LIES, FREE SPEECH, AND THE LAW

April 8, 2022

KNIGHT FIRST AMENDMENT INSTITUTE at COLUMBIA UNIVERSITY
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On behalf of the Knight First Amendment Institute at Columbia University, welcome to this symposium on “Lies, Free Speech, and the Law.”

The Knight Institute was founded by Columbia University and the John S. and James L. Knight Foundation in 2016 to protect the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. Today, the Institute is a vibrant community of litigators, scholars, technologists, journalists, and many others—including interns and externs from Columbia and beyond.

Our first major public program, which took place almost exactly five years ago, focused on the many ways in which new technology is reshaping democracy. Since then, we have hosted major symposia and conferences focusing on, among other topics, monopoly power and public discourse; digital public infrastructure; and data and democracy. These programs have generated new ideas, contributed to public debate, and informed the Institute’s litigation decisions. We’re confident that today’s program will be equally productive and inspiring.

An enormous thank you to Genevieve Lakier for conceiving and leading this rich and timely project, and to the Knight Institute’s staff for all of their creative and dedicated work, of which this symposium is just one small part. Thank you, too, to Columbia Law School and to the Knight Institute’s funders (listed at the end of the program), without whom today’s event would not be possible. And thank you, finally, to all of you for being here with us today.

Jameel Jaffer
The pervasiveness of lies and misinformation in public discourse in the United States raises all sorts of questions about the health of U.S. democracy, about the limits of human reason, and about the role that shared beliefs play in the creation of collective identity. But it also raises important questions about the meaning of freedom of speech. One of the foundational assumptions of modern First Amendment law is that the best remedy for harmful speech—including harmfully false or misleading speech—is more speech. Does this assumption hold, given our contemporary, fragmented, highly polarized public sphere? And if it doesn’t, what can we do about it? More precisely, what can the law do about it? Are there cures that would not be worse than the disease? This symposium—the product of a year-long collaboration between the Knight Institute and University of Chicago Law Professor Genevieve Lakier, who is a senior visiting research scholar at the Institute this year—will address these questions.

These questions are particularly urgent today, even if they are not new. America is more divided, politically and culturally, than it has been in decades. In addition, technological and social change have eroded the power of the institutional gatekeepers that in previous decades determined what truths or untruths made it into the public discourse. The result is a much more fragmented public sphere—one in which, to be sure, a far broader and more diverse group of people can participate than ever before in U.S. history, but also one in which factual claims are much less subject to direct challenge, and counterspeech can be lost in the floods of posts on social media platforms.

These changes in the political, economic, and technological landscape raise in new form age-old debates about the legal regulation of lies, misinformation, and misleading speech—about the government’s responsibility, if any, for guarding the public against lies and deception; whether it is possible to ensure that public discourse promotes
democratic values, or even something we might call the search for truth; and how to identify and build alternatives to the existing, fragmented, and conspiracy-laden public sphere without reimposing institutional, regulatory, or economic barriers to entry.

Disinformation and lies have received significant scholarly attention in recent years. Surprisingly little attention has been paid, however, to the role that law plays, or should play, in this context. This symposium is an effort to address this gap. Over the course of the day, we will discuss 13 original papers from legal scholars, political scientists, and historians, addressing the questions sketched above from a variety of perspectives. We are grateful to the participants for their papers, and for their participation in today’s symposium, and look forward to an energizing and illuminating series of discussions.

Genevieve Lakier | Katy Glenn Bass
PROGRAM AT A GLANCE

Friday, April 8
Columbia Law School
Jerome Greene Hall, Room 104

9:15 am - 9:45 am  Welcome
Lee C. Bollinger
Jameel Jaffer
Genevieve Lakier

9:45 am – 11:00 am  Lies in historical context
Panelists
RonNell Andersen Jones
Sam Lebovic
Sonja R. West
John Fabian Witt
Moderator
Katy Glenn Bass

11:00 am – 11:15 am  Coffee break

11:15 am – 12:45 pm  Doctrinal and definitional questions
Panelists
Helen Norton
Deborah Pearlstein
Mark Tushnet
Eugene Volokh
Moderator
Carrie DeCell

12:45 pm – 2:00 pm  Lunch

2:00 pm – 3:20 pm  Government lies
Panelists
Alan Chen
Jamal Greene
Amanda Shanor
Moderator
Catherine J. Ross

3:25 pm – 4:50 pm  Sociological conditions for the production of truth
Panelists
Adam M. Enders
Heidi Kitrosser
Artur Pericles Lima Monteiro
Joseph Uscinski
Moderator
Francesca Procaccini
Lies in historical context
9:45 am – 11:00 am

Public discussion of the problem of lies in the United States tends to assume its novelty—that at no point in history was public agreement about factual truth so contested and uncertain. But is this true? What can we learn from historical battles over propaganda, falsehoods, and distrust of institutions? And if we are now experiencing an epistemic crisis, what are its sociological, political, and economic roots?

Panelists
RonNell Andersen Jones, University of Utah S.J. Quinney College of Law
Sam Lebovic, George Mason University
Sonja R. West, University of Georgia School of Law
John Fabian Witt, Yale Law School

Moderator
Katy Glenn Bass, Knight First Amendment Institute at Columbia University
Presuming Trustworthiness
RonNell Andersen Jones and Sonja R. West

This paper investigates how justices of the U.S. Supreme Court have abandoned a once-vibrant presumption of press trustworthiness and will contrast this with the Court’s ongoing willingness to presume the credibility of other speakers. It explores both the potential causes of the decline and the potential consequences for democracy that accompany it.

Fake News, Lies, and Other Familiar Problems
Sam Lebovic

This paper argues that the contemporary crisis of fake news has deep historical roots in recurring problems of democratic public opinion, including public distrust of and disengagement from political life; the underproduction of information needed for self-governance; and cynical and self-interested political propaganda. These problems have been exacerbated and made more visible by shifts in the political economy of the media, but they are not new and there is no easy fix. Reform efforts should focus not on trying to eliminate fake news but on trying to cultivate and nurture forms of information and dialogue that can produce a more substantively democratic public sphere.

Weaponized from the Beginning
John Fabian Witt

This paper looks at a striking feature of the modern law of free speech: that it arose simultaneously with the widespread realization that free speech in mass society produced propaganda, lies, and distortion. In the wake of the First World War, early civil liberties advocates were not ignorant of this; they organized their efforts around the problem of what they too called weaponized speech. Key figures in the early civil liberties movement aimed to build a vibrant political economy of public opinion by nurturing intermediary institutions like the administrative state and industrial unions. Our dilemma 100 years later, the paper argues, is in large part the decay and collapse of these intermediary institutions for managing the distortion of public opinion.
Doctrinal and definitional questions
11:15 am – 12:45 pm

What is the First Amendment status of false speech? More specifically, what rules can and should apply to different kinds of false speech (e.g., intentional lies, negligent untruths, wrong opinions) that the government might want to regulate? And what are the justifications for those rules? This panel will explore the thorny foundational doctrinal questions raised by the regulation of false speech.

Panelists
Helen Norton, University of Colorado School of Law
Deborah Pearlstein, Cardozo School of Law
Mark Tushnet, Harvard Law School
Eugene Volokh, UCLA School of Law

Moderator
Carrie DeCell, Knight First Amendment Institute at Columbia University
PAPER ABSTRACTS

Distrust, Negative First Amendment Theory, and the Regulation of Lies
Helen Norton
This paper argues that First Amendment concerns about the government’s regulation of falsehoods are most often rooted in distrust of the government. The less tangible—or the more diffuse or causally complicated—the harm threatened by certain lies, the less we may trust the government’s decisions about whether and when to find harm. It examines the regulatory challenge of accurately capturing certain lies’ potential to inflict significant harms (for example, in election-related settings) while identifying limiting principles to address our legitimate concerns about the government’s potential for overreach, self-interest, bias, or clumsiness.

Democracy Harms and the First Amendment
Deborah Pearlstein
This paper examines the extent to which principles of free expression have been understood to permit the regulation of speech in the interest of preserving a democratic public order. Recognizing that the U.S. Constitution has long tolerated the regulation of false speech in the interest of protecting against certain individual harms, like damage to a person’s reputation, the paper discusses whether constitutionally cognizable harms may be best understood to include structural harms to constitutional democracy—a concept that extends not only to preserving the legitimacy and integrity of democratic elections, but also to protecting the functional operation of other governing institutions, and to the maintenance of an accessible marketplace of ideas.

Free Expression and the Regulation of Falsehoods and Lies
Mark Tushnet
This paper argues that while there are sometimes good reasons to be leery of regulation of falsehoods, those reasons aren’t generally applicable to lies, which it defines as falsehoods known by the speaker to be false. It notes that there are some other reasons to worry about regulating lies, but those reasons don’t weigh strongly against the constitutionality of laws targeting clearly identified lies about “basic” scientific and physical facts about the world.

Freedom of Speech and Knowing or Reckless Falsehoods
Eugene Volokh
This paper analyzes the distinction made between some factual falsehoods (“seditious libels” against the government, “false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern,” and the like) that are categorically protected even if they’re knowing lies, and other knowing lies that are nonetheless punishable—libels of living individuals, corporations, or their products; nonlibelous falsehoods about individuals (under the false light tort); lies to government officials; likely public crime hoaxes; likely lies by authors aimed at getting publishers to buy their books; and more. Does this distinction make sense, and, if so, how should it be drawn?
Of all the kinds of lies that proliferate in the public sphere, perhaps the most dangerous to the functioning of democratic government are government lies. When the government lies, it threatens the ability of the people to perform their basic democratic function: to judge whether their elected representatives are representing their interests satisfactorily. How should First Amendment doctrine treat government lies?

**Panelists**
Alan Chen, *University of Denver Sturm College of Law*
Jamal Greene, *Columbia Law School*
Amanda Shanor, *University of Pennsylvania Wharton School*

**Moderator**
Catherine J. Ross, *George Washington University Law School*
PAPER ABSTRACTS

Investigative Deceptions Across Contexts
Alan Chen

This paper explores why investigative deceptions—intentional lies used to conduct undercover investigations—are celebrated in some contexts and criminalized in others. It argues that social, political, and historical contingencies help explain the differences in how law and society view the acceptability of these lies. It also explores whether debates about the propriety of such deceptions in contexts where they are widely acceptable might help inform First Amendment doctrine in contexts where they are not.

Government Counterspeech
Jamal Greene

This paper explores the distinctive doctrinal treatment of government speech and counterspeech. It argues that government speech and counterspeech should be subject to the same regime, but that within both areas, courts should develop distinctions between different forms of viewpoint discrimination. In general, partisan political or electoral viewpoint discrimination should almost never be permitted, but the government should otherwise enjoy wide leeway to engage in either speech or counterspeech, including to combat misinformation or promote truthful discourse.

Outlaw the “Big Lie”
Amanda Shanor

This paper looks at the “Big Lie”—the false allegation that the 2020 election was stolen from former President Trump. Despite widespread recognition that the “Big Lie” fueled the storming of the U.S. Capitol and that similar lies may cause violence and election subversion in the future, conventional wisdom holds that the First Amendment prohibits lawmakers from doing anything about it. The paper argues that that assumption is incorrect.
Sociological conditions for the production of truth
3:25 pm – 4:50 pm

Lies do not occur in a vacuum. Particular institutional and cultural contexts can encourage and enable the production of falsehoods—or the production of truth. This panel will explore some of the sociological facts that encourage, or limit, the dissemination of untruths and the legal structures that enable them, as well as how law can support the production and dissemination of knowledge.

Panelists
Adam M. Enders, University of Louisville
Heidi Kitrosser, University of Minnesota Law School
Artur Pericles Lima Monteiro, Yale Law School
Joseph Uscinski, University of Miami

Moderator
Francesca Procaccini, Harvard Law School
What’s the Harm? An Interrogation of the Societal Impact of Conspiracy Theories and Potential Remedies
Adam M. Enders and Joseph Uscinski

This paper draws on social scientific scholarship regarding the causes and consequences of conspiracy theories and misinformation to argue that there is insufficient evidence of the societal harm of conspiracy theories, misinformation, and fake news to warrant a legal doctrine designed to restrict such types of speech. Moreover, the paper demonstrates how centuries-old epistemological quandaries prevent the accurate, impartial classification of ideas as conspiracy theories, misinformation, or fake news in the first place.

Protecting Public Knowledge Producers
Heidi Kitrosser

This paper explores the role of and current cultural, political, and legal threats faced by the government’s “knowledge producers.” These are the public institutions and personnel whose roles are predominantly investigative or otherwise fact-finding-based, research-oriented, or analytical in nature. They include government scientists, economists, and inspectors general, as well as public universities and their faculty members.

Anonymity, Identity, and Lies
Artur Pericles Lima Monteiro

This paper draws on multidisciplinary empirical research to provide a more sophisticated account of the role of anonymity and how it should be a part of the regulatory toolkit for healthier public discourse. It argues that while legal discussion often pits listeners’ interests in disclosure against speakers’ anonymity, research on anonymous communities and social media shows that this is not always true. In fact, anonymity generates new audiences and discursive environments, which disclosure would foreclose.
RonNell Andersen Jones is an affiliated fellow at Yale Law School’s Information Society Project and the Teitelbaum Chair and professor of law at the University of Utah S.J. Quinney College of Law. A former newspaper reporter and editor, she is a First Amendment scholar who teaches, researches, and writes on legal issues affecting the press and on the intersection between the media and the courts. Her scholarship addresses the roles of the press as a check on government and a proxy for the people. She is an adviser on the American Law Institute’s Restatement of the Law Third Torts: Defamation and Privacy. Her scholarly work has appeared in numerous books and journals, including Northwestern University Law Review, Michigan Law Review, UCLA Law Review, Washington University Law Review, and the Harvard Law Review Forum. Jones clerked for the Honorable William A. Fletcher on the U.S. Circuit Court of Appeals for the Ninth Circuit and for Justice Sandra Day O’Connor on the U.S. Supreme Court. Prior to entering academia, she was an attorney in the Issues & Appeals section of Jones Day, where her work focused on Supreme Court litigation and included major constitutional cases.

