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There is a growing consensus that American confidence in the marketplace of ideas to sustain democracy is naïve and dangerous.<sup>231</sup> 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.<sup>232</sup>

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.<sup>233</sup> Recognizing that the previously enacted Fairness

<sup>228</sup> 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].

<sup>229</sup> 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).

<sup>230</sup> See *id.*

<sup>231</sup> 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].

<sup>232</sup> 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).

<sup>233</sup> 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.<sup>234</sup> With minimal effort, the regulatory environment could create a system of review that extends beyond the limiting parameters set forth by the FCC,<sup>235</sup> making it much

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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.

<sup>234</sup> 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://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.*

<sup>235</sup> 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,<sup>236</sup> 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.<sup>237</sup> 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.<sup>238</sup> The aim is to play upon social divisions and sow mistrust

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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.*

<sup>236</sup> See Wallace, *supra* note 38.

<sup>237</sup> 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.*

<sup>238</sup> 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.<sup>239</sup> 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.<sup>240</sup> 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.<sup>241</sup> These postings promoted racial and regional conflict, with content designed to deepen social animosity and exacerbate preexisting prejudices.<sup>242</sup> Turning off enthusiasm for certain candidates by peeling away the candidate’s key support groups is a favorite technique of these “bot farms.”<sup>243</sup>

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

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<sup>239</sup> 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.”).

<sup>240</sup> 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.

<sup>241</sup> 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).

<sup>242</sup> 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.*

<sup>243</sup> 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.<sup>244</sup> 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.<sup>245</sup> An extraordinarily high percentage of people now get their “news” through social media outlets such as Facebook and Twitter.<sup>246</sup> 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.<sup>247</sup> 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.<sup>248</sup>

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<sup>244</sup> 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].

<sup>245</sup> 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).

<sup>246</sup> 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].

<sup>247</sup> 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.*

<sup>248</sup> 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.<sup>249</sup> In particular, Trump's retweeting of an account that said, "The only good Democrat is a dead one,"<sup>250</sup> 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.<sup>251</sup> 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.<sup>252</sup> Because social media relies on postings by millions of

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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.*

<sup>249</sup> 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://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.*

<sup>250</sup> 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>].

<sup>251</sup> 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.

<sup>252</sup> 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.<sup>253</sup> 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.<sup>254</sup> 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.<sup>255</sup> 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.<sup>256</sup> 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

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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.*

<sup>253</sup> 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.*

<sup>254</sup> 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.*

<sup>255</sup> 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.*

<sup>256</sup> 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.<sup>257</sup>

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.<sup>258</sup> 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.<sup>259</sup> 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.<sup>260</sup> The question would then arise as to the constitutionality of a

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<sup>257</sup> 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.*

<sup>258</sup> 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.

<sup>259</sup> 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.*

<sup>260</sup> 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.<sup>261</sup>

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.<sup>262</sup> Many such accounts are created in the territory of foreign adversaries and targeted based on the mass collection of personal data.<sup>263</sup> 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.<sup>264</sup> Identity verification is done routinely for such matters as setting up bank accounts,<sup>265</sup> and the values at stake here

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<sup>261</sup> 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.

<sup>262</sup> 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.*

<sup>263</sup> 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).

<sup>264</sup> *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.

<sup>265</sup> 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.<sup>266</sup> The law would impose obligations on social media companies to know their customers.<sup>267</sup> 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.<sup>268</sup>

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.<sup>269</sup> There is no shortage of articles on the dire threat posed by Facebook regarding free and fair elections.<sup>270</sup> This is especially ironic because Facebook began as a way for old college friends to stay in touch with one another.<sup>271</sup>

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

<sup>266</sup> 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.*

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

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

<sup>269</sup> 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.

<sup>270</sup> 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>].

<sup>271</sup> 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.<sup>272</sup> 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.<sup>273</sup> 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.<sup>274</sup>

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.<sup>275</sup> 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,

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<sup>272</sup> 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.”).

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

<sup>274</sup> 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>].

<sup>275</sup> 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.<sup>276</sup> 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.<sup>277</sup> 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

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<sup>276</sup> 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.*

<sup>277</sup> 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.

