fluencers and fringe media outlets promoted false claims about the COVID-19 pandemic being a government hoax. Others claimed that vaccines were part of a sinister plot. Politicians on both sides of the aisle lie with such regularity that people have become deeply cynical about whether to believe anything they say. Henricksen shows that large-scale fraud is carried out for many reasons beyond financial profit, including political gain, the prevention of justice, and the falsification of history.

In addition to exposing the depths of the problem, Henricksen gives readers a way forward. He proposes we call these massive deceit campaigns by their proper name; that we "de-weaponize" the First Amendment, which was never meant to shield swindlers; and that we enact new laws that protect the public from fraud. By revealing for the first time the root legal cause of the misinformation crisis and presenting novel solutions, *In Fraud We Trust* speaks to the present moment as it offers answers for the future.

Wes Henricksen is associate professor of law at Barry University School of Law. He is the author of *Making Law Review: A Guide to the Write-On Competition*.

"Disinformation is one of the greatest threats to democracy, yet we have few legal tools to fight it. That's because our laws against fraud were built for a pre-internet world where it was easy to defraud someone but incredibly difficult to defraud everyone. Henricksen shows how our antiquated legal system can be updated to hold the fraudsters of the twenty-first century accountable, from social media companies to politicians."

Justin P. McBrayer, author of *Beyond Fake News: Finding the Truth in a World of Misinformation*

"In *In Fraud We Trust*, Wes Henricksen tackles the problem of lying—a problem of existential importance to a healthy democracy—with fresh eyes and an open, determined mind. His discussion of the harms threatened by lies, as well as the challenges posed by efforts to regulate lies, is original, comprehensive, and fair. Just as important, he then proposes solutions to these challenges that are both provocative and plausible."

Helen Norton, author of *The Government's Speech and the Constitution*

"While far from being an attack on free speech, *In Fraud We Trust* is sure to trigger First-Amendment absolutists. Law professor Wes Henricksen presents thoughtful, carefully researched legal arguments as to why speech that defrauds the public at large is no more protected under the Constitution of the United States than examples of non-protected speech such as child pornography, defamation, or securities fraud. *In Fraud We Trust* also outlines how changes in the way laws on fraud are written and are currently enforced might actually slow down if not stop our seemingly inevitable march into a post-truth world."

Donald A. Barclay, author of *Disinformation: The Nature of Facts and Lies in the Post-Truth Era*

UNIVERSITY PRESS OF KANSAS
Lawrence KS 66045
www.kansaspress.ku.edu

ISBN 978-0-7006-3746-1
90000
9 780700 637461

Jacket design by Karl Janssen
Art by Mark Poprocki/Shutterstock.com

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HENRICKSEN

IN FRAUD WE TRUST

KANSAS

IN FRAUD WE TRUST

HOW LEADERS IN POLITICS, BUSINESS, AND MEDIA PROFIT FROM LIES—AND HOW TO STOP THEM

WES HENRICKSEN

Telling lies, and falling for them, is one of the things that makes us human. The vast majority of these falsehoods are harmless and perfectly legal. But when someone deceives another for material gain or profit, inflicting injury in the process, we give this kind of lie a special label: fraud.

Most people are familiar with the concept and understand that fraud is prohibited by law. What many fail to appreciate, however, is that the law does not treat all frauds equally. If you defraud an individual, you might end up in prison. On the other hand, if you defraud millions of people—what Wes Henricksen calls "fraud on the public"—you might end up wealthy or powerful, or even get elected president. In a perverse sense, the bigger the fraud, the more likely it is protected by the First Amendment and therefore legal. As a result, many of the largest and most destructive fraud schemes are allowed, encouraged, and richly rewarded.

Examples of fraud on the public are everywhere. The fossil fuel industry long used PR firms and lobbyists to spread disinformation about oil's role in climate change. Sugar companies misled the public about the dangers of high-fructose corn syrup, redirecting the public's attention to fat. Cigarette manufacturers famously lied about the risks of tobacco, and opioid makers lied about the effects of the drug. Social media in-

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IN FRAUD WE TRUST

How Leaders in Politics, Business, and Media Profit from Lies—and How to Stop Them

WES HENRICKSEN

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Published by the University Press of Kansas (Lawrence, Kansas 66045), which was organized by the Kansas Board of Regents and is operated and funded by Emporia State University, Fort Hays State University, Kansas State University, Pittsburg State University, the University of Kansas, and Wichita State University.