Lee C. Bollinger became Columbia University’s 19th president in 2002. He is Columbia’s first Seth Low Professor of the University, a member of the Columbia Law School faculty, and one of the nation’s foremost First Amendment scholars. As president, Bollinger has led the creation of several initiatives focused on the Fourth Purpose of the University: to extend the knowledge and capacity of the academy to address the world’s most pressing problems. He co-founded the Knight First Amendment Institute at Columbia University, established the Columbia Global Freedom of Expression Project, founded Columbia World Projects, and, in 2021, launched the Columbia Climate School, the first new school at the university in 25 years. From 1996 to 2002, Bollinger was president of the University of Michigan. He led the school’s landmark civil rights litigation in *Grutter v. Bollinger*, a Supreme Court decision that for the first time upheld the constitutional right of colleges and universities to engage in affirmative action to advance diversity in higher education. Bollinger is widely published, and his forthcoming book, *Social Media, Freedom of Speech, and the Future of our Democracy*, co-edited with Geoffrey R. Stone, will be published in August 2022 by Oxford University Press. Bollinger serves on the Pulitzer Prize Board, and was a director of Graham Holdings Company (formerly The Washington Post Company) from 2007 to 2021. From 2007 to 2012, he was a director of the Federal Reserve Bank of New York, where he also served as chair from 2010 to 2012. He is a fellow of both the American Academy of Arts and Sciences and the American Philosophical Society, a member of the Council on Foreign Relations, and the recipient of ten honorary degrees and numerous awards.
Alan Chen is the Thompson G. Marsh Law Alumni Professor at the University of Denver Sturm College of Law, where he teaches and writes about free speech doctrine and theory. He is the co-author of Free Speech Beyond Words: The Surprising Reach of the First Amendment (New York University Press, 2017) and has published numerous scholarly articles about the First Amendment in many of the leading national law journals. Although he is a full-time academic, Chen continues to carry an active litigation docket and represents the plaintiffs in many high-profile First Amendment cases in federal courts around the country, including constitutional challenges to “ag-gag” laws that punish undercover investigators and journalists in Arkansas, Idaho, Iowa, Kansas, and Utah, and to Colorado’s mandatory Pledge of Allegiance law. Before entering teaching, Chen was a staff attorney with the ACLU of Illinois, where he was a litigator focusing primarily on cases concerning the First Amendment, police misconduct, and privacy rights. Prior to that, he served as a law clerk to the Honorable Marvin E. Aspen, U.S. District Court judge for the Northern District of Illinois.

Carrie DeCell is a senior staff attorney at the Knight First Amendment Institute and a lecturer in law at Columbia Law School. Her litigation focuses on freedom of speech on social media and government surveillance of speech at the border. In addition, she runs the Knight Institute’s externship program with Columbia Law School. Prior to joining the Institute, DeCell was a senior associate at Jenner & Block LLP. DeCell graduated from the University of Pennsylvania and Harvard Law School, where she served as the Essays & Book Reviews editor of the Harvard Law Review. Following law school, she clerked for the Honorable Judith W. Rogers on the U.S. Court of Appeals for the D.C. Circuit.

Adam M. Enders is an associate professor of political science at the University of Louisville, where he teaches and conducts research on conspiratorial thinking and misinformation, political polarization, and racial prejudice. He also teaches advanced methodology courses on measurement and scaling at the ICPSR Summer Program at the University of Michigan.

Katy Glenn Bass is the research director of the Knight First Amendment Institute at Columbia University. She is responsible for conceptualizing and executing all of the Institute’s research initiatives, including the production of scholarship and research materials, the organization of conferences and symposia, and the Institute’s Senior Visiting Research Scholars program. Prior to joining the Institute, Glenn Bass worked at PEN America, where she supervised the production of reports analyzing free expression issues. She has also taught at NYU Law’s Center for Constitutional Transitions and at the Walter Leitner
International Human Rights Clinic at Fordham Law School. She holds a B.A. from Princeton University and a J.D. from Harvard Law School, where she received the Kaufman Pro Bono Service Award.

Jamal Greene is the Dwight Professor of Law at Columbia Law School, where he teaches constitutional law, comparative constitutional law, the law of the political process, First Amendment, and federal courts. His scholarship focuses on the structure of legal and constitutional argument. Greene is the author of numerous articles and book chapters and is a frequent media commentator on constitutional law and the U.S. Supreme Court. Prior to joining Columbia’s faculty, he was an Alexander Fellow at New York University Law School. Greene served as a law clerk to the Honorable Guido Calabresi on the U.S. Court of Appeals for the Second Circuit and for the Honorable John Paul Stevens on the U.S. Supreme Court. He earned his J.D. from Yale Law School and his A.B. from Harvard College. Greene was the Knight Institute’s senior visiting research scholar in 2018-2019.

Jameel Jaffer is the Knight Institute’s executive director. Until August 2016, Jaffer served as deputy legal director at the ACLU, where he oversaw the organization’s work on free speech, privacy, technology, national security, and international human rights. Jaffer’s recent writing has appeared in The New York Times, The New Yorker, The Washington Post, and the Yale Law Journal Forum. He is an executive editor of Just Security, a national security blog, and his most recent book, *The Drone Memos*, was one of The Guardian’s “Best Books of 2016.” Jaffer is a graduate of Williams College, Cambridge University, and Harvard Law School. He served as a law clerk to the Honorable Amalya L. Kearse of the U.S. Court of Appeals for the Second Circuit, and then to the Right Honorable Beverley McLachlin, Chief Justice of Canada.

Heidi Kitrosser is the Robins Kaplan Professor at the University of Minnesota Law School. She is currently a visiting professor at Northwestern Pritzker School of Law and will join the Northwestern faculty as a tenured professor in fall 2022. Kitrosser is an expert on the constitutional law of federal government secrecy and on separation of powers and free speech law more broadly. She has written, spoken, and consulted widely on these topics. Her book, *Reclaiming Accountability: Transparency, Executive Power, and the U.S. Constitution* (University of Chicago Press, 2015) was awarded the 2014 IIT Chicago-Kent College of Law/Roy C. Palmer Civil Liberties Prize. Kitrosser’s articles have appeared in many venues, including Supreme Court Review, Georgetown Law Journal, UCLA
Genevieve Lakier is professor of law at the University of Chicago Law School. Her work examines the changing meaning of freedom of speech in the United States, the role that legislatures play in safeguarding free speech values, and the fight over freedom of speech on the social media platforms. Between 2006 and 2008, she was an academy scholar at the Weatherhead Center for International and Area Studies at Harvard University. Her work has appeared in the Harvard Law Review, the Columbia Law Review, University of Pennsylvania Journal of Constitutional Law, and Supreme Court Review. Lakier is the Knight First Amendment Institute’s 2021-2022 senior visiting research scholar. In this role, she has led an interdisciplinary inquiry into disinformation, misinformation, and the First Amendment in the mass public sphere. During her tenure at the Institute, Lakier has brought together scholars from a range of disciplines to explore these issues in a series of roundtables, and organized a major symposium to produce new scholarship on lies, free speech, and the law.

Sam Lebovic is an associate professor of history at George Mason University, where he also serves as associate editor for the Journal of Social History. A historian of U.S. political and cultural life, he is particularly interested in the ways that information and ideas circulate—and don’t circulate—through the U.S. public sphere. Lebovic is the author of *Free Speech and Unfree News: The Paradox of Press Freedom in America* (Harvard University Press, 2016), which won the OAH’s Ellis Hawley Prize, and *A Righteous Smokescreen: Postwar America and the Politics of Cultural Globalization* (University of Chicago Press, 2022), as well as numerous articles and essays on the history of civil liberties, foreign relations, the media, and the national security state. With support from an NEH Public Scholar fellowship, he is currently completing a narrative history of the Espionage Act, which is under contract with Basic Books.

Artur Pericles Lima Monteiro is a visiting fellow at the Information Society Project, Yale Law School. He is also a researcher at the Constitution, Politics & Institutions Research Group at the University of São Paulo, Brazil, and head of research, freedom of expression at InternetLab, a Brazilian center on law and technology. He is a co-editor of the Digital Future Whitepaper Series (Information Society Project, Yale Law School), and leads the freedom of expression clinic at the Center for Law, Internet, and Society (University of São Paulo). He holds an LL.B. and an M.Sc. (distinction) from the University of São Paulo, where he is also
a doctoral candidate. Previously, he practiced law in Brazil, advising national and international clients on data protection, technology, and intellectual property. He was also a law clerk for an appellate judge sitting at the São Paulo Court of Justice. His doctoral research focuses on privacy and encryption. He is also working on projects on anonymity on the internet, content moderation, and platform governance.

Helen Norton is a university distinguished professor and Rothgerber Chair in Constitutional Law at the University of Colorado School of Law. Her scholarly and teaching interests include constitutional law and civil rights law. Before entering academia, Norton served as deputy assistant attorney general for civil rights at the U.S. Department of Justice, and as director of legal and public policy at the National Partnership for Women & Families, and she currently serves as special counsel on constitutional and civil rights for Colorado’s attorney general. She has been honored with the Excellence in Teaching Award on multiple occasions and appointed as a University of Colorado presidential teaching scholar. Her work has been published by Cambridge University Press, Duke Law Journal, Northwestern University Law Review, Stanford Law Review Online, and the Supreme Court Review, among others.

Deborah Pearlstein is professor of law and co-director of the Floersheimer Center for Constitutional Democracy at Cardozo School of Law at Yeshiva University. Before joining Cardozo, Pearlstein was an associate scholar in the Law and Public Affairs Program at Princeton University’s School of Public and International Affairs, and held visiting appointments at the University of Pennsylvania Law School and Georgetown University Law Center. Her scholarship on the Constitution’s separation of powers and U.S. foreign relations has been published widely in leading law journals and in the popular press, and has been the subject of repeated testimony before Congress on topics from war powers to executive branch oversight. She has served as chair of the AALS National Security Law Section, on the ABA’s Advisory Committee on Law and National Security, and on the editorial board of the peer-reviewed Journal of National Security Law & Policy. Most recently, she was appointed to the U.S. State Department Advisory Committee on Historical Diplomatic Documentation, a nine-member board of historians, political scientists, and international law experts who help ensure the timely declassification of government records surrounding major events in U.S. foreign policy. A magna cum laude graduate of Harvard Law School, Pearlstein clerked for Judge Michael Boudin of the U.S. Court of Appeals for the First Circuit, then for Justice John Paul Stevens of the U.S. Supreme Court. Following her
clerkships, she became a practicing human rights lawyer, earning the Voting Rights Award from the ACLU of Southern California for her litigation work following the 2000 presidential election.

**Francesca Procaccini** is a Climenko Fellow and lecturer on law at Harvard Law School. Her scholarship focuses on structural constitutional rights, free speech law, and the federal courts. Her work has appeared or is forthcoming in such publications as the Virginia Law Review and Fordham Law Review, as well as in popular outlets including The Atlantic, Stroke of Genius podcast, and Lawfare. Procaccini is also a visiting lecturer at Yale Law School, where she teaches a course on “The Roberts Court and Freedom of Speech.” Additionally, she serves as a visiting fellow at the Information Society Project at Yale Law School, where she studies how the First Amendment is adapting to the technologizing of democratic processes. She received a B.A. summa cum laude and Phi Beta Kappa in political science and Italian from Barnard College, and a J.D. cum laude from Harvard Law School. She served as a law clerk on the U.S. Court of Appeals for the Ninth Circuit and as an appellate attorney in the Civil Rights Division of the U.S. Department of Justice.


**Amanda Shanor** is an assistant professor at the University of Pennsylvania’s Wharton School, where she writes about U.S. constitutional law with an emphasis on the freedom of speech. Shanor’s research explores the changing meaning of the First Amendment and the forces that affect it; democratic theory and illiberalism; and the intersection of constitutional law, economic life, and equality. Prior to joining the academy, Shanor was a practicing lawyer in the National Legal Department of the ACLU, where she worked on the organization’s U.S. Supreme Court litigation, including *Masterpiece Cakeshop*, a case involving a bakery that declined to sell a wedding cake to a gay couple. Shanor has work
PARTICIPANTS

published or forthcoming in the New York University Law Review, the UCLA Law Review, the Emory Law Journal, and the Wisconsin Law Review, among others, and she is the co-author of a textbook on counterterrorism law. Shanor teaches first-year constitutional law at the University of Pennsylvania Carey Law School and has also taught at Yale and Georgetown law schools. She is a graduate of Yale Law School and Yale College, and a Ph.D. candidate in law at Yale University. Shanor served as a law clerk to Judges Cornelia Pillard and Judith Rogers on the U.S. Court of Appeals for the D.C. Circuit, and Judge Robert Sweet in the U.S. District Court for the Southern District of New York.

Mark Tushnet is William Nelson Cromwell Professor of Law Emeritus at Harvard Law School. He is the co-author of four casebooks, including the most widely used casebook on constitutional law, has written numerous books, including a two-volume work on the life of Justice Thurgood Marshall and Advanced Introduction to Comparative Constitutional Law; Taking Back the Constitution: Activist Judges and the Next Age of Constitutional Law; Why the Constitution Matters; and Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Perspective, and has edited several others. He was president of the Association of American Law Schools in 2003. In 2002, he was elected a fellow of the American Academy of Arts and Sciences.

Joseph Uscinski is a professor of political science at the University of Miami, where he studies and teaches courses on conspiracy theories and the people who believe them. More broadly, he studies public opinion, mass media, and the interaction between the two. He is co-author of American Conspiracy Theories (Oxford University Press, 2014) and Conspiracy Theories and the People Who Believe Them (Oxford University Press, 2018).

Eugene Volokh teaches First Amendment law and a First Amendment amicus brief clinic at UCLA School of Law, where he has also often taught criminal law, copyright law, tort law, and a seminar on firearms regulation policy. Before coming to UCLA, he clerked for Justice Sandra Day O’Connor on the U.S. Supreme Court and for Judge Alex Kozinski on the U.S. Court of Appeals for the Ninth Circuit. Volokh is the author of the textbooks The First Amendment and Related Statutes (7th ed., 2020) and Academic Legal Writing (5th ed., 2016), as well as over 90 law review articles. He is a member of the American Law Institute, and the founder and co-author of The Volokh Conspiracy, a blog that was hosted by The Washington Post and is now at Reason Magazine. In addition to his academic work, he has also filed briefs in more than 125 appellate cases
throughout the country since 2013, and has argued in over 30 federal and state appellate cases.

**Sonja R. West** is the Brumby Distinguished Professor in First Amendment Law at the University of Georgia School of Law, where she teaches and writes about constitutional law and the U.S. Supreme Court. Her scholarship examines the interpretation of the First Amendment’s press clause, legal protections for the press, and the role of the courts in protecting expressive freedoms. In recognition of her scholarly impact, West was awarded the Association for Education in Journalism and Mass Communication’s Harry W. Stonecipher Award for Distinguished Research on Media Law and Policy, and the National Communication Association’s Franklyn S. Haiman Award for Distinguished Scholarship in Freedom of Expression. West is a graduate of the University of Chicago Law School and clerked for Judge Dorothy W. Nelson of the U.S. Court of Appeals for the Ninth Circuit and for Justice John Paul Stevens of the U.S. Supreme Court. Her other professional experience includes several years practicing media law with the Los Angeles law firms Gibson, Dunn & Crutcher and with Davis Wright Tremaine.

