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The Propaganda Conundrum: How to Control This Scourge on Democracy

Introduction.....	123
I. Introducing Propaganda: We Cannot Go on Like This.....	125
A. A Rights-Based Approach to the Propaganda Problem.	125
B. The Nature of Propaganda: Attacks on Freedom of Thought and Understanding	135
C. Flooding the Zone: Turning Democracy Against Itself.	137
II. When Information Is the Weapon, How Do You Fight the War?	143
A. New Weapons, Same Legal System	144
B. Taking Propaganda Seriously: Naming It for What It Is	147
III. Broadcast Propaganda: From the War Room to Your Living Room	155
IV. Media and Electoral Politics: Impersonating Real People to Deceive Real People	171
V. The Lying Politician: Making Official Lies Unlawful and Disqualifying.....	179
Conclusion	180

INTRODUCTION

Propaganda is playing an unprecedented role in global political life. With frightening reach and ambition, political and corporate actors are using propaganda to undermine the democratic ideals of truth and transparency. Because freedom of speech is a basic right that enjoys widespread public support, and as meaningful restrictions on noxious

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propaganda present legal difficulties, propaganda continues to flourish as a subtle and increasingly pervasive disease, undermining the core assumptions of democratic governance. Political choices citizens make in a democratic society mean little in the absence of true and accurate information; propaganda subverts the vital link between political understanding and political choice.

For purposes of this Article, I have come up with a working definition of propaganda. It is no simple matter to define propaganda as a destructive force to be legally restrained without also inadvertently creating new tools for the suppression of free speech. With that in mind, I offer this attempt:

Propaganda may be understood as a bad faith use and abuse of information and/or opinion, or both, whether true, false, or partly true, but in all cases misleading, to serve a nefarious and antidemocratic purpose that is itself at least partly concealed in the expression of the propaganda. While propaganda is often characterized by the unrestrained telling of lies, propaganda may also mix truth and falsehood to maximize chaos and confusion. Such messages are imparted not to help people arrive at the factual reality of a situation but to serve some other damaging purpose. Propaganda is a commonly used technique of fascism and similar authoritarian systems of government where power is attained and maintained by encouraging hatred of social subgroups. Propaganda is known for its power to create an "alternative" reality, one at odds with objective, fact-based reality, frequently exaggerating certain dangers and downplaying others. Propaganda is not designed to assist people in making decisions nor even to convince them of a point of view. Rather, propaganda is designed to change group behavior in a manner advantageous to the propagandist.

There is an understandable reluctance to enact laws to restrain propaganda for fear of restraining protected speech. But as toxic propaganda proliferates in every corner of the world, there is an urgent need to reconceive of propaganda as a weapon of war rather than merely a tool of political persuasion. This Article proceeds in two main parts: first, relying on decades of scholarly analysis on the topic, the Article attempts to define propaganda as a dangerous mix of lies and manipulation. It argues that weaponized propaganda leaves civilian casualties in its wake and undermines democratic institutions. It argues that legal responses are, in fact, possible and will not necessarily lead to the repression of free speech. Second, the Article focuses on three areas where legal regulation could succeed and must be attempted as a matter of urgency: first, by requiring factual truth in televised broadcasts; second, by creating enforceable rules for social media companies with regard to fake accounts, bots, and trolls; and third, by

disqualifying public officials who tell deliberate, demonstrable lies from office. These three changes to the legal landscape could go a long way toward reducing the power of weapons-grade propaganda in our modern world.

I

INTRODUCING PROPAGANDA: WE CANNOT GO ON LIKE THIS

In this part, the Article introduces the concept of the Propaganda Conundrum. There exists an inherent tension between the protection of free speech and the need to restrain propaganda that inhibits free and fair democracy. Section A suggests employing a rights-based approach to resolving this dilemma, emphasizing a uniform international approach to relaying truthful information. Section B discusses the nature of propaganda while acknowledging that modern forms of warfare often use varying tactics that include propaganda. Section C takes account of the different forms of modern propaganda and their looming threat to democracy.

A. A Rights-Based Approach to the Propaganda Problem

The age of Trump has hopefully taught us several important lessons about law and democracy, particularly on the legal requirements for the survival of genuine democracy in light of its true essence. I write in the hope that we will be able to implement some of those lessons rather than accept that we now live in a world where autocrats and oligarchs prevail, and we are left only with a false or “staged” version of democracy without free and fair elections and with all institutions of government politicized. As of late 2021, we cannot know what the immediate future holds. But in the hope of forestalling the permanent imposition of autocracy in the United States and elsewhere, we should begin to identify the legal features that must change to confront what has been a sustained and virulent attack on our democracy.

As mentioned, the conundrum is balancing restraints on propaganda without suppressing free speech.¹ While isolating propaganda from

¹ See Martha Minow, *The Changing Ecosystem of News and Challenges for Freedom of the Press*, 64 LOY. L. REV. 499 (2018) (discussing restriction on First Amendment rights). Constitutional democracies achieve a higher level of success when composed of “informed and active members.” *Id.* at 543. The current structure and nature of digital information platforms create a challenge to present actual news to consumers. *Id.* at 544, 546. Changes to these platforms could “focus on ensuring fair access and treatment, protecting the privacy and safety of users, and establishing transparency and forms of accountability.” *Id.* at 547.

other forms of speech seems to be a garden-variety problem on the surface, the legal challenge presented by propaganda is both urgent and unusually complex. In recent years, Western democracies have seen propaganda infect the body politic with startling speed and aggression.² For any legal system to treat propaganda and disinformation like ordinary speech is ultimately self-destructive.³ It should be obvious that propaganda is powerful by nature and immensely effective.⁴ It almost always achieves the perverse aims it sets out to accomplish, indicating that its tenets are well known to propagandists.⁵ While propaganda and

² See William J. Aceves, *Virtual Hatred: How Russia Tried to Start a Race War in the United States*, 24 MICH. J. RACE & L. 177 (2019) (describing the far-reaching effects of Russia's disruptive disinformation campaigns). See also Nathan Cortez *Information Mischief Under the Trump Administration*, 94 CHI.-KENT L. REV. 315 (2019) (discussing the lack of transparency under the Trump administration). Trump's use of information in the media likened to "Harry Potter's cloak of invisibility to cover the entire administration." *Id.* at 324 (quoting Juliet Eilperin, *Under Trump, Inconvenient Data Is Being Sidelined*, WASH. POST (May 14, 2017), https://www.washingtonpost.com/politics/under-trump-inconvenient-data-is-being-sidelined/2017/05/14/3ae22c28-3106-11e7-8674-437ddb6e813e_story.html). Although it is unclear as to the legal tools that can be used to combat these executive interests, "[t]he most powerful tool may be to fight information with information, drawing attention to these practices and archiving important information." *Id.* at 348.

³ See Reggie Jackson, *The Danger of Denial: Ignoring Domestic Terrorism and the Propaganda That Blinds Us to Its Threat*, MILWAUKEE INDEP. (Oct. 16, 2020), <http://www.milwaukeeindependent.com/featured/danger-denial-ignoring-domestic-terrorism-propaganda-blinds-us-threat/> [<https://perma.cc/N8M5-TWJ>] (evaluating the consequences of accepting propaganda as truth). "They know they are being lied to, but don't care. This is what led to the rise of fascism in Europe. People looked the other way while being lied to day after day, week after week, month after month and year after year." *Id.*

⁴ See Ari E. Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 846 (2018) (analyzing the concept of a "marketplace" of ideas). Justice Oliver Wendell Holmes conceived the phrase a "marketplace of ideas" in *Abrams v. United States*, when he eloquently wrote: "The best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.* at 847–48. Fake news is by definition designed to mislead and thus cannot be reconciled with the marketplace of ideas. *Id.* at 848. Including fake news in the marketplace of ideas "bastardizes the doctrine and erodes the very freedoms the First Amendment, as the constitutional manifestation of the marketplace of ideas metaphor, is meant to protect." *Id.* at 866. Thus, it is difficult for the marketplace of ideas metaphor to be a legal barrier against fake news and disinformation in the United States. *Id.* at 869.

⁵ See GARTH S. JOWETT & VICTORIA O'DONNELL, *PROPAGANDA & PERSUASION 1* (Diane McDaniel et al. eds., 5th ed. 2012) (developing a definition of propaganda). Propaganda is an "attempt to achieve a response that furthers the desired intent of the propagandist." *Id.* "[T]he purpose of propaganda is to send out an ideology to an audience with a related objective." *Id.* at 3. See also *Public Relations and Propaganda Techniques*, GEO. WASH. UNIV.: GRADUATE SCH. OF POL. MGMT. (Oct. 27, 2020), <https://gspm.online.gwu.edu/blog/public-relations-and-propaganda-techniques/> [<https://perma.cc/F82R-BY8L>] (expressing that the goal of propaganda is to "influence public perception"). There are different techniques utilized by propagandists that allow for the "manipulation" of perception and actions. *Id.* See generally Gregory Asmolov, *The Effects of Participatory Propaganda: From Socialization to Internalization of Conflicts*, J. OF DESIGN & SCI. (Aug. 7, 2019),

its near cousin disinformation take various forms, this Article proceeds on the assumption that propaganda is a political construct that can be identified, defined, and separated from other forms of political speech.⁶ This task is vital if Western democracy is to be preserved and the alliance of democracies is to be rescued.⁷

But there is a vital conceptual step that we must take before plunging into a discussion of how to distinguish and then regulate the dissemination of propaganda.⁸ We should first think of contemporary propaganda from the novel vantage point of the general public who are the victims of propaganda.⁹ People in any society rely on certain

<https://jods.mitpress.mit.edu/pub/jygz7j6x/release/2> [https://perma.cc/98QF-RBEX] (highlighting effects of propaganda). “[P]ropaganda can not only influence users’ perception of a situation and trigger activity around it, but it also shapes how we perceive other users within the situation.” *Id.* at 12.

⁶ See Ashley C. Nicolas, *Taming the Trolls: The Need for an International Legal Framework to Regulate State Use of Disinformation on Social Media*, 107 GEO. L.J. ONLINE 36 (2018) (discussing use of broadcast media to disinform public). The highly complex structure of the online system presents a difficult challenge in applying international law to regulate States’ use of the internet. *Id.* at 37. The well-established international norms of nonintervention still exist, but the International Court of Justice has yet to fully define the application of these laws to threats and attacks in the digital realm. *Id.* Psychological operations (PSYOPS) have expanded through the rise of social media. *Id.* at 38. The current international legal framework does not sufficiently stop disinformation. *Id.* “The United States Department of Defense defines PSYOPS as planned operations to convey selected *truthful* information and indicators to foreign audiences to influence their emotions [and] motives . . . to induce or reinforce foreign attitudes and behavior favorable to the originator’s objectives.” *Id.* at 39 (quoting ROBERT J. KODOSKY, PSYCHOLOGICAL OPERATIONS AMERICAN STYLE: THE JOINT UNITED STATES PUBLIC AFFAIRS OFFICE, VIETNAM AND BEYOND xiv (2007) (emphasis added)). Officially, the United States does not engage in disinformation through PSYOPS. *Id.* at 40.

⁷ See Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 514 (2009) (describing propaganda’s threat to democracy).

⁸ See Christopher Paul & Miriam Matthews, *The Russian “Firehose of Falsehood” Propaganda Model: Why It Might Work and Options to Counter It*, RAND CORP. (2016), <https://www.rand.org/pubs/perspectives/PE198.html> [https://perma.cc/ZJJ4-M8DQ] (discussing Russia’s approach to propaganda). The model has “high numbers of channels and messages and a shameless willingness to disseminate partial truths or outright fictions . . . [and] is also rapid, continuous, and repetitive, and it lacks commitment to consistency.” *Id.* “Forewarning,” a proposed method to limit the falsehoods disseminated by the government, does not go further than simply pointing out the Russian propaganda sources and the nature of their efforts. *Id.*

⁹ See Steve Rendall, *The Fairness Doctrine: How We Lost It, and Why We Need It Back*, FAIR (Jan. 1, 2005), <https://fair.org/extra/the-fairness-doctrine/> [https://perma.cc/W7PK-YT5A] (analyzing rights of viewers and listeners). The Reagan administration repealed the Fairness Doctrine in 1987. *Id.* The Fairness Doctrine required broadcasters to spend airtime discussing both controversial public issues as well as the contrasting views of those same

outlets, mostly television, radio, and the internet, for the information needed to make rational choices.¹⁰ Consumers of information supposedly exist within the “marketplace of ideas,” selecting information that is useful and discarding what is not.¹¹ As is well known, this “marketplace” is manipulated by the powerful in less free societies.¹² Wherever this kind of manipulation is found, the bad faith dissemination of information is designed to harm democracy and, by extension, to harm the general public.¹³ Propaganda and disinformation take away the right of the people *to a proper understanding of reality*.¹⁴ The right to information is an internationally recognized right and part of our shared legal inheritance.¹⁵ We need to expand our understanding of this right to

matters. *Id.* In contrast, the current media structure gives broadcasters “a political megaphone” on air that transmits a singular viewpoint and rarely shares opposing perspectives. *Id.*

¹⁰ See Addison O’Donnell, *Mixed Messages: How the Free Press Has a Responsibility to We the People at the Marketplace of Ideas*, 41 HASTINGS COMM’NS & ENT. L.J. 35 (2019) (discussing the inhibited marketplace of ideas). The First Amendment serves “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.” *Id.* at 65–66. But when the news media prioritizes attention-grabbing stories and continues to conflate editorializing with reporting, it becomes harder for viewers to distinguish truth from fiction. *Id.* at 66. See also Waldman, *supra* note 4, at 847 (discussing First Amendment implications on fake news). The Court’s decision in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), stated that false statements of fact are “valueless [because] they interfere with the truth-seeking function of the marketplace of ideas.” *Id.* at 865. The marketplace of ideas tolerates falsehoods. *Id.* at 863.

¹¹ See Cody Delistraty, *Has the Internet Broken the Marketplace of Ideas? Rethinking Free Speech in the Digital Age*, DOCUMENT (Nov. 5, 2018), <https://www.documentjournal.com/2018/11/has-the-internet-broken-the-marketplace-of-ideas-rethinking-free-speech-in-the-digital-age/> [<https://perma.cc/7G8P-FSYG>] (rethinking use of marketplace of ideas within modern-day news platforms). With the ability to search for and read information from all corners of the world, the digital media age has allowed for ease in the spread of ideas without the need to even leave our homes. *Id.* With the change in media outlets in the digital age, there is the possibility that the marketplace of ideas diminishes because the “best ideas” may not be the most viewed compared to “unworthy” ideas and articles. *Id.*

¹² See generally Xiadon Lou, Alessandro Flammini & Filippo Menczer, *Manipulating the Online Marketplace of Ideas*, IND. UNIV. OBSERVATORY ON SOC. MEDIA (Apr. 12, 2020), <https://arxiv.org/pdf/1907.06130.pdf>.

¹³ See generally Eric Rosenbach & Katherine Mansted, *Can Democracy Survive the Information Age?*, HARV. KENNEDY SCH.: BELFER CTR. FOR SCI. & INT’L AFFS. (Oct. 2018), <https://www.belfercenter.org/publication/can-democracy-survive-information-age#4> [<https://perma.cc/9Y6X-R5JA>] (discussing the threat and impact of information weaponization on democracies); *Issue Brief: How Disinformation Impacts Politics and Publics*, NAT’L ENDOWMENT FOR DEMOCRACY (May 29, 2018), <https://www.ned.org/issue-brief-how-disinformation-impacts-politics-and-publics/> [<https://perma.cc/4VCA-4FZM>].

¹⁴ See PETER POMERANTSEV, *THIS IS NOT PROPAGANDA: ADVENTURES IN THE WAR AGAINST REALITY* (2019).

¹⁵ See Educational, Scientific and Cultural Organization Res. 38 C/15, at 47 (Nov. 18, 2015) (declaring “International Day for the Universal Access to Information” a UN recognized holiday).

include a universal right to accurate information untainted by manipulation.¹⁶

We have grown accustomed to hearing that we are currently engaged in a global disinformation war or cyberwar.¹⁷ In any event, it is widely recognized that the most common form of political strife in the world today is not based on conventional weaponry but on the use and abuse of information, false narratives, fearmongering, and targeted political tropes meant to mislead and/or confuse.¹⁸ But if this is war, it must not be forgotten that the war aims its weapons at real people, and that people are suffering tangible harms as a result. Every information war in one sense leads to civilian casualties.¹⁹

Changes in global realities demand the creation of new rights or an updated understanding of established rights.²⁰ No contemporary issue is more urgent than the ongoing attacks on ordinary people through the dissemination of false information—information whose purpose is to destroy the notion of fact-based truth.²¹ If facts and truth are valued and

¹⁶ See generally Maeve McDonagh, *The Right to Information in International Human Rights Law*, 13:1 HUM. RTS. L. REV. 25 (2013).

¹⁷ See Andrew Hastie, *Challenge to Democracy to Counter Russia, China*, THE SYDNEY MORNING HERALD (Dec. 10, 2019, 12:00 AM), <https://www.smh.com.au/politics/federal/challenge-to-democracy-to-counter-russia-china-20191204-p53gzj.html> [<https://perma.cc/BW99-C6XF>]. Recently, the West has struggled to respond to the use of cyber-attacks, intellectual property theft, and espionage by authoritarian regimes. *Id.* The weaponization of previously “benign activities” has created a new theater of political warfare. *Id.* Political leaders have the flexibility and access to certain media platforms that can be used to avoid conflict in this new area of war. *Id.*

¹⁸ See generally Neil MacFarquhar, *A Powerful Russian Weapon: The Spread of False Stories*, N.Y. TIMES (Aug. 28, 2016), <https://www.nytimes.com/2016/08/29/world/europe/russia-sweden-disinformation.html> [<https://perma.cc/732C-2QXV>] (sharing Russia’s use of falsity in information release as political tactic); Tom Gjelten, *Seeing the Internet as an ‘Information Weapon,’* NPR (Sept. 23, 2010, 12:00 AM), <https://www.npr.org/templates/story/story.php?storyId=130052701> [<https://perma.cc/PGE7-6EDM>] (discussing cyberweaponry); *Disinformation That Kills: The Expanding Battlefield of Digital Warfare*, CBINSIGHTS (Oct. 21, 2020), <https://www.cbinsights.com/research/future-of-information-warfare/> [<https://perma.cc/VZQ6-YULV>].

¹⁹ See Brian C. Lewis, *Information Warfare*, FED’N OF AM. SCIENTISTS, <https://fas.org/irp/eprint/snyder/infowarfare.htm> [<https://perma.cc/PGE7-6EDM>] (last visited Feb. 18, 2021).

²⁰ See WILLIAM F. SCHULZ AND SUSHMA RAMAN, *THE COMING GOOD SOCIETY: WHY NEW REALITIES DEMAND NEW RIGHTS* (2020) (exploring the manner in which our conceptions of human rights change with evolving realities).

²¹ See Farhad Manjoo, *I Spoke to a Scholar of Conspiracy Theories and I’m Scared for Us*, N.Y. TIMES (Oct. 21, 2020), <https://nyti.ms/31ozrLh> [<https://perma.cc/N5HL-JD2M>] (pointing to effects of disinformation). Unfortunately, for “many Americans, digital communication has already rendered empirical, observable reality beside the point.” *Id.*

necessary possessions of people, then attacks on truth must be seen as seriously harmful to those same people.²² Information wars are not carried out on a merely state-to-state basis, but are fought by political forces, official and corporate, against the understanding of ordinary citizens.²³ An international right to free access to information is, properly understood, a right to clear understanding and transparency.²⁴

Over the years, society has become accustomed to international law adding to the bundle of rights enjoyed by all people, wherever situated.²⁵ While the current age is witnessing a retrenchment in our collective belief in international law and its power to compel national governments to do anything,²⁶ there is one right that seems not to have been widely considered at all. While we generally focus attention on the rights to freedom of speech, freedom of expression, and freedom

²² See Tom Wheeler, *Time to Fix It: Developing Rules for Internet Capitalism*, HARV. KENNEDY SCH.: SHORENSTEIN CTR. ON MEDIA, POL. & PUB. POL'Y (Aug. 16, 2018), <https://shorensteincenter.org/developing-rules-internet-capitalism/> [<https://perma.cc/KK48-V7XU>] (recognizing the detrimental effects of propaganda and offering digital economy oversights to remedy propaganda's effect). Tom Wheeler suggests looking to the common law to find protections against propaganda and false information. *Id.* The duty of care to not cause harm could be used as the standard of care when determining the effects of disseminating false media. *Id.*

²³ See Lili Levi, *Real "Fake News" and Fake "Fake News,"* 16 FIRST AMEND. L. REV. 232 (2017) (discussing warfare with fake news). Present-day technological advancements allow for the weaponization of free speech and greatly affect the public's perception of both politics and the media itself. *Id.* at 248–49. Reports note “that American voters were exposed to more ‘fake news’ than accurate political information on Twitter during the 2016 election.” *Id.* at 249–50. President Trump does not hide his strong dislike for the press and uses his position to openly attack the media. *Id.* at 258–59. In 2018, 83% of Americans polled categorized the relationship between the White House and the news media as “unhealthy,” and 73% indicated that this relationship “impede[d] their access to important national political news and information.” *Id.* at 261–62.

²⁴ See generally *Access to Information*, UNCAC COAL., <https://uncaccoalition.org/learn-more/access-to-information/> [<https://perma.cc/R9P2-EDKR>] (discussing extreme importance of transparency).

²⁵ See David Goldberg, *Responding to “Fake News”: Is There an Alternative to Law and Regulation?*, 47 SW. L. REV. 417, 421–26 (2018). Four Special Rapporteurs issued a Joint Declaration on the freedom of expression stating that when focusing on “fake news” and disinformation there remains an applicable human rights standard. *Id.* at 424. Fake news and disinformation “are incompatible with international standards for restrictions on freedom of expression . . . and should be abolished.” *Id.* (citation omitted).