Library of Congress Cataloging-in-Publication Data

Names: Henricksen, Wes, author.
Title: In fraud we trust : how leaders in politics, business, and media profit from lies—and how to stop them / Wes Henricksen.
Description: Lawrence, Kansas : University Press of Kansas, 2024. | Includes bibliographical references and index.
Identifiers: LCCN 2024000305 (print)
LCCN 2024000306 (ebook)
ISBN 9780700637461 (cloth)
ISBN 9780700637478 (ebook)
Subjects: LCSH: Fraud. | Deception. | Disinformation.
Classification: LCC HV6691 .H467 2024 (print) | LCC HV6691 (ebook) | DDC 364.16/3—dc23/eng/20240628
LC record available at https://lccn.loc.gov/2024000305.
LC ebook record available at https://lccn.loc.gov/2024000306.

British Library Cataloguing-in-Publication Data is available.

Printed in the United States of America

10 9 8 7 6 5 4 3 2 1

The paper used in this publication is acid free and meets the minimum requirements of the American National Standard for Permanence of Paper for Printed Library Materials Z39.48–1992.

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The simplest and most accessible key to our self-neglected liberation is this: personal non-participation in lies. Though lies may conceal everything, though lies may control everything, we should be obstinate about this one small point: let them be in control but without any help from us.

—Aleksandr Solzhenitsyn, "Live Not by Lies"

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Acknowledgments

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A work of this scope could not have been completed without the help of many individuals. Thank you, first and foremost, to all who helped me turn this idea into a book, including my agent Robert Lecker and my editor at the University Press of Kansas, David Congdon. Others who contributed to the creation of this book include Nadia Ahmad, Adriana Almeida, James (Knox) Anderson, Broderick Betz, Danielle Boring, Linda Coco, Raphael Cohen-Almagor, Renita Culpepper, Whitney Curtis, Leticia Diaz, Alyssa Dimmick Velazquez, Benjamin P. Edwards, AlaEldean Elmunaier, Kara Finnegan, Gregory Ford, Benjamin Franta, Andrea Freeman, Giovanni Fumei, Gina Garcia, Alyssa Gonzalez, Claudia Haupt, Zakia Henderson-Brown, Samantha Huffman, Karl Janssen, Hadley Johnson, Rebeca Jomarron, Lucy Jewel, John Kruzel, Andrea Laws, B. Paige Lawson, Kevin Leske, Lucinda Machado, Tara Mason, Chris Monaghan, Gianna Morgado, Erica Nicholson, Wendy Parmet, Clara Platter, Dorit Rubinstein Reiss, Matthew Rettino, Lauren Robertson, Vanesa Salgado, Martina Sapia, Lawrence Solum, Julie E. Steiner, Victoria Suri-Beltran, Katherine Sutcliffe-Lenart, Wayne Unger, Diane Wachtell, Noah Walker-Crawford, Kelsey Weston, and Tyven Zalloum. I would also like to thank Dr. Marianne Heberlein of the Core Facility Wolf Science Center, University of Veterinary Medicine Vienna, for her generous contributions.

Some material in this book grew out of my discussions with participants

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at the Second Annual Northwestern, University of Pennsylvania, and Stanford Law School's Junior Faculty Forum for Law and STEM at Northwestern University Pritzker School of Law. These include Shawn Bayern, Jason Chin, Bryan Choi, Shari Diamond, Rochelle Dreyfuss, Janet Freilich, Deborah Hensler, Margot Kaminski, Sarah Lawsky, Mark Lemley, Daniel Linna, Jonathan Masur, Tracy Pearl, Nicholson Price, Matthew Sag, Harry Surden, Victoria Stodden, David Thaw, Polk Wagner, Jordan Woods, and Chrisopher Woo.

My work on large-scale dishonesty and its societal and constitutional implications builds on the scholarly, scientific, journalistic, and policy accomplishments of others in this field. I am greatly indebted to them. These include Daniel Baker, Neela Banerjee, Yitzchak Besser, Manal Cheema, Erwin Chemerinsky, Alan K. Chen, Erik M. Conway, Caroline Mala Corbin, John H. Cushman, Jr., Marin Dell, Sara Dillon, Peter Frumhoff, Michael B. Gerrard, Alvin I. Goldman, Jill I. Goldenziel, James Hansen, David Hasemyer, Richard L. Hasen, Katharine Hayhoe, Maura Healey, Zahra Hirji, Paul Horn, Kenneth Kimmell, Jane Kirtley, Thomas H. Koenig, Genevieve Lakier, Michael E. Mann, Laurie Marden, Alden Meyer, Helen Norton, Fernando Nuñez, Naomi Oreskes, Roxana Radu, Ann M. Ravel, Kathleen Rest, Catherine J. Ross, Michael L. Rustad, Naveena Sadasivam, Benjamin Santer, Sabrina Shankman, Suzanne Shaw, Richard K. Sherwin, Susan Solomon, Lisa Song, Cass R. Sunstein, Geoffrey Supran, Eugene Volokh, James Weinstein, Darrell M. West, Abby K. Wood, Alexander Wood, and Tim Wu.