**John Fabian Witt** is Allen H. Duffy Class of 1960 Professor of Law at Yale Law School. He is the author of a number of books, including *American Contagions: Epidemics and the Law from Smallpox to COVID-19* (Yale University Press, 2020) and *Lincoln’s Code: The Laws of War in American History* (Free Press, 2012), which was awarded the Bancroft Prize and the ABA’s Silver Gavel Award, was a finalist for the Pulitzer Prize, and was a New York Times Notable Book for the year 2012. Other writings include *To Save the Country: A Lost Manuscript of the Civil War Constitution* (Yale University Press, 2019) (with Will Smiley), *Patriots and Cosmopolitans: Hidden Histories of American Law* (Harvard University Press, 2007), and *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Harvard University Press, 2004), as well as articles on legal history and tort law. He has been a John Simon Guggenheim Memorial Foundation Fellow and is a fellow of the American Academy of Arts and Sciences. Witt is currently writing the story of the people behind the Garland Fund, the 1920s foundation that quietly financed the litigation campaign leading to *Brown v. Board of Education*. 
Reflections

As part of the Knight Institute’s year-long exploration of Lies and the Law, spearheaded by our Senior Visiting Research Scholar Genevieve Lakier, the Institute hosted a series of public roundtables with scholars, journalists, and practitioners, exploring what the law can and should do about the problem of lies and deception in the mass public sphere. Participants wrote short reflections in advance of the roundtables. The prompts for these reflections, as well as the reflections themselves, are reprinted here.

Videos of the Lies and the Law roundtables are available at knightcolumbia.org/events/. 
LIES AND THE LAW
ROUND TABLE 1
9/24/21, 1:00-2:30 PM EDT
LIES AND
DEMOCRACY

OPENING REMARKS: Katy Glenn Bass, Knight First Amendment Institute
FEATURING: Masha Gessen, The New Yorker; Quinta Jurecic, Brookings Institution; Sophia Rosenfeld, University of Penn School of Arts & Sciences
MODERATED BY: Genevieve Lakier, Knight First Amendment Institute
In her wonderful 1967 essay, *Truth and Politics*, Hannah Arendt wrote: “No one has ever doubted that truth and politics are on rather bad terms with each other, and no one, as far as I know, has ever counted truthfulness among the political virtues.” Is she correct? Is truthfulness a political virtue? Should it be? And are lies politically virtuous? And if so, what does that mean about democratic politics, both in the United States and elsewhere? As a way of “setting the table” for our roundtable discussion, please introduce us to your thinking on these questions—for example, what do you find most interesting, and/or challenging, about attempting to answer these questions? What aspect of these issues do you think is under- or over-represented in current debates about lies and truth in America?
Is Politics Possible in the Absence of Truth?

By Masha Gessen

I am moved, first, to defend the facts. The prompt—the first few lines of Hannah Arendt’s essay—reflects not her beliefs but what she portrays as “current convictions.” Her own position was the opposite: Truth is the sine qua non of politics. When lies overpower truth, politics dies. When politics dies, our world collapses, and we humans die too—because it is only in the world, among other humans, that we exist.

I realize that the prompt was not designed to elicit a microtreatise on one of my favorite essays, but this is what you get—in the name of truth and politics. Let’s begin with definitions of both politics and truth. When Arendt speaks of politics, she is referring not to the electoral process or a legislative process—the things we most frequently have in mind when we use the word “politics” in everyday speech—but to the process of human beings figuring out how we live together. For the purposes of the essay, Arendt adopts a distinction between rational truth and factual truth, and it’s the latter that concerns her. She believes that factual truth—things that we have observed empirically—is in more danger of being obscured by lies than rational truth, such as scientific theorems that are purely the product of the human mind. This may seem counterintuitive, but our experience has borne this out again and again: We have seen the lies of the powerful elide things that we know actually happened.

In her essay, Arendt uses the example of Leon Trotsky, one of the leaders of the Bolshevik Revolution in Russia, whose name was, at the time of the writing, entirely absent from Soviet history books, reference literature, and textbooks. Another example is the existence of concentration and extermination camps in Stalin’s U.S.S.R. and Hitler’s Germany—facts, indeed publicly known facts, that were nonetheless risky to mention. Half a century later, these examples make for strange and depressing case studies. On the one hand, Trotsky’s name and the existence of concentration and death camps have been restored to history. On the other hand, that restoration required extraordinary efforts and the extraordinary event of the collapse of an empire—and still, historical memory wants to backslide. The ruling party in Poland, where most Nazi concentration and death camps were located, is pushing back the memory of the Holocaust—again. And

just this month Russians unveiled two new monuments to Stalin.

Arendt warns that once a fact or a person has been elided from public accounts, it may be impossible to restore to common memory. We love to read books or watch shows that revise and correct history, but we also forget them immediately, and history regresses to the dominant narrative. In the best-case scenario, Alexander Hamilton acquires a second life as a show tune, and Monica Lewinsky amasses a genuinely sympathetic audience on Twitter—where she makes allies by making jokes at her own expense.

Arendt uses two terms to show the mechanics of suppressing factual truth: “opinion” and “secret.” Something that is publicly known—something that is empirically knowable—is downgraded to an opinion and then shamed as a secret. Let’s take a more recent example. We have just commemorated the 20th anniversary of 9/11. Twenty years ago, the official line promoted by the White House, and backed by the force of mobilized public opinion, was that “cowardly” terrorists attacked the United States because “they hate us for our freedom.” The factual truth was that a group of determined and, one can conclude on the basis of their actions, brave men mounted a terrorist response to U.S. military and political interventions. Yet the force of the official narrative was such that this factual truth quickly became an unpopular opinion and then a secret in the sense in which Arendt uses the word: something that you can be punished for saying.

In the intervening period, we have seen many scholars utter this “secret,” and a few politicians have joined them; the mainstream coverage of the 20th anniversary of 9/11 generally acknowledged what used to be a heretical opinion. And yet, we have a museum at Ground Zero that treats the terrorist attacks like a force of nature or, perhaps more accurately, as an act of God, because forces of nature at least have physical explanations but the terrorist attacks continue to be treated as inexplicable. And then we have former President George W. Bush, the principal author of the lies about 9/11, make a facile comparison between those terrorists and domestic terrorists—and collect plaudits, when the comparison actually perpetuates the lie.

There are indeed several direct lines between 9/11 and our current predicament, though—and one of them is the argument we are having about what happened on January 6. If you listened to our elected representatives, you might conclude that it was a matter of opinion whether what happened was an armed coup attempt or a humorous protest and tourist visit. We are in the same situation with the pandemic: One might think (if one were sufficiently isolated for a sufficient period of time) that whether the disease caused by the novel coronavirus exists, and
whether the vaccine against it is effective or causes people to become magnetized, are questions of opinion rather than factual truth.

These contemporary arguments are strikingly different from the examples I used—whether 9/11 or Trotsky—in that they don’t pit a truth against a single political power. Instead, two halves of this country, give or take, are pitted against each other, one fighting for factual truth as though it were an opinion to be defended, the other fighting against factual truth as though it were an opinion to be defeated. We talk about polarization and the impossibility of dialogue, and what we mean is that we are no longer engaged in politics: We are not making a society together. This predicament is consistent with Arendt’s assertion that politics is impossible in the absence of truth.

**Masha Gessen** is a staff writer at The New Yorker and author of numerous books.
The Anguish of the Necessary Lie
By Quinta Jurecic

Donald Trump’s presidency marked such a breach from governing norms of American politics that—in the same way that you would notice a rug as it was yanked out from under you—it drew attention to the unspoken moral preconceptions that had held up the system before Trump came along. One of these preconceptions was an expectation of civic virtue—the idea that the public should have some basic level of trust in the moral character of its leaders, their barest ability to tell right from wrong. Another was the centrality of truth to political life.

Politics in the United States, like everywhere else, is populated by liars. But Trump’s strained relationship with honesty—his willingness not just to lie, but to navigate through life without any attention whatsoever paid to the facts—made clear how important the truth really is.

Truth and politics, Hannah Arendt argues in her essay of the same title, “are on rather bad terms with each other.”¹ The notion of a single immovable truth, in Arendt’s view, sits uncomfortably with the concept of governance by a democratic community, where ideas are debated among citizens who share different ideas and perspectives. She builds her vision of politics around human unpredictability and the capacity for change, a fluidity to which the “coercive” force of unchangeable facts is necessarily opposed. At the same time, Arendt argues that the existence of democratic politics is dependent on assent between citizens on the facts that make up their shared world. If we have no common understanding of how things work, we won’t be able to come to agreement—and without the possibility of mutual consent, the only option is for one group to compel agreement through force. For this reason, Arendt’s view is less that truth and politics are incompatible, and more that they exist in tension with one another. They may be on bad terms, but they remain speaking.

Arendt’s project, she writes, is “to look upon politics from the perspective of truth.”² But looking at truth from the perspective of politics, the relationship remains similarly strained. Even the most conscientious politician struggles under the weight of what Max Weber, in his essay “Politics as a Vocation,” calls “the ethical irrationality of the world”—the fact that morally good actions can bring about

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² Id. at 83.
catastrophe, and morally bad actions can be necessary to achieve good political ends.3 This includes lying.

Consider, for example, a minor political controversy that took place in 2015 over President Obama’s views on gay marriage. Obama’s longtime aide, David Axelrod, wrote in a memoir published that year that Obama had lied during his 2008 presidential campaign about his position on the issue: The candidate believed that same-sex couples should be able to marry, Axelrod wrote, but publicly opposed those unions until 2012, when public opinion tipped in favor of gay marriage for the first time.4 According to Axelrod, Obama misled the public about his position in order to win the election, which then allowed him to support policies in favor of gay marriage years later. Should he instead have been honest and perhaps lost the election?

The political theorist Michael Walzer terms this “the problem of dirty hands,” and it has been a dilemma of political life since Machiavelli argued that “a prudent ruler ought not to keep faith when by so doing it would be against his interest.”5 Weber’s solution to this ethical irrationality relies on the interior life of the politician. He wants his principled leaders to compromise—to lie—when necessary, but he also wants them to feel the moral pain of those lies and to recognize when telling falsehoods would take them over a line they refuse to cross. The conscientious politician still has to lie to get things done, but those lies are told with anguish.

It is not saying anything controversial to state that Weber’s scheme depends on a level of moral decency utterly lacking in Donald Trump. The former president remains unburdened by the self-reflection that Weber seeks. His lies are so free of anguish, in fact, that they might not even be lies at all. They’re closer to what the philosopher Harry Frankfurt deems “bullshit,” statements to which the truth is not just opposed but irrelevant. As a Frankfurrian bullshitter, Trump lacks not only the keen sense of right and wrong that guides Weber’s politician but also the level of care that Weber seeks.6 Trump is careless, in the sense of being sloppy

but also in the sense of being unconcerned with the existence of a common world shared between him and other people—the tending of which, in coordination with others, is the work of democracy.

Unlike the totalitarian leaders whom Arendt saw as eradicating truth through violence, Trump lacked the strength of will or the capacity for follow-through. But his lack of care for facts was a powerful enough current that it still set the United States adrift. Today, many of the suggestions made for re-anchoring American politics in truth focus on cultivating habits of good citizenship: Americans should argue, but respectfully; they should trust one another more, but not so much they believe everything they see; they should peel themselves away from their screens and engage as productive members of society who seek to flourish in their common life. Likewise, political leaders need civic virtue in order to navigate the necessity of lying without getting morally lost.

The problem, of course, is that virtue—like truth—sometimes sounds best in the abstract. Who defines it, and for whom? Plato, notoriously, advocated a system of maintaining and cultivating virtue that depended on the city’s leaders telling their people a lie. The experience of the Trump presidency has shown how thoroughly preferable it is to have a leader who lies and is pained by it than it is to be governed by someone who will tell falsehoods for any reason at all. But that is a low bar. And the trouble with moral qualms as a qualification for governance is that it’s impossible to confirm whether politicians are really suffering or not in departing from the truth. Are they anguished by the necessity of lying to get things done? Or are they just, well, lying?

Quinta Jurecic is a fellow in governance studies at the Brookings Institution and a senior editor at Lawfare.
Is Lying Actually a Good Thing in Politics?

By Sophia Rosenfeld

That Hannah Arendt was not only an iconoclastic thinker but also a contrarian one with a taste for slaying bourgeois, liberal pieties, is readily apparent in her 1967 essay “Truth and Politics.” For in this little essay, originally written for The New Yorker, she opens with two characteristically Arendtian claims that have been resuscitated repeatedly, if uncertainly, since the mid-2010s for our own moment of hand-wringing over the status of truth in current affairs. One of these claims is that politics and truth have never been aligned (which challenges a core democratic article of faith). The other is that the absence of truthfulness in politics might not be such a bad thing either (which is even more of a provocation).

But was she right? Or, maybe I should ask, is any of this true? The answer, I think, is yes, but only to a point.

The first issue that needs confronting is the difference between truth and truthfulness. The former is an epistemic category related to accuracy. But truthfulness is another kettle of fish entirely. This is a moral category. One can, of course, be sincere in spreading misinformation. One can also tell a truth—“overshare,” for example—without intending to or by accident. On this distinction, Arendt is slippery, but that difference is actually important to establish before we begin to address the question of just what counts as a political virtue.

Then there is the question of whether truth and politics are necessarily or even consistently “on rather bad terms with each other,” as Arendt posits. Here I feel obliged to answer as a historian. Perhaps it is true that politics and truth are rarely aligned in the most general sense. However, the more important and useful point is that, both in practice and in theory, their relationship has worked differently, and has been strained to greater and lesser degrees, depending on when, where, and in whose hands—a point Arendt herself made elsewhere, as did Michel Foucault with his talk of various “regimes” of truth.

My own conviction is that there is something highly particular (though we are so used to it by now that it can seem banal or even natural) about the way truth is understood to operate in modern democracies. That something was baked in at its point of origin, namely, the trans-Atlantic Enlightenment of the 18th century.

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On the one hand, early proponents of republics like Jean Jacques Rousseau or Thomas Paine declared that whereas monarchial politics made a virtue of secrecy and deception, self-rule would encourage something different and better: the reign of transparency and veracity, as well as accurate information. Early democratic politics is full of tributes to truth and truthfulness. But on the other hand, these same figures also insisted that most kinds of truth should be left open-ended and undogmatic in the public sphere. Moreover, rather than resting on any one authority, they would be a product of a loose and evolving consensus among experts and the public alike, all facilitated and regulated by nothing more than a) the informal norms of trust and plain speech, and b) the formal norm of constitutionally protected freedom of speech or expression.

Of course, what that has meant in practice is that not only what counts as truth but also where truth is found, who gets to determine it, and by what method have always been subject to challenge and, indeed, conflict. This has particularly been the case when either knowledge elites or ordinary people—the two critical populations who need ultimately to negotiate truth claims—try to hijack the process and gain a monopoly on truth for themselves. And though this risk has been apparent from the start, the vast expansion and diversification of both those granted the status of expert and the citizenry of modern democracies, along with newer factors like technological change and the transnational nature of today’s most pressing problems, have accelerated and exacerbated this weakness in the nature of democratic truth in our moment. Which is to say: We need to resist not only the “this is all absolutely unprecedented” position (which is prominent in mainstream media today, especially under the influence of technological determinism) but also the cynic’s “there is nothing new under the sun” position in favor of a truly historical perspective on the present.

