossibility of reaching all the users who have been misinformed, it is also true that there is a problem of credence<sup>121</sup>: The solution of the rectification of fake news, primarily on social networks, could enable every user to be reached by notifications, but it would not guarantee that they will believe the rectification, regardless of the source of the correction.

In addition, the current effectiveness of “political” fake news also seems to have infected the non-populist parties, which are beginning to use fake news<sup>122</sup>: At this point, it is possible that the end of the democratic theory embracing the press as the watchdog will soon arrive.<sup>123</sup> Concerning the new Internet media, some authors have discussed the birth of the “Fifth Estate”.<sup>124</sup> With the advent of the political communication of populism, it is not said that there will be a new paradigm of the press, but that it will be more similar to what the press was in the 19<sup>th</sup> century than the paradigm of the more recent past, moving the hands of the clock back to a time when journalism and information were nothing more than a branch of political activism.

Ultimately, the mordant and only conclusion that can be reached is that it is necessary to try to equilibrate the new tools for the news and to try to regulate them in accordance with the old paradigm of the press – although is not certain whether this will work.

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<sup>120</sup> As suggested by some very disturbing polls: Kelsey Sutton, ‘Poll: 6 in 10 Americans think traditional news outlets report fake news’, *Politico* (2017), available at <http://www.politico.eu/blogs/onmedia/2017/03/poll-6-in-10-americans-think-traditional-news-outlets-report-fake-news/>

<sup>121</sup> As stressed by the Fake News – Workshop Report - Yale Law School: “Not only may fact-checking articles not reach the same people who view the original piece, but the reiteration of the original claims by fact-checkers may lend them credence”. Workshop Report, 5

<sup>122</sup> See Hasen, 19 and BBC, ‘The rise of left-wing, anti-Trump fake news’, *BBC Trending* (2017), available at: <http://www.bbc.co.uk/news/blogs-trending-39592010>

<sup>123</sup> In the end, as stressed, the same populism could also be considered as a sort of constitutional theory theory (Luigi Corrias, ‘Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity’, *European Constitutional Law Review* 12, no. 1 (2016)), and it could be the form of the democratic theory of the future.

<sup>124</sup> Elizabeth Dubois and William H Dutton, ‘Empowering Citizens of the Internet Age’, in *Society and the Internet*, eds. Mark Graham and William Dutton (Oxford: Oxford University Press, 2014). Cf. Committee on Culture, Science, Education and Media of the Parliamentary Assembly of the Council of Europe, Report doc. 14228, 09 January 2017, 3.