No one deserves more acknowledgment here than my wife, Natalia Salgado, who has supported me in all my endeavors now for over twenty years. She and our children keep me grounded and provide me the peace of mind and stability that make me better in all I do.

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Introduction

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In about fifty years, when the world is three or four degrees warmer and sea levels a foot higher, many will look back at today and it will astonish them to discover how passionately we fought one another over the issue of climate change. To them, it will seem absurd. To be sure, they will undoubtedly have their own peculiar partisan squabbles, controversies unique to their own time and place, but climate change will not be among them. So, when they look back at our time, they will be surprised to find that our most hotly contested issue was, in fact, the heat. Opinion polls from the 1990s and 2000s reveal that global warming—now called climate change—was more divisive than any other issue in America.[1] Court opinions label climate change a "political question," meaning it was so controversial courts would not even touch it.[2] And over the past quarter century, those on one side of the aisle called for measures to stop or slow climate change, to study it and find ways to adapt to it, while those on the other side denied it was happening at all.

To people in the future, this will sound crazy. And they will be right. It is crazy. Because although climate change is, today, politically divisive, it shouldn't be. The issue hinges on scientific questions unrelated to, and with no rational connection with, ideology, culture, religion, personal beliefs, or political affiliation.

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- Is the Earth getting hotter?
- If so, what is causing it?
- How much warming will happen in the future?
- What effects will it have?
- What can be done to reverse it or adapt to it?

None of these questions has anything to do with viewpoints, opinions, or partisan divisions.

But it's even more bizarre.

If you strip climate change down to its bones and remove the ideological baggage from it completely, the issue should, if anything, unite people, not divide them. It affects every single person on Earth. True, it affects some more than others, and it does not affect everyone the same way, or to the same degree. But it touches each of us. Not one country, city, or community is unaffected. Therefore, even out of pure self-interest—if not out of concern for family, friends, and future generations or for one's own region or nation—people should want to know the truth about what is causing the Earth to heat up and what we can do about it. It should, in other words, bring us together. And in many parts of the world, it does just that.

But that only occurs *outside* the United States. Inside, it does the exact opposite: it sharply divides the Left from the Right.

The issue did not start out this way. Up until about thirty years ago, no political divide on climate change existed. Republicans and Democrats agreed broadly that global warming was happening, that we were causing it, and that it was urgent we act to address it. In fact, conservatives, not liberals, first raised the climate change alarm.

But almost as soon as conservatives began the charge to address it, they did an about-face. In a few months, they went from raising the alarm to denying climate change existed. How and why that radical shift occurred involved one of the largest schemes to defraud the public ever carried out. The wealthiest industry on Earth funded it, turning a neutral scientific question into a hot-button issue that divided America. As a result, the industry became even wealthier. How they pulled this off was, by any measure, both frightening and impressive.

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THE TRILLION-DOLLAR SWINDLE

In a 1974 survey, respondents were asked first if they identified as conservative or liberal and then if they "trust" science. The results were, by today's standards, startling. Slightly more than half (51 percent) of conservatives said they trust science. But slightly less than half (47 percent) of liberals said that they did.[3] Today, the idea conservatives trust science as much as or more than liberals seems counterintuitive, if not absurd. Yet, that was in fact the case for most of the past century. And it wasn't just science. It was also trust in scientists, scholars, educators, and experts, as well as concern for the environment.

Yes, concern for the environment.

The idea of conserving nature was, until recently, a long-held conservative priority. Republican presidents pushed through several major environmental protection milestones. Theodore Roosevelt, a conservative Republican, might have been the strongest environmental advocate to ever occupy the White House. After becoming president in 1901, Roosevelt established 150 national forests, fifty-one federal bird reserves, five national parks, four national game preserves, and eighteen national monuments on over 230 million acres of public land.[4] His strong leadership, in what was then called the conservation movement, helped pave the way for modern environmentalists.

President Richard Nixon, another conservative Republican, signed into law what is widely considered the most important environmental US legislation ever passed: the National Environmental Policy Act. Six months later, on July 9, 1970, under authority granted by the Act, Nixon issued an executive order establishing the Environmental Protection Agency (EPA). It is thanks to Nixon we now have a federal agency dedicated solely to the protection of the environment.

In the late 1970s and early 1980s, when the issue of global warming first came to the fore in scientific circles, there was no political divide whatever on whether to acknowledge or address it, let alone on whether it exists. And why should there be? It was up to scientists to figure that out. And conservatives at the time trusted scientists at least as much as liberals did, if not more.