²⁶ See Mohamed S. Helal, *The Crisis of World Order and the Constitutive Regime of the International System*, 46 FLA. ST. U. L. REV. 569 (2019) (describing the shared sense of foreboding about the direction of our international system); see also Peter S. Goodman, *The Post-World War II Order Is Under Assault from the Powers That Built It*, N.Y. TIMES (Mar. 26, 2018), <https://www.nytimes.com/2018/03/26/business/nato-european-union.html> [<https://perma.cc/38RK-T59X>] (“The model that has dominated geopolitical affairs for more than 70 years appears increasingly fragile.”).

from governmental suppression of speech, we do not adequately insist upon the right of the public to be free from serving as the *targets* of disinformation warfare.²⁷ Those who experience disinformation warfare cannot fully participate in democracy.²⁸ They suffer from confusion and the inability to assess the political conditions in which they find themselves.²⁹ To frame this problem within already well-established doctrines, they are certainly being thwarted in their right to self-determination.³⁰

In recent years, the general public has become the site of actual warfare in which foreign adversaries, corporate interests, and other parties attempt to confuse and overwhelm the understanding of voters.³¹ In fact, organized crime groups, state actors, and large corporations formed new alliances, all sharing a goal to suppress the ability of the general public to demand positive political change.³² Traditional warfare is in a nation-to-nation context; however, this war is one

²⁷ See Richard Wingfield, *A Human Rights-Based Approach to Disinformation*, GLOB. PARTNERS DIGIT. (Oct. 15, 2019), <https://www.gp-digital.org/a-human-rights-based-approach-to-disinformation/> [<https://perma.cc/CHH2-6HZU>] (exploring the right to be free from targeted disinformation). The spread of disinformation disrupts the public because it causes harm to human rights. *Id.* The human right to freedom of expression can be hindered through “inappropriate policy responses to disinformation.” *Id.* See also Tsesis, *supra* note 7, at 522 (introducing Canada’s protection against hate speech). Canada has hate speech standards incorporated into its laws for free speech. *Id.* The Canadian Human Rights Act of 1999 states that entities cannot spread messages of “hatred or contempt” based on a protected class. *Id.* at 524. These standards combined both Canada’s own free speech laws with international laws governing hate speech. *Id.*

²⁸ See Nina Jankowicz, *No Matter Who Wins the Election, Disinformation Will Still Poison Our Democracy*, WASH. POST (Oct. 28, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/10/28/disinformation-election-qanon-democracy/> [<https://perma.cc/GSL4-KU2R>].

²⁹ See *Issue Brief: How Disinformation Impacts Politics and Publics*, *supra* note 13 (“Used proactively, disinformation provides much greater potential to move audiences to action, share or confuse public understanding, and influence political events.”).

³⁰ See Wenqing Zhao, *Cyber Disinformation Operations (CDOs) and a New Paradigm of Non-Intervention*, 27 U.C. DAVIS J. INT’L L. & POL’Y 35 (2020) (arguing that disinformation and cyber meddling should be seen in the light of traditional international law principles of nonintervention); see also Eileen Donahoe, *Internet Platforms Should Exercise Their Own Free Expression to Protect Democracy*, THE HILL (Aug. 15, 2020, 11:00 AM), <https://thehill.com/opinion/technology/511943-internet-platforms-should-exercise-their-own-free-expression-to-protect> [<https://perma.cc/QT42-NSJV>].

³¹ See generally Simeon Djankov et al., *Who Owns the Media?*, 46 J.L. & ECON. 341 (2003) (highlighting the importance of accurate news). It is necessary to have widely available access to correct information to have a population that is well informed of their voting options.

³² See generally CRAIG UNGER, *HOUSE OF TRUMP, HOUSE OF PUTIN* (2018) (describing criminal linkages among Donald trump, Vladimir Putin, and the global mafia).

brought directly to the people of any particular country by hostile actors, private and governmental, foreign and domestic. This warfare has further morphed into a complicated and ever-changing conflict between the global mega-rich and ordinary people with information being used to subjugate the global population.³³

In the United States, voters have long been subject to a barrage of often intentionally misleading advertisements on television and social media during election cycles, providing false and lurid commentary on certain candidates, as well as television broadcasting that is demagogic and inflammatory.³⁴ Many writers concerned with truth in broadcasting have pondered the problem of how to make regulation of propaganda consistent with the familiar norms of First Amendment doctrine.³⁵ But this thorny problem requires consideration from the point of view of ordinary people constantly subjected to information designed to make them believe falsehoods. These waves of false and confusing information cause discouragement and uncertainty, leading to political passivity.³⁶ There are countless works describing disinformation and propaganda, old and new, that detail its effects on people.³⁷ What we

³³ See Scott Shackelford et al., *Defending Democracy: Taking Stock of the Global Fight Against Digital Repression, Disinformation and Election Insecurity*, 77:4 WASH. & LEE L. REV. 1747, 1762 (2020) (introducing the idea of digital repression, the use by malign actors of disinformation and aggressive digital techniques in order to control a population).

³⁴ See Levi, *supra* note 23 (discussing fake news influencing voters). The British consulting firm Cambridge Analytica “played a pivotal role in winning presidential races as well as congressional and state elections.” *Id.* at 253–54. The firm collected data and used it to inform its clients’ political strategies. *Id.* at 254. The strategies employed fake news to exploit the emotions of individual voters or groups of voters with the goal of swaying these voters’ opinions and ultimately, votes. *Id.* at 254. Fake news is more than the use of targeted voter ads but is instead a sophisticated form of manipulation and the weaponization of the media to mislead the public. *Id.* at 255. This polarization of peoples’ reality creates an “us versus them” mentality, sometimes leading to violence. *Id.* at 257.

³⁵ See Mark R. Arbuckle, *Political Broadcasting Fairness in the Twenty-First Century: Putting Candidates and the Public on Equal First Amendment Footing*, 36 HASTINGS COMM’NS. & ENT. L.J. 27 (2014) (examining origin of broadcasting rules). The FCC repealed the Fairness Doctrine because it believed that the Doctrine inappropriately balanced editorial discretion and the decision-making of broadcast journalists. *Id.* at 54. Further, the FCC argued that the Doctrine infringed upon the broadcaster’s First Amendment rights. *Id.*

³⁶ See Janna Anderson & Lee Rainie, *The Future of Truth and Misinformation Online*, PEW RSCH. CTR. (Oct. 19, 2017), <https://www.pewresearch.org/internet/2017/10/19/the-future-of-truth-and-misinformation-online/> [<https://perma.cc/7KER-C8RJ>] (identifying the impact of false narratives on people’s thoughts and actions). “[M]any [become] vulnerable to accepting . . . misinformation.” *Id.* “[A] lack of commonly shared knowledge leads many in society to doubt the reliability of everything, causing them to simply drop out of civic participation . . .” *Id.*

³⁷ See generally JASON STANLEY, *HOW PROPAGANDA WORKS* (2015); PETER POMERANTSEV, *THIS IS NOT PROPAGANDA* (2019) (describing the multifaceted adverse

lack is a clear legal doctrine asserting the rights of ordinary people to be free of this menace.³⁸

This Article calls for the recognition of an international principle that governments and media corporations must adhere to reasonable standards of truth and that national governments must create restrictions on the political techniques of gaslighting, misrepresenting, demonizing, and deliberately causing mass confusion.³⁹ Countries like Russia weaponize political disinformation and spread these techniques, generally in the service of neofascism, even in heretofore stable democracies.⁴⁰ If seen from the point of view of how best to restrain

effects on society from propaganda and weaponized disinformation); POMERANTSEV, *NOTHING IS TRUE AND EVERYTHING IS POSSIBLE* (2014); THOMAS RID, *ACTIVE MEASURES: THE SECRET HISTORY OF DISINFORMATION AND POLITICAL WARFARE* (2020).

³⁸ See Lane Wallace, *Should Lying Be Illegal? Canada's Broadcasters Debate*, THE ATL. (Mar. 23, 2011), <https://www.theatlantic.com/international/archive/2011/03/should-lying-be-illegal-canadas-broadcasters-debate/72866/> [https://perma.cc/948V-DYBP] (comparing Canadian Broadcasting Act of 1986 to the lack of a similar broadcasting law in the United States). Canada's Broadcasting Act of 1987 states that a licensee "shall not broadcast . . . false or misleading news." *Id.* The public drove the enactment of the Act and emphasized that a broadcasting license "was a privilege, not a right." *Id.* The Canadian Radio-television and Telecommunications Commission (CRTC) has the power to revoke a station's license. *Id.* In comparison, the United States had the Fairness Doctrine until the late 1980s, when the broadcaster's right to free speech was harmed. *Id.* In further questioning the lack of regulation in the United States, Wallace inquires, "Is it unacceptable censorship to require someone to be basically honest in what they broadcast as 'news'—and which we are more likely to accept as truth, because it comes from a serious and authoritative-sounding news anchor?" *Id.*

³⁹ See, e.g., Michael Schwartz, *Top Secret Russian Unit Seeks to Destabilize Europe, Security Officials Say*, N.Y. TIMES (Nov. 16, 2020), <https://www.nytimes.com/2019/10/08/world/europe/unit-29155-russia-gru.html> [https://perma.cc/UBN4-VXLP] (characterizing hybrid warfare outside of the United States). Hybrid warfare is a "blend of propaganda, hacking attacks and disinformation—as well as open military confrontation." *Id.* Russia uses this kind of hybrid warfare in an attempt to neutralize the supposed threat posed by the West. *Id.*

⁴⁰ See Hastie, *supra* note 17. The Russian Federation "conduct[s] hybrid and political warfare operations in the pursuit of strategic objectives, exploiting the norms and global peace built by the United States and its allies . . ." *Id.* See also Nicolas, *supra* note 6. Russia uses disinformation primarily to "muddy the waters and cast doubt upon objective truths." *Id.* at 45 (quoting Christopher S. Chivvis, *Understanding Russian "Hybrid Warfare" and What Can Be Done About It, Testimony Before the H. Armed Serv's Comm.*, 115th Cong. 3 (Mar. 22, 2017), https://www.rand.org/content/dam/rand/pubs/testimonies/CT400/CT468/RAND_CT468.pdf [https://perma.cc/NW34-YWXV]). The Russian disinformation efforts have been referred to as a "firehose of falsehood" because of the "speed, volume, and 'shameless willingness to disseminate partial truths or outright fictions.'" *Id.* (quoting Christopher Paul & Miriam Matthews, *The Russian "Firehose of Falsehood" Propaganda Model: Why It Might Work and Options to Counter It*, RAND (2016), <https://www.rand.org/pubs/perspectives/PE198.html> [https://perma.cc/8XXX-982N]).

such weaponization, then one is beset by a legal conundrum, as free speech cannot be completely sacrificed even to the need for truth.⁴¹ What is missing in this debate is the idea that human beings deserve and *have a right* to be free from acting as the targets of such information warfare. In that sense, it is a negative right: the right to be spared the damage caused by disinformation and propaganda.⁴²

Modern warfare is most likely to be asymmetric and information-based, as opposed to physical or overtly violent.⁴³ Unscrupulous political operatives, relying opportunistically on doctrines of free speech, have taken measures in the assurance that they would not be prevented from engaging in information warfare;⁴⁴ they have reaped the rewards of free speech by using this freedom to restrict the freedom of understanding of the general population.⁴⁵ In societies where freedom of expression and thought have largely disappeared after a brief period of liberation, such as Russia, disinformation is aimed at Western democracies in ever more audacious cascades of confusion.⁴⁶ Some of the effects can be seen in neofascist regimes coming to power in countries that were considered bedrocks of democracy.⁴⁷ None of

⁴¹ See Sandeep Gopalan, *Free Speech Cannot Be Sacrificed to Strike Fake News*, THE HILL (Apr. 6, 2018, 11:00 AM), <https://thehill.com/opinion/cybersecurity/381871-free-speech-cannot-be-sacrificed-to-strike-fake-news> [<https://perma.cc/7ZPA-HGP2>].

⁴² See Kathleen Mahoney, *Hate Speech, Equality, and the State of Canadian Law*, 44 WAKE FOREST L. REV. 321, 324 (2009) (detailing international law's regulation of hate speech). Although no law yet exists that protects people from information warfare, international law does protect against hate speech. *Id.* The International Convention on Civil and Political Rights (ICCPR) prohibits "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence." *Id.*

⁴³ See Lewis, *supra* note 19 ("[I]nformation warfare is more of a defensive concern than an offensive one.").

⁴⁴ See Daniela C. Manzi, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, 87 FORDHAM L. REV. 2623 (2019) (describing the difficulty of restraining disinformation in light of the First Amendment).

⁴⁵ See *id.*

⁴⁶ See Ken Bredemeier, *Putin Aims to Undermine Western Democracies with Election Meddling, Experts Say*, VOICE OF AMERICA (Mar. 9, 2017, 6:15 PM), <https://www.voanews.com/a/russia-putin-western-democracies-election-meddling/3757477.html> [<https://perma.cc/8UNB-KY8M>].

⁴⁷ See *Fascist Countries 2021*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/fascist-countries> [<https://perma.cc/6F2E-JXCU>] (discussing visibility of fascism in democratic nations such as the United States and the United Kingdom).

that confusion could have been achieved without major investment in the techniques of disinformation.⁴⁸

What difference will it make to approach this thorny legal problem from the point of view of ordinary people, rather than from the vantage point of official restrictions on speech? For one thing, a rights-based approach limits the kind of speech that should be restrained to *demonstrably harmful and duplicitous information*. Disinformation warfare techniques such as gaslighting (official sources repeating what is obviously untrue or projecting onto others what oneself has recently done or is doing, or both), diversion, and crude, aggressive denial of facts are self-evidently harmful to the mental health of the community.⁴⁹ Under a human rights analysis, the community has a right to good, reliable, and sincere information and a right to be free from the threat of weaponized information.⁵⁰ This right should be enshrined in a new international instrument or read into existing instruments as a core and extremely significant right.

B. The Nature of Propaganda: Attacks on Freedom of Thought and Understanding

Information warfare is the most prevalent form of aggressive state behavior in our time.⁵¹ We can no longer limit our discussion of

⁴⁸ See Charles E. Ziegler, *Russian Diplomacy: Challenging the West*, 19 WHITEHEAD J. DIPL. & INT'L REL. 74 (2018) (describing the role of Russian trolling and disinformation as part of Russia's focus on undermining Western institutions).

⁴⁹ See Justin Sherman & Anastasios Arampatzis, *Gaslighting and Information Warfare*, REALCLEAR DEF. (May 7, 2018), https://www.realcleardefense.com/articles/2018/05/07/gaslighting_and_information_warfare_113410.html [<https://perma.cc/NM42-AX3X>]. Gaslighting refers to a technique used in information warfare that aggressive personalities use to cause their targets to question their own reality. *Id.* Both lying and misdirection are at the heart of the technique, which is used to draw an emotional response from the target. *Id.* Both users in the United States as well as Russia have employed the tactic to sway voters by spreading disinformation and multiple conspiracy theories. *Id.*

⁵⁰ See *The Pro-Free Speech Way to Fight Fake News*, PEN AM., <https://pen.org/press-clip/pro-free-speech-way-fight-fake-news/> [<https://perma.cc/U2YS-6Z2C>] (analyzing implications of fake news on the First Amendment). A fine line exists between the need to protect the public from fake news and the freedoms guaranteed by the First Amendment. *Id.* The First Amendment includes the right to "receive and impart information," and the public has a right to information free of fraudulent or misrepresented statements. *Id.* But fake news undermines these rights. *Id.* With the ability for news to be heard, the power to persuade is also present, and viewers struggle to distinguish between truth and falsehood. *Id.* Social media has become a platform and a flashpoint for the competition between truth and fiction. *Id.*

⁵¹ See *id.* Recognition of the persuasive power of fake news is only the first step in addressing the threat it poses. *Id.* Media platforms have become a battleground, and users

adversarial international relations to “armed conflict.” The struggle for domination, from within and without, has long focused on how to best control the thinking and understanding of people who inhabit nation states.⁵² A major problem is that the rise of information warfare cannot be contained without confronting the almost instinctual insistence of mainstream legal thinkers that even insidious propaganda enjoys the protection of free speech doctrine, or in the alternative, would be too difficult to control.⁵³ Surely propaganda, if it can be accurately identified, cannot be a weapon of war and a form of protected speech at the same time.

Although partly integrated through international laws and norms, the world and its nation-states have recently fallen back toward nationalist passions with an overlay of new and darker transnational alliances not based on international law.⁵⁴ An unregulated financial system ensnares politicians of many countries with promises of future wealth, as corrupt governments (notably, the Russian government under Vladimir Putin) have set out to undermine democracy by purchasing elected officials in heretofore relatively transparent states.⁵⁵ A large-scale international realignment has been taking place beneath the surface. Those new forces, built around greed as opposed to a specific ideology, have made

of these tactics may never cease in their efforts to disrupt democracy. *Id.* The best defense proposed is to build up viewers’ ability to defend themselves online in sorting out the information that they come across. *Id.*

⁵² See Tim Wu, *Disinformation in the Marketplace of Ideas*, 51 SETON HALL L. REV. 169 (2020) (describing the legal and political complexities of the campaign to undermine public understanding through the use of disinformation).

⁵³ See Manzi, *supra* note 44.

⁵⁴ See Sara A. Dillon, *Global Corruption: International Law’s Counterrevolution*, 45 N.C. J. INT’L L. 111 (2020).

⁵⁵ See Carl Lampe & Roksana Gabidullina, *Is Russia Undermining Democracy in the West?*, FOREIGN POL’Y RSCH. INST. (Mar. 26, 2019), <https://www.fpri.org/article/2019/03/is-russia-undermining-democracy-in-the-west-conference-report/> [<https://perma.cc/U36Y-LL2X>] (considering Russian involvement in United States). Russia has been involved in various tactics aimed at disrupting democracy in the United States including cyber-warfare, dark money, and the weaponization of corruption. *Id.* Russian officers have used social media platforms as a means of operations, most notably during the 2016 United States presidential election. *Id.* Russia’s interference fueled the disinformation campaign that allegedly disrupted the United States. *Id.* See also Seva Gunitsky, *Democracies Can’t Blame Putin for Their Disinformation Problem*, FOREIGN POL’Y (Apr. 21, 2020, 3:54 PM), <https://foreignpolicy.com/2020/04/21/democracies-disinformation-russia-china-homegrown/> [<https://perma.cc/R4TL-BUKK>] (demonstrating disinformation’s effect on democracy). The democratic process requiring the free flow of information may be to blame for the disinformation issue. *Id.* Democracy promotes a free-flowing marketplace of ideas that consists of different viewpoints and sometimes even “outlandish viewpoints.” *Id.* Censoring information could assist in alleviating the issue but presents challenges in democratic states. *Id.*

the most daring use of information warfare. While not necessarily ideological in the conventional sense, disinformation campaigns rely on the manipulation of political prejudices of citizens in the target state.⁵⁶ Yet, so complex and devious is this information-based weaponry that few thinkers seem clear on how to call for its regulation. Perhaps, as a first step, we need to distinguish propaganda from other types of speech, lest regulation on propaganda be used against the free speech most needed to counteract attacks on thought.

C. Flooding the Zone: Turning Democracy Against Itself⁵⁷

There is a general awareness that disinformation and false facts pose an urgent threat to democracy everywhere.⁵⁸ Since the earthshaking political events of Brexit and the United States presidential election of 2016, global attention has turned to the role of disinformation and the use of analytics to sway voters.⁵⁹ Not only have commentators noted that this sophisticated form of aggression is extraordinarily dangerous but also that it operates largely without legal constraint.⁶⁰

⁵⁶ See *Government Responses to Disinformation on Social Media Platforms: Comparative Summary*, LIBR. OF CONG., <https://permanent.fdlp.gov/gpo133997/social-media-disinformation.pdf> [<https://perma.cc/PC6Y-8MAK>]. See generally Wenqing Zhao, *Cyber Disinformation Operations (CDOS) and a New Paradigm of Non-Intervention*, 27 U.C. DAVIS J. INT'L L. & POL'Y 35 (2020) (describing the threats posed by a vast global disinformation order).

⁵⁷ See Gunitzky, *supra* note 55. The reference, of course, is to Steve Bannon's famous statement that all Trump needed to do was to "flood the zone with sh*t."

⁵⁸ See John Johnston, *Disinformation Poses 'Existential Threat' to Democracy, Parliamentary Committee Warns*, PUB. TECH. (June 30, 2020), <https://www.publictechnology.net/articles/news/disinformation-poses-'existential-threat'-democracy-parliamentary-committee-warns> [<https://perma.cc/K6YV-XUXB>] (noting the potential damage disinformation can cause); see also *Misinformation Is a Threat to Democracy in the Developing World*, COUNCIL ON FOREIGN RELS. (Jan. 28, 2019, 7:00 AM), <https://www.cfr.org/blog/misinformation-threat-democracy-developing-world> [<https://perma.cc/WV6X-Z2UQ>] (discussing the impact of misinformation on "emerging and developing economies"); Coda Rayo-Garza, *Why Misinformation Spreads So Quickly and How We Can Combat It*, SAN ANTONIO REP. (July 31, 2020), <https://sanantonioreport.org/why-misinformation-spreads-so-quickly-and-how-we-can-combat-it/> [<https://perma.cc/UYU8-GZE2>].

⁵⁹ See Lampe & Gabidullina, *supra* note 55. The use of disinformation and cyberwarfare was evident in the 2016 presidential election in the United States. *Id.* Russia has modernized the use of information to target voters without necessarily creating new content. *Id.* Russia has also exploited the structure of social media and used research agencies to target voters during the election cycle. *Id.*

⁶⁰ See Mark R. Leiser, *Regulating Computational Propaganda: Lessons from International Law*, CAMBRIDGE INT'L L.J. (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3440157 [<https://perma.cc/7A53-JKQF>] ("Any national or regional speech

As a complicating factor, freedom of speech is one of the most familiar and entrenched legal ideas in societies with even a modicum of democratic accountability.⁶¹ If any speech short of explicit threats of violence is protected, and if any kind of false information can be broadcast, it is unclear how a stable democratic order can deal with the clear threat propaganda poses. As schematic as it may be, the first order of business is to define what distinguishes propaganda from other forms of speech. But even in doing so, the danger in imposing legal restraints on propaganda is that those in power may use such restraints to repress the speech of political dissenters. Thus, we must proceed with caution when suggesting how to confront the problem of propaganda.