But is either lying or the lie actually a good thing in politics, as Arendt’s slur against truthfulness seems to suggest? And does her comment mean we should simply accept or even embrace their prevalence now? Arendt was very aware that too much lying on the part of the political classes was dangerous—the risk was totalitarianism, where everything is fictional, and the public is forced to withdraw into private life as a result. But too much emphasis on the telling of truth and the public unmasking of deceit can be oppressive too, as in the French Revolution’s Reign of Terror, she argued; for then truth too becomes despotic, as it allies itself against any kind of pluralism or even nuance. By this reasoning, some looseness in the policing of the boundaries around truth and lies is not only a way to save people from the guillotine but also an essential element of any political movement that yearns to challenge the status quo. Here again, Arendt’s refusal to be
the starry-eyed idealist, though it can seem almost too knowing, is also a helpful wake-up call for democratic handwringers.

Perhaps, though, the situation in the U.S. at this moment isn’t really equivalent to either of Arendt’s examples, despite the unusual reach of disinformation right now, not to mention a major political party that is trading on this set of falsehoods to stir up partisanship and maybe an attack on democracy itself (i.e., the “Big Lie”). What we are witnessing now is better described as a dense intellectual fog. In our cacophonous public sphere, there are so many conflicting and competing accounts of reality in circulation that it is impossible for any single “truth” to rise to the top, and epistemic positions have become a nasty form of identity politics. And here’s the problem: Not only are most of our known remedies ill-suited to this situation, so are our Enlightenment-inspired paradigms—including Arendt’s—for how to ultimately get from spin, exaggeration, and their close cousins to something like the basic consensual truths that democracy is thought to require. The Enlightenment vision of truth and truthfulness depends on both a logic and a context that make it harder to square with reality than it has ever been before. The scariest thing about the present is how few other models we can, as yet, imagine.

Sophia Rosenfeld is Walter H. Annenberg Professor of History at the University of Pennsylvania.
LIES and THE LAW ROUND TABLE No.2

DATE: 10/13/21 TIME: 1:00-2:30 PM EDT LOCATION: ONLINE

PARTICIPANTS: Richard Hasen, University of California, Irvine School of Law; Janell Byrd-Chichester, Thurgood Marshall Institute of the NAACP LDF; Atiba Ellis, Marquette University Law School; Matt Perault, Center on Science & Technology Policy at Duke University

MODERATED BY: Genevieve Lakier, Knight First Amendment Institute
In First Amendment law, elections have long been treated as special events that allow more government regulation, including of lies and misinformation. The exceptionalism of the electoral context is what allows the government to, for example, make it a crime to deceive another about the location of their polling place. It also helps justify extensive campaign finance disclosure requirements. Is the exceptionalism of electoral speech regulations warranted? Are election-related lies different, or more serious, than other kinds of lies? Why? And if these lies are exceptional, should the government, or private actors like social media platforms, expand the scope of the exception to include (for example) lies about election results?
We Must Fight Lies, Ignorance, and the Bigotry They Produce If We are to Remain a Democracy

By Janell Byrd-Chichester

The first sentence of a recently released report on the 2020 elections, Democracy Defended, by my organization, the NAACP Legal Defense and Educational Fund, Inc. (LDF), reads: “Democracy was on the ballot in 2020.”¹ As we all know, democracy is still on the ballot. It will be on the ballot in 2021 and 2022—and will remain so for the foreseeable future. The country we thought we knew, the norms we thought were inviolate, and the truths that united us even as we struggled, are all under siege in ways that we have not seen in recent or distant memory.

During the 2016 and the 2020 election seasons, as we sought to understand what was occurring in the United States, I looked to books about authoritarianism, fascism, and tyranny to understand whether America was indeed heading in that direction. It was not surprising to see the critical common thread of political manipulation through the spread of disinformation in these texts—and the parallels to what we are experiencing in the United States.

Indeed, we learned that in 2016 the Trump campaign and foreign operatives had targeted Black voters through online messaging designed to provoke anger at established institutions and politicians for historic and structural mistreatment.² This messaging was employed to stop Black people from voting: either by encouraging them to send a message by boycotting the election—or by convincing them that the system is corrupt, so voting doesn’t matter. We also learned how Big Tech’s algorithms were being used to feed a constant stream of hate-filled, racist, and extreme messaging to incite and divide the nation. Civil rights leaders have been pushing for companies like Facebook to address these problems, but the response has been insufficient.³

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³ Sherrilyn Ifill, Opinion, Mark Zuckerberg doesn’t know his civil rights history, WASH. POST (Oct. 17, 2019), https://www.washingtonpost.com/opinions/2019/10/17/mark-zuckerberg-doesnt-know-
In 2020, we watched in shock and dismay as people with firearms showed up to protest pandemic orders, a plot to kidnap Michigan’s sitting governor was revealed, and people with assault weapons at polling places and caravans of vehicles tried to intimidate voters.\(^4\) We watched on January 6, 2021, as domestic terrorists—prompted by a sitting president—used violence to disrupt the peaceful transfer of presidential power. The attempted coup occurred under the false flag of “stop the steal,” a gross misinformation campaign alleging nonexistent electoral fraud, when in fact it was the flag bearers and their supporters inside who were attempting to carry off the theft of the election—and democracy itself. And while they may have failed that day, they haven’t stopped spreading the false narrative.

After all of this, we saw the rise of well-funded, organized efforts in state legislatures across the country to enact laws to suppress the vote, efforts to continuously audit the election results to sow doubt about the integrity of our electoral process, and a campaign to stoke racial division by denying schools and educators the ability to teach our children the truth about the racial history of the United States. The campaign attacking school history curricula has co-opted an academic legal framework about structural racism—known as critical race theory—and turned it into a sound bite for a head-on challenge to the honest teaching of history.\(^5\)

This promotion of a false narrative through the omission of historically accurate information seeks enforcement through law and regulation.\(^6\) And, just as this effort divides and incites the electorate in advance of the upcoming elections, the ignorance of our history promotes a false sense of white entitlement and supremacy.


\(^3\) Char Adams et al., *Map: See which states have passed critical race theory bills*, NBC News (June 17, 2021, 2:54 PM), [https://www.nbcnews.com/news/nbcblk/map-see-which-states-have-passed-critical-race-theory-bills-n1271215](https://perma.cc/RZ8P-LHNB).
acy among those lacking an understanding of the brutal predatory underpinnings of white privilege, wealth, and advantage that exists in the modern United States. Learning the truth is a benefit to all and the only path forward for the future of our nation.  

We also know the seriousness with which lies and disinformation must be countered, including through litigation like that brought by LDF challenging Donald Trump’s attacks on Black voters and efforts to stop the certification of votes from Detroit. These falsehoods must be confronted until they are defeated.

So, when asked about the role of disinformation and lies in the most sacred democratic process—the electoral process—my view is that we need to be bold, aggressive, and smart. We have many allies in this fight. We have true victories, as is clear from the historic voter turnout in the 2020 elections. We can defeat the use of disinformation to sow chaos, doubt, and fear by pressing our government for laws that protect democracy and promote the truth, while we practice the same in our public and private lives:

1. We must press for the passage of the laws that protect free and open access to the ballot, including the John R. Lewis Voting Rights Advancement Act of 2021 and proposals like the Freedom to Vote Act.

2. The Department of Justice must enforce Section 11(b) of the Voting Rights Act, which prohibits attempts to intimidate, threaten, or coerce voters and those, such as state and local elections officials, who count and certify votes.

3. We must build the infrastructure to effectively regulate the social media and tech industries, to require transparency in their use of algorithms, to mandate the immediate removal of false information from their platforms along with the individuals who promote these falsehoods, and to stop the use of harmful algorithms, such as those that fuel racial hatred and bigotry.

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4. We must fight against the movement to force our children into ignorance by countering efforts to prohibit schools and educators from teaching the racial history of the United States.

5. We must hold politicians accountable by voting against those who champion false narratives.

6. We must protect the freedom of the press and journalists.

7. We must protect the integrity of our election administration processes and protect the election officials, who are on the front lines in that process, from threats and acts of violence.

Janell Byrd-Chichester is the director of the Thurgood Marshall Institute of the NAACP Legal Defense and Educational Fund, Inc.
Race, the Epistemic Crisis of Democracy, and the First Amendment

By Atiba R. Ellis

On October 8, 2021, the Norwegian Nobel Committee awarded the Nobel Peace Prize to Maria Ressa and Dmitry Muratov for their willingness to pursue truthful reporting in opposition to authoritarian regimes.¹ In the citation, the Nobel committee rearticulated the basic truth that “freedom of expression and freedom of information [are] crucial prerequisites for democracy.”

But in a democracy, government must limit some speech to safeguard other democratic values. This is relatively uncontroversial in areas of the law of politics like campaign finance (where certain disclosures of donors’ identities and donations promote transparency and forestall corruption)² and voter deception (where criminal penalties for lying to voters to prevent them from voting preserves voter access).³

To me, the question is whether to limit the First Amendment protection of lies that directly subvert the integrity of the election system and, moreover, call into question the value of inclusion as a practice in American democracy. Because this disinformation not only subverts any objective meaning of election integrity but also stems from a motive that seeks to suppress and nullify the influence that people of color exercise in the 21st century American electorate, it does not deserve robust protection.

To be clear, this is not an effort to ban the exaggerations and half-truths that are part of ordinary political discourse. My concern is with the recent rhetoric of conspiracy and corruption that have created what I call an “epistemic crisis” for American democracy.⁴ This represents a crisis of knowledge where the difference between true and false claims regarding election integrity is increasingly difficult to discern, and that erasure threatens democracy itself.

³ Gilda Daniels, Voter Deception, 43 IND. L. REV. 343 (2010).
⁴ Atiba R. Ellis, Voter Fraud as an Epistemic Crisis for the Right to Vote, 71 MERCER L. REV. 757, 759 (2020).
For example, the “Big Lie” promulgated around the 2020 election—the allegation made with no proof that voter fraud and systemic corruption exist in select states and cities—sows widespread doubt about the integrity of election results. This doubt, in the guise of the “voter fraud meme” then is used to justify overly restrictive election laws that harm the voting process.\(^5\)

According to the Brennan Center for Justice, at least 18 states have passed 30 laws in the wake of the 2020 election that will make it harder to vote—and these states were likely driven by this “Big Lie.”\(^6\) In addition, investigations in Pennsylvania and Wisconsin, and a protracted recount in Arizona (which found no proof of fraud) continue to foster doubt around the legitimacy of the 2020 presidential election.\(^7\) Despite the evidence that the 2020 election was, by all objective measures, “the most secure in American history,” the result continues to be openly doubted.\(^8\)

Historically, those who promoted public narratives of fear over lost election integrity did so to fight the inclusion of the “unworthy” into the political process. I have argued in prior work that the long story of the voter fraud lie stems in part from the racist belief that people of color are unworthy to engage in the political process.\(^9\) It is partly because this lie—and the apartheid consequences to the United States that this lie protected—was a clear threat to American democracy that Congress passed the Voting Rights Act of 1965. Read through this lens, the modern-day anti-democracy problem of disinformation takes on another dimension.

The “Big Lie” is racially coded.

The Trump campaign targeted several cities with unfounded claims of voting corruption where a significant part of the voting population is people of color—including Atlanta, Detroit, Milwaukee, and Philadelphia. Even after the election


\(^9\) Ellis, *supra* note 5.
ended, the Georgia Legislature (among other conservative legislatures in states with substantial minority voting strength) passed laws to “fix” the mythical problem of voter fraud (sustained by the “Big Lie”) to further suppress voting. And most shocking—and echoing Jim Crow-era race riots intended to subvert the vote of people of color—the “Big Lie” motivated the Capitol insurrection of January 6, 2021.

As Sherrilyn Ifill of the NAACP Legal Defense Fund observed:

> The president’s use of dog whistles to suggest the illegitimacy of votes cast by Black voters in Detroit, Philadelphia, Milwaukee, and Atlanta are an appeal to a dangerous and corrosive racialized narrative of voter fraud.¹⁰

Though we might take comfort from the fact that courts wholly blocked this attempt to use the legal process to subvert the 2020 election, the larger lie is still protected free speech.¹¹ Indeed, some have argued that First Amendment doctrine has a blind spot to bad ideas and disinformation that have real-world consequences.¹² And to compound that effect, some argue that the First Amendment protects speech that harms communities of color while abandoning protection around speech that harms the powerful.¹³ So, the epistemic crisis remains.

We should reconsider the degree of tolerance the First Amendment allows for election lies that pose a clear and present danger to the political process, especially considering the threat towards racial minorities in that process. Perhaps an objective truth requirement for discourse around election integrity—or a disclaimer to signal such truth is lacking—ought also to apply to claims on social media, the press, and elsewhere (including the legislature!). Perhaps the government has an interest in protecting election outcome credibility, akin to the kind of disaster-related election infrastructure interest Rick Hasen suggested in his recent

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book, and this value could justify a narrower speech protection for impactful election integrity lies.¹⁴

But the problem of epistemic crisis is not just a problem of how to monitor or police election claims in the public sphere. This epistemic crisis is a crisis of democratic values—the values of inclusion and equality that are central to a functioning democracy. Framing the problem as a need to amplify these values in our electoral process is perhaps a necessary preliminary step.

The only long-lasting solution to the continued promulgation of the “Big Lie” is a broader conversation about both the positive values contained in worthwhile civic education—including an appreciation of the mechanics of the democratic process and its complexities—as well as a critique of negative values and disreputable history of American democracy, including the history of and ongoing harms caused by coded racial voter suppression. The government’s promotion of this speech as a counternarrative to the “Big Lie” of anti-democratic exclusion should be our way forward.

**Atiba R. Ellis** is a professor of law at the Marquette University Law School.

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If there was ever any doubt that lies about elections can be especially dangerous, the January 6, 2021, insurrection at the United States Capitol should put that to rest. The invasion put the lives of then-Vice President Mike Pence and the congressional leadership in danger, and it left four Trump supporters dead and 146 law enforcement officers injured, including one tased by protestors so many times he suffered a heart attack. One Capitol Police officer died of a stroke the next day and four more died by suicide within months of the riot.

It is quite easy to connect the violence that accompanied Congress’ ceremonial counting of Electoral College votes to determine the winner of the 2020 presidential election to the repeated false statements from former President Donald J. Trump about whether the election was “stolen” or “rigged” against him. Trump made over 400 statements on Twitter about the election being stolen in less than three weeks after the November 3 election, and repeatedly encouraged his supporters to attend a “wild” rally in the nation’s capital on January 6 to protest the formal recognition of his opponent Joe Biden’s victory. At that rally, Trump exhorted the crowd to go to the Capitol building and “take back our country.”