Republicans were some of the earliest and loudest voices raising the alarm on climate change. Take Republican senator Frank Murkowski of Alaska. At a November 9, 1987, Senate hearing on Global Climate Change and the Greenhouse Effect, Senator Murkowski said:

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> I'd like to commend the Chairman for holding these hearings. This subject has been an interest of mine for quite some time. In my first speech on the floor of the United States Senate [in 1980], I called for a higher national priority for scientific research on global climate changes, the greenhouse effect, and other areas of study in the Arctic. That was nearly eight years ago.
>
> Today, we are hearing alarming reports about the so-called "Ozone Hole" in the Antarctic, Arctic air pollution, and a possible global warming trend that is likely to be most evident in the Arctic. . . . I want to impress upon my colleagues in Congress, and agency heads who make budget requests, the importance of funding Arctic research initiatives as a national priority. . . for the purpose of understanding and addressing "the Greenhouse Effect."

Murkowski and other Republicans in 1987 strongly supported the message from scientists, that climate change was an emergency and we must address it. Bipartisan support to reduce, cap, or eliminate fossil fuels persisted throughout the 1980s, right up to 1988. Indeed, when George H. W. Bush, a Republican, ran for president in 1988, he "identified as an environmentalist and called for action on global warming, framing it as a technological challenge that American innovation could address."[5] Republicans frequently expressed concern about global warming. Both parties called it urgent and acknowledged it was likely human caused. And both parties called for action to address it.

Then, something changed. In the waning months of '88, conservatives took a 180-degree turn on the issue of climate change. They went from calling it a "national priority" in one breath to a "liberal hoax" in the next. Within months, conservatives mocked climate scientists as biased, insisted climate change was not happening, and claimed that even if it was happening, the warming would likely be *good* for humanity.

How did this radical political shift occur? And, more importantly, why?

For the fossil fuel industry, the year 1988 started off marvelously. It was the wealthiest industry on Earth by market cap. And its largest players, the oil giants, were flush with cash after a spectacular first quarter. A *New York Times* headline on April 26, 1988, announced, "5 Major Oil Companies Report Higher Earnings."[6] The article touted the companies' "higher first-quarter profits" in large part "from chemical operations and improved margins in their oil refining and marketing businesses." For the biggest

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firms, profits were *way* up: "The Exxon Corporation, the world's largest petroleum company, said its net income climbed 36 percent, while the Mobil Corporation's earnings doubled. Meanwhile, earnings rose 80.4 percent at the Amoco Corporation, 16.5 percent at the Occidental Petroleum Company and tripled at the Unocal Corporation."[7]

This impressive economic trajectory continued through most of '88. On October 25, the *Times* reported the industry's third quarter performance for that year, noting that "Exxon, Amoco, Unocal and ARCO yesterday reported earnings sharply higher than in the corresponding period a year ago."[8] From the outside, the industry was having one of its best years ever. They were making money hand over fist.

Behind closed doors, however, fossil fuel executives were not celebrating but panicking. A growing number of them feared they might soon be out of business—with good reason. They saw a threat materializing right before their eyes, and they knew if they did not act quickly, and decisively, to stamp it out, the fossil fuel industry itself would soon *be* a fossil.

The threat, of course, was climate change.

No—wait. That's not quite right. The threat was not climate change per se, which industry executives and managers had, long before that year, known about and openly discussed. The fossil fuel companies' own scientists had, during the 1970s, repeatedly warned them of the "catastrophic" and "irreversible" impacts of global warming if oil and gas use continued unabated.[9] In 1981, Exxon was already factoring global warming and sea level rise into business models of its multibillion-dollar capital projects.[10] By 1988, climate change was, to them, old news. What changed that year, and what scared the daylights out of industry insiders, was not that climate change was happening but that climate change was, for the first time, coming to the public's attention.

That was the threat. The fact the public had gotten wind of it.

This resulted from a chain of events that began in the summer of 1988, with a series of record-breaking heatwaves. These were followed by the worst drought North America had experienced since the Dust Bowl. The heatwaves and drought killed an estimated five thousand in the United States and resulted in record-breaking wildfires in the West. Yellowstone National Park had so many forest fires breaking out across it that they closed the park in peak tourist season. Crops failed. Billions in agricultural products were lost. The heat, drought, and fires were discussed nonstop in the news. This naturally begged the question: Was all this being caused

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by global warming? This was a topic that, up to then, had been relegated largely to scientific papers. But now, the media—and therefore the public—became keenly interested in the phenomenon. The public interest in this issue prompted the US Senate to launch an investigation into climate change and global warming. Their investigation culminated in a series of televised Senate hearings on the topic, where Dr. James Hansen dropped a now-famous bombshell: scientists, he said, are now more than 99 percent certain that the burning of fossil fuels not only will heat the planet but already is heating it, and it is projected to get far worse in coming decades. If nothing is done to stop it, he warned, the results will be catastrophic.[11] Those hearings, and particularly Dr. Hansen's testimony, led to TV news reports and front-page stories on global warming in newspapers like the *New York Times*, the *Washington Post*, and the *Wall Street Journal*.[12] These front-page reports were echoed in hundreds of other national and local news outlets.