Certain kinds of disinformation tossed into the public sphere are dangerous because they have the potential to change the course of history by altering the understanding of ordinary people.⁶² When people have their prejudices and political views exploited through targeted propaganda, they make choices differently than they otherwise would. Such disinformation does not compete in the so-called marketplace of ideas but rather alters that market beyond recognition.⁶³ Propaganda is powerful enough to overturn the mechanisms of democracy.⁶⁴

While comforting to imagine that listeners are immune from the effects of agenda-heavy propaganda, propaganda is, in fact, demonstrably effective in causing people to believe things that are not

regulation passed to regulate the dissemination of propaganda is constrained, in part, by international or domestic guarantees of freedom of expression.”); *see also* *Why It Is So Difficult to Regulate Disinformation Online*, CAMBRIDGE CORE, <https://www.cambridge.org/core/books/disinformation-age/why-it-is-so-difficult-to-regulate-disinformation-online/A7613D7394F18AAE8F241894E8DA064A/core-reader> [<https://perma.cc/TK9R-MAE7>] (incorporating the First Amendment into conversations concerning difficulty in disinformation regulation).

⁶¹ *See* Becky Beaupre Gillespie, *What Is the Role of Free Speech in a Democratic Society?*, U. CHI. NEWS (Jan. 15, 2019), <https://news.uchicago.edu/story/what-role-free-speech-democratic-society> [<https://perma.cc/5343-AAS2>] (discussing First Amendment barriers). The increase of information availability and digital publication makes it harder to regulate and more difficult to control access. *Id.*

⁶² *See generally* Karina Margit Erdelyi, *The Psychological Impact of Information Warfare & Fake News*, PSYCOM, <https://www.psycom.net/iwar.1.html> [<https://perma.cc/HNR7-BUWW>].

⁶³ *See* Gunitzky, *supra* note 55. Disinformation dilutes the marketplace of ideas. *Id.* These misrepresentations or false ideas “leave[] potential voters ‘numb and disoriented, struggling to discern what is real in a sea of slant, fake, and fact.’” *Id.*

⁶⁴ *See id.*

true and to act in ways adverse to the interests of the community.⁶⁵ For instance, there are many examples of pre-genocidal rhetoric leading to drastic changes in the behavior of community members.⁶⁶ Certain kinds of words lead directly to predictable changes in citizens' behavior⁶⁷ due to an altered sense of fear, loathing, and the nature of the community interest.⁶⁸ Propaganda is not the random expression of someone's view⁶⁹: *it is a carefully studied, specialized act of statecraft* designed to weaken the resistance of the targeted demographic.⁷⁰

In that sense, imagine a nation in which equal rights, such as the right to participate in political life, and social integration are founding values—not an unusual situation in Western democracies. Imagine further that a chain of broadcast television stations falls into the hands of an owner with a particular agenda; for instance, turning one subset of the population against the other to make the divided community easier to manipulate and control. Treating such concentration of ownership as just one more element in the “free market of ideas” is unsatisfactory.⁷¹ But can the television stations be squelched for

⁶⁵ Thomas B. Edsall, *Have Trump's Lies Wrecked Free Speech?*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/opinion/trump-lies-free-speech.html> [<https://perma.cc/HR4K-D4Z9>].

⁶⁶ See also Jean Mukimbi, *The Seven Stages of the Rwandan Genocide*, 3 J. INT'L CRIM. JUST. 823, 824–25 (2005) (noting the first stage of inter-community violence preceding the Rwandan genocide was identification of a target group).

⁶⁷ See Haifeng Huang & Nicholas Cruz, *Propaganda, Presumed Influence, and Collective Protest*, POL. BEHAV. (Feb. 8, 2021), <https://link.springer.com/content/pdf/10.1007/s11109-021-09683-0.pdf> [<https://perma.cc/UZ9J-XLCR>].

⁶⁸ See Allyson Haynes Stuart, *Social Media, Manipulation, and Violence*, 15 S.C. J. INT'L L. & BUS. 100 (2019) (describing how social media whips up negative emotions that can lead to violence).

⁶⁹ See Pawel Surowiec, *Post-Truth Soft Power: Changing Facets of Propaganda, Kompromat, and Democracy*, 18 GEO. J. INT'L AFFS. 21, 22–23 (2017) (describing the multilayered and intentional nature of modern propaganda methodologies).

⁷⁰ See Albinko Hasic, *Why Propaganda Is More Dangerous in the Digital Age*, WASH. POST (Mar. 12, 2019), <https://www.washingtonpost.com/outlook/2019/03/12/why-propaganda-is-more-dangerous-digital-age/> [<https://perma.cc/YW88-2WAP>] (comparing different eras of propaganda to show its evolving nature). Studies show that the modern era of digital advertising that has evolved since the distribution of “Uncle Sam” war-time propaganda affects Americans' subconscious minds. *Id.* Advertisements, television shows, and other forms of media have an unpredictable effect on viewers. *Id.*

⁷¹ See Dean Jackson, *Issue Brief: How Disinformation Impacts Politics and Publics*, NAT'L ENDOWMENT FOR DEMOCRACY (May 29, 2018), <https://www.ned.org/issue-brief-how-disinformation-impacts-politics-and-publics/> [<https://perma.cc/L8TC-9CAH>] (describing the dynamic and influential nature of manipulative information campaigns within societies). Capitalizing on existing political divides fuels disinformation campaigns “[i]n part due to low trust in media and in part due to cognitive biases that make many

broadcasting “falsehoods”?⁷² Unlike Europeans, Americans have resisted applying doctrines of hate speech to broadcasting requirements.⁷³ Such owners of broadcast outlets, like Rupert Murdoch, are notoriously friendly with mega-rich politicians and investors all over the world, so that we can hardly avoid the suspicion that social unrest is being stirred up to further the cause of the global rich.⁷⁴ This leads to the question of why ideas that favor the interests of oligarchs and autocrats are heard in millions of living rooms while other, more balanced views are not.⁷⁵

This mass-market, television-centered example is only one form of propaganda—the televised use of emotive disinformation, opinions unsubstantiated by facts, and generally anti-enlightenment rhetoric influencing people in their political behavior are also prevalent forms of propaganda. Radio is a slightly more old-fashioned version of the same thing, with talk radio having a significant influence on people who sit in cars for long periods of time.⁷⁶ Television can efficiently

consumers more likely to believe content that confirms their beliefs, to prefer partisan cheerleading over conclusions of fact checkers, and to share content that makes them angry or afraid.” *Id.* The real-world effects of disinformation campaigns can be seen globally, including in India where “far-right religious figures used messaging applications to spread false claims about religious minorities, sparking communal violence.” *Id.*

⁷² See Kaitlyn Tiffany, *Americans Are Writing to the FCC About ‘Fake News’ on TV, Google, and Facebook*, THE VERGE (Apr. 19, 2017, 11:12 AM), <https://www.theverge.com/2017/4/19/15356122/fcc-fake-news-complaints-facebook-google-cable-news> [<https://perma.cc/9R3V-3JUP>] (depicting Americans’ awareness of the harm of fake news). The FCC has received complaints about fake news dating back to 2016 that range from cable bias toward liberal views to factual errors on Fox News. *Id.* Americans recognize the threat fake news poses in their lives but do not know whom to contact or what can be done to resolve the issue. *Id.*

⁷³ See Kim R. Holmes, *The Origins of “Hate Speech,”* THE HERITAGE FOUND. (Oct. 22, 2018), <https://www.heritage.org/civil-society/commentary/the-origins-hate-speech> [<https://perma.cc/PZ7X-5G3R>] (noting Europe has been far more willing to regulate and restrain hate speech than the United States).

⁷⁴ See Jonathan Mahler & Jim Rutenberg, *How Rupert Murdoch’s Empire of Influence Remade the World*, N.Y. TIMES (Apr. 3, 2019), <https://www.nytimes.com/interactive/2019/04/03/magazine/rupert-murdoch-fox-news-trump.html> [<https://perma.cc/SHA3-5YXR>] (discussing the scope of oligarch reach).

⁷⁵ See *id.*

⁷⁶ See Brian Rosenwald, *The Talk Radio Effect*, POLITICO MAG. (June 17, 2014), <https://www.politico.com/magazine/story/2014/06/the-talk-radio-effect-107942/> [<https://perma.cc/2W37-BL6F>] (highlighting impact talk radio has upon listeners). See also Darrell M. West, *How to Combat Fake News and Disinformation*, BROOKINGS INST. (Dec. 18, 2017), <https://www.brookings.edu/research/how-to-combat-fake-news-and-disinformation/> [<https://perma.cc/8KWP-FSVQ>] (explaining potential solutions to combat fake news). As “information systems have become more polarized and contentious,” trust in journalism continues to decline. *Id.* Censoring content could do more harm than good. *Id.* Overly

beam out both pundit-based propaganda and politically sponsored advertisements.⁷⁷ Where racial and ethnic themes are prominent, the most obvious fallout from divisive, televised propaganda is that it turns people away from one another and makes it much harder for them to cooperate in service of a national ideal or positive political objective.

Another more subtle version of contemporary propaganda involves the mass production of ads with fake personalities (i.e., purporting to be people of a certain background but not actually belonging to that background) bombarding people with messages for and against certain candidates or policies.⁷⁸ These ads are based on sophisticated algorithms and appear in social fault lines that run along race, gender, and other differentiating characteristics.⁷⁹ This technique was made famous during the 2016 presidential campaign when Russian-sponsored bots and trolls flooded social media with messages that appeared to be sent by real people but were, in fact, manufactured to create confusion or to stir emotion.⁸⁰ Much like in the 2016 election,

restrictive measures could curb the freedom of expression and set a dangerous precedent on an extremely sensitive issue. *Id.*

⁷⁷ See Jennifer Pan et al., *The Effects of Television News Propaganda: Experimental Evidence from China*, SSRN at 1 (Apr. 17, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3579148 [<https://perma.cc/W45H-T4AG>] (noting the extremely powerful nature of televised propaganda).

⁷⁸ See Dannagal G. Young & Shannon C. McGregor, *Mass Propaganda Used to Be Difficult, but Facebook Made It Easy*, WASH. POST (Feb. 14, 2020), <https://www.washingtonpost.com/outlook/2020/02/14/mass-propaganda-used-be-difficult-facebook-made-it-easy/> [<https://perma.cc/SGTA-VDS9>] (explaining the rise of social media and its weaponization). Social media introduced the potential for users to share and like content and connect with one another. *Id.* “Doing so offered up [a] profit model—turning every share, like, click, photo and location tag into data points used to inform the sale of microtargeted audiences to advertisers.” *Id.* This puts the television industry at a disadvantage because it can only target audiences that tune into certain channels. *Id.*

⁷⁹ See Megan Graham, *Facebook Delivers Ads Based on Race and Gender Stereotypes, Researchers Discover*, CNBC (Apr. 4, 2019, 11:02 AM), <https://www.cnn.com/2019/04/04/facebook-targets-ads-based-on-race-and-gender-stereotypes-study.html> [<https://perma.cc/C66M-SC9J>].

⁸⁰ See Gabe O’Connor & Avie Schneider, *How Russian Twitter Bots Pumped Out Fake News During the 2016 Election*, NPR (Apr. 3, 2017, 4:53 PM), <https://www.npr.org/sections/alltechconsidered/2017/04/03/522503844/how-russian-twitter-bots-pumped-out-fake-news-during-the-2016-election> [<https://perma.cc/8PPM-LSM4>], for a description of the use of “bots” in the 2016 presidential election. During the 2016 presidential election, Russians used bots on Twitter to spread fake news to voters in swing states. *Id.* This tactic involved engineering profiles that contained pictures and other information that voters identified with. *Id.* These profiles then relayed information used to sway voters on important issues. *Id.*

Facebook hosted such ads in the run-up to the 2020 election.⁸¹ Facebook's role cannot be analyzed in the context of simplistic notions of "free speech" alone.

Finally, we come to the problem of officials lying or misleading the public. Especially notorious in recent years is Vladimir Putin-style propaganda: gaslighting.⁸² Gaslighting is a genre of political discourse whose objective is to undermine the concept of truth.⁸³ Gaslighting may occur during television broadcasts, press conferences, interviews, or other public fora.⁸⁴ After prolonged exposure to confusing, contradictory messages from political leaders, the general population begins to lose a sense of what is accurate.⁸⁵ Then, the public is likely to give up any attempt to sort out fact from fiction.⁸⁶ The act of lying and gaslighting by officials sends the deeper message that they are not obliged to be truthful.⁸⁷ Under this kind of system, officials spew a "firehose" of contradictory messages, including obscure conspiracy

⁸¹ See Shirin Ghaffary, *A Senator Is Demanding to Know How Facebook Will Stop Misinformation from Spreading Online*, VOX (Feb. 24, 2020, 7:30 AM), <https://www.vox.com/recode/2020/2/24/21147428/facebook-2020-elections-misinformation-senator-michael-bennet-letter-zuckerberg> [<https://perma.cc/M9AV-5E9N>] (supporting political action that safeguards elections). In a letter to the CEO of Facebook, Mark Zuckerberg, Senator Michael Bennet expressed his concerns over the company's "inadequate" measures taken to stop the spread of misinformation during the presidential election. *Id.*

⁸² See Ian Bond, *A Word of Advice to Western Leaders: Talk to Putin but Don't Let Him Gaslight You*, EURONEWS (Mar. 17, 2020), <https://www.euronews.com/2020/03/17/a-word-of-advice-to-western-leaders-talk-to-putin-but-don-t-let-him-gaslight-you-view> [<https://perma.cc/NX5S-NY3U>].

⁸³ See *id.* for more about the persuasive tactics used by Vladimir Putin to misrepresent facts. Putin, a "master of gaslighting," "skillfully [sic] gets Western leaders to see his interests as more legitimate than their own." *Id.* Western countries must intimately familiarize themselves with the truth to prevent gaslighting by Putin when he attempts to "distort" the facts to suit his own agenda. *Id.* Putin has most often used this gaslighting technique when speaking of Russia's involvement in Ukraine. *Id.* Western leaders, particularly in the European Union, should not isolate Putin but rather prepare to respond to Russia's spread of disinformation. *Id.*

⁸⁴ See Mary E. Dean, *What Is Gaslighting? A Type of Emotional Abuse*, BETTERHELP (Nov. 23, 2021), <https://www.betterhelp.com/advice/relations/gaslighting-a-sneaky-kind-of-emotional-abuse> [<https://perma.cc/6N9F-HRCN>] (noting how gaslighting can occur anywhere); see also Aaron Rugar, *Trump's Latest Press Conference Was a Master Class in Gaslighting*, VOX (July 12, 2019, 3:20 PM), <https://www.vox.com/policy-and-politics/2019/7/12/20691852/trump-press-conference-gaslighting-acosta> [<https://perma.cc/M8WH-PV2H>] (providing an example of how gaslighting occurred during press conferences).

⁸⁵ See G. Alex Sinha, *Lies, Gaslighting and Propaganda*, 68 BUFFALO L. REV. 1037 (2020) (exploring the link between traditional forms of manipulative propaganda and modern gaslighting, wherein the speaker repeats demonstrably false things as a technique of disorientation).

⁸⁶ See *id.*

⁸⁷ See *id.*

theories, and project their own crimes onto their opponents to further confuse the public.⁸⁸ They may well use the legal system against their opponents to further weaken the public's hold on reality and truth.⁸⁹

If there is broadcast propaganda but no disinformation coming from officials, the damage is present but limited. The reverse is also true: if there is no "state media" to assist the corruption of information coming from officials, then there may be limited harm done. The most dangerous situation occurs when the friendly media conspires with dishonest officials to wear down public perceptions of truth. The harm done in such a case is serious, and total confusion of the listening public is likely to ensue. In such a case, mutual amplification works to maximum effect. Within this milieu, it takes enormous energy and dedication to seek out experts, ferret out relevant facts, and find the energy to openly defy the imposition of falsehoods. Many ordinary people simply give up trying to do so. This Article argues that governments are legally obligated to ensure that our principal streams of information are not tainted by gaslighting and other forms of insidious propaganda. In modern societies, three major forms of disinformation work together to confuse the public and thwart democracy: broadcast propaganda, lies repeated by officials, and manipulative social media posts.⁹⁰ These forms of propaganda are components of a complex form of warfare aimed directly at the understanding of the public.⁹¹

II

WHEN INFORMATION IS THE WEAPON, HOW DO YOU FIGHT THE WAR?

In this part, the Article discusses the contemporary versions and challenges of propaganda. The first section discusses the importance of acknowledging propaganda as a modern weapon of warfare and suggests that a legal apparatus must be developed to combat this threat. The second section discusses historical versions of propaganda and argues that modern propaganda takes a new form, thus requiring a new approach.

⁸⁸ See Paul & Matthews, *supra* note 8 (describing the magnitude and continuity of disinformation promotion).

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *supra* notes 8–14 and accompanying text (discussing scope of propaganda tactics).

A. *New Weapons, Same Legal System*

Western democracies are currently under attack at a very fundamental level. Britain's parliamentary democracy is facing serious difficulties, and truth itself is at risk in the United States.⁹² Science and fact-based activities of U.S. governmental agencies were severely undermined through 2020.⁹³ While on the surface everyday life goes on as before, there is a vast change at work with threats to all assumptions vital to the maintenance of democracy. In fact, across the world, most democracies are experiencing attacks, and many may not survive.⁹⁴ For example, the political atmospheres in Brazil and the Philippines are sharply different from those of a mere few years ago, with authoritarian strongmen spouting emotional appeals to nationalist mythology and collective fears.⁹⁵ A fascist germ we had considered defeated for good is on the rise, financed through global dark money.⁹⁶

⁹² See Robert Shrimley, *America's Warning for British Democracy*, FIN. TIMES (Jan. 13, 2021), <https://www.ft.com/content/f664e47d-e4a4-47ad-b170-f62961370b73> [<https://perma.cc/YW59-MRE8>] (noting "a cavalier approach to truth and a readiness to break political norms have fomented a similar rot."); Angela Dewan, *UK Parliament Finally Rubber Stamps Brexit in No-Fuss Vote*, CNN (Jan. 9, 2020, 1:08 AM), <https://www.cnn.com/2020/01/09/uk/brexit-deal-uk-votes-gbr-intl/index.html> [<https://perma.cc/5BWG-8U43>] (explaining the state of Britain post-Brexit vote).

⁹³ See McKay Coppins, *Trump's Dangerously Effective Coronavirus Propaganda*, THE ATL. (Mar. 11, 2020), <https://www.theatlantic.com/politics/archive/2020/03/trump-coronavirus-threat/607825> [<https://perma.cc/75AC-RPL5>] (highlighting Donald Trump's propagandist strategies used in minimizing severity of Coronavirus throughout 2020).

⁹⁴ See Maria A. Ressa, *Propaganda War: Weaponizing the Internet*, RAPPLER (Oct. 3, 2016, 7:00 PM), <https://www.rappler.com/nation/propaganda-war-weaponizing-internet> [<https://perma.cc/8994-5YWX>] (describing how President Rodrigo Duterte of the Philippines has used the internet to sway popular emotion and drive hatred in the state); see also Mitra V. Yazdi, *The Digital Revolution and the Demise of Democracy*, 23 TUL. J. TECH. & INTELL. PROP. 61 (2021) (describing the complex challenges the digital revolution has posed to democratic structures of governance unable to respond effectively).

⁹⁵ See Federico Finchelstein, *Jair Bolsonaro's Model Isn't Berlusconi. It's Goebbels*, FOREIGN POL'Y (Oct. 5, 2018, 5:15 PM), <https://foreignpolicy.com/2018/10/05/bolsonaros-model-its-goebbels-fascism-nazism-brazil-latin-america-populism-argentina-venezuela> [<https://perma.cc/2ZCB-ZFM4>] (describing the Brazilian president's rhetoric as coming straight from the Nazi playbook). See also Mac Margolis, *Brazil's Politics and Economics Are Splitting Apart*, BLOOMBERG (Nov. 14, 2019, 9:00 AM), <https://www.bloomberg.com/opinion/articles/2019-11-14/brazil-s-politics-and-economics-are-splitting-apart> [<https://perma.cc/MZ9X-359W>] (discussing the fall of Brazil's political system). Over the past few years, Brazil's political system has left its people skeptical and fearful of the future. *Id.* Specifically, President Jair Bolsonaro's attacks on both democracy and the independent press have concerned the Brazilian people. *Id.* Despite Brazil's "toxic politics," the country has seen an economic turnaround with low interest rates and a bright economic future. *Id.*

⁹⁶ See Joseph Biden & Michael Carpenter, *Foreign Dark Money Is Threatening American Democracy*, POLITICO (Nov. 27, 2018), <https://www.politico.com/magazine/story/2018/11/27/foreign-dark-money-joe-biden-222690> (analyzing Russian tactics attacking

This adversary is also a hybrid: a strange and extremely effective alliance of forces revolving on the axes of corruptly obtained money, global extractive industries, and unaccountable political power.