The violence that ensued was as predictable as it was tragic.

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It is far harder to know what to do about election-related lies in ways that are consistent with the First Amendment and that do not squelch the kind of robust political debate that is essential for a vibrant, modern democracy.

In a book to be released in March 2022, Cheap Speech: How Disinformation Poisons Our Politics—and How to Cure It, I explain how technological change has allowed the spread of disinformation, and particularly disinformation about how elections are run, to threaten the integrity of the election system. And I offer a host of both legal and norm-based solutions to lessen the risk that disinformation will bring down American democracy, as was threatened on January 6.7

I cannot offer the full argument in this brief blog post, but I do think it is useful to address a point I will make in the book about a distinction between false election speech and false campaign speech. I believe that Congress or states may constitutionally ban the former but not the latter, and government may require social media companies to remove false election speech from their platforms.

*False election speech* is false speech about when, where, and how people vote. Lying about the location of a polling place or the dates of voting falls into this category. *False campaign speech* is false speech in the context of a campaign that is about any other subject besides when, where, and how people vote. A candidate lying about whether her opponent voted to raise taxes falls into this category.

In the 2012 case, *United States v. Alvarez*, the Supreme Court struck down on First Amendment grounds a law barring a person from lying about having received the Congressional Medal of Honor.8 The Court was divided in its reasons, but virtually all the justices seemed to agree that lies about political or historical facts merit strong First Amendment protection. Indeed, lower courts relying on *Alvarez* have struck down some state laws that bar *false campaign speech*, even when a candidate or campaign knowingly lies.9

But there is reason to think that the constitutional question about *false election speech* is different. In the 2018 case, *Minnesota Voters Alliance v. Mansky*, the Court struck down on First Amendment grounds a state law barring the wearing

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9 Care Comm. v. Arneson, No. 13-1229 (8th Cir. 2014).
of clothing with political messages into the polling place for voting.\textsuperscript{10} Among other things, the Court found the law too vague, leading to potential uneven administration by election officials. But in the course of discussing a ban on “Please I.D. Me” buttons at the polling place in a state that did not require photo identification to vote, the Court declared that “We do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures.”

It is easy to see how a law barring false election speech falls on the permissible side of the constitutional line after \textit{Mansky}. Rather than requiring discretion on the part of government officials, or embroiling them in difficult questions about what is a lie (as when a candidate claims it is a lie to say she voted to increase taxes when she voted to increase fees rather than taxes on users of certain services), figuring out whether someone lied about when, where, and how people vote is typically easy. Either voting is allowed on Wednesday or it is not; either someone may vote by text (the subject of an ongoing prosecution\textsuperscript{11}) or they may not. Laws barring false election speech protect the integrity of the election process itself; they ensure that people are not disenfranchised by lies, particularly when such lies are directed to suppress the vote in particular communities.

Such laws do not put the state into a position in taking sides between candidates in a debate over things like what constitutes a tax increase. In this age of hyper-polarization and disinformation, assuring that voters have accurate information about when, where, and how to vote is indeed a compelling interest, as compelling as the interest in truthtelling during judicial proceedings that led the Court to endorse anti-perjury laws in \textit{Alvarez}.

A ban on false election speech still raises very thorny questions such as whether the state may require social media companies to remove posts containing such speech and written by others, and whether a ban on merely misleading speech (such as “Please I.D. Me”) would be permissible.

\textsuperscript{10} Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876 (2018).

And one of the most difficult questions concerns Trump’s post-election conduct: Is falsely claiming an election was stolen or rigged something that the government may prohibit? The question is a close one, and it is one with which I continue to wrestle. If such a law is permissible, it must be because such a law is necessary to protect the integrity of future elections and democracy more generally.

Richard L. Hasen is Chancellor’s Professor of Law and Political Science at the University of California, Irvine, and is co-director of the Fair Elections and Free Speech Center.
Congress Must Act to Establish Sensible Rules on Electoral Speech

By Matt Perault

Despite the depth, breadth, nuance, and complexity of First Amendment jurisprudence, the scope of the government’s ability to regulate election-related misinformation remains murky. That blurriness has undermined our ability to tackle the challenges of harmful political speech. With such a fragile legal foundation, the set of regulations that have developed to govern electoral speech is confusing and plagued by omissions. The federal government, states, tech platforms, and individual users all have a role to play in addressing electoral harms, but it remains unclear who bears primary responsibility for regulating electoral speech and the scope of their authority to regulate it.

Basic questions are unsettled. For instance, is it a crime to intentionally mislead voters about the day of an election? In several states, it is.\(^1\) In others, it isn’t. It might be a violation of federal law, but only in some cases, such as when it is carried out “under color of law” or when it targets certain protected categories of voters.\(^2\) Some platforms prohibit it, but others do not.\(^3\)

It’s not only confusing to understand what law prohibits what speech, it’s also difficult to delineate which types of electoral speech restrictions might survive First Amendment challenge and which wouldn’t. Content-based restrictions are subject to strict scrutiny, but despite this “exacting” review, the Supreme Court has upheld some speech-restrictive voter protection laws in some cases.\(^4\) States like Virginia prohibit certain types of deceptive practices, such as “false information” related to “the date, time, and place of the election, or the voter’s precinct, polling place, or voter registration status,” and laws to this effect remain on the books.\(^5\)

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5 Code Va., § 24.2-1005.1, A.
Efforts to clarify this area of law have been plagued by this confusion. In 2006, then-Sen. Barack Obama introduced a bill to make it a federal crime to “knowingly deceive” a person about key election information, including the “time, place, or manner” of the election. The ACLU originally supported the bill without raising concerns about its constitutionality, but has since criticized its provisions on false candidate endorsements, claiming that they may constitute an overbroad restriction on constitutionally protected false speech.

In the absence of a clear regulatory regime governing election speech, tech platforms have struggled to regulate election speech themselves, and they have contorted themselves to try to respond to criticism. In the lead-up to the 2020 election, many platforms changed their terms to prohibit certain types of election-related misinformation, some eliminated the ability to run all political ads, and others limited political ads but didn’t ban them entirely.

The impact of these interventions by tech platforms remains unclear, but preliminary data suggests that they have been counterproductive. In a paper I authored with Duke University’s Scott Brennen, we found that platforms’ restrictions on political advertising likely had a minimal effect on curbing misinformation, but likely harmed poorer campaigns more than wealthier ones, and Democratic more than Republican campaigns.

Despite the historic interventions in electoral speech by tech platforms in 2020, we are headed toward the 2022 midterm elections with little information about which measures worked and which ones didn’t. Congress and the Federal Election Commission have largely watched from the sidelines, seemingly content to hold hearings and give speeches about the problems of election lies but without

8 Rosen et al., supra note 3.
passing new laws that will modernize election law for the digital age.

The responsibility for governing election speech shouldn’t be left entirely to platforms, which are likely to shift back and forth in response to pressure from politicians, the media, and shareholders. If we’re serious about addressing election misinformation, the federal government must act.

Congress should pass a federal law criminalizing deceptive practices in voting. The legislation Sen. Obama introduced in 2006 has since been incorporated into the For the People Act, which was passed by the House but remains stalled in the Senate. If Congress can’t pass this watershed reform, it could still salvage the deceptive practices provisions and pass those. Passing this bill has broad benefits, including deterring voter suppression, taking advantage of an exception to Section 230 that will enable law enforcement to prosecute platforms that violate the law, and making it possible for platforms to work collaboratively with law enforcement to investigate cases of voter suppression.

If Congress passes a law on deceptive practices, it would inevitably be challenged, and courts would have an opportunity to provide more clarity on the constitutionality of government restrictions on election misinformation. The government’s interest in regulating this speech has evolved as new communication technologies have become increasingly prevalent, and courts must take account of these new realities.

Even though electoral speech is the foundation of a democratic system of government, our laws do not provide policymakers, tech platforms, or users with sufficient guidance on the bounds of electoral speech protections. We are only a year away from our next midterm elections and still have not learned important lessons from our last election cycle. To establish sensible rules on electoral speech in a digital age, we need Congress to act.

Matt Perault is a professor of the practice at UNC’s School of Information and Library Science, and a consultant on technology policy issues.

12 For the People Act of 2021, H.R. 1, 117th Cong. (as introduced on Jan. 4, 2021).
LIES AND THE LAW ROUNDTABLE No. 3

LOCATION: The World Room, Pulitzer Hall, Columbia University, 2590 Broadway, New York, NY 10027 or ONLINE

DATE: 11/18/21 TIME: 4:00-5:30 EST

PARTICIPANTS: Carrie Goldberg, Sexual Assault and Privacy Attorney; Robert Post, Yale Law School; Nabiha Syed, The Markup

MODERATED BY: Genevieve Lakier, Knight First Amendment Institute

REGISTRATION: knightcolumbia.org/events/lies-and-the-press

PARTICIPANTS:
Carrie Goldberg, Sexual Assault and Privacy Attorney; Robert Post, Yale Law School; Nabiha Syed, The Markup

MODERATED BY:
Genevieve Lakier, Knight First Amendment Institute
Justices Clarence Thomas and Neil Gorsuch have both recently advocated for the overturning of *New York Times v. Sullivan*, the case that Alexander Meiklejohn described as “an occasion for dancing in the streets.” For almost 60 years, *Sullivan* and the cases following after it have made it difficult for both public officials and public figures to successfully sue news organizations for defamation. However, *Sullivan* has always been a controversial opinion. What some see as an important safeguard of press freedom, others see as an excuse for journalistic irresponsibility. In your view, which of these views is more correct? Should *Sullivan* be preserved, changed, or abolished? What is the current debate about the future of libel law missing?
The Media will be All Right

By Carrie Goldberg

In March 2017, Katie Hill, a then-29-year-old former director of a homelessness nonprofit, announced her run for California’s 25th Congressional District. Her year-and-a-half-long grassroots campaign unseated a carbon-emission-defending, gun-loving Trump sycophant who voted against women’s abortion rights and even voted to protect the Confederate flag. In a historic midterm, Hill was among the 99 women who triumphantly entered the United States Congress.

In another historic first, on October 27, 2019, Hill became the first member of Congress to resign after conservative media made her the victim of what we odiously refer to as revenge porn.

Hill would later learn that intimate images she’d only shared with her then-soon-to-be ex-husband were uploaded onto Google Drive. Then, via an anonymous email account, the Google link was shared directly to Hill’s political opponents, including a blogger at the extremist blog Red State. The blogger published one of the images on Red State, accompanied by an article falsely identifying a tattoo on Hill’s pubic bone as Nazi iconography. She then downloaded onto an external device a selection of images from the Google Drive, including 10 depicting Hill nude. The blogger pitched those images to the Daily Mail, where they were published (and continue to be published) under the byline of the blogger. Within minutes, Hill’s naked body became tabloid entertainment for trolls around the world. Over the next year, the Daily Mail would publish 21 more articles about Hill, with her nude images lightly pixelated or semicensored in each.


The humiliation nearly killed Hill. She suffered PTSD and attempted suicide in the days that followed the publication of the images and her subsequent resignation. While the articles accompanying the images fixated on her sex life and conjectured about whether she’d abused her power over her campaign and legislative staff, the images were completely gratuitous and provided no additional context or legitimate journalistic value whatsoever.

Hill reported the crimes in California and Washington, D.C., but to date, nobody has ever been charged. So Hill sued. And she hired me to do it. Hill wanted to show future young politicians that they can always fight back and that even when all doors seem closed, our judiciary is the great equalizer.

We didn’t dare sue for defamation despite the many lies published about Hill. The heightened pleading standard for public figures imposed by *New York Times v. Sullivan* requiring us to prove actual malice—that the statements were published with the knowledge they were false or with reckless disregard of whether they were false or not—was an obstacle, but not the obstacle.

The blogger and publications were protected by something far mightier and more sabotaging to plaintiffs than the *actual malice* privilege of *Sullivan*. They were protected by anti-SLAPP. The term SLAPP is an acronym for strategic lawsuit against public participation. The idea is that anti-SLAPP statutes are supposed to eliminate frivolous lawsuits filed against publishers that, in aggregate, become so costly to defend, according to lawmakers, that it’s cheaper to just delete the article. Anti-SLAPP statutes provide an accelerated way for defendants to get cases involving the publication of protected speech dismissed, and it shifts the cost to the plaintiff who dared bring the case. Two-thirds of states have some sort of anti-SLAPP statute, which is why Justice Clarence Thomas could conceivably gut *Sullivan* without it impacting publishers in any meaningful way.

As the Association of Business Trial Lawyers writes, anti-SLAPP motions are considered under a two-prong analysis. First, the defendant must make a threshold showing that the challenged cause of action arises from the publication of constitutionally protected speech. After that, the burden shifts to the plaintiff, who

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must show probability of succeeding on the merits of the claim. For this second prong, plaintiffs must present evidence beyond the allegations contained in the complaint. Since anti-SLAPP motions occur before the phase of litigation where discovery is exchanged, providing evidence puts the plaintiff at a grave disadvantage.\(^8\)

In Hill’s case, we sued under California’s new nonconsensual pornography law, which empowers victims to seek civil damages against those who share their nude images without consent.\(^9\) Our defendants included Hill’s ex, the blogger, Salem Media (owner of Red State), and Mail Media (owner of the Daily Mail). In contrast to publication torts where we typically see anti-SLAPP challenges (e.g., defamation, false light, or public exposure of a private fact), the nonconsensual pornography cause of action has no element involving the publication of content. Instead, it centers around the nonconsensual sharing of the images.

For us, the publication of Hill’s images was relevant only to later analysis of her damages. To our bemusement, we were served with four anti-SLAPP motions within the first couple of weeks of filing our case. This was the first confrontation in the country where revenge porn and anti-SLAPP would go head-to-head. We thought we had it in the bag with prong one. Our cause of action didn’t involve publication, we figured. The lawsuit was about clandestine sharing—not publication. Were we ever wrong.

Anti-SLAPP statutes are an effective weapon for media defendants to disappear lawsuits and get them tossed out of court well before discovery, and faster than a standard motion to dismiss. With the fee-shifting features contained in anti-SLAPP statutes, most lawsuits against media go poof before passing the reception desk of plaintiff firms.\(^10\) In other words, anti-SLAPP motions pose too much risk for even meritorious publication torts to get filed, including cases where there are true injuries. In ordinary lawsuits, the risk to a plaintiff of losing is the ego wound of losing and the wallet injury of paying their own legal fees. However, anti-SLAPP statutes require judges to transfer a successful defendant’s legal fees and expenses to the plaintiff. This unusual punitive measure is a one-way road—a plaintiff who successfully defends against an anti-SLAPP motion is not reimbursed for attorneys’ fees or costs.

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\(^{9}\) CAL. PENAL CODE § 639–653.2.