The industry's dirty little secret was out. Almost overnight, regular people had begun talking about climate change the way they talked about sports, sitcoms, and the weather. Worse yet, from the industry's perspective, *governments* were talking about it. They were discussing what should be done to address it. It was not just the US Senate; leaders around the globe proposed, and pushed for, measures to tax, cap, or ban fossil fuels. *Ban fossil fuels!* And this call was not coming from some tiny group of radical extremists but from national governments across the globe, including those in Germany, Italy, France, Sweden, Denmark, Japan, Australia, and the United Kingdom. All proposed reducing or eliminating reliance on oil, gas, and coal. Congress was moving quickly in the same direction. Then, as if to throw fuel on the flame—if you'll excuse the metaphor—on December 6, 1988, the United Nations established the Intergovernmental Panel on Climate Change, or IPCC, a collaboration of leading scientists from around the world, which remains today the foremost authority on the certainty, causes, and effects of climate change.[13] It was the start of a global movement to address this global issue.

But the movement never happened. Indeed, the movement was not just stopped but smashed to pieces—by the fossil fuel industry. Its weapon? Disinformation. The industry launched a crusade to raise doubt about the existence and causes of global warming. In other words, they lied. And they paid hundreds of millions to spread the lie far and wide. Almost as

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soon as the climate doubt campaign was up and running, it was a massive success.

The nuts and bolts of how the industry pulled off this 180-degree turn, from agreeing with the science of climate change to rejecting it, is an epic tale that can, and has, filled books. In essence, it involved a two-step strategy. Step one, as observed by journalist Amy Westervelt, was to "target media outlets to get them to report more on the 'uncertainties' in climate science, and position industry-backed contrarian scientists as expert sources for media." Step two was to "target conservatives with the message that climate change is a liberal hoax, and paint anyone who takes the issue seriously as 'out of touch with reality.'"[14]

To accomplish both aims, companies like ExxonMobil, Shell, and British Petroleum (BP) hired public relations firms, like Edelman, Singer, Story, and Pac/West, and established a powerful industry lobbying group, the American Petroleum Institute, to craft and disseminate the message of climate change doubt, frequently demonizing climate science and scientists.[15] One paid-for editorial, published in the *New York Times* in 1992, was titled "Apocalypse No." It said the American people were being "inundated by the media with dire predictions of global warming catastrophes." "Unfortunately," the piece went on, "the media hype proclaiming that the sky was falling did not properly portray the consensus of the scientific community." They published dozens of similar paid-for editorials from 1989 to 2004. These had titles like "Tomorrow's Energy Needs," "Unsettled Science," and "Directions for Climate Research," but their objective-sounding titles were mere façades for falsehoods, half-truths, and misleading claims.[16] The companies also hired scientists like Wei-Hock Soon, Fred Singer, and Patrick Michaels to produce research papers, editorials, TV commentary, and presentations to spread climate change doubt under the banner of science. These academics were paid millions.[17] For decades, they cited industry talking points to support the idea scientists were divided on the issue, that there was a legitimate "debate." Recent reports show the "debate" was, and had been all along, a manufactured myth.[18]

While the industry planted seeds of doubt in the public generally, it aimed to rile up conservatives specifically. From the beginning, they politicized climate change, pointing the denial megaphone at rightwing politicians, pundits, and voters. Falsehoods were spread aggressively through

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conservative talk show radio hosts like Rush Limbaugh, Mark Levin, and Glenn Beck; conservative news outlets like Fox News, Drudge Report, the *New York Post*, and the *Washington Times*; conservative academics and scientists willing to produce industry-friendly studies and publications in exchange for funding; national, state, and local Republican party leaders; rightwing books, op-eds, emails, and social media posts, perhaps most notoriously through Facebook.

Conservative politicians fell in line. No doubt, campaign contributions won many over. But even those not persuaded by cash adopted the new party line because Republican voters' views now reflected industry propaganda. Republicans running for office had no choice but to fight on the industry's behalf. That was where the money, and the votes, came from. A US Senate report in 2020 titled "Dark Money" laid bare how "giant fossil fuel corporations have spent billions—much of it anonymized through scores of front groups—during a decades-long campaign to attack climate science and obstruct climate action."[19] In Jane Mayer's book of the same name, *Dark Money*, Mayer details how the Koch brothers and others in the oil and gas industries spent millions to raise climate doubt, with that money going overwhelmingly to conservative think tanks, media platforms, and academic institutions, as well as Republican-aligned politicians and political groups. In return, Republicans, with the help of a handful of Democrats, rewarded the industry with billions in subsidies, tax breaks, and other preferential treatment.[20]

The biggest gift to the industry, however, was a green light to continue extracting and selling fossil fuel. The campaign worked. The industry got exactly what it wanted. It made trillions of dollars. That's trillions with a *t*. Yes, *trillions*. The six largest oil companies alone have made $3 trillion in profits since 1990, and the oil industry's profits in 2022 alone were $4 trillion.[21]

This makes the climate doubt campaign likely the most profitable swindle in history. But how did they get away with it? Isn't it against the law to mislead people for profit? Don't we prohibit harmful deceit? Isn't that called "fraud"?