By contrast, Western democracies seem to have lost their will to resist, though they may chatter about the need to preserve and protect freedom and democracy.⁹⁷ However, democratic forces on the ground are seriously outgunned, if not outnumbered.⁹⁸ The rationality and politeness of democratic politics appear to be no match for the flood of disinformation unleashed by this shape-shifting adversary. When the weapon is propaganda, Western democracy is uncertain how to confront propaganda legally or whether to confront propaganda at all.⁹⁹

Information warfare has its roots in totalitarian thinking and seeks to dominate not only behavior but thought itself.¹⁰⁰ Information warfare reflects a combination of twentieth century fascist and communist methodologies, but information warfare is certainly based on the

American democracy). Foreign powers use cyber operations, disinformation, and dark money to disrupt the democratic process. Loopholes in the rules governing super PACs have allowed both Russia and China to bypass the ban on the foreign funding of elections. *Id.* Government agencies, such as the FEC and FBI, struggle to trace dark money because of this legal loophole. *Id.* Congress has not addressed the issue of dark money since the passage of the Patriot Act in 2001. *Id.* Then-presidential nominee Joe Biden added that dark money is an issue of national security, and it should be a priority to “reduce our vulnerability to foreign corrupt influence.” *Id.* Reformation to campaign finance laws could address the current problem of dark money in politics. *Id.*

⁹⁷ See, e.g., Tom Glaisyer, *Is Social Media a Threat to Democracy?*, DEMOCRACY FUND (Oct. 4, 2017), <https://democracyfund.org/idea/is-social-media-a-threat-to-democracy> [<https://perma.cc/P8CW-SKQJ>] (detailing actions taken by the organization to protect democracy from the threat of social media).

⁹⁸ See *New Report: The Global Decline in Democracy Has Accelerated*, FREEDOM HOUSE (Mar. 3, 2021), <https://freedomhouse.org/article/new-report-global-decline-democracy-has-accelerated> [<https://perma.cc/WE3R-V2ZH>] (noting that fewer than a fifth of the world’s people now live in fully free countries).

⁹⁹ See John S. Ehrett, *Confronting Disinformation Warfare*, YALE J.L. & TECH. (Apr. 18, 2017), <https://yjolt.org/blog/confronting-disinformation-warfare> [<https://perma.cc/S5KZ-33PJ>] (analyzing potential legal solutions to disinformation). The First Amendment presents a large barrier to stopping disinformation. *Id.* In the international realm, the United States can push back against state-sponsored disinformation; however, on the domestic front, free press presents a thornier issue. *Id.* As technology develops, it becomes increasingly difficult to identify the actors spreading disinformation. *Id.*

¹⁰⁰ See Paul Jackson, *Totalitarianism in the Twentieth Century and Beyond*, OPEN DEMOCRACY (Aug. 27, 2019, 5:26 PM), <https://www.opendemocracy.net/en/countering-radical-right-totalitarianism-twentieth-century-and-beyond/> [<https://perma.cc/E8D7-JNGP>] (describing subtle differences and links between the far-right, authoritarianism and totalitarianism).

approach perfected by the GRU, formerly called the KGB.¹⁰¹ The KGB knew well that to hold onto power, it would be most convenient to destroy truth.¹⁰² If there is no truth, then there is no comparative virtue and, ultimately, no need to fear political opposition.¹⁰³ Opposition requires articulate advocacy, and without a basis in truth, people cannot distinguish the value of one argument or advocate from another. If everyone is believed to be corrupt, then no one can plausibly accuse anyone else of corruption. In recent years, few seem to discuss information warfare in terms of the rules of engagement but rather react on a daily basis and in piecemeal fashion to particular attacks.

Interestingly, pundits in Western democracies tend to think their societies are generally immune from the effects of information warfare, gaslighting, and disinformation.¹⁰⁴ This is because of broad legal acceptance of free speech rights.¹⁰⁵ Free speech rights originate in the enduring principle of the marketplace of ideas and relatively free access by all citizens to whatever they wish to read.¹⁰⁶ So, where did things go wrong? It is striking that so many citizens of Western democracies have fallen prey to false narratives naively thought to be effective only in overtly repressive states.¹⁰⁷ Certain segments of the population have seemingly proven susceptible to the influence of propaganda while

¹⁰¹ See, e.g., *U.S. Charges Russian GRU Officers with International Hacking and Related Influence and Disinformation Operations*, U.S. DEP'T. OF JUST. (Oct. 4, 2018), <https://www.justice.gov/opa/pr/us-charges-russian-gru-officers-international-hacking-and-related-influence-and> [<https://perma.cc/NA9D-Y74K>] (showing proof of Russian GRU involvement in disinformation warfare).

¹⁰² See Piers Brendon, *Death of Truth: When Propaganda and 'Alternative Facts' Grippled the World*, THE GUARDIAN (Mar. 11, 2017, 6:00 PM), <https://www.theguardian.com/media/2017/mar/11/death-truth-propaganda-alternative-facts-grippled-world> [<https://perma.cc/NW24-BVYR>] (describing how Hitler used state resources to control German minds).

¹⁰³ See generally MICHIKO KAKUTANI, *THE DEATH OF TRUTH: NOTES ON FALSEHOOD IN THE AGE OF TRUMP* (2018) (describing the gradual death of a sense of shared truth in today's world).

¹⁰⁴ See Timothy McLaughlin, *'We Tried to Warn You'*, THE ATL. (Jan. 12, 2021), <https://www.theatlantic.com/international/archive/2021/01/us-big-tech-capitol-hill/617636/> [<https://perma.cc/8MRP-GRXQ>].

¹⁰⁵ See Elin Hofverberg, *Initiatives to Counter Fake News in Selected Countries: Sweden*, LIBR. OF CONG., <https://tile.loc.gov/storage-services/service/l1/l1glrd/2019668145/2019668145.pdf> [<https://perma.cc/B4JL-2JMM>].

¹⁰⁶ See *id.*

¹⁰⁷ See Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO STATE L.J. 815 (2020) (noting that while some people are inclined to believe political lies, others simply become exhausted hearing them repeated).

others have not.¹⁰⁸ It is unclear how to even create a social dialogue around the issue of propaganda when so many do not perceive the false narratives as propaganda.

The main premise of this Article is that there must be a way to take propaganda seriously as a technique of real and actual war and that there must be *legal* ways of suppressing propaganda. Regulation of broadcast content through an enforceable requirement of factual truth, a legal obligation placed on social media companies with regard to political advertising, and a disqualification of elected officials for telling demonstrable lies are all legal responses that should be considered. While propaganda and its ill effects were largely discussed during the Trump era, we did not seem to know how to frame laws that could do so, particularly with an accurate definition of propaganda proving so elusive. Thus, are we doomed to accept propaganda as a fact of life? This is no small question since propaganda is endangering democratic values and the Western Alliance in a way that conventional weapons and ideological debate were never able to.¹⁰⁹

Although the global disinformation war is multifaceted, the second half of this Article will focus primarily on the threats posed by televised propaganda, propaganda spread through social media, and propagandistic lies used by politicians in addressing the public. These several forms are often mutually reinforcing, for a friendly television station might well amplify and spread the demagoguery of a politician.¹¹⁰

B. Taking Propaganda Seriously: Naming It for What It Is

In earlier decades, virtually every high school student in the United States and Europe learned that a key to Hitler's brief and brutal

¹⁰⁸ See Giovanni Luca Ciampaglia & Filippo Menczer, *Biases Make People Vulnerable to Misinformation Spread by Social Media*, SCI. AM. (June 21, 2018), <https://www.scientificamerican.com/article/biases-make-people-vulnerable-to-misinformation-spread-by-social-media/> [<https://perma.cc/DBL3-4WK7>] (noting the emotional dimension of misinformation that resonates with personal biases).

¹⁰⁹ See *Putin's Asymmetric Assault on Democracy in Russia and Europe: Implications for U.S. National Security*, Committee on Foreign Relations: U.S. Senate Minority Staff Report, January 10, 2018.

¹¹⁰ See YOCHAI BENKLER ET AL., NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION AND RADICALIZATION IN AMERICAN POLITICS (2018) (describing a "propaganda feedback loop" that runs through US media); see also Justin Baragona, *How Fox News Primetime Jacked Up Trump's 'Big Lie,'* THE DAILY BEAST (Feb. 7, 2021), <https://www.thedailybeast.com/how-fox-news-primetime-jacked-up-trumps-big-lie> [<https://perma.cc/ZJ28-8RLA>].

domination of Europe was his astonishingly effective use of propaganda.¹¹¹ Students in the “free world” watched films depicting the rise of the Nazi movement, a movement that was indistinguishable from the barrage of propaganda cooked up by its proponents.¹¹² The parades, pamphlets, hateful cartoons, repetitious cursing, and sound of paramilitary boot steps were familiar to every schoolchild.¹¹³ Young Americans in earlier decades were deeply affected by films depicting Nazi atrocities and books on the Nazi phenomenon, but it was reassuring that these poisonous tropes seemed to have been safely defeated in World War II.¹¹⁴ Nazism was seen as part and parcel of its reliance on propaganda to seize and hold, then expand its power.¹¹⁵

Even the greatest scholars of the period would be hard-pressed to identify clear policy goals of the Nazis;¹¹⁶ rather, Nazi’s power for power’s sake, used to shake up an allegedly effete “system,” was based on the shock value of outrage-shattering propaganda.¹¹⁷ Indeed, rethinking Hitler’s rise to power, one is struck by the fact that Hitler had little in the way of a coherent ideology; his main appeal was precisely in the seduction of his hate-filled rhetoric.¹¹⁸ Without any real

¹¹¹ See Timothy Snyder, *How Hitler Pioneered ‘Fake News,’* N.Y. TIMES (Oct. 16, 2019), <https://www.nytimes.com/2019/10/16/opinion/hitler-speech-1919.html> [https://perma.cc/83XE-WX67].

¹¹² See *infra* note 143 and accompanying text (discussing author’s experience of school curriculum).

¹¹³ See Snyder, *supra* note 111.

¹¹⁴ This world, as remembered by the author, seems to no longer exist. See Kit Ramgopal, *Survey Finds ‘Shocking’ Lack of Holocaust Knowledge Among Millennials and Gen Z*, NBC NEWS (Sept. 16, 2020, 12:28 AM), <https://www.nbcnews.com/news/world/survey-finds-shocking-lack-holocaust-knowledge-among-millennials-gen-z-n1240031> [https://perma.cc/2KGJ-EHL7].

¹¹⁵ See *Nazi Propaganda*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/nazi-propaganda> [https://perma.cc/Q9NB-DNAF].

¹¹⁶ See Nicholas O’Shaughnessy, *How Hitler Conquered Germany*, SLATE (Mar. 14, 2017, 11:59 AM), <https://slate.com/news-and-politics/2017/03/how-nazi-propaganda-encouraged-the-masses-to-co-produce-a-false-reality.html> [https://perma.cc/E8DP-M8L5].

¹¹⁷ See *id.* for a discussion about Nazi use of propaganda. The Third Reich mastered the use of propaganda to project the Nazi ideology. *Id.* Hitler “was a magician of illusion” who used propaganda to create the “collective” mindset at the heart of the Nazi warfare machine. *Id.* Rather than forcing a collective ideology on the German people, Nazi propaganda instead used the power of suggestion, lulling people into believing that they had thought this way all along. *Id.*

¹¹⁸ See Snyder, *supra* note 111 (“On October 16, 1919, Adolf Hitler became a propagandist. It would be his chief occupation for the rest of his life. Without propaganda, he could never have become a public figure, let alone risen to power. It was as a propagandist that he made a second world war possible, and defined Jews as Germany’s foe. The form of his propaganda was inextricable from its content: the fictionalization of a globalized world into simply slogans, to be repeated until an enemy thus defined was exterminated.”).

expertise or skills, this eccentric drifter rose to power through the raw power of his relentless denunciation of Jews and of a supposedly failed German state.¹¹⁹ A feeble democracy was one of his favorite targets, but the glorification of Germans and the endless vilification of Jews became the essence of Hitlerism.¹²⁰

The Soviet approach to propaganda, while also reliant on parades and slogans,¹²¹ was both less inflammatory and more devious. The propaganda's ability to translate into other nations and systems was also more effective than the Nazis' Teutonic mysticism.¹²² The Soviet approach to propaganda aimed to keep the population guessing, uncertain, and without a sense of any stable truth.¹²³ Dissidents were labeled insane and packed away out of sight.¹²⁴ Poor management and desperate economic realities were labeled great victories.¹²⁵ The Soviet military parades, dull economic indoctrination, celebration of happy workers, and diatribes on international socialist solidarity all contributed to the survival of the Soviet system.¹²⁶ Much of this false optimism was exposed by the dissident Soviet writers—heroes in the West for their selfless devotion to a truth that would have otherwise been buried under a barrage of propaganda.¹²⁷ The citizenry mistrusted its own perceptions as a constant stream of controlled narrative flowed

¹¹⁹ See *Adolf Hitler*, HISTORY (Aug. 30, 2019), <https://www.history.com/topics/world-war-ii/adolf-hitler-1> [<https://perma.cc/Y6D7-CKC8>]; see also *Hitler Comes to Power*, U.S. HOLOCAUST MEM'L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/hitler-comes-to-power> [<https://perma.cc/6U7W-X49L>].

¹²⁰ See Snyder, *supra* note 111.

¹²¹ See generally *Nazi and Soviet Propaganda's Shared Aesthetic*, RADIOFREEEUROPE (Mar. 20, 2013, 3:00 PM), <https://www.rferl.org/a/24934238.html> [<https://perma.cc/DVB7-KLNX>] (noting the commonalities between Nazi and Soviet propaganda characteristics).

¹²² See Snyder, *supra* note 111.

¹²³ See generally SARAH DAVIES, *POPULAR OPINION IN STALIN'S RUSSIA: TERROR, PROPAGANDA AND DISSENT, 1934-1941* (1997).

¹²⁴ See Daniel Singer, *Socialism and the Soviet Bloc*, THE NATION (Jan. 2, 1998), <https://www.thenation.com/article/archive/socialism-and-soviet-bloc/> [<https://perma.cc/Q29U-N3MB>]. In addition to legal sanctions, Soviet dissidents were exiled, sent to psychiatric wards, or sent to labor camps. See *id.*

¹²⁵ See generally PETER KENEZ, *THE BIRTH OF THE PROPAGANDA STATE: SOVIET METHODS OF MASS MOBILIZATION, 1917-1929* (1985).

¹²⁶ See, e.g., Katya Soldak, *This Is How Propaganda Works: A Look Inside a Soviet Childhood*, FORBES, (Dec. 20, 2017, 1:28 PM), <https://www.forbes.com/sites/katyasoldak/2017/12/20/this-is-how-propaganda-works-a-look-inside-a-soviet-childhood/?sh=13782a7a3566> [<https://perma.cc/HG86-EAAZ>].

¹²⁷ See Gal Beckerman, *How Soviet Dissidents Ended 70 Years of Fake News*, N.Y. TIMES (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/opinion/how-soviet-dissidents-ended-70-years-of-fake-news.html> [<https://perma.cc/77WH-QNZT>].

from the television screen. Those two systems—the Nazi regime and the Soviet regime—offer two versions of disinformation-based repression, both heavily reliant on propaganda to maintain power. Successful propaganda, in turn, relies on maintaining a sense of reality not tied to rationality or fact.

As the decades rolled on, the world witnessed a violent and radical Cultural Revolution in China designed to disassemble any thinking person still refusing to bow down to the Maoist version of Communist control.¹²⁸ The most radical experiment occurred in Cambodia under the Khmer Rouge,¹²⁹ where even the act of wearing eyeglasses was seen as disloyal to the forced worship of unadorned work.¹³⁰ As one sees in the film *The Killing Fields*, propaganda blared through a loudspeaker all day, and the people toiling in the fields could not tune it out through any form of personal diversion.¹³¹ All Americans absorbed the same lesson: wherever there was repression, there was always propaganda. American schools have presumably in recent years abandoned such early training in “propaganda detection.”¹³²

As Vladimir Putin took charge of a post-Soviet Russia, a highly sophisticated form of propaganda became a central feature of his regime.¹³³ Many writers have noted his KGB background and expertise in gaslighting—deliberate lies meant to confuse and disorient the

¹²⁸ See Austin Ramzy, *China's Cultural Revolution, Explained*, N.Y. TIMES (May 14, 2016), <https://www.nytimes.com/2016/05/15/world/asia/china-cultural-revolution-explainer.html> [<https://perma.cc/FD4H-ZLGT>].

¹²⁹ See *Khmer Rouge: Cambodia's Years of Brutality*, BBC NEWS (Nov. 16, 2018), <https://www.bbc.com/news/world-asia-pacific-10684399> [<https://perma.cc/33LN-8MFX>].

¹³⁰ See *id.*

¹³¹ THE KILLING FIELDS (Goldcrest Films 1984).

¹³² See Tessa Jolls & Michele Johnsen, *Media Literacy: A Foundational Skill for Democracy in the 21st Century*, 69 HASTINGS L.J. 1379, 1405 (2018), for a discussion of media literacy in schools. Americans cannot rely on media outlets and social media platforms to uphold standards and regulate content that threatens democracy. *Id.* Tessa Jolls and Michele Johnsen call for a media literacy program in school to teach the skills once possessed by American children to detect propaganda and misleading information. *Id.* at 1406. Media literacy could address the threat that misleading and untruthful news poses to our democracy. *Id.* at 1402.

¹³³ See William J. Broad, *Putin's Long War Against American Science*, N.Y. TIMES (Apr. 13, 2020), <https://www.nytimes.com/2020/04/13/science/putin-russia-disinformation-health-coronavirus.html> [<https://perma.cc/H4N7-F2J7>], for descriptions of Putin promoting disinformation, particularly surrounding issues of public health. Most recently, with COVID-19, Putin aims to portray American officials as downplaying the severity of the pandemic. *Id.* Although difficult to track, the Russian President used blogs and other media channels to paint American officials as frauds. *Id.* Since his rise to power, Putin has used propaganda to attack Western democracy. *Id.*

population.¹³⁴ Shocking and subduing the public through a combination of disparate techniques like nuanced and obvious lies, self-aggrandizement, crass talk, and insults, Putin made common cause with “oligarchs” who were given large slices of the privatization pie as the Soviet system crumbled.¹³⁵ Despite receiving only a modest salary, Putin is known as one of the world’s richest men.¹³⁶ Putin’s complex web of dealing with the Russian mafia, connections to the oligarchs who keep him in power, and reactionary religious elements in Russian society all contribute to a failure of the Russian state to progress.¹³⁷ Instead, modern Russia reflects a *mélange* of Soviet-style repression, reactionary thought, and political gaslighting. As Yale historian Timothy Snyder has pointed out, Putin has taken this show on the road into Western democracies, using money looted from the state to purchase influence in Europe, the United States, and elsewhere with striking success.¹³⁸ Putin’s success in corrupting mainstream European and American politics has been staggering.¹³⁹ His brand of information

¹³⁴ See Áine Cain, *Before He Became the President of Russia, Vladimir Putin Was a KGB Spy – Take a Look at His Early Career*, BUS. INSIDER (July 16, 2018, 1:17 PM), <https://www.businessinsider.com/vladimir-putin-kgb-spy-2017-9> [https://perma.cc/P9YM-J92M]; see also Bond, *supra* note 82.

¹³⁵ See Dana Milbank, *Opinion: The Absurdity of Putin’s Lies Should Be Obvious. Thanks to Trump, It Isn’t.*, WASH. POST (June 16, 2021, 7:23 PM), <https://www.washingtonpost.com/opinions/2021/06/16/republicans-parroted-putins-propaganda-now-putin-parrots-republican-propaganda/> [https://perma.cc/7RT6-JH5N] (discussing lies Putin has told in recent press conferences); see Henry Foy, *The Russian Oligarchs Are Gone. Long May They Prosper!*, FIN. TIMES (July 2, 2019), <https://www.ft.com/content/8fbcf652-9c10-11e9-9c06-a4640c9feebb> [https://perma.cc/3E2E-SKDE] (explaining how a new generation of oligarchs has come to power under Putin).

¹³⁶ See Samantha Karas, *Vladimir Putin Net Worth 2017: Russia’s Leader May Be One of the Richest Men in the World*, INT’L BUS. TIMES (Feb. 15, 2017, 9:30 AM), <https://www.ibtimes.com/vladimir-putin-net-worth-2017-russias-leader-may-be-one-richest-men-world-2492300> [https://perma.cc/MQH2-F3FL].

¹³⁷ See Dylan McIlvenna-Davis, *Gangs and Gulags: How Vladimir Putin Utilizes Organized Crime to Power His Mafia State*, BERKLEY POL. REV. (Dec. 16, 2019), <https://bpr.berkeley.edu/2019/12/16/gangs-and-gulags-how-vladimir-putin-utilizes-organized-crime-to-power-his-mafia-state/> [https://perma.cc/F95J-BFBW].

¹³⁸ See David Frum, *The Great Russian Disinformation Campaign*, THE ATL. (July 1, 2018), <https://www.theatlantic.com/ideas/archive/2018/07/the-great-russian-disinformation-campaign/564032/> [https://perma.cc/8GEP-GGYH], for a discussion of Timothy Snyder’s view on Russian cyber-warfare. Historian Timothy Snyder predicted that Russian television would lie about the situation in Ukraine to deceive the Russian people. *Id.* Russia further identified both Facebook and Twitter as platforms that could be weaponized. *Id.* Snyder also writes about how the United States is becoming increasingly like Russia in that President Trump is utilizing tactics used by the Russian President to move toward a nation of economic oligarchy and “distorted information.” *Id.*

¹³⁹ See *id.*

and scandal overload has taxed the capacity of the United States and the United Kingdom to resist.¹⁴⁰ In a few short years, *official lying* in the United States and the United Kingdom appears to have become normalized,¹⁴¹ and the ability of the population to push back is showing signs of exhaustion even in these established democracies.¹⁴²

Back when American students all studied propaganda and totalitarianism, there was corresponding literature to accompany that curriculum.¹⁴³ Articles, books, and works of fiction all presumed that the rise of mind-bending and hate-generating propaganda was a threat greatly to be feared.¹⁴⁴ Propaganda was recognized to have a life of its own; one could not think about World War II without considering the role of Nazi propaganda.¹⁴⁵ Yet, since at least 2016, the Western Alliance has been struggling in the face of a propaganda-based, asymmetric form of warfare coming from a complex set of players, including billionaire-funded companies such as Cambridge Analytica.¹⁴⁶ Once again, we have a dramatic reminder that high-volume propaganda assists in triggering radical shifts in power. Democracies cannot be undermined without an arsenal of propaganda. Equally surprising is the lack of legal tools available to begin restraining the effects of propaganda.