In April and May of 2020, we took a bloodbath in court. The court ruled multiple times that the sharing of the images was constitutionally protected speech because it was performed in pursuit of journalism and about a public figure. Even the right-wing blogger’s dissemination of the 10 images to the Daily Mail, only three of which were published, was considered part of newsgathering and reporting. And we were no more successful in prong two, because repeatedly the court found no likelihood of succeeding on the merits, as none of the defendants were alleged to have been the first to share the images. Moreover, the court was convinced by their affirmative defenses that they were reporting about a newsworthy topic that was in the public interest. As you see, the judge played a cringeworthy number of roles in her anti-SLAPP adjudication—judge, jury, and expert.

We could have appealed and maybe won. Or more likely, we would have lost. Not surprisingly, the appellate jurisprudence throughout the country favors defendants. Plaintiffs who lose anti-SLAPP motions and are saddled with their opponent’s legal bills are deterred from appealing anti-SLAPP decisions, since doubling down on the loss could easily increase their debt from six figures to seven. Thus, the folks most likely to appeal are deep-pocketed media defendants.

Many with a journalistic bent who are reading this may find these grousings of a frustrated plaintiff’s lawyer to be grounds for celebration and demonstrative of the anti-SLAPP system working as designed. However, I urge readers to consider that even plaintiffs and, I dare say, plaintiff’s lawyers, appreciate a world with a thriving free press and journalistic freedom. Speech and journalism, though, are not well served by the current trend toward dismissing even valid cases where individuals have been truly harmed. Anti-SLAPP not only denies those litigants their day in court and hope for equity but also cripples litigants with legal fees that would drive all but the most wealthy into bankruptcy. The anti-SLAPP system, with its extravagant reach and fee-shifting, has perverted our justice system even further.

Our biggest publishers—consolidated corporations and Big Tech/social media—can make money off of somebody’s nude images going viral around the globe. They get to not only make money from the advertising and the likes but can render insolvent the brave litigant who dares to sue. The current anti-SLAPP regime is a far more insidious threat to everyday folks’ access to justice than any picking

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away at *Sullivan* that Justice Thomas might tease about.\(^{12}\) Just ask Katie Hill.\(^{13}\)

**Carrie Goldberg** is a victims’ rights attorney and the founder of C.A. Goldberg, PLLC law firm.


Sullivan is Not the Problem

By Nabiha Syed

Justice Neil Gorsuch was half-right: The internet has changed things. Our media landscape—networked, around-the-clock, largely online—has certainly “shifted in ways few could have foreseen.”¹ Lies abound, misinformation flourishes. But meaningfully addressing those challenges will have very little to do with Sullivan’s actual malice standard.

Let’s identify the harm. To Justice Gorsuch, the concern is that our “new media environment ... facilitates the spread of disinformation,” and results in “falsehoods in quantities no one could have envisioned almost 60 years ago.” Justice Clarence Thomas is similarly troubled by the “proliferation of falsehoods.” Both appear focused not on the existence of falsehoods—which of course have always existed—but their quantity and how quickly they spread. Any intervention, including a dramatic change to a constitutional standard, should speak specifically to that concern.

Both Justices Gorsuch and Thomas assume that the falsehoods they worry about are meaningfully governed by defamation law and the incentives created for journalists. That is a mistake. Their error leads them to sidestep two particularly thorny problems that warrant much more of our attention.

Take, for example, falsehoods around vaccines. Frequently circulated nonsense includes claims that the COVID-19 vaccine contains a bioluminescent marker referencing the devil, that the COVID-19 vaccine causes infertility, and that ivermectin is a reliable cure for COVID-19. These are consequential, harmful falsehoods that flood our information ecosystem. And they are falsehoods where defamation—a doctrine that focuses on falsehoods about reputation, not just falsehoods generally—is not particularly relevant. Who would be the plaintiff in a claim that the vaccine causes infertility? And without a viable plaintiff, why exactly would the Sullivan standard even matter? We can carry out the same exercise with the QAnon theory that John F. Kennedy Jr., who has been dead for decades, will reappear and announce that former President Donald Trump is back in office. The defamation plaintiff here isn’t obvious, but the harm is. And that’s because reputation isn’t the problem here—the falsehood is.

¹ Berisha v. Lawson, No. 20-1063, slip op. at 3 (2021) (Gorsuch, J. dissenting).
This reveals the first thorny problem. Our public square is infected by coordinated campaigns to spew falsehood, motivated by profit, politics, and opportunism. As I’ve written elsewhere, falsehoods might originate on social media platforms but hopscotch seamlessly to television, radio, podcasts, and other channels in the information ecosystem. This repetition is powerful, and it has the power to persuade. What do we do? We can train people to spot misinformation, but it is challenging to do that at scale and in a timely way. We can incentivize platforms to police content more effectively, which is thorny. We can let the government weigh in as an arbiter of truth, which seems anathema to our tradition, or we can revisit the logic in the stolen valor case, *United States v. Alvarez*. Some mix of these interventions are needed, but the exact recipe will be tricky. *Sullivan* may well be relevant, especially for limited-purpose public figures, but at most it’s seasoning for that recipe.

This is why the journalistic irresponsibility point raised by Justice Gorsuch rings so hollow. Gorsuch blames disinformation on journalists who have little incentive, he claims, to actually do their jobs in light of the favorable *Sullivan* actual malice standard. But this ignores other actors who peddle disinformation entirely, ones who claim no mantle of journalism at all. Gorsuch realizes the business model for journalism—that is, the production of timely, truthful facts for the public’s benefit—is troubled. He then proposes a solution that would further imperil journalists who already struggle to afford libel insurance amidst a growing landscape of meritless litigation over unpleasant truths about the powerful. This does not serve truth and doesn’t even address most falsehood.

Even if we were to engage in the exercise of altering the actual malice standard, a lower standard may not help with many flavors of misinformation. Take, for example, the *Chapadeau* standard in New York. A lower standard than actual malice, *Chapadeau* applies to those acts taken “without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.” At first blush, this sounds like it may be what Justices Thomas and Gorsuch would encourage. But as Judge Robert D. Sack observed, there are situations where even the lowered standard is ineffective:

If, for example, a television station were to rebroadcast a public official’s news conference despite the broadcaster’s knowledge that one of the speaker’s statements, a defamatory one, was likely false, the rebroadcast would

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arguably have been made “with subjective awareness of probable falsity” of the defamatory remarks—“actual malice”—yet in accordance with standards of responsible journalism under [the gross irresponsibility standard].

This brings us to our second thorny problem. What do you do when public figures knowingly peddle falsehoods, and others repeat them because of newsworthiness? The way that journalists do contribute to falsehoods online is by recirculating the ones made by our public officials. The argument is that these falsehoods are newsworthy. They are and they aren’t: It may well be newsworthy and worth debunking, but mere stenography of outlandish claims holds little value. But here, defamation law would protect the recirculation through the fair report privilege. And for good reason: If we remove the legal protections for commenting on what powerful figures say, we risk returning to the scandalum magnatum days of English yore. What is the right balance?

At their heart, both of these problems are about amplification—amplification by social media platforms and amplification by journalists. Neither flavor of amplification is neatly resolved through a doctrine that focuses on reputation, like defamation law. The amplification questions are truly about the architecture of our public square, held up by private platforms and actors. We have not yet designed the correct, complex balance of norms, self-police, regulatory incentives, and yes, legal rules, to fix them. I wish the solution to our plagued public square was a mere tweak to a 57-year-old constitutional standard, but it’s not—and we should get started on the larger, thornier projects first.

Nabiha Syed is the president of The Markup.

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4 Konikoff v. Prudential Insurance Co. of America, 234 F.3d 92, 104 (2d Cir. 2000).
LIES AND THE LAW ROUND TABLE No. 4

GOVERNMENT

LIES

DATE: 01/28/22 TIME: 1:00-2:30 PM EST LOCATION: ONLINE

PARTICIPANTS: Hina Shamsi, ACLU; Helen Norton, Colorado Law; David Luban, Georgetown Law; Wendy Wagner, Texas Law
MODERATED BY: Genevieve Lakier, Knight First Amendment Institute
Roundtable 4: Government lies

Public conversation about the problem of misinformation and disinformation tends to focus on private lies—lies uttered by private people and disseminated on private platforms. But the last few years make clear how powerful, and corrosive, government lies can be. How significant is the problem of government lies? What kinds of government lies are particularly troubling? And what, if anything, can law do about it?
Thoughts on Government Lies

By David Luban

Governments lie; this comes as a surprise to nobody. But governments can’t lie, nor can they tell the truth. Governments don’t speak at all. People speak. And depending on their role in government, and their purpose, and their audience, the terrain of the lies they tell is vast. It ranges from a manager in a state agency writing malicious lies about a former employee in a job reference, to a diplomat dissembling to another government, to the years of lies about “progress” in the Vietnam War coming from the upper reaches of the defense establishment and documented in the Pentagon Papers.

To map the terrain, let’s start at its peak, with the president of the United States. The Poynter Institute’s PolitiFact website fact-checks politicians and rates their statements on a six-point scale ranging from “true” to “pants on fire.” (Along with “pants on fire,” the other flavors of falsehood are “mostly false” and “false.” For short, call these three categories the red zone.)

According to PolitiFact, Barack Obama was in the red zone in nearly a quarter of his 600 fact-checked statements, making him the least dishonest of our past four presidents.¹ For Donald Trump, it was almost three-fourths of his 944 fact-checked statements, with 17 percent in the “pants on fire” category.² Joe Biden veers into the red zone 40 percent of the time.³

A falsehood isn’t necessarily a lie; that depends on whether the speaker knows it is false. Maybe presidents don’t know that the statistics they’re spouting were cooked and their anecdotes concocted. In her famous essay on lying in politics, Hannah Arendt pointed out that presidents are wholly reliant on their advisers for factual information, which makes the president “an ideal victim of complete manipulation.”⁴

Perhaps so, but standing by a falsehood after it’s been publicly and persuasively debunked converts a mere mistake into a lie by omission. You said it, you own it. The president commands the bully pulpit, which makes the “You said it, you own it” principle apply with maximum force. By these lights, the fact that even our least mendacious president lied a quarter of the time sets a disturbing benchmark.

Distinctions matter here. Presidential whoppers told on the campaign trail are often boasts or trash talk that fool no one and probably aren't intended to. In any case, campaign lies are personal; they’re coming from the president, not from the presidency, and thus not from the government.

Presidential policy lies are a different matter. Here’s an example of a policy lie. In September 2006, President George W. Bush strode into the East Room and publicly confirmed that the CIA had held terrorism suspects in black sites and interrogated them with what he delicately called an “alternative set of procedures”—which we now know meant torturing them. (“I cannot describe the methods used—I think you understand why.”)⁵

Bush’s speech was a sales pitch for the program, and his chief selling point was the supposedly lifesaving information the CIA obtained. He offered specific examples to make the sales pitch stronger. The trouble is, they weren't true.⁶ His information came from the CIA—but the president stood by it. He said it and he owned it.

What makes it a policy lie is that torture was his government’s policy, and nearly every high official had signed off on it: the vice president, the secretaries of defense and state, the national security advisor, the CIA director, the attorney general, and all their lawyers. The fictitious Tonkin Gulf Incident, used to get Congress to approve the Vietnam War without declaring war, was a policy lie. So were the massive falsehoods detailed in the Pentagon Papers to perpetuate a war that had lost all purpose except to maintain the mirage of “credibility” that fooled no one. And so were the “fixed” intelligence findings used to justify the Iraq War.⁷

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It may be that some U.S. officials, like Colin Powell and perhaps Bush himself, actually believed that Saddam Hussein had weapons of mass destruction. After all, the government spent two years hunting for them—in vain.\(^8\)

This proves only that Arendt was right when she observed the connection between deception and self-deception.\(^9\) Indeed, government mendacity would hardly have surprised Arendt, who said that “the deliberate falsehood and the outright lie used as legitimate means to achieve political ends, have been with us since the beginning of recorded history.” Most people, I think, would agree with her historical claim, but calling policy lies a legitimate means should give us pause. What’s so legitimate about lying to the public in a democracy, where government is supposed to be accountable to its people? Democratic accountability requires their active and informed opinion, and government lying defeats it.

Again, some distinctions are essential. Obviously, even democratic governments need secrecy and confidentiality for some of their business, and keeping secrets may require lies. In this category, clandestine operations, covert actions, and counterintelligence are the obvious examples. They fall into a class of their own because concealment is built into the nature of the work.\(^10\) Every reader of John le Carré knows that intelligence work takes place in a moral twilight zone, and some covert actions are thoroughly immoral. But intelligence gathering is a fundamental responsibility of government, and its necessary lies can indeed be legitimate. (A recent book by the philosopher Cécile Fabre makes that case well.)\(^11\)

At the opposite end of the spectrum are lies told to cover up government misconduct, malfeasance, or outright criminality. These, I think, are never legitimate. Unfortunately, the temptation to masquerade cover-ups as legitimate state secrets is overwhelming, and our own government has abused the state secrets privilege massively. (My colleague Laura Donohue has documented just how massively.)\(^12\) Even the Supreme Court’s leading case establishing the state secrets privilege turned out years later to be based on a cover-up.\(^13\)


\(^{9}\) Arendt, *supra* note 4.


\(^{13}\) See generally United States v. Reynolds, 345 U.S. 1 (1953).
I think that Arendt had a third category in mind, and this is the one I find most troubling. All political action rests on persuasion, and in a large, vibrant, and pluralistic country every significant policy will face bitter opposition. Truth, Arendt argued, always appears in public as just another opinion. It won’t persuade everyone, and the frictional force of public opinion can lead to paralysis. That’s when the temptation toward policy lies is the strongest, and it’s at least possible that sometimes the political ends justify lies as the means.

Sometimes. Perhaps. But policy lying is addictive, and a public sphere filled with government lies leads (as Arendt also predicted) to a cynical public that devalues truth and believes nothing—the ultimate political danger to democracy. So, if we have to choose between a hard rule of political morality that forbids government policy lying and a soft permission that threatens to debase truth itself, the choice is easy: Stick to the truth.

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15 Id.
What the Constitution Can—and Can’t—Do About the Government’s Lies

By Helen Norton

Lies are complicated: They’re told by many different speakers for many different reasons to many different listeners with many different consequences. Lies’ legal treatment is similarly complicated: In United States v. Alvarez, all nine U.S. Supreme Court justices agreed (albeit in three different opinions) that the First Amendment permits the government to punish lies that inflict sufficient harm.¹ What the justices didn’t agree upon, however, is what constitutes harm sufficient to justify the government’s intervention.

The government’s lies are similar to the lies of nongovernmental parties in their frequency, variety, and thus their complexity. But the government’s lies are also different from our own lies in important ways that can and should affect their legal treatment. As I’ve written elsewhere, “[t]he government is unique among speakers because of its coercive power as sovereign, its considerable resources, its privileged access to key information, and its wide variety of speaking roles as policymaker, commander-in-chief, employer, educator, health care provider, property owner, and more.”²

Because the government is like no other speaker, its lies sometimes threaten harms different from—and greater than—the harms inflicted by nongovernmental speakers’ lies. For these reasons, we may understandably worry more about the government’s lies than we worry about the same sorts of lies delivered by nongovernmental speakers.