Well, yes and no. Yes, it's fraud. But no, it's not illegal.

This is where it gets a little bit weird. You see, within the constellation of laws covering fraud, there is a strange contradiction. For the most part, schemes to profit off deception are against the law only if they are small—aimed at deceiving one person or a small group. The more people one deceives, the less likely one will run afoul of the law.

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THE LARGEST FRAUDS ARE LEGAL

Falling for fraud is like falling in love; both involve acting on impulses we by and large possess, but about which we know little. Both are deeply ingrained in us, but are also something of a mystery. We cannot explain why we fall for fraud, or why we fall in love, any more than we can explain why we enjoy eating ice cream, looking at a sunset, or listening to our favorite song. These feelings and impulses are buried inside the mostly still-unexplored human mind. But while we might not yet be able to pinpoint the precise neural pathway or biological processes behind our gullibility, we need not treat its existence as a total enigma.[22] We know a lot about how deceit, and our vulnerability to it, impacts individuals and society.

We know, for example, that people are expert liars. We lie all the time, mostly about little things—to smooth over social interactions and enhance our own relationships with loved ones, friends, and colleagues. We tell little lies all the time. Yet, for as good as we are at telling lies, we are inept at detecting them.

Worse still, recent studies reveal we are hardwired to believe most of what we are told. This is called truth-default; we default to assuming the truth, or at least truthfulness, of what we read, see, and hear. Because of this, we tend to buy into much of what we are told. There are exceptions. For instance, we instinctively distrust information from politicians on the other side of the aisle or from anyone who asserts something that conflicts with our deeply held beliefs. But in most cases, our truth-default impulse forces us to trust most of what we are told.

This impulse, combined with our inability to spot lies, results in what might be described as credulity on a mass scale. That it is invisible to us makes it no less real. Moreover, if we did *not* believe most of what we are told most of the time, it would disrupt everyday personal interactions, from going to the supermarket to going on a date. Imagine carrying on a friendship, or a marriage, or transacting business, with someone whose every word you doubted. We simply must blindly trust others to function in society, at work, in relationships, and in our families.

This blind trust of ours is helpful, and probably necessary. But sometimes, it gets us into trouble.

One way it gets us into trouble is that it allows others to mislead and manipulate us. While most people tell only white lies most of the time, some are willing, or downright driven, to lie about things of far greater

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importance and which cause far greater harm. Scholars call such people *prolific liars*. Prolific liars cause damage to individuals and society. If permitted, they will lie to get a job or a promotion, to destroy the reputation of an enemy, or to gain wealth, power, or political office. The lies they tell deprive others of money, property, personal rights, or, in extreme cases, their health or life.

When these self-serving falsehoods cross the line, from trifling white lies to causing unacceptable harm, we generally call it fraud. Fraud is always harmful. It is always wrongful. But it is not always illegal. Only where the fraudulent conduct satisfies all elements of a crime or a tort does it rise to the level of *actionable fraud*.

Why aren't all frauds actionable?

In short, because drawing the line that delineates what is legal from what is illegal is a delicate business. If, while crafting a law to prohibit some undesirable conduct, the lawmaker or judge errs even slightly in the direction of overreach, so that the law prohibits more conduct than necessary, it tramples innocent people's rights and results in an enormous amount of harm to those unjustly oppressed by the law. The contours of the criminal codes, civil tort claims, and constitutional rights must be drawn with utmost care. Determining that *doing this thing* or *saying that thing* will subject you to imprisonment, fines, or liability is a severe infringement on individual liberty. This should only be done if, on balance, society is better with the restriction than without it.

Fraud, actionable or otherwise, occurs where Person A (the liar) deceives Person B (the dupe) for advantage or profit and causes nontrivial harm to Person B or to others. This last part is important. The harm fraud causes is always nontrivial, and generally repugnant and unacceptable. Fraud causes harm that offends our sense of fairness and justice. This is what marks a deception as something that rises to the level of fraud, rather than a mere white lie. This is why we always abhor fraud and reject it on principle.

But we reject it, not only on principle but through force of law. Prohibitions on fraud can be found in the oldest legal codes yet discovered, dating back thousands of years. Naturally, the anti-fraud laws evolved in some ways as society progressed, but their core nature changed little. And why should they? The nature of how fraud operates changed little, if at all, for

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millennia. People defrauded one another about the weight of grain or the purity of metals in ancient society, and about the condition of a used car or the value of an investment course in more modern times. But a new species of fraud emerged in the twentieth century—fraud aimed at the public at large. This was made possible by new technologies. First, it was radio and television. These two inventions alone opened the door to widespread—and very effective—efforts to manipulate public opinion for profit or political advantage.[23] More recently, social media and other digital platforms have ratcheted up the velocity, efficiency, and accuracy of this manner of fraud, which is aimed not at one victim but at millions.