It seems clear that propaganda poses a mortal threat to democracy, the constitutional order, and the civility in politics that is necessary for ordinary problem-solving. Yet, before considering legal ways to counter and repress propaganda, a difficulty remains in adequately

¹⁴⁰ *See id.*

¹⁴¹ *See, e.g.,* Milbank, *supra* note 135.

¹⁴² *See generally* HELEN NORTON, *THE GOVERNMENT'S SPEECH AND THE CONSTITUTION* (2019) (suggesting ways in which the legal system might restrict official speech that endangers constitutional values).

¹⁴³ The author's high school curriculum would have included such works as Viktor Frankl's *Man's Search for Meaning* (1946), Arthur Koestler's *Darkness at Noon* (1940), Erich Fromm's *Escape from Freedom* (1941), and many others exposing the horrors of fascism and totalitarianism.

¹⁴⁴ *See id.*

¹⁴⁵ *See* O'Shaughnessy, *supra* note 116. Invoking fear and anger in his people, Hitler did not use fact but played on emotions to mobilize his people during World War II. *Id.* Through the repetition of simple and clear information, Hitler used propaganda to unite the German people against a common enemy. *Id.* The propaganda targeting and dehumanizing the Jewish population created hatred toward that group of people from the German population. *Id.*

¹⁴⁶ *See* David Ingram, *Factbox: Who Is Cambridge Analytica and What Did It Do?*, REUTERS (Mar. 19, 2018, 10:00 PM), <https://www.reuters.com/article/us-facebook-cambridge-analytica-factbox/factbox-who-is-cambridge-analytica-and-what-did-it-do-idUSKBN1GW07F> [<https://perma.cc/FQ58-QDB5>].

identifying and defining it. How does propaganda work as effectively as it consistently does? How is propaganda distinguishable from impassioned persuasion? If there are two speeches, one by a propagandist and the other by an emotional advocate for some cause or point of view, can we meaningfully distinguish them? If we cannot say with certainty what propaganda is, then we cannot call for its regulation. These are difficult questions even for linguists and anthropologists, yet in a historical moment when forces around the world feel entitled once again to rely on propaganda, failure to regulate it and failure to control its power to corrupt political discourse is to surrender in advance.

To that end, we might consider the elements that place propaganda in a category by itself. Demagoguery is a particularly threatening form of propaganda in a liberal democracy.¹⁴⁷ Demagoguery may be described as propaganda in the service of unworthy political ideals.¹⁴⁸ Demagoguery aims to play upon preexisting prejudices and social fault lines¹⁴⁹ and makes false promises.¹⁵⁰

While we cannot come to a definite conclusion as to propaganda's contours, we should approach propaganda as something that can be defined and faced with legal penalties. We should assume that it has particular characteristics such that we can put certain speech in a box marked propaganda and other not. Propaganda has unique properties and is distinguishable from other forms of expression, although the full scope and variety of propaganda may be impossible to identify with precision. As with the study of symptomology, it may be easier to judge the presence of propaganda by the observable effects on the general public and from the adverse effects wrought on law and society.

¹⁴⁷ See generally MICHAEL SIGNER, DEMAGOGUE: THE FIGHT TO SAVE DEMOCRACY FROM ITS WORST ENEMIES (2009).

¹⁴⁸ See generally JASON STANLEY, HOW PROPAGANDA WORKS 41 (2015) ("A demagogue is the tyrant Plato describes in the last part of book 8 of *The Republic*, one who sows fear among the people and then presents himself as 'the people's protector,' all the while intending to exploit them."). Additionally, demagoguery is a form of undermining propaganda. *Id.* Again, drawing on the emotion of the viewer, someone will fail to recognize the tension between the goal that an argument serves and the political ideals that it employs. *Id.*

¹⁴⁹ See Zócalo Pub. Square, *What History Teaches Us About Demagogues Like the Donald*, TIME (June 20, 2016, 3:05 PM), <https://time.com/4375262/history-demagogues-donald-trump/> [<https://perma.cc/9GJC-EX94>].

¹⁵⁰ See *id.*

Propaganda is closest in type to “opinion” speech—expressing a point of view based on unprovable assertions.¹⁵¹ “This is the worst city in our country” is a statement of opinion. While the statement could invoke a strong reaction in favor or opposition, one would hardly feel compelled to suppress such a statement. But what if the city is quite nice, with many good qualities, and the speaker repeats this remark with great frequency and is in a position to be influential? Is the falsehood contained in the statement a candidate for being called “propaganda”? If so, we might want to suppress such statements, but how is the statement distinguishable from thousands of other statements of opinion? One could detect the propagandistic aspect in the degree of falsehood as well as the intended result, like saying, “This city is dangerous, ugly, and dirty,” when in fact the city is not particularly any of those things. The prominence of the speaker is important, but many public figures have come to prominence precisely because of their propagandistic utterances.¹⁵² Repetition is also central to propaganda, but it is difficult to say why repetition of falsehoods makes them appear truer than otherwise.¹⁵³

In summary, the working assumptions of this Article are as follows: first, that democracy is incompatible with the loud roar of ongoing propaganda; second, that propaganda is distinguishable from other forms of impassioned speech; third, that propaganda has a poisonous effect and must be countered by legal means; and fourth, that in Western democracies, adherence to the idea of free speech has made opponents reluctant to call for the suppression of propaganda, even when its adverse effects on democracy are clear to see.

Finally, the Article rests on the belief that propaganda is part of psychological operations aimed at civilians to confuse, mislead, and control them more easily. This is a form of warfare that turns civilians into victims. Thus, our approach to the problem of controlling

¹⁵¹ See generally John Silva, *Distinguishing Among News, Opinion and Propaganda*, NEWS LITERACY PROJECT (June 20, 2018), <https://newslit.org/educators/civic-blog/distinguishing-among-news-opinion-and-propaganda/> [<https://perma.cc/FQ58-QDB5>] (providing both similarities and differences between propaganda and opinion).

¹⁵² See Tracey Martin, *Propaganda: How Germany Convinced the Masses*, 13 HIST. IN THE MAKING 8 (2020) (describing the dynamic by which propaganda unites and motivates listeners to believe in a common threat and idolize strongman leaders).

¹⁵³ See Tom Stafford, *How Liars Create the ‘Illusion of Truth,’* BBC FUTURE (Oct. 26, 2016), <https://www.bbc.com/future/article/20161026-how-liars-create-the-illusion-of-truth> [<https://perma.cc/P3PR-YKAX>] (“Repetition makes a fact seem more true, regardless of whether it is or not.”); see also Emily Dreyfuss, *Want to Make a Lie Seem True? Say It Again. And Again.* WIRE (Feb. 11, 2017, 7:00 AM), <https://www.wired.com/2017/02/dont-believe-lies-just-people-repeat/> [<https://perma.cc/6V3N-TLZQ>].

propaganda should be to assert a human right to be free of information warfare and the psychological manipulation that is at its heart.

What follows is a brief examination of three types of propaganda and three proposed sets of legal responses. These three kinds of propaganda include: propaganda that is broadcast, especially on television; propaganda that is spewed directly by demagogues; and propaganda that is created through artificial intelligence and funneled through social media outlets like Facebook or data-processing companies such as Cambridge Analytica.¹⁵⁴

III BROADCAST PROPAGANDA: FROM THE WAR ROOM TO YOUR LIVING ROOM

Longstanding adherence to free speech doctrines under the First Amendment of the U.S. Constitution has numbed people to the possibility of confronting propaganda with the force of law. Yet, it is vital to oblige the legal system to impose penalties for the conduct of information warfare, of which propaganda is the primary manifestation.¹⁵⁵ Propaganda is not new, but its worldwide use via techniques old and new, combined with the shadow world of financial corruption, makes it imperative that we devise creative legal strategies to confront it. Those who peddle propaganda would like us to believe that we must endure those well-funded and coordinated attacks on the nature of reality itself, but laws to tame propaganda, while not easy to structure, are possible to enact. Considering the ever-expanding reach of propaganda, a multifaceted legal response is needed. This Article will detail several legal rules that could rehabilitate our democracy.

There is not enough space in this Article to deal with any one of these topics in depth. However, the three areas of legal focus below

¹⁵⁴ See Carole Cadwalladr & Emma Graham-Harrison, *Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach*, THE GUARDIAN (Mar. 17, 2018), <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election> [<https://perma.cc/QQB4-7NZH>] (describing a major data harvesting operation designed to influence American voters to favor Donald Trump).

¹⁵⁵ See Sean Illing, *How Propaganda Works in the Digital Age*, VOX (Oct. 20, 2019, 8:47 AM), <https://www.vox.com/policy-and-politics/2019/10/18/20898584/fox-news-trump-propaganda-jason-stanley> [<https://perma.cc/MF96-GV2M>] (describing the tenuous balance between regulation and free speech). When the government values free speech above all else, the protection of free speech overshadows any harmful effects that may result. *Id.* Hitler's propaganda minister Joseph Goebbels succinctly said, "This will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed." *Id.*

suggest a future direction and indicate how to move beyond a mere concern with propaganda and its pernicious effects to doing something about it. Journalism as a discipline has objective standards—fact-checking, examining both sides of an issue, layers of professional review, etc.¹⁵⁶ There are well-known and seriously studied codes of journalistic ethics and standards.¹⁵⁷ In short, common journalistic standards are an integral part of professional training in journalism.¹⁵⁸ While there is a case to be made that mainstream media has its flaws, to call most news media in the United States or other democratic countries “fake news” or an “enemy of the people” is largely false.¹⁵⁹ To some degree, professional journalism is self-policing and does not knowingly lie.¹⁶⁰ But the rise of propaganda outlets in recent years is an exception to this earlier reality. In particular, news outlets run by the Murdoch family—namely, Fox News in the United States—operate outside the normal standards of journalistic ethics and invent a reality that serves certain far-right political ends.¹⁶¹

¹⁵⁶ See *Principles of Journalism*, AM. PRESS ASS'N, <https://americanpressassociation.com/principles-of-journalism/> [<https://perma.cc/KZX4-6YAP>].

¹⁵⁷ See *The 5 Principles of Ethical Journalism*, ETHICAL JOURNALISM NETWORK, <https://ethicaljournalismnetwork.org/who-we-are> [<https://perma.cc/2X43-X7RS>] (stating five principles of ethical journalism including truth and accuracy, independence, fairness and impartiality, humanity, and accountability); see also *Society of Professional Journalists Code of Ethics*, SOC'Y PRO. JOURNALISTS (Sept. 6, 2014, 4:49 PM), <https://www.spj.org/ethicscode.asp> [<https://perma.cc/NK87-TCPY>] (requiring that all journalists seek truth and report it, minimize harm, act independently, and be accountable and transparent).

¹⁵⁸ See, e.g., *NPR Ethics Handbook*, NPR, <https://www.npr.org/ethics> [<https://perma.cc/L9QH-5XA8>] (listing NPR's journalistic standards that include accuracy, fairness, completeness, honesty, independency, impartiality, accountability, respect, and excellence); see also *Ethical Journalism: A Handbook of Values and Practices for the News and Editorial Departments*, N.Y. TIMES, <https://www.nytimes.com/editorial-standards/ethical-journalism.html#> [<https://perma.cc/58JX-DUWF>] (providing the NYT's guidelines followed by its journalists, which includes the scope of the guidelines, duties to their readers, and standards by department).

¹⁵⁹ See Illing, *supra* note 155. Networks, under the guise of fairness, seek to air views from a variety of people, but in doing so, invite people to question factual situations, undermining reality. *Id.*

¹⁶⁰ See *NPR Ethics Handbook*, *supra* note 158 (“Our purpose is to pursue the truth. Diligent verification is critical. We take great care to ensure that statements of fact in our journalism are both correct and in context.”).

¹⁶¹ See Djankov et al., *supra* note 31, at 363 (observing the dynastical history of media outlets in the United States); see also Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 107, 113 (2009) (examining the history of family-owned media outlets).

Inventing facts and including them in print or broadcast form for public consumption is not journalism but something else.¹⁶² Journalistic standards are no more optional or arbitrary than medical or legal standards. Adhering to factual truth and veracity and distinguishing between fact and speculation are features that underpin professional journalism, and their violation is a serious matter within the profession.¹⁶³ With so many “news” outlets, it is important to recall that real journalism is not whatever the broadcaster says it is.¹⁶⁴

Universities have taught journalism as a professional branch of inquiry for decades.¹⁶⁵ In the United States, however, individuals are increasingly conflating entertainment and journalism.¹⁶⁶ The sale of advertisements is more lucrative when the content of the “news” is more enthralling.¹⁶⁷ Serious discussions about climate change or arms

¹⁶² See Illing, *supra* note 155 (defining a new version of media propaganda). Propaganda in the media today operates less like a blanket spreading of ideology and instead seeks to spread conspiracy theories, adding a different spin to stories and pumping disinformation into the media sphere. *Id.* Jason Stanley, a professor at Yale College and the author of *How Propaganda Works*, posits that the “goal of propaganda is no longer to make people believe lies—it’s to make information irrelevant altogether.” *Id.*

¹⁶³ See *Society of Professional Journalists Code of Ethics*, *supra* note 157 (“Ethical journalism should be accurate and fair. Journalists should be honest and courageous in gathering, reporting and interpreting information.”).

¹⁶⁴ See Daniel Hallin, *Whatever Happened to the News*, CTR. FOR MEDIA LITERACY, <https://www.medialit.org/reading-room/whatever-happened-news> (last visited Feb. 18, 2021) (examining different ways to present the news). Certain television shows parody the format of traditional news sources. *Id.* These “entertainment programs that borrow the aura of news” blend real news stories with entertaining comedy segments. *Id.*

¹⁶⁵ See generally *The State of American Journalism Education*, KNIGHT FOUND., <https://knightfoundation.org/features/je-the-state-of-american-journalism-education/> [<https://perma.cc/3G55-UTK5>].

¹⁶⁶ See Tony Schwartz, *Why TV News Is Increasingly Being Packaged as Entertainment*, N.Y. TIMES (Oct. 17, 1982), <https://www.nytimes.com/1982/10/17/arts/why-tv-news-is-increasingly-being-packaged-as-entertainment.html> (questioning changes in television journalism). As far back as 1982, a *New York Times* article questioned the changes that CBS had made to its nightly television programs. *Id.* The *New York Times* described an overhaul of the television network with its “increasing emphasis on eye-catching graphics, slick packaging and alluring promotion of highly paid stars.” *Id.* Ratings for the network improved, but the *New York Times* asked if the changes to the network lessened the journalistic standards once held in such high regard. *Id.* Questions lingered as to whether the increased focus on ratings would bring news away from journalism and toward chasing whatever story would most grab the attention of the viewer. *Id.*

¹⁶⁷ See Illing, *supra* note 155 (noting propaganda in media prioritizes flashy new stories over fact-checked information to boost rating and viewership). See also Taber Bergman, *American Television: Manufacturing Consumerism*, in *THE PROPAGANDA MODEL TODAY: FILTERING PERCEPTION AND AWARENESS* 159, 161 (Joan Pedro-Carañana et al. eds., 2018) (underscoring the power of money in media). Advertising, and the money it brings to

control policy are unlikely to attract the maximum number of viewers, whereas a highly personalized approach to elections, for instance, will excite viewers as commentators take on the all-important issue of who is winning and who is losing at any given time.¹⁶⁸ Yet, when broadcasters depart from well-recognized journalistic standards to push a particular point of view or outright lie to the public, the concept of “news” breaks down.¹⁶⁹

A fine line exists between cable news that presents a particular point of view, including commentators espousing that perspective, and cable “news” that pushes a point of view with the inclusion of demonstrably *false* information, or “alternative facts.”¹⁷⁰ Although the line is fine, it does exist.¹⁷¹ There could be a right- or left-leaning cable news show in which analysts praise or blame a policy, but when the analysts invent facts to support their point of view or when the praise or blame of a political view bears no relationship to factual reality, then the broadcast has veered into propaganda.¹⁷² Subsequently, journalistic standards have been abandoned.¹⁷³ There are, of course, hard cases when the

networks, drives the machine of American television networks. *Id.* If shows cannot engage enough viewers, they will not solicit adequate advertisements, and networks will cancel the shows due to lack of revenue. *Id.*

¹⁶⁸ See Hallin, *supra* note 164 (tracing styles of news coverage). Television news outlets have transitioned from a documentary style of presenting the news to using more eye-catching and viewer-drawing methods of news coverage. *Id.* As far back as the 1970s, 60% of television stations’ profits came from the news. *Id.* With profits driving coverage, the way that outlets cover news is driven by presentations that grow profits. *Id.*

¹⁶⁹ See Eric Fish, *Is Internet Censorship Compatible with Democracy? Legal Restrictions of Online Speech in South Korea*, 2 ASIA-PAC. J. ON HUM. RTS. & L. 43 (2009) (“[D]ominant websites maintain their positions not by winning exclusive broadcasting licenses or owning printing presses, but by continuing to produce the content that attracts users to their websites.”).

¹⁷⁰ See Alan Burdick, *Looking for Life on a Flat Earth*, NEW YORKER MAG. (May 30, 2018), <https://www.newyorker.com/science/elements/looking-for-life-on-a-flat-earth>. The Flat Earth Movement presents a study of how an obscure online conspiracy theory has now become a national movement fueled by its extensive online viewership. *Id.* Despite scientific evidence to the contrary, “flat-earthers” can no longer be swayed by the truth. *Id.* Rather, “[f]acts are no longer correct or incorrect; everything is potentially true unless it’s disagreeable, in which case it’s fake.” *Id.*

¹⁷¹ See *Sowing the Seeds of Trust*, 4 LEXISNEXIS: THE TRUST ISSUE 1, 1 (2019) (considering journalistic standards). The media does have inherent biases, but ethical journalists do not intentionally inject bias into their reporting. *Id.* at 6. Rather, these biases exist because journalists do not have the ability to mention every single viewpoint of a story. *Id.*

¹⁷² See *id.*

¹⁷³ See Illing, *supra* note 155 (observing that the “manipulation of the political space” undermines reality and erodes the importance of journalistic standards).

distinction is difficult to discern; however, in most cases, the line is reasonably clear.

Probably the most influential form of propaganda is that which emanates from the television screen.¹⁷⁴ Most repressive societies maintain “state media” broadcasting channels.¹⁷⁵ From the crude, North Korea, to the subtle and confusing, Russia, state media is meant to bolster the image and authority of the government in charge and usually a particular strongman at the center of that government.¹⁷⁶ Whether or not there is a distinct ideological bent to the regime in power, state broadcasters exist to provide the perspective of the regime in power.¹⁷⁷ In fact, state media tries to create the impression that

¹⁷⁴ See Emily B. Laidlaw, *Mapping Current and Emerging Models of Intermediary Liability*, SSRN 10 (June 15, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3574727 [<https://perma.cc/3TGZ-2GJB>] (explaining the power of broadcasters to select and arrange programs and then broadcast their arrangements to viewers). See also Shahnawaz Ahmed Malik & Neelam Faizan, *Fake News: Legal Analysis of False and Misleading News and Cyber Propaganda*, 6 J. LAW. 51, 52 (Apr.–June 2019) (defining fake news). Networks use a combination of both disinformation and misinformation. *Id.* This technique uses an “intentional item to mislead [the] public about anything in order to increase viewership or readership.” *Id.* at 51.

¹⁷⁵ See Djankov et al., *supra* note 31, at 341 (defining state media). Many view state-owned media as either an unbiased source that supplies information to viewers for the public good or an entity that “distort[s] and manipulate[s]” information to serve the wishes of those in power. *Id.* at 342. See also John Hudson, *U.S. Repeals Propaganda Ban, Spreads Government-Made News to Americans*, FOREIGN POL’Y (July 14, 2013, 7:06 PM), <https://foreignpolicy.com/2013/07/14/u-s-repeals-propaganda-ban-spreads-government-made-news-to-americans/> (examining the United States’ use of state media). Until 2013, domestic audiences could not listen to or watch certain United States government-funded broadcasts. *Id.* The Smith-Mundt Act barred this media from broadcasting in the United States. *Id.* These broadcast programs include Voice of America, Radio Free Europe, and Middle East Broadcasting Networks. *Id.* Those who oppose the broadcasting of these programs in the United States claim that they function as nothing beyond a propaganda arm while supporters of these programs claim that they report on proper news that “shed[s] the best light on the United States.” *Id.*

¹⁷⁶ See Joshua R. Fattal, *FARA on Facebook: Modernizing the Foreign Agents Registration Act to Address Propagandists on Social Media*, 21 LEGIS. & PUB. POL’Y 903, 918 (2019) (exploring Russia’s role in disinformation war). Since the Cold War, Russia has used information to “sow discord” within nations and promote its own interests as a country. *Id.*

¹⁷⁷ See Wendy Wyatt, *The Blame Game*, UNIV. OF SAINT THOMAS (Mar. 15, 2012), <https://news.stthomas.edu/the-blame-game-when-is-blame-in-the-news-ethically-justifiable/> [<https://perma.cc/F9BV-PJPF>] (discussing the frequency of “blaming” in news). See also Sarah Repucci, *Media Freedom: A Downward Spiral*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-and-media/2019/media-freedom-downward-spiral> [<https://perma.cc/Z9EX-R5HJ>] (describing government influence on journalists). In addition to regime-supported ownership changes, “[g]overnments have also offered proactive support to friendly outlets through measures such as lucrative state contracts, favorable regulatory

everything is going well—or if it is not, shift fault onto vulnerable ethnic, religious, or sexual minorities.¹⁷⁸ It is reasonable to assume that the presence of state media is incompatible with the operation of a genuine democracy.¹⁷⁹

By definition, a democracy thrives on open criticism of those in power and the possibility of changing the regime through voting.¹⁸⁰ State media assists in solidifying the regime and preventing forward movement and change.¹⁸¹ In the United States, television broadcasters such as Sinclair, Newsmax, or the One America News Network (OAN) are taking the country closer to authoritarian style state media than anything that has ever been seen in the United States before.¹⁸² The latter is a nakedly pro-Trump outlet, whose partiality to praising the “leader” would be familiar in any Central Asian dictatorship.¹⁸³ Since

decisions, and preferential access to state information. The goal is to make the press serve those in power rather than the public.” *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See Djankov et al., *supra* note 31, at 344. More autocratic regimes have state-owned media. *Id.* Additionally, having state-owned media companies results in “lower levels of political rights, civil liberties, security of property, and quality of regulation, and higher levels of corruption and risk of confiscation.” *Id.* at 367.