And because the government—unlike the rest of us—has no constitutional rights of its own, under some circumstances speech that is protected by the First Amendment when uttered by a nongovernmental speaker may still violate specific constitutional protections when uttered by the government. To be sure, the Supreme Court has recognized that we don’t have a First Amendment right to shut down the government’s speech just because we disagree with it: The government must speak on a wide range of issues and take a variety of policy positions in

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order to govern. But the constitutional analysis is very different when the government’s speech—including its lies—interferes with or punishes its targets’ exercise of their constitutional rights.

**When Do the Government’s Lies Violate the Constitution?**

The government’s lies violate the Constitution when they deprive the government’s targets of their constitutional rights as effectively as the government’s action. Think, for instance, of law enforcement officers’ lies about the existence of a search warrant to trick their targets into permitting a search of their home. Or governmental lies about the consequences of exercising constitutional rights—like police officers’ false claims that a suspect’s child would be taken away from her unless she waived her rights to a lawyer and to remain silent. Or prosecutors’ lies through fake subpoenas that falsely stated that “[a] fine and imprisonment may be imposed for failure to obey this notice” to deceive crime victims and potential witnesses into coming forward when they otherwise chose not to.

At times, moreover, the government deploys falsehoods as weapons to punish dissenters. And when the government’s lies silence its targets’ speech as effectively as the government’s lawmaking and other regulatory action, those lies also can violate the free speech clause. Consider, for example, government officials’ lies told to encourage their critic’s employer to fire her in retaliation for her speech. Think, too, of lies told by the Mississippi State Sovereignty Commission in the 1950s and 1960s to the employers, friends, families, and neighbors of civil rights workers that falsely accused its targets of criminal and other misconduct in hopes of muzzling their speech advocating desegregation.

This invites a range of questions about the causal connection between the government’s lies and the deprivation of a constitutional right: Would governmental lies about the dangerousness of an individual that puts that individual on a no-fly list deprive that individual of the liberty to travel in violation of the due process clause (which bars the government from denying “life, liberty, or property without due process of law”)? Would governmental falsehoods that a hurricane

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8. American C.L. Union Miss., Inc v. King, 84 F.3d 784 (5th Cir. 1996).
threatens a specific state violate the due process clause if it causes individuals or emergency responders to change their behavior in ways that lead to loss of life or property? Would governmental lies misrepresenting the medical risks of abortion sufficiently interfere with women’s reproductive rights to violate the due process clause?

Of course, some of us will be quicker than others to find that causal connection. My point is simply that the government’s lies sometimes deny its targets’ rights and opportunities in violation of the Constitution, even though at times we will disagree about when this is so.

And to be sure, many governmental lies—like the government’s lies to avoid political and legal accountability for its misconduct—may inflict more diffuse and less tangible harm, such that it may be hard to trace a causal connection between the government’s speech and the denial of a specific constitutional right. That these lies’ harms are intangible or diffuse, however, does not mean that they’re painless or unimportant: They are instead often deeply dangerous, threatening to corrode our democracy. But constitutional law often has limited capacity to address diffuse, collective, or causally complicated harms. As I’ve written elsewhere, “[t]hese complexities suggest that the government’s most catastrophic lies may be those especially resistant to redress.”

Other Responses to the Government’s Lies

But constitutional litigation is by no means the only way to remedy the government’s lies.

Legislatures can enact laws that constrain the speech of governmental bodies, along with the public officials empowered to speak for those bodies. Statutes, for example, can require government officials to tell the truth in specific settings: Consider Illinois’ newly enacted law that bars law enforcement officers from engaging in deceptive practices when interrogating minors, like falsely stating that incriminating evidence exists or making false promises of leniency. Some statutes forbid certain lies by governmental and nongovernmental speakers alike—as is the case of laws punishing lies under oath or lies that obstruct justice, or the federal law that prohibits fake weather forecasts “falsely representing such

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forecast or warning to have been issued or published by”\textsuperscript{11} a government agency, or laws like the Federal False Statements Act that prohibit lies to federal government officials told to influence their decision-making.\textsuperscript{12}

Legislatures can also engage in speech of their own to counter destructive governmental lies. Examples include vigorous oversight of public officials and agencies alleged to have engaged in deceit; resolutions censuring government officials for their lies and related misconduct (like the Senate’s 1954 censure of Joe McCarthy); and—in circumstances involving federal judges and certain other federal officials—impeachment and conviction (like Congress’ 2010 impeachment and conviction of a federal judge in part for his lies to cover up the fact that he had received kickbacks).\textsuperscript{13}

Legislatures can also enact laws to prohibit retaliation against the whistleblowers who help expose the government’s lies and other misconduct. So, too, can reporting by a free and vigorous press reveal and confront the government’s lies. And of course the people themselves can challenge governmental lies through their protest and through their political choices.

Each of these remedies has its limitations. At the same time, however, the range of available responses to the government’s lies is far from a null set. I sketch these possibilities in hopes that it may provoke us to identify and implement a variety of mechanisms for holding the government accountable for its damaging lies.

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\textsuperscript{11} 18 U.S.C. § 2074.

\textsuperscript{12} 18 U.S.C. § 1001.

\textsuperscript{13} Times-Picayune Staff, \textit{Thomas Porteous is the eighth federal judge to be convicted and removed from office by the Senate}, TIMES-PICAYUNE | NEW ORLEANS ADVOC. (Dec. 9, 2010, 9:40 AM), https://www.nola.com/news/crime_police/article_1ca66b78-893e-571d-9633-7425be43af73.html.
The Most Troubling Government Lie? 
The “Presumptive” One

By Wendy Wagner

I promise to avoid getting tied up in knots over the fundamental question of “what is a lie?” However, a preliminary problem in the U.S. is that I don’t think we are yet able—at a societal level—to agree on how to tell a lie from the truth. A majority of the population does seem comfortable concluding that when a statement is contradicted by empirical evidence, it is a “lie.” However, large segments of the population apparently do not trust conventional empirics, nor do they trust government processes to sort truth from fiction (e.g., is COVID a hoax?).

So, if we are looking for lie-related issues to worry about at the governmental level, this democratic impasse belongs high on the list. Until we have an accepted method for sorting truth from fiction at a collective level, we are at a standstill. And, to be more grim, as long as government and elite processes are not trusted by a sizable part of the population, solutions seem beyond reach.

Fortunately for me, however, these deep questions fall outside my wheelhouse, and I assume in this post that a “lie” is simply a claim refuted by empirical evidence that satisfies conventional tests for robustness.

With that definition in place, what are the most troubling government lies? In my own field—environmental and public health regulation—the most troubling lies are not theouted, false statements that make the headlines (like the ineffectiveness of Trump’s hydroxychloroquine). Rather, they are the many, often obscure “facts” used to inform the establishment of protective regulations and that turn out to be presumptively untrustworthy because of underlying flawed government processes that allow and even encourage the government to propagate misinformation. To make matters worse, in these same settings the public is often precluded from fact-checking the truthfulness of the underlying information.

Certainly, this paranoid-sounding concern does not apply to all or even much of the work of government. In many agency rule-makings, for example, vigorous transparency and deliberative requirements leave little room for lies.¹ Agency policies are often intensely scrutinized by a broad array of vigorous

stakeholders who can even enlist the courts to review information they consider untrustworthy. False claims and unreliable facts in this heated, adversarial environment tend to get smoked out. Indeed, in these healthy oversight processes, agencies tend to be extra careful to ensure the underlying information is reliable from the start.

However, there are other sectors of regulatory decision-making where we see some of these legal structures backfire, allowing and even tacitly encouraging the government to bias or distort critical information—leading to what I call “presumptive government lies.”

What are some examples? Although we have a lot more to learn about misdesigned government processes, I can offer up two illustrations from my own work.

First, when the stakes are high enough, political officials within the executive branch can and sometimes do manipulate the scientific record supporting an agency decision. There have been a number of disturbing accounts over the last four decades of political officials directing politically motivated, secret revisions to the staff’s technical analyses, censoring dissenting agency experts, and engaging in other means to control the scientific record dishonestly.2 Political officials have even “stacked”3 the composition of the members serving on science advisory panels to ensure that peer review is more favorable to their own preferred political position.4

How could these presumptive lies be occurring? Our institutional design positions political officials at the apex of all agency work; in most regulatory processes, agency experts are subservient to them. This means that the political officials, if they find it worth the trouble, can adjust and manipulate the scientific record without restraint (unless they are outed by a whistleblower). These manipulations, moreover, often occur without public oversight because internal government deliberations are protected as a deliberative process under the FOIA.5 Since many agencies conduct their technical analyses in ways that are not insulated from political management, it is thus impossible for those on the outside to know

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which supporting analyses have been manipulated and which analyses officials left alone.\(^6\)

A similar type of structural flaw occurs in our design of regulatory settings that are dominated or sometimes monopolized by regulated parties. In chemical and pesticide regulation, for example, industry is generally the only participant weighing in on whether a chemical or pesticide is hazardous and whether it should be restricted. But under the American Psychological Association (APA) and related legal requirements, the agency experts need only be attentive to this active set of vigorous participants.\(^7\) By law, the agency staff is directed to consider all the information submitted to it (which generally comes exclusively from industry) and respond to all comments (again all from industry). And finally, since they are the sole participants, industry is the only party that can challenge the agency’s final decision in court (under a court-created “exhaustion of remedies” requirement).

In these backwater regulatory programs, in fact, there is growing evidence that the factual bases for at least some agency decisions are unreliable and biased towards industry. Investigative reports document how career management has manipulated risk assessments and underregulated pesticides;\(^8\) these exposés provide a worrisome peek inside the regulatory black box.\(^9\) But even more problematic—in this legally structured echo chamber where an agency must consider and respond only to industry—we see the agencies also develop overgenerous protections that shield the underlying industry data from public view through such legal vehicles as broad trade secret protections and vague industry classification systems.\(^10\) So, even if there were broader public involvement in some of these decisions, the public often cannot access key information needed to evaluate the veracity of the agency’s analyses.

What can be done? The good news is that if these presumptive lies are partly a

\(^6\) See National Science and Technology Council, Protecting the Integrity of Government Science (2022).


product of wrongheaded institutional design, we simply need to redesign the problematic government processes to discourage and prevent the government from propagating untrustworthy information. The solution to the political control over the agency expertise problem, for example, is in large part to institute firewalls\textsuperscript{11} around agency expert analyses (already done in at least one agency process).\textsuperscript{12}

With respect to the echo chamber problem occurring in certain regulatory programs, rigorous, robust peer review of expert work (along with other adjustments) should go a long way to counteract the dangerous biasing incentives created by the APA. Once we see why the government information can’t be trusted in these (and other) misdesigned settings, we can begin to treat the problems. And once we treat the problems, hopefully government work will begin to be both more trustworthy and more trusted.

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\textsuperscript{12} Wendy Wagner, \textit{It isn’t Easy Being a Bureaucratic Expert: Celebrating the EPA’s Innovations}, 70 CASE W. RESRV. L. REV. 1093 (2020).
LIES AND THE LAW ROUND TABLE No. 5

LIES AND COUNTERSPEECH

DATE: 02/16/22 TIME: 3:30-5:00 PM EST LOCATION: ONLINE

PARTICIPANTS: David Pozen, Columbia Law; Amy Kapczynski, Yale Law; Yochai Benkler, Harvard Law MODERATED BY: Genevieve Lakier, Knight First Amendment Institute
In his plurality opinion in United States v. Alvarez, Justice Kennedy claimed that “in a free society,” the proper “remedy for speech that is false is speech that is true.” The idea that the best remedy for bad speech is more speech underpins a great deal of First Amendment law. But when it comes to lies and deception, is it true? To what extent can speech—disclosures, warning labels, fact checks, apologies, and/or counterspeech generally—defang the poison of the lie?

Roundtable 5: Lies and counterspeech
Of Noisy Songs and Mighty Rivers

By Yochai Benkler

There is no particular reason to think that Americans are more or less likely to hold wrong beliefs than they have been throughout the history that Richard Hofstadter covered in his famous *The Paranoid Style in American Politics*, published over half a century ago. The young United States, then still sporting among the highest literacy rates in the world, was awash in falsehoods and bile when the Sedition Act was passed; or when pro-slavery warnings or Know Nothing anti-immigrant and anti-Catholic cartoons and opinion pieces abounded in daily and weekly papers, often alongside patent medicine advertisements. And misinformation and disinformation have never only come from the unwashed peripheries. Americans believed the Vietnam War was necessary and winnable, and millions believed Iraq had had a role in 9/11 or was holding weapons of mass destruction. Hundreds of millions believe that wearing a shoe with a swoosh will make them cool; wearing this or that perfume or shirt will make them desirable; or buying this or that clever brand will give their lives meaning. We live awash in falsehoods. And the business model of two of the most valuable companies in the world is built on nothing but the belief of advertisers and investors alike that they will, finally, crack the code of manipulating our desires and wants to at long last fully align manufactured demand with whatever it is the advertisers are ready and able to sell.

The entire framework of “marketplace of ideas” or “truth will drive out lies” is a fairy tale, a ritual incantation mainstream elites recite to ourselves to bridge the yawning gap between our reality and the governing conceptions of markets and democracy as domains of more-or-less rational choice, by more-or-less rational individuals, aggregated through more-or-less well-functioning markets or electoral systems to deliver a reasonable, stable, and above all legitimate system astride which we, miraculously or by merit, have found ourselves sitting.

The reality, of course, is and always has been much different. At least since the rise of the penny press, a journalist, as Harold Innis put it 70 years ago, became “one who wrote on the back of advertisements.”1 In our present era, Rush Limbaugh picked up the mantle of Father Coughlin and made big business out of stoking outrage in large audiences to make them feel good about themselves, while reinforcing their sense that they were living in a society governed by elites

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1 Harold Innis, *The Bias of Communication* 156 (1951).
that were taking them for fools.²

And on the latter point, he wasn’t wrong. The driving force of our present epistemic crisis is that elite institutions, including mainstream media, in fact failed the majority of the people for over four decades. Throughout the neoliberal period, elite consensus implemented policies and propagated narratives that underwrote and legitimated the rise of a small oligarchic elite at the expense of delivering economic insecurity to the many. These material drivers of justified distrust were compounded by profound changes in political culture that drove movements, on both the right and the left, to reject the authority structures of mid-20th century high modernism. The New Left, Nader’s Raiders, and postmodern critique of science did no less to dismantle trust in objective neutral truth than did the acerbic attacks on the very possibility of decent democratic governance by James Buchanan and Gordon Tullock, or George Stigler’s attacks on the possibility of publicly oriented regulation, the sustained attacks on science by business whenever science threatened to cut into profits,³ or the cynical politicians who sought to harness the visceral politics of white identity and evangelical fervor to the “party of business.” We will never get Walter Cronkite’s “that’s the way it is” back, nor should we yearn for it, because that wasn’t the way it really was for the majority of people back then either.