As a result, there is now a severe mismatch between the opportunities for fraudsters and the protections for fraud victims. As the ways fraud is carried out transformed, the law failed to keep pace. Our laws remain stuck in a bygone era while the technologies available to those willing and able to lie to get what they want are ever expanding.

This creates a paradox within the law. The larger a fraud scheme is, the less likely it will be actionable. For instance, if a liar deceives you for profit and deprives you of something rightfully yours, this is often both a crime and a tort. The state can prosecute the liar and send them to prison. As the victim, you can sue the liar for damages. However, if instead of deceiving one person the liar deceives a far greater number of people in the exact same way, the legal picture looks fuzzier. And the larger that number of dupes (and victims) becomes, the less easily the deceit will fit into a legal category created to protect people against fraud. And once the number of dupes a liar targets reaches into the millions, it becomes almost guaranteed the liar is no longer committing any kind of actionable fraud but is rather simply doing business, reporting the news, or running for office. Or, in the case of climate change denial, all three.

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This helps explain why falsehoods pile onto us from all directions. As the late Princeton professor Harry Frankfurt put it, "One of the most salient features of our culture is that there is so much bullshit."[24] Lies drown out the truth.

Of course, not every falsehood pumped out to the masses is, or should be, labeled fraud, actionable or otherwise. Some falsehoods are unintentional. Some are mere white lies. But a significant portion of the bullshit disseminated on a large scale is intentional, malicious, self-serving, and

harmful. And some of these lies *do* amount to fraud. Any time an industry, a media outlet, a political candidate or group, or anyone else with a public megaphone makes a knowingly false claim to deceive us for their own advantage or profit, and in the process causes nontrivial harm to individuals or society, they commit a fraud that, every bit as much as a one-on-one fraud, should be addressed by law.

It is not, however. Fraud on the public is mostly permitted by law. It is ignored, allowed, and rewarded by law. For that reason, the larger a fraud scheme is, like the fossil fuel industry's climate change doubt campaign, the less likely it is the law will touch it. This is the paradox: it is against the law to defraud *some*one but legal, and highly lucrative, to defraud *every*one.

This is completely backward. It is also dangerous. But that is how the law works—or doesn't, depending on how you look at it. And it is why it is illegal for a car salesman to lie about the true mileage of a used car he is selling but legal for a fossil fuel company to lie about the existence and causes of global warming, legal for a politician to baselessly claim a presidential election was "stolen" through nonexistent "massive fraud," and legal for a police department to lie to the public to cover up violent crimes committed by police officers against suspects. Those who speak to the public can spread self-serving falsehoods, regardless of the harm caused, as long as they spread the falsehoods to enough people.

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THEY GET AWAY WITH IT. BUT SHOULD THEY?

Society operates on a set of values. We rarely think about these values, but we nevertheless agree to live by them. These include the idea one may not, without good reason, injure or kill someone. This value is codified in laws prohibiting, among other things, murder, manslaughter, assault and battery, and wrongful death. Codification ensures people treat it as an obligation, not a suggestion. Although most agree one should not kill, not everyone will follow this principle if left to their own devices. The "honor code" system does not work.

Related values are codified in laws that prohibit robbery, larceny, trespass, and rape. We rarely, if ever, discuss or even think about these values because they seem to go without saying. These actions are not just against the law; they go against deeply held convictions. But although they may violate our principles, those principles are not immutable truths. They cannot

be proven scientifically. Rather, they are, as Yuval Noah Harari points out, fictional stories we tell one another and buy into as if they were objective truths.[25] They are not universal. They differ from society to society and even among distinct communities within the same society. They also differ from one era to another. Of course, we generally believe very strongly in our own society's current version of these values, and we consider it a fundamental right not to fall victim to these kinds of wrongful acts. That is, we each have the right not to be murdered, robbed, or raped. The laws codifying these values make us safer, healthier, and happier. They make our lives better.

Like murder, robbery, and rape, fraud goes against a long-held societal value: one should not be permitted to defraud another, cause harm, and get away with it. We rarely, if ever, give this much thought. We simply live our lives as if it were true. We feel entitled to not be taken advantage of in a harmful way, particularly if it deprives us of something important, like money, property, health, or life. We know that if we are targeted by fraud the one who defrauded us is liable civilly and criminally. It is our right to not be defrauded, and we therefore have a corresponding obligation to not defraud others.