¹⁸⁰ See Gilda Daniels, *Democracy’s Destiny*, 109 CALIF. L. REV. 1067 (2021) (noting that the right to vote is central to a democratic form of government). See also Ariel Leve, *Trump Is Gaslighting America—Here’s How to Survive*, BUS. INSIDER (Mar. 18, 2017, 6:30 AM), <https://www.businessinsider.com/trump-is-gaslighting-america-heres-how-to-survive-2017-3> [<https://perma.cc/N7HR-LE7C>] (explaining how leaders use propaganda to their advantage). If someone in a position of authority claims that only his version of reality is correct, it leads his citizens to question their own thinking on the subject. *Id.* “The crazy-making, mind-bending, massive-confusion-inducing effects of our current [Trump] administration’s recklessness with the truth and disregard for verifiable facts is creating an emotional and psychological whiplash.” *Id.*

¹⁸¹ See Bergman, *supra* note 167, at 163. Although the United States may not have an official state media organization, the American government has a history of influencing the television industry. *Id.* Most notably, during the McCarthy era and after September 11, the government pushed certain “information campaigns” onto the American public. *Id.*

¹⁸² See Devin Gordon, *Trump’s Favorite TV Network Is Post-Parody*, THE ATLANTIC (May 19, 2020), <https://www.theatlantic.com/politics/archive/2020/05/trumps-favorite-tv-network-post-parody/611353/> [<https://perma.cc/3B4V-AJXX>] (following the rise of OAN). OAN launched in 2013 as a response to founder Robert Herring and his son’s belief that Fox News no longer took a hard enough stance on the news. *Id.* Known for creating then providing airtime to numerous conspiracy theories, OAN acts as a “useful vector for propagandists.” *Id.*

¹⁸³ See *id.* President Trump watches Fox News as his first source for news followed by OAN. *Id.* When describing President Trump’s relationship with OAN, journalist Devin Gordon remarked that Trump “treats OAN like his sidepiece, and Fox News like a future ex-wife.” *Id.*

state media must adhere to a pro-government script, the newscasters and commentators are not free to act as journalists.¹⁸⁴

Television still gives an impression of authoritative information that less formal internet sources lack.¹⁸⁵ In the United States, the allocation of broadcasting licenses operates on a relatively laissez-faire basis.¹⁸⁶ Anyone with the money to operate a channel may do so; there is no requirement of a commitment to the United States Constitution, objectivity, or a record of work in the public interest.¹⁸⁷ Rules restricting foreign ownership have recently been relaxed.¹⁸⁸ While cable news operates via the internet,¹⁸⁹ and thus has been allowed to broadcast without concern for presenting an objective view, seen from the vantage point of the public, network and cable news do not appear to be appreciably different things.¹⁹⁰

¹⁸⁴ See Robert Orttung & Christopher Walker, *Authoritarian Regimes Retool Their Media-Control Strategy*, WASH. POST (Jan. 10, 2014), https://www.washingtonpost.com/opinions/authoritarian-regimes-retool-their-media-control-strategy/2014/01/10/5c5bfa6e-7886-11e3-af7f-13bf0e9965f6_story.html [<https://perma.cc/25YK-4LEQ>] (describing how authoritarian regimes use state media to control public perception and maintain power).

¹⁸⁵ See, e.g., Helen Lewis, *The Mainstream Media Won't Tell You This*, THE ATL. (June 12, 2020), <https://www.theatlantic.com/international/archive/2020/06/conspiracy-mainstream-media-trump-farage-journalism/612628/> [<https://perma.cc/TAV5-GX76>] (observing television methods used to increase viewership). Journalist Helen Lewis refers to the right-wing media engagement method as “Potemkin journalism,” which creates an investigation for viewers to follow, but at the time of broadcasting, the network has already come to its own conclusion. *Id.* These broadcasters mirror the traditional style of television news reporters but brush aside any facts that may discredit their version of the news story. *Id.*

¹⁸⁶ See Bergman, *supra* note 167, at 160 (noting the FCC legally has the power and duty to regulate broadcasting as well as the power to both distribute broadcast licenses and revoke them).

¹⁸⁷ See generally *Application for Digital Television Broadcast Station License*, FED. COMM’NS COMM’N, <https://transition.fcc.gov/Forms/Form302-DTV/302dtv.pdf> [<https://perma.cc/DR6R-845M>]; *Mass Media Services Application Fee Filing Guide*, FED. COMM’NS COMM’N, <https://transition.fcc.gov/fees/2000mmbguide.pdf> [<https://perma.cc/8MPU-MNDM>].

¹⁸⁸ See Alina Selyukh, *U.S. FCC Eases Foreign Investment Limit for Broadcasting Stations*, REUTERS (Nov. 14, 2013, 12:46 PM), <https://www.reuters.com/article/us-usa-fcc-foreigninvestment/u-s-fcc-eases-foreign-investment-limit-for-broadcast-stations-idUSBR E9AD12F20131114> [<https://perma.cc/4VJA-EQ6L>].

¹⁸⁹ See Tyler Abbott, *How Does Cable Internet Work?*, REVIEWS.ORG (Dec. 8, 2020), <https://www.reviews.org/internet-service/cable-internet-work/>.

¹⁹⁰ See *What Is the Difference Between Broadcast and Cable?*, BLOOMADS, <https://www.bloomads.com/blog/broadcast-local-cable-whats-the-difference/> [<https://perma.cc/J2B5-X85P>] (“To the average customer, broadcast and cable offerings are almost indistinguishable.”).

In decades past, under the Fairness Doctrine, the Federal Communications Commission (FCC) enforced a legal requirement that all news channels should afford “equal time” to both sides of a political question being discussed on television.¹⁹¹ In pre-internet days, the rationale was that access to the scarce resource of broadcasting channels placed unique public interest obligations on broadcasters.¹⁹² Broadcasters were required to be “honest, equitable and balanced” in their presentation.¹⁹³ For example, a station would have to guarantee meaningful time to both sides of a gun control debate. The FCC revoked this requirement in 1987, reasoning that it could no longer be maintained in the crowded media environment of modern times.¹⁹⁴ The FCC erroneously assumed that, with the proliferation of news outlets, the problem of partiality would be fixed by a healthy marketplace of competing ideas.¹⁹⁵ American television has recently trended toward evening cable news programs dominated by certain personalities in a format that combines news and entertainment, with even whole channels or networks embracing an identifiable political perspective.¹⁹⁶ Prior to the rise of cable news, three major networks dominated public perception with their early evening news broadcasts, which were quite tame and conventional in content by the standards of today.¹⁹⁷

While there is no opportunity in this one Article to address the rise of far-right broadcasting and its effect on democratic norms, the

¹⁹¹ See Shannon K. McCraw, *Equal Time Rule*, FIRST AMEND. ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/949/equal-time-rule> [https://perma.cc/PT45-4F58].

¹⁹² See Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CALIF. L. REV. 1687 (1997).

¹⁹³ See Melissa De Witte, *Ted Koppel Delivers a Brief History of Fake News to the Stanford Community*, STANFORD NEWS (Apr. 18, 2018), <https://news.stanford.edu/2018/04/20/brief-history-fake-news/> [https://perma.cc/3EH9-593J].

¹⁹⁴ See Penny Pagano, *Reagan’s Veto Kills Fairness Doctrine Bill*, L.A. TIMES (June 21, 1987, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1987-06-21-mn-8908-story.html> [https://perma.cc/U3DZ-HM8U].

¹⁹⁵ See Hallin, *supra* note 164 (tracing FCC deregulation under the erroneous belief that the free market would bring a more diverse array of news and news networks).

¹⁹⁶ See Mahler & Rutenberg, *supra* note 74 (noting the end of the Fairness Doctrine allowed right-wing media outlets to broadcast one-sided stories tailored to their conservative audiences).

¹⁹⁷ See William F. Baker, *On the State of American Television*, 136 DAEDALUS 141, 142 (2007) (discussing original broadcast networks). Television viewers originally only had the option to watch three broadcast networks, *CBS*, *NBC*, and *ABC*, and possibly a few local public television programs. *Id.* As the popularity of cable television increased, the power of the original big three networks waned. *Id.* at 143. Cable television networks then began to split their stations to cater to the desires of specific kinds of viewers. *Id.* See also Lewis, *supra* note 185 (researching public’s news sources).

influence of Rupert Murdoch and his son Lachlan on public perceptions in the United States (as well as the United Kingdom and Australia) cannot be overlooked.¹⁹⁸ The Murdochs sponsor right-wing political views and are generally representative of the global oligarch class.¹⁹⁹ Their print and broadcast technique over the years has been to exploit racial and ethnic tensions in the general public and turn people against immigrants and the poor, while also skirting close to an authoritarian perspective through simplistic nationalist doctrines.²⁰⁰ The evening stars of the Fox News channel in the United States are such figures as Sean Hannity, the now retired Bill O'Reilly, Laura Ingraham, and Tucker Carlson, all of whom express disdain for liberals, consistently voiced contempt for President Obama, and were relentless supporters of Donald Trump.²⁰¹ Fox News has whipped the public into a frenzy on

¹⁹⁸ See Liam Stack, *6 Takeaways from the Time's Investigation into Rupert Murdoch and His Family*, N.Y. TIMES MAG. (Apr. 3, 2019), <https://www.nytimes.com/interactive/2019/04/03/magazine/murdoch-family-investigation.html> [<https://perma.cc/3VFK-LANW>] (tracing Murdoch family's effects on political campaigns in both the United States and Australia). See also *Rupert Murdoch & Family*, FORBES, <https://www.forbes.com/profile/rupert-murdoch/?sh=42a92be6b1af> [<https://perma.cc/3XRC-U4YR>] (detailing Murdoch family's wealth and influence). *Forbes* currently puts Rupert Murdoch's fortune at 23.5 billion dollars. *Id.* The chairman and CEO of News Corp has a media empire that includes *Fox News*, *The Times of London*, and *The Wall Street Journal*. *Id.* Fox as an entity alone includes broadcast television, cable news, and other networks. *Id.*

¹⁹⁹ See Taylor Borden, *A Nearly \$18 Billion Media Empire, 6 Children, and a Succession Battle: Meet the Murdoch Family*, BUS. INSIDER (Aug. 25, 2020, 5:04 PM), <https://www.businessinsider.com/meet-the-murdoch-family-rupert-murdochs-media-empire-heirs-2020-8> [<https://perma.cc/E4TU-XJ3J>] (describing the beginnings of the Murdoch empire). The Murdochs have had control over their media empire since 1952, when twenty-two-year-old Rupert Murdoch inherited an Australian newspaper from his father. *Id.* See also Mahler & Rutenberg, *supra* note 74 (setting forth history of familial media empires). Multigenerational media empires continue to thrive. *Id.* The Graham family owned *The Washington Post* for eighty years; the Hearst family still owns Hearst; and the Ochs-Sulzberger family has owned *The New York Times* for over 100 years. *Id.*

²⁰⁰ See Mahler & Rutenberg, *supra* note 74 (describing the Murdoch family's role in drumming up tensions). The Murdoch family did not create the right-wing movement, but they "enabled it, promoted it, and profited from it." *Id.*

²⁰¹ See Lewis, *supra* note 185 (observing methods used by right-wing news reporters). These news "stars" will use the label of "journalist" when reporting from their own networks but will then disclaim that title when attempting to take down the "mainstream media." *Id.* See also Brian Steinberg, *Advertisers Continue to Cut Ties with Fox News' Tucker Carlson*, VARIETY (Dec. 19, 2018, 1:27 PM), <https://variety.com/2018/tv/news/advertisers-tucker-carlson-fox-news-1203093497/> [<https://perma.cc/EM56-BWJ7>] (presenting views of *Fox News'* main hosts). Twenty companies pulled their advertisements from Tucker Carlson's program after Carlson suggested on air that immigrants made the United States "dirtier." *Id.* *Fox News* threw their support behind Carlson despite the divisiveness of his comments, stating, "We cannot and will not allow voices like Tucker Carlson to be censored by agenda-

issues ranging from the Benghazi tragedy to the Central American immigrant caravan coming to the United States.²⁰²

Fox News, like Newsmax, is in fact not a news outlet.²⁰³ This cable network should not be able to call itself “news,” or alternatively, should not be allowed to broadcast obvious lies from the television.²⁰⁴ One could argue that Fox’s true mission is to maintain a right-wing voting base for the Republican Party by controlling the outlook of its viewers.²⁰⁵ Stridently anti-science, Fox’s commentators present issues like climate change as the invention of liberals.²⁰⁶ On these and other matters, Fox News often repeats things that are demonstrably untrue.²⁰⁷ This is certainly the case in the presentation of the COVID-19 virus as a Democrat hoax to the American public,²⁰⁸ a frankly nonsensical

driven intimidation efforts” from progressive organizations. *Id.* Another *Fox News* host, Laura Ingraham, caused further controversy when she referred to the detention facilities holding undocumented children who have come into this country as “summer camps.” *Id.*

²⁰² See Lewis, *supra* note 185 (describing techniques of Fox News). This kind of reporting plays on the audience’s need for a sensational story, but once evidence to the contrary is produced, the network pivots to the next exciting piece of news. *Id.* The birtherism scandal plagued the beginning of President Obama’s presidency. *Id.* Outlets such as Fox News argued that President Obama was not born in the United States. *Id.* When the White House finally shared President Obama’s birth certificate, Fox News did not acknowledge its mistake but instead jumped to cover the next salacious piece of news that targeted the President. *Id.* See also Megan Garber, *Do You Speak Fox? How Donald Trump’s Favorite Source Became a Language*, THE ATL. (Sept. 16, 2020), <https://www.theatlantic.com/culture/archive/2020/09/fox-news-trump-language-stelter-hoax/616309/> [<https://perma.cc/3FDT-WDM4>] (explaining the ways in which Fox News has exacerbated new stories).

²⁰³ For purposes of this Article, the author defines news in her own words as: News may include commentary, but to be news it should be based on observable fact. News is distinguishable from manipulation and propaganda since it is designed to inform listeners and increase their understanding of reality, rather than cloud it.

²⁰⁴ See *id.* (author normatively defining news); see also Michael Schneider, *It’s Time for Fox News to Stop Using the Misnomer ‘News’ in Its Channel Name*, VARIETY (Feb. 4, 2021, 9:15AM), <https://variety.com/2021/voices/columns/fox-news-1234899836/> [<https://perma.cc/GQA3-3C4C>] (highlighting how Fox is “dominated and driven by opinion,” not actual news).

²⁰⁵ See Mahler & Rutenberg, *supra* note 74 (pointing to a 2007 study that found Fox News pushed voters to the right, labeling the phenomenon as the “Fox News Effect”).

²⁰⁶ See Graig Graziosi, *Tucker Carlson Says Climate Change Is a Liberal Invention ‘Like Racism’ in Shocking On-Air Rant*, INDEP. (Sept. 13, 2020, 3:31 PM), <https://www.independent.co.uk/news/world/americas/tucker-carlson-climate-change-fox-news-california-wildfires-racism-liberal-b434261.html> [<https://perma.cc/WRA7-8JBN>].

²⁰⁷ See Ben Adler, *The Real Problem with Fox News*, COLUM. JOURNALISM REV. (Mar. 25, 2011), https://archives.cjr.org/campaign_desk/the_real_problem_with_fox_news.php [<https://perma.cc/J24X-DBHF>].

²⁰⁸ See Margaret Sullivan, *The Data Is In: Fox News May Have Kept Millions from Taking the Coronavirus Threat Seriously*, WASH. POST. (June 28, 2020, 7:00 AM), <https://www.washingtonpost.com/news/energy-environment/wp/2020/06/28/fox-news-may-have-kept-millions-from-taking-the-coronavirus-threat-seriously/>

argument. Considering Fox News relies on preexisting hatreds and fears in the population, some may argue the channel operates similarly to the hate radio stations that operated in pre-genocidal societies such as Rwanda or the Balkans.²⁰⁹

Currently in the United States, there are no enforceable factuality requirements for the granting of permission to broadcast current events programming via television.²¹⁰ As mentioned above, the distinction between cable and non-cable news is nonexistent from the point of view of the viewer.²¹¹ Courts have interpreted “broadcasters” to refer to non-cable news outlets, since cable relies on the same technology as

.washingtonpost.com/lifestyle/media/the-data-is-in-fox-news-may-have-kept-millions-from-taking-the-coronavirus-threat-seriously/2020/06/26/60d88aa2-b7c3-11ea-a8da-693df3d7674a_story.html [https://perma.cc/3CG3-9GC3] (analyzing Fox News’ effect on viewers). Studies show that *Fox News* created a “media ecosystem that amplifi[ed] misinformation, entertain[ed] conspiracy theories and discourag[ed] audiences from taking concrete steps to protect themselves and others.” *Id.* The media giant misled the public regarding the severity of the pandemic, the importance of safety measures, and the effectiveness of possible treatments. *Id.* See also Tiffany Hsu, *Right-Wing Media Stars Mislead on Covid-19 Death Toll*, N.Y. TIMES (Sept. 24, 2020, 4:40 PM), <https://www.nytimes.com/2020/09/24/business/media/right-wing-media-stars-mislead-on-covid-19-death-toll.html> [https://perma.cc/4MPY-HP8P] (pointing to specific misleading information). Despite an official count of over 200,000 deaths from COVID-19, *Fox News* hosts have repeatedly claimed that the number is either untrue or grossly inflated. *Id.* Mark Levin, a *Fox News* radio host, tweeted that “THE U.S. DID NOT SURPASS 200,000 COVID-19 DEATHS.” *Id.* These hosts have thousands of viewers and followers on social media and continue to broadcast false or misleading claims about the state of the pandemic. *Id.*

²⁰⁹ See Kennedy Ndauro, *In Rwanda, We Know All About Dehumanizing Language*, THE ATLANTIC (Apr. 13, 2019), <https://www.theatlantic.com/ideas/archive/2019/04/rwanda-shows-how-hateful-speech-leads-violence/587041/> [https://perma.cc/DC4G-BYDX] (detailing the history of the Rwandan genocide). The radio station RTLM broadcasted hate speech against the Tutsi minority group. *Id.* These radio broadcasts referred to the Tutsis as “cockroaches” and set out to dehumanize an entire population. *Id.* The genocide of the Tutsi group by the Hutus remains one of the most horrific instances of violence fueled by hate speech; in a span of only 100 days, one million Tutsis died. *Id.*

²¹⁰ See Joel Timmer, *Broadcasters and Trump’s False Information on Coronavirus: What Role for the FCC?*, JUST SECURITY (Apr. 27, 2020), <https://www.justsecurity.org/69843/broadcasters-and-trumps-false-information-on-coronavirus-what-role-for-the-fcc/> [https://perma.cc/Q5W7-LHT9] (noting the limitations the FCC faces in enforcing any requirement of truth in a broadcast). The FCC has stated that its role is not to be the “arbiter of truth in journalism.” *Id.* Inaccuracy can be handled post-report; however, the First Amendment restricts how far the FCC reaches. *Id.* Further, some suggest that in enforcing factuality and, in turn, “punishing the press for covering false statements . . . could limit and harm public debate.” *Id.*

²¹¹ See *Broadcast, Cable . . . What’s the Difference?*, NCTA (Nov. 12, 2008), <https://www.ncta.com/whats-new/broadcast-cable-whats-the-difference> [https://perma.cc/XJM8-CSSV] (explaining the differences between broadcast and cable services); see also *What Is the Difference Between Broadcast and Cable*, *supra* note 190 (noting the difficulty among the public to distinguish broadcast and cable from one another).

the internet.²¹² While news broadcasters are supposed to operate in the public interest,²¹³ cable news outlets are allowed to determine their own content.²¹⁴ However, a cable news program looks and feels like “news,” so the basis for this distinction does not hold up. As long as a party can purchase a broadcast company and obtain licenses for their stations, there is no condition placed on that party that they should adhere to the factual truth.²¹⁵

The exclusion of cable news from whatever regulation there is creates a particularly dangerous situation. If a cable news operator wishes to sponsor programming that argues that Martians are coming to kidnap American citizens or that China has spies on every street corner, there is no law stopping them from doing so. Given the outsize influence of television broadcasters, it is not surprising that those who consume a great deal of television media that does not follow journalistic standards believe things that are not true and tend to harbor hatred toward various minority groups.²¹⁶ At a certain point, this is not a matter of variations within public opinion, but rather becomes an

²¹² See Abbott, *supra* note 189 (discussing the existing technological connection between cable internet and cable television network).

²¹³ See Stuart N. Brotman, *Revisiting the Broadcast Public Interest Standard in Communications Law and Regulation*, BROOKINGS (Mar. 23, 2017), <https://www.brookings.edu/research/revisiting-the-broadcast-public-interest-standard-in-communications-law-and-regulation/> [<https://perma.cc/MB72-ZCP6>].

²¹⁴ See Geraldine Moriba, *Visualizing the Who and What of Cable TV News*, MEDIUM (Aug. 19, 2020), <https://medium.com/tvnewsanalyzer/visualizing-the-who-and-what-of-cable-tv-news-f51d314b4c2d> [<https://perma.cc/Q223-DCJW>] (“Each day, cable TV news networks determine what information millions of Americans receive.”).