There are two critical facts we need to keep in mind as we look at free speech in the next two decades. First, disinformation, misinformation, and broad popular confusion are the product of business models and political strategies designed by elites to make more money or garner more political power at the expense of the majority of the population. The crisis of American democracy is not caused by neutral factors like technology or some baseline population-level psychological dynamic, nor is it a passing infatuation with a masterful con man. It is simply the wreckage that neoliberalism has left us. It won’t be solved by more fact-checking, Twitter notices, or Facebook oversight boards. It won’t be solved by increasing the budget of the intelligence industrial complex to identify foreign trolls or hacks. It will be solved, if at all, by building a multiracial coalition aimed to construct an inclusive social democracy in which people actually have a stake and have reason to trust governing elites.

Second, the United States is on track for at least one, possibly several bouts of


³ For more on the sustained attacks on science by business, see Naomi Oreskes & Erik Conway, Merchants of Doubt (2010).
government held by a political party exhibiting increasingly authoritarian tendencies. School boards and many an official are zealously moving along, seeking to disprove Justice Robert H. Jackson wrong in his assertion that “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”

We needn’t soothe ourselves with myths of the marketplace of ideas to recognize that whatever we do to deal with our present crisis, we must remember the first, and most important role of the First Amendment, as an anti-authoritarian provision, and where feasible and not inconsistent with that first role, deployed in such a way that it “does not sanction repression of that freedom by private interests.”

Yochai Benkler is the Jack N. and Lillian R. Berkman Professor of Entrepreneurial Legal Studies at Harvard Law School, and co-director of the Berkman Klein Center for Internet and Society at Harvard University.

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Freedom From the Marketplace of Speech

By Amy Kapczynski

In *United States v. Alvarez*, Justice Anthony Kennedy declared that “in a free society,” the proper “remedy for speech that is false is speech that is true.” In sideways fashion, Kennedy is invoking the magical “marketplace of ideas.” Put simply, this is the notion that if the government does not interfere, the truth in any setting will be revealed by the free play of competition, via some sort of invisible hand. This idea is commonly invoked in U.S. constitutional law. It is also clearly wrong. One indicator is that courts themselves do not even believe it.

Consider how courtrooms operate. Judges do not accept all comers, allowing anyone who wishes to speak to take the stand. Instead, they wield the gavel. If there is a more powerful instrument of censorious power, it’s hard to know what it might be. Judges can jail people for speaking out of turn and act as government speech regulators every time they apply the rule against hearsay evidence, or exclude astrologers or phrenologists from giving evidence because they fail the *Daubert* standard. The Supreme Court won’t allow cameras in the courtroom, and if any ordinary citizen tries to enter the courtroom to speak about the freedom to bear arms, they’ll be met by a person with a gun.

But none of this has ever seriously been thought to raise a First Amendment concern. Why not? In part, I think, because judges know, like the rest of us, that getting to the bottom of things—seeing what “holds,” in Donna Haraway’s wonderful formulation—requires processes, structures, and rules. Institutions for fact-finding and the production of knowledge are nothing if not disciplined.

The structuring or regulating of inquiry in the pursuit of knowledge is in fact pervasive in our society, and First Amendment law is full of rules that implicitly

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make space for speech regulation, including to protect our ability to declare or evaluate what is true.⁵ Courts have essentially excluded evidence law from the reach of the First Amendment, by treating it as not about speech.⁶ “Commercial speech” initially was unprotected, and later given only partial protection via the Central Hudson test.⁷ This is why government can punish false or misleading commercial speech, though it cannot do the same for false or misleading political speech. The speech of professionals has also often been given special treatment, which is why a doctor (but not Joe Rogan) can be punished for advising a patient to take ivermectin to cure COVID-19. For many years, courts also accepted certain kinds of political speech regulation as constitutionally legitimate. Examples include the Fairness Doctrine and campaign finance laws.

That was then, this is now. Over the last several decades, the Court has embarked upon an overtly deregulatory campaign, one that resonates deeply with and borrows from neoliberal tropes of market freedom. It fiercely attacked campaign finance laws, and in cases like Sorrell v. IMS Health and NIFLA v. Becerra, has begun to dissolve distinctions between political, commercial, and professional speech.⁸ It is not clear whether the regulatory state can survive these latter developments, or whether our democracy can survive the former.⁹

Over these same decades, the Court has also revised a raft of other doctrines—in areas as varied as labor law, civil procedure, antitrust law, and anti-discrimination law—to help usher in an era of extraordinary inequality and concentrated power. Though these shifts and the developments in First Amendment doctrine might seem unrelated, colleagues and I have tried to show that they together reflect different dimensions of the influence of neoliberalism in law.¹⁰

The immense power of intermediary platforms like Facebook, Google, and Amazon is also an artifact of these shifts. It was not technical change alone that gave Facebook power over the data and newsfeeds of hundreds of millions of Amer-

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icans. All of this was enabled also by law that, for example, gave corporations stronger claims to intellectual property, made mass online contracting viable, and created Section 230 immunity for platforms.\(^\text{11}\) As I describe in a forthcoming article, The Public History of Trade Secrecy Law, shifts in the law of trade secrecy have also consolidated corporate control over data. Companies today can and do call upon the new constitutional law of takings to block the public from accessing data about the safety or qualities of their products, or that would help them understand relations and exchanges between firms and government.

We live in an upside-down world, then, where the “free market in speech” in fact translates into the freedom of market actors to mislead and manipulate the public. There is a deep point about “market freedom” and legal coercion embedded here. As the realists long ago noted, and scholars of law and political economy are calling attention to today, all markets rely upon coercion, such as the state coercion that underpins property, contract, and labor law. Rendering speech more like the “free market” is to render it susceptible not to less coercion, but to more “private” coercion—coercion that is traceable, despite the label, also to government. So, the “free market” in speech doesn’t support either truth or freedom. It just defers to coercion and power operating outside of the frame. In the last several decades of “free as in markets,” private entities have gained more power to control speech and ideas—theirs and ours—and we have begun to take apart important institutions of public meaning-making and inquiry.

What does a political economy analysis of this sort imply about what we should do? Here are a few ideas:

First, we need to reassert the importance of freeing speech from the market. We must recognize that private power—especially as amplified and encased by the neoliberal turn—generates coercion that is also troubling if we are committed to free speech.

Second, and relatedly, we should demand data publicity that proactively enables the public to access data and information that can help us resist manipulation or other harms generated by privatized power over speech and data. It should be a problem for our free speech tradition, for example, that private actors have so many tools—in FOIA law and via trade secrecy and takings cases, for example—to hide information from the public and to manipulate and mislead while blocking

public scrutiny. In my forthcoming paper, I resurrect largely forgotten Supreme Court cases that authorized government to disclose private commercial information to the public. These cases should be revived, and takings law interpreted as presenting no barrier to the (ideally proactive) disclosure of commercial information to the public. On this basis, legislatures could design a wave of data publicity laws, for example, to help us discipline and regulate corporate actors.

Third, we should challenge the structural power that enables market actors to mislead or manipulate the public. We should explore avenues by which antitrust law and regulation might curb the power of private firms—for example, by regulating their size, or restricting certain types of profit-seeking data gathering and use.

Finally, we should rebuild and democratize public institutions that cultivate, produce, and test knowledge. We must explore the possibility of public data trusts and figure out new ways to support public media and intermediaries, and we must reinvest in our public schools, universities, and scientific institutions. These, too, are out of the frame of most First Amendment discussion, but are of obvious importance if our concern is the pursuit of truth and the defense of the preconditions of democratic discourse.

**Amy Kapczynski** is a professor of law at Yale Law School and was a senior visiting research scholar at the Knight Institute in 2019-2020.
“Truth Drives Out Lies” and Other Misinformation

By David Pozen

Ten years out, it’s hard to know whether to laugh or cry at Justice Anthony Kennedy’s pronouncement in United States v. Alvarez that “[t]he remedy for speech that is false is speech that is true.”

There has never been solid evidence for the proposition that a larger volume of speech, or a more open marketplace of ideas, tends to lead people away from falsity and toward truth. Decades of research in social psychology, behavioral economics, and communications suggests instead that any such causal relationship is highly contingent—and in many situations negative. Technological and economic changes in the U.S. media landscape that were already underway when Alvarez was decided in 2012, and that have accelerated in the decade since, have further undermined the purifying properties of counterspeech. As Frederick Schauer has observed, “the persistence of the belief that a good remedy for false speech is more speech ... may itself be an example of the resistance of false factual propositions to argument and counterexample.”

Justice Kennedy, accordingly, was participating in the very problem he was purporting to solve. Insofar as he was making an empirical claim about the likelihood of truth prevailing in the absence of regulation, we might say that Kennedy was not only being naive about the power of human rationality but also actively spreading misinformation.

Adjacent to the field of First Amendment law, evidence on the effects of mandated disclosure provides additional grounds to doubt the curative capacity of truthful speech. Targeted transparency policies, which aim to educate citizens and consumers while otherwise minimizing government interference with the market, have proliferated since the 1970s. Yet a large body of literature demonstrates

that such disclosure “chronically fails to accomplish its purpose.”\textsuperscript{5} “In area after area,” as I’ve explained elsewhere, “transparency has proven inadequate by itself to achieve public objectives or protect vulnerable parties.”\textsuperscript{6} Only when combined with broader substantive reforms do information-forcing rules seem to produce meaningful social benefit.

What does all of this research imply for the debate over how to respond to the flood of disinformation and misinformation online? Most fundamentally, I believe it puts the burden on those who would rely to any significant degree on strategies of mandated discourse or disclosure—warning labels, fact checks, corrections, criticisms, and the like—to show that they actually work. These strategies have disappointed in countless discrete domains. We shouldn’t expect them to solve a world-historical epistemic crisis in political communication.\textsuperscript{7}

This is not to deny the potential utility of “speech that is true” for combatting certain forms of falsity, nor its potential to serve other democratic values, nor the difficulty of ascertaining the truth on contested issues. Because the practical impact of counterspeech is so context-sensitive, much depends on the details. And of course, alternative approaches to combatting falsity will come with their own costs and limitations. But the sobering point remains: We have no basis in evidence or experience to predict that increasing the quality or quantity of true speech on the internet will reliably neutralize false speech or inculcate true beliefs in society. For those ends, measures that seek to limit the salience and spread of false speech—whether by prioritizing authoritative news sources, down-ranking or removing deceptive content, or imposing penalties on serial purveyors of harmful lies—may well be more effective.

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Consider the case of the Fairness Doctrine. Before it was repealed in 1987, the Fairness Doctrine required broadcasters to cover controversial issues of public importance in a manner that accurately reflected opposing views. Many progressive commentators, alarmed by the rise of fake news and filter bubbles, have seen in this policy a possible antidote. Brian Leiter, for example, argues in a recent essay that the demise of the Fairness Doctrine contributed to a “collapse of epistemic

\textsuperscript{7} Yochai Benkler et al., \textit{Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics} (2018).
authority” and that its reinstatement is a necessary if insufficient response. Let’s stipulate that Leiter is right on both counts. Why, exactly, would a policy like the Fairness Doctrine be such a powerful tool against misinformation?

One possibility is through the counterspeech it ensures. In Leiter’s words:

[I]t is easy to see why it would be much harder to mislead people if television and radio programs would be required to air at the same time those with an opposing view. The Fairness Doctrine does not stop falsehood or epistemic debunking from enjoying media time, but it does prevent it from being aired unchallenged.

This passage exhibits some of Justice Kennedy’s optimism. Speakers will occasionally make misleading or erroneous statements, but when they do, their opponents will be motivated to call them out. True speech will be enlisted to expose, and defeat, false speech. Although the laissez-faire “let everyone speak” model and the state-supervised “debating club” model might seem like polar opposites from the standpoint of political theory, they share a set of social-psychological assumptions about the efficacy of counterspeech in the face of falsity.

Leiter’s historical narrative also suggests, however, a quite different mechanism by which the Fairness Doctrine may reduce the influence of false speech—not by curing it with truthful speech ex post, but by limiting the amount of falsity that reaches people’s ears in the first place. As Leiter recounts, the repeal of the Fairness Doctrine paved the way for the emergence of wildly popular right-wing media outlets such as Fox News and The Rush Limbaugh Show that were less committed than their “mainstream” counterparts to traditional journalistic norms of objectivity and truth-seeking. It is hard to imagine how Fox News could maintain its brand under the Fairness Doctrine, and indeed Fox News pulled out of the United Kingdom in 2017 after repeated violations of U.K. broadcasting standards on “due impartiality and due accuracy.” Were the United States to bring back the Fairness Doctrine, broadcasters like Fox News would have to overhaul their approach to political coverage or avoid controversial issues altogether.

9 Id. at 13.
There does not appear to be any momentum at this time for reviving the Fairness Doctrine, and if Congress or the Federal Communications Commission were to do so, I assume the Supreme Court would rebuff them.\textsuperscript{11} It is nonetheless instructive to think about such a reform’s social-epistemological implications in light of the research recounted above. Policies like the Fairness Doctrine simultaneously stimulate and stifle political expression; they promote dissenting viewpoints while making it less likely that certain sorts of inflammatory and irresponsible claims will be uttered on-air or emphasized to the same extent. Discourse and disclosure are easy to celebrate. But at least when it comes to inculcating factually accurate beliefs across society, the Fairness Doctrine’s chilling effects and undercutting of hyperpartisan media models may be more consequential than all of the counterargument it generates.

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I hasten to add that this does not add up to a clear case for the Fairness Doctrine, much less a call for broader efforts to restrict political speech. The pursuit of truth is just one value at stake in communications law and policy. Moreover, we live in times of rapid cultural, technological, and administrative change, along with ideologically polarized interpretation of that change.\textsuperscript{12} Under conditions of radical uncertainty and deep division, we cannot have confidence that the reigning class of policymakers or professionals will have special access to the truth on many matters of public concern.

All of which leaves us in a bind. It may be more important than ever for American democracy to devise means to limit the salience and spread of misinformation, and yet more difficult than ever to secure broad agreement as to what counts as misinformation. We need greater political protection against lies but also greater epistemic humility. More speech won’t help much with either.

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\textsuperscript{12} For more on cultural change, see Ronald F. Inglehart, \textit{Cultural Evolution: People’s Motivations are Changing, and Reshaping the World} (2018). For more on technological change, see Anuraag Singh et al., \textit{Technological improvement rate predictions for all technologies: Use of patent data and an extended domain description} 50 Rsch. Pol’y (2021). For more on administrative change, see Jeremy Kessler & Charles Sabel, \textit{The Uncertain Future of Administrative Law}, 150 DAEDALUS 188 (2021).
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