²¹⁵ See *Broadcasting False Information*, FED COMM’N COMM’N, <https://www.fcc.gov/consumers/guides/broadcasting-false-information> [<https://perma.cc/578B-LGAE>] (“The FCC is prohibited by law from engaging in censorship or infringing on First Amendment rights of the press.”). The need to uphold and protect First Amendment rights makes it difficult for the FCC to actually enact and enforce a *requirement* for broadcasters to inform the public with truth. *Id.*

²¹⁶ See Kevin Drum, *The Real Source of America’s Rising Rage*, MOTHER JONES (last visited Oct. 18, 2021), <https://www.motherjones.com/politics/2021/07/american-anger-polarization-fox-news/> [<https://perma.cc/JME4-FNBA>] (citing to the frequency with which Fox News mentions issues like critical race theory). See also Baker, *supra* note 197, at 144 (setting forth principles of television consumption). Television continues to evolve to produce news at a faster pace with footage sourced not only from television journalists but also submitted and elicited from the general public. *Id.* In 1984, on the heels of the passage of the Cable Television Act, Chairman of the FCC Mark Fowler foretold of problems that would stem from unchecked television broadcasters: “It’s time to move away from thinking of broadcasters as trustees and time to treat them the way that everyone else in society does, that is as a business. Television is just another appliance.” *Id.* at 142.

issue of national security.²¹⁷ No democracy can survive millions of viewers consuming dangerous lies on a daily basis.

It would be possible, even if difficult, to impose conditions of objective factuality on television broadcasters.²¹⁸ Of course, that does not eliminate the (non-televised) internet-based world of extremism and conspiracy theories, but it might have the effect of denying viewers an alternative universe from which to nurse their grievances and hatreds.²¹⁹ The fact that Fox News in the United States consistently spread the theory that the COVID-19 virus was a Democratic hoax (though this was unclear as to its actual meaning) and that various unproven remedies would provide an easy cure for the virus made it far more difficult for states to take action that would slow down the virus in the general population,²²⁰ hence leading to more death and confusion.²²¹

²¹⁷ See, e.g., Garrett M. Graff, *Fox News Is Now a Threat to National Security*, *Wired* (Dec. 11, 2019), <https://www.wired.com/story/fox-news-is-now-a-threat-to-national-security/> [<https://perma.cc/C2LZ-3PDM>] (noting that Fox creates an “upside down World” for viewers, where Trump’s enemies are part of a deep state plot against him).

²¹⁸ See Laidlaw, *supra* note 174, at 13–14 (calling for imposing restrictions on broadcasters). Broadcasters have the power to act as “surrogates or shortcuts for individual people’s decisions.” *Id.* at 9. Dr. Emily Laidlaw calls for imposition of “intermediary liability.” *Id.* at 12. Laidlaw and fellow researcher Hilary Young suggest seven possible models for intermediary liability: strict liability, generalist, broad immunity, safe harbor, notice, notice and human rights, and duty of care. *Id.* at 14.

²¹⁹ See Wheeler, *supra* note 22 (considering role of social media platforms). Major social media platforms have become “gatekeepers” of information, especially the news. *Id.* These platforms control how the information is stored, shared, and spread. *Id.* See also Jim Brunner, *Fox News Runs Digitally Altered Images in Coverage of Seattle’s Protests, Capitol Hill Autonomous Zone*, *SEATTLE TIMES* (June 14, 2020, 8:06 PM), <https://www.seattletimes.com/seattle-news/politics/fox-news-runs-digitally-altered-images-in-coverage-of-seattles-protests-capitol-hill-autonomous-zone/> [<https://perma.cc/CFH8-JM33>] (detailing example of misinformation by *Fox News*). *Fox News* originally aired altered images of the Seattle protests depicting an armed man in front of a store with smashed windows. *Id.* Only after *The Seattle Times* inquired about the altered photo did the network remove the image. *Id.*

²²⁰ See Aaron Blake, *How Those Ivermectin Conspiracy Theories Convinced People to Buy Horse Dewormer*, *WASH. POST* (Aug. 24, 2021), <https://www.washingtonpost.com/politics/2021/08/24/how-rights-ivermectin-conspiracy-theories-led-people-buying-horse-dewormer/> [<https://perma.cc/A4PS-QFFY>]; Oliver Darcy, *Right-Wing Media Pushed a Deworming Drug to Treat Covid-19 That the FDA Says Is Unsafe for Humans*, *CNN* (Aug. 23, 2021, 1:50 PM), <https://www.cnn.com/2021/08/23/media/right-wing-media-ivermectin/index.html> [<https://perma.cc/2THN-THNL>].

²²¹ See Drum, *supra* note 216 (citing to the frequency with which *Fox News* mentions issues like critical race theory). See also Christian Paz, *All the President’s Lies About the Coronavirus*, *THE ATLANTIC* (Nov. 2, 2020), <https://www.theatlantic.com/politics/archive/2020/11/trumps-lies-about-coronavirus/608647/> [<https://perma.cc/7DMH-BZCA>] (listing President Trump’s lies surrounding Coronavirus). The President has consistently lied and

Fox News and the Trump White House engaged in a consistent process of amplification of falsehoods over a period of years, giving Mr. Trump's delusions a television-sized megaphone and raising up demagogues posing as television journalists.²²² It is difficult to think that far-right talking points were not coordinated between the White House and the Murdoch news executives.²²³ When many of the statements being made are demonstrably false, it is clear that such coordination creates a socially destructive dynamic.²²⁴ In addition to the actual falsehoods, the television-to-Trump echo chamber created a kind of culture war around issues that should have been dealt with in the realm of public health.²²⁵ The politics of wearing masks to reduce the spread of COVID-19 is a good example of this phenomenon.²²⁶

Americans tend to believe that the First Amendment prevents the United States from regulating and suppressing dangerous propaganda.²²⁷ However, in a legal or constitutional sense, this need not be accepted at face value. Canadian broadcasting law exemplifies a system that

spread falsehoods surrounding the COVID-19 pandemic. *Id.* These lies include: "It's going to disappear. One day, it's like a miracle—it will disappear"; "Coronavirus numbers are looking MUCH better, going down almost everywhere"; "99% of COVID-19 cases are 'totally harmless'"; and "You get better and then you're immune." *Id.*

²²² See generally Yevgeniy Golovchenko et al., *Cross-Platform State Propaganda: Russian Trolls on Twitter and YouTube During the 2016 U.S. Presidential Election*, INT'L J. PRESS/POL. (2020). Not only do the networks themselves amplify falsehoods, but Russian IRA trolls link to conservative news outlets 34% of the time in comparison to liberal news outlets only 24% of the time. *Id.* Links on YouTube connect users to conservative news outlets 75% of the time. *Id.*

²²³ See Mahler & Rutenberg, *supra* note 74 (connecting Murdoch with Trump's rise to power). Although originally Murdoch did not support Donald Trump's candidacy for president, Murdoch later used his networks to air more Trump-supporting news and run attacks on Hillary Clinton. *Id.* Fox News has now become the mouthpiece of President Trump. *Id.*

²²⁴ See Jane Mayer, *The Making of the Fox News White House*, NEW YORKER (Mar. 4, 2019), <https://www.newyorker.com/magazine/2019/03/11/the-making-of-the-fox-news-white-house> [<https://perma.cc/SG6M-B5ME>] (describing the intense coordination between the Trump White House and Fox News personalities).

²²⁵ See Lewis, *supra* note 185 (describing conspiracy theory coverage by news networks). Conspiracy theorists push news networks to cover their stories by claiming that by not doing so they are repressing the story or are too afraid to air it. *Id.*

²²⁶ See Ashley Gold, *YouTube Temporarily Suspends, Demonetizes OANN*, AXIOS (Nov. 24, 2020), <https://www.axios.com/youtube-temporarily-suspends-demonetizes-oann-420e8ea9-66c1-4eab-9754-6e3b708483c9.html> [<https://perma.cc/S25F-KM55>] (discussing COVID-19 misinformation). Most recently, YouTube decided to suspend the OAN Network from posting new videos or collecting revenue from its current content for a week due to the network's violation of YouTube's COVID-19 misinformation policy. *Id.*

²²⁷ See Corbin, *supra* note 107 (arguing that the US legal tradition has been hesitant to regulate even government propaganda).

is both deeply favorable toward free expression but appropriately discouraging of harmful propaganda and disinformation.²²⁸ In the United States, decades of deregulation in both ownership and content have brought us to a situation where information in many cases encourages hatred and social division,²²⁹ clearly an unsustainable national approach.²³⁰

There is a growing consensus that American confidence in the marketplace of ideas to sustain democracy is naïve and dangerous.²³¹ In Europe, Canada, and New Zealand, there is far greater recognition that guaranteeing the quality of information is a task of government and that, without some regulation, the public may be left at the mercy of malign forces, using free speech not as a means of communication but as a weapon of political warfare.²³²

If the United States wishes to continue as a functioning democracy, some regulation of broadcasting and suppression of dangerous disinformation are urgently necessary, as has been done internationally.²³³ Recognizing that the previously enacted Fairness

²²⁸ See Wallace, *supra* note 38 (examining Canadian broadcasting laws); see also Eve Gaumont, *Is Canadian Law Better Equipped to Handle Disinformation?*, LAWFAREBLOG (Dec. 11, 2020, 8:01 AM), <https://www.lawfareblog.com/canadian-law-better-equipped-handle-disinformation> [<https://perma.cc/XXN7-848L>].

²²⁹ See Sharaf Rehman, *News Media: A Thing of the Past for the Millennials*, 10 INT'L J. OF COMM. RSCH. (2020) (linking decades of deregulation with perceived unreliability of the news media).

²³⁰ See *id.*

²³¹ See William H. Widen, *Failure in the Marketplace of Ideas: Censorship and Impeachment*, JURIST (Feb. 15, 2021, 12:21:23 PM), <http://jurist.org/commentary/2021/02/william-widen-censorship-impeachment-ideas/> [<https://perma.cc/4XEN-PNLW>].

²³² See Emily Bazelon, *The First Amendment in the Age of Disinformation*, N.Y. TIMES MAG. (Oct. 13, 2020), <https://www.nytimes.com/2020/10/13/magazine/free-speech.html> [<https://perma.cc/5DZR-SMMQ>] (outlining different concepts of information and the public interest in Canada, France, and other countries).

²³³ See Michael-Ross Fiorentino, *France Passes Controversial 'Fake News' Law*, EURONEWS (Nov. 22, 2018), <https://www.euronews.com/2018/11/22/france-passes-controversial-fake-news-law> [<https://perma.cc/2J55-4JB6>] (“Candidates and political parties will now be able to appeal to a judge to help stop ‘false information’ during three months before an election.”). With the enactment of this new law, France may take steps toward holding television TV stations that promote and circulate “false news” accountable. *Id.* The Higher Audiovisual Council (CSA), similar to the United States’ FCC, was granted the ability to implement suspensions on channels if it is discovered that they have “deliberately disseminate[d] false information likely to affect the sincerity of the ballot.” *Id.* See also Yoshiyasu Shida & Ritsuko Ando, *Japan’s Abe Seeks to Remove ‘Balance’ Requirements in Broadcast News*, REUTERS (Mar. 26, 2018, 5:09 AM), <https://www.reuters.com/article/us-japan-broadcast/japans-abe-seeks-to-remove-balance-requirements-in-broadcast-news-idUSKBN1H20YH> [<https://perma.cc/3DZR-4Y6W>]. Japanese Prime Minister Abe called

Doctrine is not an appropriate model for this moment in time, the United States would be well advised to follow a similar yet less controversial path that works not to impede free speech but to hold broadcasters, including those in cable “news,” accountable for the damage they may cause by uttering lies.²³⁴ With minimal effort, the regulatory environment could create a system of review that extends beyond the limiting parameters set forth by the FCC,²³⁵ making it much

for an “overhaul [of] the broadcast law to put traditional television channels on equal footing with online media.” *Id.* See also *Initiatives to Counter Fake News in Selected Countries*, LIBR. CONG. (Apr. 2019), <https://irp.fas.org/eprint/lloc-fake-news.pdf> (reviewing ways countries have stopped fake news dissemination). Argentina has sought to enact legislation that would “preserve the value of truth in broadcasting” through the creation of a Comisión de Verificación de Noticias Falsas (CVNF) (Commission for the Verification of Fake News). *Id.* at 4. The CVNF reviews complaints filed for lack of truthful information in a broadcast. *Id.* at 5. Additionally, in the United Kingdom, the Office of Communications works to “enforce content standards across television and radio broadcasters” through “require[ments] of accuracy and impartiality.” *Id.* at 102.

²³⁴ See Victor Pickard, *The Strange Life and Death of the Fairness Doctrine: Tracing the Decline of Positive Freedoms in American Policy Discourse*, 12 INT’L. J. COMM’N 3434 (2018) (discussing objective effect of Fairness Doctrine). The Fairness Doctrine “encouraged sensitivity toward programming biases and provided local communities an important tool with which to hold broadcasters accountable.” *Id.* As its name suggests, the Fairness Doctrine was built on the idea of fairness. *Id.* The Fairness Doctrine enabled “activists to challenge local broadcasters’ programming practices . . . [and gave] public interest groups [the opportunity] to make their voices heard in an increasingly consolidated media landscape.” *Id.* at 3444. See also Jonathan A.S. Honig, *Public Policies on Broadcast and the Fairness Doctrine: History, Effects, and Implications for the Future*, 7 PUB. POL. & ADMIN. REV. 1 (2019) (explaining the creation and impact of the Fairness Doctrine). The Fairness Doctrine made it so that broadcasters were to give the public “all sides” and perspectives of issues at hand. *Id.* at 2. The issue with the Doctrine was that “self-censorship of private media providers in response to the heavy-handed regulation put forth by the government” began to occur. *Id.* at 3. See also Philip M. Napoli, *Back from the Dead (Again): The Specter of the Fairness Doctrine and Its Lessons for Social Media Regulation*, SSRN (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3764849 [<https://perma.cc/R2KH-GKV9>] (detailing the First Amendment discussion in relation to Fairness Doctrine). Though “the FCC did not eliminate the Fairness Doctrine on the basis that it violated broadcasters’ First Amendment rights,” there was existing criticism and conversation occurring about the Fairness Doctrine having the ability to contribute to free speech violations. *Id.* See also Camille Caldera, *Fact Check: Fairness Doctrine Only Applied to Broadcast Licenses, Not Cable TV Like Fox News*, USA TODAY (Nov. 28, 2020, 10:46 AM), <https://www.usatoday.com/story/news/factcheck/2020/11/28/fact-check-fairness-doctrine-applied-broadcast-licenses-not-cable/6439197002/> [<https://perma.cc/82LM-6X4W>] (focusing on additional information and common misconceptions about Fairness Doctrine). Some broadcasters argued that the Fairness Doctrine was flawed because it “was overly burdensome and an inhibition to their coverage and free speech.” *Id.* Further, the Fairness Doctrine did not apply to “cable or satellite service providers,” and there is minimal likelihood that “the Fairness Doctrine would have impacted Fox News.” *Id.*

²³⁵ See *Broadcasting False Information*, *supra* note 215 (outlining FCC regulation on broadcasting false information). The regulatory action allowed on behalf of the FCC for

more difficult for a character like Donald Trump to launder lies through friendly news outlets in a manner destructive to the public interest. This system would allow for members of the public, based on their own observations, to file complaints for falsehoods broadcast on television and cable news. As has been done in Canada,²³⁶ the United States could consider instituting a requirement that would penalize repeated lies with a loss of rights to the airwaves. Canadian broadcasting law gives the Canadian Radio-television and Telecommunications Commission—the regulating body of Canadian broadcasters—the “ability to revoke a station’s license” when continued lies are publicized by “on-air” talent.²³⁷ Indeed, it is likely that if this problem is not taken up as a matter of urgency, shared understanding as we know it in the United States may become a thing of the past.

IV

MEDIA AND ELECTORAL POLITICS: IMPERSONATING REAL PEOPLE TO DECEIVE REAL PEOPLE

It is widely recognized that election campaigns and political movements around the world are being manipulated by invisible actors who use social media platforms to disseminate inflammatory messages.²³⁸ The aim is to play upon social divisions and sow mistrust

broadcasting of false information, as currently written, places limitation on complainants. *Id.* The handling of broadcasted falsities may be acted upon only “if there is documented evidence of such behavior from persons with direct personal knowledge.” *Id.* With no firsthand knowledge, those who seek to complain to the FCC about their exposure to “allegedly false information aired on TV or radio” cannot do so successfully. *Id.*

²³⁶ See Wallace, *supra* note 38.

²³⁷ See *id.* (offering insight on how Canadian law handles broadcasting matters). See also *Initiatives to Counter Fake News: Canada*, LIBR. CONG., <https://tile.loc.gov/storage-services/service/l1/lglrd/2019668145/2019668145.pdf> [<https://perma.cc/ZK6U-CUZC>] (highlighting the Canadian approach against lies in news). Intertwined with its “legislative framework,” Canada has put into place “[f]ederal broadcasting regulations issued under the Broadcasting Act that deal with false or misleading news.” *Id.*

²³⁸ See Manjoo, *supra* note 21 (studying the effect of conspiracy theories in U.S.). Bad actors now use “bots, memes and other tricks of social media to ‘hack’ the public’s attention.” *Id.* See also Wheeler, *supra* note 22 (exploring the spread of propaganda and disinformation on social media). Social media platforms have brought many positive changes to our lives, but the platforms have also fueled hateful speech, propaganda, disinformation, and enabled Russia to interfere in the 2016 election. *Id.* See also Laidlaw, *supra* note 174, at 11 (summarizing the objectives of social media platforms). American legal scholar Tim Wu refers to social media platforms as “attention merchants” that set up their platforms to secure the most engagement with little regard for the consequences. *Id.*

and confusion.²³⁹ Impersonating an actual human being is not difficult for purposes of political persuasion; one can simply borrow a photo, invent a brief bio, and use the language of hate, division, or apathy, which were the crude tools of political seduction in 2016 and beyond.²⁴⁰ The most notorious instance of this method was the United States presidential election of 2016, during which Russian-sponsored operatives used “bots” to impersonate Americans posting on social media.²⁴¹ These postings promoted racial and regional conflict, with content designed to deepen social animosity and exacerbate preexisting prejudices.²⁴² Turning off enthusiasm for certain candidates by peeling away the candidate’s key support groups is a favorite technique of these “bot farms.”²⁴³

Data mining companies, such as Cambridge Analytica, played a pivotal role in election outcomes by using massive amounts of personal information to target individuals and dissuade them from supporting

²³⁹ See Mark Verstraete et al., *Identifying and Countering Fake News*, 73 HASTINGS L.J. 1, 19–20 (forthcoming 2022) (explaining how Facebook curates its “Trending Topics” list through human selection, but also uses algorithms to push the most likely viewed stories to the top of the newsfeed); see also Malik & Faizan, *supra* note 174, at 53 (noting that Business for Social Responsibility, a nonprofit organization that promotes positive business practices, labeled Facebook as a “means for those seeking to spread hate and cause harm.”).

²⁴⁰ See Golovchenko et al., *supra* note 222, at 1 (defining different kinds of propaganda). Bad actors utilize a variety of strategies in order to spread disinformation. *Id.* “White propaganda” uses and relies upon the truth and uses accessible sources that consumers can fact-check, whereas “black propaganda” conceals its sources with the goal of spreading disinformation. *Id.* at 2. The use of “pre-propaganda” precedes the actual use of propaganda and contains the initial spread of information in order to gain trust and establish reliability with that source of media. *Id.* at 3.

²⁴¹ See *id.* at 5 (detailing Russia’s use of bots during the 2016 presidential election). Russia’s Internet Research Agency (IRA) created both automated accounts (bots) and accounts controlled by Russian IRA members (“rolls and sock puppets”). *Id.* Human accounts gave the IRA the opportunity to engage with users in the U.S. and a direct method to influence Americans online. *Id.* at 6. The U.S. Director of National Intelligence remarked that the IRA sought to “undermine the faith in the U.S. democratic process” by sowing discord among Americans. *Id.* at 5. See also Fattal, *supra* note 176, at 923 (pointing out social media platforms logged more Russian activity during the United States 2018 midterm elections than during the 2016 presidential election).

²⁴² See generally Golovchenko et al., *supra* note 222, at 2 (describing Russia’s disinformation campaign). Amplification of the divisions that already existed between Americans served two possible goals in Russia’s disinformation campaign: (1) to discredit Hillary Clinton and create support for Donald Trump or (2) to generally “sow political discord” within the country. *Id.*

²⁴³ See Fattal, *supra* note 176, at 919. In the summer of 2016, Twitter recorded 17,000 Russian-controlled bots on the platform. *Id.* The following year, that number climbed to over 75,000. *Id.* Bots can more easily spread information due to their heightened ability to tweet and retweet information over a short period of time. *Id.*

particular candidates—notably, Hillary Clinton.²⁴⁴ Through complex and wide-ranging mechanisms, 2016 was the year social media became an integral part of a sophisticated and well-funded information war, which played out in major political events, including the Brexit referendum in the United Kingdom and the United States presidential election.²⁴⁵ An extraordinarily high percentage of people now get their “news” through social media outlets such as Facebook and Twitter.²⁴⁶ These platforms have in turn become inundated with false accounts created with the intent to turn elections in the direction favored by powerful international forces, including both foreign governments and multinational companies.²⁴⁷ Social media platforms are well aware that they are being used to spread false messages and division, and Facebook in particular has yet to take responsibility for the political harm done by many of the posts it allows.²⁴⁸

²⁴⁴ See Jen Psaki, *Cambridge Analytica Brags About Weaponizing ‘Crooked Hillary’ Slogan*, CNN (Mar. 21, 2018, 4:32 PM), <https://www.cnn.com/2018/03/21/opinions/trump-cambridge-analytica-clinton-slogan-opinion-psaki/index.html> [https://perma.cc/3UVC-PFUV].

²⁴⁵ See Illing, *supra* note 155 (examining spread of propaganda in the news media). The information war is not limited to partisan or conservative news outlets. *Id.* Both the *New York Times* and *The Washington Post* struggle to balance reporting news and amplifying misleading stories. *Id.* See also Rachel Ellehuus & Donatienne Ruy, *Did Russia Influence Brexit?*, CTR FOR STRATEGIC & INT’L STUD. (July 21, 2020), <https://www.csis.org/blogs/brexit-bits-bobs-and-blogs/did-russia-influence-brexit> [https://perma.cc/2CHY-TNDP] (describing Russia’s attempts to meddle in recent elections and the Brexit referendum); Abigail Adams, *Here’s What We Know So Far About Russia’s 2016 Meddling*, TIME MAGAZINE (Apr. 18, 2019), <https://time.com/5565991/Russia-influence-2016-election/> [https://perma.cc/28VS-UC32] (explaining how Russia interfered in U.S. electoral politics in 2016).

²⁴⁶ See Peter Suci, *More Americans Are Getting Their News from Social Media*, FORBES (Oct. 11, 2019, 10:35 AM), <https://www.forbes.com/sites/petersuciu/2019/10/11/more-americans-are-getting-their-news-from-social-media/?sh=59e007eb3e17> [https://perma.cc/V7UC-6H63].

²⁴⁷ See generally Fattal, *supra* note 176, at 920 (pointing to Russia’s social media disinformation campaign). Russia’s Internet Research Agency (IRA) members scheduled shifts to tweet information on Twitter in every United States time zone in order to more accurately create a blanket campaign of disinformation. *Id.* The IRA also paid U.S. citizens to create in-person events based on the troll activity that the IRA had created. *Id.*

²⁴⁸ See Shirin Ghaffary, *Why This Facebook Scandal Is Different*, VOX (Oct. 3, 2021, 8:15 PM), <https://www.vox.com/recode/2021/10/3/22707940/frances-haugen-facebook-whistleblower-60-minutes-teen-girls-instagram> [https://perma.cc/TQ4D-6LER] (critiquing Facebook’s handling of misinformation). See also Joan Donovan, *Why Congress Should Look at Twitter and Facebook*, MIT TECH. REV. (July 27, 2020), <https://www.technologyreview.com/2020/07/27/1005648/why-congress-should-look-at-twitter-and-facebook/> [https://perma.cc/S89P-ZJ6Q] (describing some measures taken by social media platforms). Twitter publishes data that shows the accounts it has banned, and Facebook circulates blog

During 2020, Donald Trump clashed with Twitter over whether he was violating the company's terms of service by inciting violence in the midst of various national crises.²⁴⁹ In particular, Trump's retweeting of an account that said, "The only good Democrat is a dead one,"²⁵⁰ and invoking a racist meme calling for Black protesters against police brutality to be shot, elicited many complaints and calls for the suspension of Trump's account.²⁵¹ This led Trump to issue a supposed Executive Order denouncing Twitter's attempt to fact-check statements made on Trump's account and threatening the company with legal penalties.²⁵² Because social media relies on postings by millions of

posts that discuss its suspension and removal activity. *Id.* YouTube and Facebook have also made some efforts to ban accounts and pages that promote hate speech. *Id.* See also Philip Verveer, *Platform Accountability: An Interim Measure*, SHORENSTEIN CTR. ON MEDIA, POL. & PUB. POL'Y (Apr. 15, 2019), <https://shorensteincenter.org/platform-accountability-interim-measure/> [<https://perma.cc/F8TK-C2XD>]. Large social media companies have great influence over their large base of users. *Id.* Users sign and agree to a terms of service when accessing these platforms. *Id.* at 12. Once users agree to the terms of service conditions, the platforms have the right to censor and curate the users' content on the platform. *Id.*

²⁴⁹ See Kate Conger & Mike Isaac, *Twitter Permanently Bans Trump, Capping Online Revolt*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/2021/01/08/technology/twitter-trump-suspended.html> [<https://perma.cc/ZVY4-K4D5>] (explaining why Trump was banned from Twitter); see also *Fact Checker*, WASH. POST (Jan. 20, 2021), https://www.washingtonpost.com/graphics/politics/trump-claims-database/?utm_term=.27babc5e58c&itid=ik_inline_manual_2&itid=ik_inline_manual_2 [<https://perma.cc/UE9T-JNUV>] (recording President Trump's various falsehoods). On June 24, 2020, amid national movements protesting police brutality, President Trump tweeted out the falsehood, "Black Lives Matter leader states 'If U.S. doesn't give us what we want, then we will burn down this system and replace it.' This is Treason, Sedition, Insurrection!" *Id.* Earlier, on June 9, President Trump tweeted, "Domestic Terrorists have taken over Seattle, run by Radical Left Democrats, of course. LAW & ORDER!" *Id.*

²⁵⁰ See Aaron Blake, *'The Only Good Democrat Is a Dead Democrat.'* *'When the Looting Starts, the Shooting Starts.'* *Twice in 25 hours, Trump Tweets Conspicuous Allusions to Violence*, WASH. POST. (May 29, 2020), <https://www.washingtonpost.com/politics/2020/05/28/trump-retweets-video-saying-only-good-democrat-is-dead-democrat/> [<https://perma.cc/3ADT-2S7U>].

²⁵¹ See Jack Moore, *Donald Trump's Twitter Account Is Very Much in Violation of Twitter's Terms of Service*, GQ MAG. (Aug. 11, 2017), <https://www.gq.com/story/donald-trump-twitter-account-violation-of-twitter-terms-of-service> [<https://perma.cc/D97C-GSSV>] (citing the ways President Trump has violated Twitter's terms of service). In addition, President Trump has threatened nuclear war with North Korea numerous times. *Id.* Twitter's terms of service includes the prohibition of: "violent threats; wishes for the physical harm, death, or disease of individuals or groups; reference to mass murder, violent events, or specific means of violence in which/with which groups have been the primary targets of victims." *Id.* See also Blake, *supra* note 250.

²⁵² Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020) (providing expanded definition to s. 230 of Communications Decency Act). Following President Trump's public spat with the Twitter platform, he issued the "Executive Order on Preventing Online

users and because it is so easy to create an account, it is not difficult for bad actors to influence elections by creating false accounts and for demagogues like Donald Trump to manipulate a vast audience of Twitter users to his own advantage.²⁵³ Trump vehemently objected to anyone, including the management of the social media platform, fact-checking or otherwise interfering with his postings, however contrary to official Twitter policy his tweets might be.

These events caused a renewed public debate about the role of social media in politics.²⁵⁴ Having started life as platforms for the free expression of anyone wishing to create an account, Facebook, Twitter, and others have morphed into fora in which human personae are put to the service of propaganda, based on models of division and fear.²⁵⁵ As is usual in debates on the subject of free speech, many wonder whether conventional interpretations of the First Amendment would allow any significant regulation of the social media environment without violating constitutional rights to be free of restraints on expression.²⁵⁶ This conflict between the need to regulate new media in the public interest and the need to allow all but the most dangerous forms of free expression is playing out in the political realm, as global experts use

Censorship.” *Id.* The executive order (“EO”) suggests that “online platforms are engaging in selective censorship that is harming our national discourse.” *Id.* As such, this EO clarifies that online platforms cannot use the liability protections offered under section 230 of the Communications Decency Act if, instead of promoting free speech, the platforms suppress “free and open debate by censoring certain viewpoints.” *Id.*

²⁵³ See Fish, *supra* note 169 (pointing to the structure of the internet and social media). Sharing videos with a user’s own commentary can facilitate the spread of the original piece of information and distribute the post to a wider audience. *Id.*

²⁵⁴ See *The Daily: Social Media and the Hunter Biden Report*, N.Y. TIMES (Oct. 21, 2020) (downloaded using iTunes). Facebook, Twitter, and YouTube have taken some measures since 2016 to lower the incidents of foreign interference on their platforms, including hiring moderators to monitor their platforms. *Id.* But when Twitter initially stepped in and removed an unverified report on Hunter Biden’s activities, users were outraged, calling the action policing of speech. *Id.* YouTube did not take down the story, while Facebook also left the story on the platform but chose to demote it on their newsfeed. *Id.*

²⁵⁵ See Jolls & Johnsen, *supra* note 132, at 1392–93 (stressing the negative effects of unethical uses of the internet). Using the internet in an unethical or untruthful manner can (1) divide people based on ideology, (2) provide a platform for propaganda, (3) allow for more cyberbullying, and (4) erode the public’s trust in democracy and its institutions. *Id.*

²⁵⁶ See Verveer, *supra* note 248, at 10–12. Requiring social media platforms to edit content in a certain way could implicate the First Amendment protections and would then need to pass the strict scrutiny test. *Id.* at 11.

social media against the very people who supposedly benefit from its existence.²⁵⁷

In the belief that something must be done to stop the proliferation of bogus accounts misleading ordinary people as they make decisions relating to their participation in civic life, the legal argument made here is that social media platforms should only allow actual people to operate Facebook or Twitter-like accounts and should include in their terms of service a requirement that deliberately divisive, false, racist, or sexist commentary should be excluded.²⁵⁸ Short of threatening violence against particular people, there are likely sufficient sites on the internet where individuals can vent even extremely unsavory political views. Influential media platforms, however, should not allow malign actors, governmental or corporate, to avail themselves of these sites without revealing their identity or agenda.²⁵⁹ As has been amply discussed in the context of Trump versus Twitter, the private companies operating these platforms are inherently incapable of violating the First Amendment because they are not governmental actors.²⁶⁰ The question would then arise as to the constitutionality of a

²⁵⁷ See *The Daily*, *supra* note 254 (stating the goals of online platforms). Online platforms do not seek to “improve journalism,” but rather, they exist to facilitate the interaction of their users. *Id.* But see Donovan, *supra* note 248 (examining the new social media outlet Parler). Fear of censorship has already sent some Twitter users to a new platform called Parler. *Id.* This right-wing app caters to those who have been banned or removed from other platforms. *Id.* Parler claims to be a “liberation technology that values the First Amendment above all else.” *Id.*

²⁵⁸ See Fish, *supra* note 169, at 85. South Korea requires that websites hosting more than 100,000 visitors a day register with the government using real names and social security numbers. *Id.* During elections, the government can censor content categorized as “slander” against candidates and require those discussing the election online to use real names. *Id.* at 81. During the 2007 election alone, South Korea’s online censorship body deleted 87,753 internet posts. *Id.* at 83.

²⁵⁹ See, e.g., Malik & Faizan, *supra* note 174, at 54 (noting various censorship policies). In 2018, France passed a law that gave the French Courts the authority to take down anything during the election cycle labeled as fake news and suspend broadcasting of any foreign news that intentionally spread misinformation to the French people. *Id.* The Egyptian government considers any social media account with more than 5,000 followers a “media outlet” and, as such, may punish the account for publishing fake news. *Id.* See also Manjoo, *supra* note 21 (calling on media companies to regulate posts). Propaganda spreaders continually find new ways to spread disinformation. *Id.* Technology and media companies have so far acted too slowly in targeting and stopping the spread of this disinformation. *Id.*

²⁶⁰ See Balkin, *supra* note 161, at 433 (summarizing section 230 of the U.S. Telecommunications Act). The U.S. Telecommunication Act provides that those “who deliver internet traffic” as well as those who host content “cannot be held liable for what other people say when others use their networks, services, or sites.” *Id.*

law requiring true identities and genuine personhood to establish a social media account.²⁶¹

It is impossible to deny that the use of fake accounts aimed at dividing and confusing the public, using bots and swarming commenters, have had a pernicious effect on democracy itself.²⁶² Many such accounts are created in the territory of foreign adversaries and targeted based on the mass collection of personal data.²⁶³ There are several legal steps that may be taken to confront this menace, but the argument is made here that something must be done to stop this use and abuse of personal profiles to influence elections or other political outcomes.

One method would be to require that all users of social media platforms be real people.²⁶⁴ Identity verification is done routinely for such matters as setting up bank accounts,²⁶⁵ and the values at stake here

²⁶¹ See Tsesis, *supra* note 7, at 508 (citing to freedom of expressions debate). Any regulation of social media accounts must balance the value of the speech with the possible harms that the speech could cause. *See id.* Oftentimes, “harassing expression is disguised as political expression,” and this kind of speech “adds nothing to [the] democratic debate.” *Id.* at 501.

²⁶² See Laidlaw, *supra* note 174, at 11 (evaluating the role of platforms in disinformation wars). Social media platforms no longer only act as a “space for social interactions” because they now also influence our “social and informational reality.” *Id.* *See also* Fish, *supra* note 169, at 44 (addressing problematic aspects of the internet). The structure of the internet does not necessarily promote democracy and can instead act as a barrier to freedom of expression. *See id.*

²⁶³ See Jolls & Johnsen, *supra* note 132, at 1406 (discussing platforms’ collection of personal data). Currently, no legal framework exists for how social media platforms handle the personal data of their users. *Id.* Access to all of this personal data also erodes the trust that the public has in these sources. *See id.* The collection of personal information benefits the social media platforms and does not benefit the users themselves. *See id.* *See also* Scott Shane, *The Fake Americans Russia Created to Influence the Election*, N.Y. TIMES (Sept. 2, 2017), <https://www.nytimes.com/2017/09/07/us/politics/russia-facebook-twitter-election.html> [<https://perma.cc/39FY-6K6V>] (explaining Russia’s use of fake accounts in the 2016 presidential election).

²⁶⁴ *See generally* Fattal, *supra* note 176, at 939 (describing how social media platforms handle fake accounts). Twitter currently does not require account users to identify themselves, but Facebook does require an official identity. *Id.* The platforms could track activity, anonymity, and amplification in order to pin down fake accounts. *Id.* at 930. In order to identify the entities behind the fake accounts, the platforms could use either direct or indirect attribution methods. *Id.* at 929. Direct attribution identifies an entity using “evidence that directly links the actor to the act.” *Id.* Indirect attribution uses experts who research and monitor social media accounts to match patterns to actors. *Id.* In order to avoid any First Amendment issues, the tracking could be a system of voluntary compliance rather than one of liability. *Id.* at 943.

²⁶⁵ See Justin Pritchard, *How to Open a Bank Account Online*, BALANCE (June 19, 2020), <https://www.thebalance.com/can-you-open-a-bank-account-online-315160> [<https://>

are extremely important. No foreign adversary, such as Russia, should be able to recruit people to send swarms of disinformation into the vision field of American voters.²⁶⁶ The law would impose obligations on social media companies to know their customers.²⁶⁷ No speech would be suppressed, except, for instance, that of people hired by the Kremlin to spread disinformation, and that does not seem like the sort of commentary the First Amendment was intended to protect.

A second major legal focus should be making it unlawful to mine data from Facebook or similar platforms. Facebook has knowingly allowed its users' profiles and data to be used by data analytics companies that flood those users with messages that purport to come from real people but are aimed at manipulating the public.²⁶⁸

In any event, to carry on as though large and influential social media companies have no obligation to the public interest is dangerous to democracy.²⁶⁹ There is no shortage of articles on the dire threat posed by Facebook regarding free and fair elections.²⁷⁰ This is especially ironic because Facebook began as a way for old college friends to stay in touch with one another.²⁷¹

perma.cc/BB7T-U3R8] (discussing the requirement, among others, that individuals must verify their identity in order to open a bank account).

²⁶⁶ See Donovan, *supra* note 248 (advocating for the regulation of social media). Without a strong “network of super-spreaders” of misinformation and propaganda, the less likely these videos will be picked up and shared through social media platforms’ algorithms. *Id.* See also Fattal, *supra* note 176, at 941 (calling for social media platform accountability). One regulation could require that social media accounts label themselves as foreign entities. *Id.*

²⁶⁷ See generally Laidlaw, *supra* note 174, at 9 (arguing for greater responsibilities for social media platforms).

²⁶⁸ See *id.* Users should trust their social media platforms to not only protect their privacy but to also protect their democratic values. *Id.*

²⁶⁹ See Tsesis, *supra* note 7, at 514. Disinformation and hate speech may not seem like an immediate threat to society, but the sentiments caused by this spread of information simmer over time until they become a part of the common lexicon. See *id.* This “gradual process of incitement” does not promote discussion but instead fosters social unrest. See *id.* at 507, 516.

²⁷⁰ See generally Vanita Gupta, *Facebook Is Threatening Our Elections—Again*, POLITICO MAG. (Oct. 11, 2019), <https://www.politico.com/magazine/story/2019/10/11/facebook-threatening-elections-again-229844/> [<https://perma.cc/SSMN-BXSP>].

²⁷¹ See *This Day in History: February 04, 2004: Facebook Launches*, HISTORY (Oct. 24, 2019), <https://www.history.com/this-day-in-history/facebook-launches-mark-zuckerberg> [<https://perma.cc/Z6NV-22UG>].

V

**THE LYING POLITICIAN:
MAKING OFFICIAL LIES UNLAWFUL AND DISQUALIFYING**

It may be considered something of a truism that “all politicians lie.” However, in modern times, political leaders, whether elected fairly or through some manipulation of the electoral process, have become purveyors of lies that connect to an alternative reality. This is often done with the assistance of state media or other friendly broadcasting outlets. As high school students, Americans learned about Nazi propaganda and Hitler’s famous theory of the “big lie.” Hitler’s propagandist Joseph Goebbels was known for his insistence that effective lies should project onto one’s opponents’ those crimes committed by oneself and that there should never be any apology for, or backing down from, a lie.²⁷² Vladimir Putin has perfected the art of postmodern propaganda and is known for his technique of flooding the population with so much disinformation that it is not possible to know what is true and what is not true.²⁷³ To that end, only one struggling independent news source exists in Russia; the other stations keep up a confusing drumbeat that never includes actual dissenters against the Putin regime or official corruption.²⁷⁴

This Article is based on the legal and political premise that lies are incompatible with democracy, that factual truth is fundamental for the survival of democracy itself. Since 2016, many pundits have expressed frustration that Donald Trump has violated “mere” norms in the absence of explicit laws that might outlaw much of what he is doing.²⁷⁵ It is certainly arguable that well-established norms have the status of *de facto* laws and should be enforced against offending officials. However, that is the topic of another essay. Suffice it to say here that the U.S. must enact laws making the propagation of lies, deliberate untruths of a significant nature, by elected or other officials,

²⁷² See Ndahiro, *supra* note 209 (“That propaganda is good which leads to success, and that is bad which fails to achieve the desired result. It is not propaganda’s task to be intelligent; its task is to lead to success.”).

²⁷³ See Bond, *supra* note 82 (noting use and success of persuasion techniques of Putin).

²⁷⁴ See *Russia’s Independent Media All but Silenced*, NPR (May 10, 2014, 7:52 AM), <https://www.npr.org/2014/05/10/311276075/russias-independent-media-all-but-silenced> [<https://perma.cc/SMC6-DUV5>].

²⁷⁵ Rudri B. Patel, *Trump Has Broken Every Presidential Norm. But Has He Done Anything Illegal?*, DAME (June 15, 2017), <https://www.damemagazine.com/2017/06/15/trump-has-broken-every-presidential-norm-has-he-done-anything-illegal/> [<https://perma.cc/CX95-FUP2>].

immediately disqualifying. Had such a law been in place, Trump would hardly have been allowed to take office. From the first moment, in lying about the crowd size at his inauguration, Trump has uttered no fewer than approximately 20,000 lies.²⁷⁶ The argument that there is no explicit law against official lying is an absurd proposition. There is a logic to democracy, and certain crimes against democracy have been considered too obvious to legislate against. After America's recent experience, it is certainly time to put in place a rule to be administered by nonpartisan players that demonstrable lies uttered intentionally by elected or other officials will be grounds for immediate dismissal from office. It is not possible to live up to an oath to uphold the Constitution if that official is also lying to the public. This should be seen as self-evident and irreducible.

CONCLUSION

In order to preserve democracy, we must lose the belief that we are powerless in the face of propaganda.²⁷⁷ We need new laws that recognize the distinction between free expression and propaganda, as the latter is a weapon used against the civilian population. This Article has suggested three categories of statutory law that could have the effect of turning back the tide of propaganda in the United States, thus allowing for a revival of democracy. The first would be to place obligations of factual truth on television (including cable) news broadcasters. Rules restricting the concentration of ownership and foreign or shadowy ownership should also be reestablished. The second set of rules has to do with social media companies, whose increasing influence is widely recognized as pernicious, that have failed to adequately engage in self-regulation. Social media accounts should only be set up by actual human beings (not bots or other chaos agents), and data mining from social media platforms like Facebook should not

²⁷⁶ Glenn Kessler et al., *President Trump Has Made More Than 20,000 False or Misleading Claims*, WASH. POST. (July 13, 2020, 3:00 AM), <https://www.washingtonpost.com/politics/2020/07/13/president-trump-has-made-more-than-20000-false-or-misleading-claims/> [<https://perma.cc/YT9S-VW7B>] (documenting President Trump's lies while in office). As of July 9, 2020, *The Washington Post's* Fact Checker team has recorded 20,000 false or misleading statements by President Trump. *Id.* This "tsunami of untruths" averages out to twenty-three false or misleading claims every day. *Id.* President Trump's most-repeated falsehoods involve claims that America has the best economy ever under his presidency and exaggerations about the status of the building of the border wall. *Id.*

²⁷⁷ See generally Bergman, *supra* note 167, at 167 (discussing power of propaganda). Jacques Ellul, an eminent scholar of propaganda warned forty years ago, in a message that still holds importance: "Today, the greatest threat is that propaganda is seeking not to attract people, but to weaken their interest in society." *Id.*

be allowed for purposes of politically motivated analytics. Finally, no democracy can exist where its officials can lie with impunity. We urgently need a law that makes deliberate, demonstrable lies made by elected officials grounds for disqualification from public office.

While the American people and others around the world have been flooded with propaganda in recent years, the belief that this is a regrettable aspect of “free speech” has held us back from attacking the problem in a credible, legally enforceable manner. Propaganda is not a subset of protected speech; it is instead a weapon of war, increasingly aimed at the heart of democracy itself.