This value, like the others, is codified in law. The idea, as always, is to ensure that those who defraud may do so only at the risk of criminal punishment and civil liability. The law is designed to reinforce the value, to give it teeth. It is supposed to deter wrongful conduct, punish those who commit it, and protect those who might otherwise fall victim to it.

However, the fraud *principle* does not line up with fraud *law*. Perhaps the two mirrored one another in the past. What is clear, however, is that a lot of the wrongful fraudulent conduct falls entirely outside the contours of the law. How this came to be is no mystery. The way fraud is carried out has changed radically over the past century, going from always occurring in face-to-face transactions to now more typically occurring on a mass scale through digital channels. The law has not kept pace. There is now a gaping chasm between the principle, on one hand, and the laws aimed to codify it on the other. The result? Defrauding millions has become legal while defrauding one person or a small group is illegal. The fossil fuel industry's campaign of climate change doubt is one example, but leaders in politics, business, and media do this all the time.

But if defrauding the public really is happening, and if it truly is such a big problem, then why aren't more people discussing it? What are scholars

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saying about it? What solutions have they come up with? What does this book offer that has not been covered by others?

Let me answer each question in turn. First, in recent years people have been discussing this problem constantly, not only in the scholarly literature but in the news and on social media. It is one of the most talked-about topics in the past decade. Many major news stories have centered on efforts to pass off falsehoods as truth: the claim the 2020 presidential election was "stolen"; the January 6 attack on the US Capitol; the fossil fuel industry's campaign to mislead the public; the ongoing discussions of sea level rise, extreme weather events, and other effects of climate change; the backlash by opponents of the fossil fuel industry, who have spread climate change exaggeration and alarmism; the growth and spread of the opioid crisis; the demonization of immigrants and other marginalized communities; book bans in numerous states; anti-LGBTQ+ laws, on one side of the political aisle, anti-female policies in the name of pro-LGBTQ+ ideology, on the other; claims made on both side of the political aisle on the diversity, equity, and inclusion debate; claims by those for, and by those against, abortion rights; police departments covering up police violence; efforts to censor or strongarm Twitter, Facebook, and other social media companies based on speech by third parties using their platforms. The list goes on. Moreover, this problem is bipartisan. Neither the Left nor the Right has a monopoly on spreading self-serving falsehoods.

Scholars have been grappling with fraud on the public for at least a decade. Professors, jurists, and lawmakers have proposed numerous changes to the law aimed at curtailing, prohibiting, or punishing fraud on the public. James Parker-Flynn proposed creating a new tort claim to impose liability for misrepresenting climate science. Caroline Mala Corbin argued that disinformation created and spread by the government may not be protected by the First Amendment, potentially opening up avenues to prohibit it by law. Catherine J. Ross has, in a similar vein, argued that the president, as a public employee, should be "accountable for material verifiable factual falsehoods." Robert Size has argued that spreading false and misleading news should be prosecuted under the federal wire fraud statute. Numerous other legal scholars have discussed the disinformation problem at length, some calling for liability and others for immunity.[26]

And it's not just scholars. In recent years, many have called for stricter rules for social media companies that allow their platforms to be used to spread disinformation. Senator Mark Warner proposed a law that would

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place the burden on social media firms like Twitter and Facebook to identify and shut down accounts that spread false and misleading claims.[27] Many US states and numerous countries have proposed, or passed, laws aimed to restrict narrow categories of harmful disinformation.[28]

This book's argument builds on important work by others and differs in an important way. The proposals stated, and others like them, focus in narrow subcategories of falsehoods aimed at the public. None now discussing this problem have clearly identified what lies at the heart of it, which is the fact we reward those who carry out large frauds, even as we prohibit and punish small frauds. This paradox means the larger a fraud scheme is—whether it pertains to oil, immigrants, or a "stolen" election—the more legal it is. This results in massive harm to people, society, and the environment. It's a serious problem. To fix any problem, one must first understand it—where it came from, how bad it is, and what we can be done. The fraud law paradox is no exception to this general rule.

One cannot understand fraud on the public without first gaining a firm grasp on fraud in general, how people deceive for profit. And to understand fraud in general, one must first understand how lying works. Lying, after all, is a key ingredient of fraud.

This ladder of understanding, each rung necessary to grasp before reaching for the next, sets the structure of the book. Part 1, "The Disinformation Age," explains in five chapters what the problem is and how it came to be. Chapter 1 breaks down how lying and deceit work in general, examining why deceit is such an effective tool for gaining wealth, property, and political office. Chapter 2 explores how certain harmful lies cross the line into fraud and distinguishes fraud in general, which is often legal, from actionable fraud, which meets the elements of a crime or a tort. This chapter also discusses how people, by and large, fail to appreciate how fraud really works and why it is important to think about fraud as centering not on deception but evasion.

Chapter 3 reveals how the largest and most destructive frauds are rarely labeled "fraud" at all. Instead, our legal and political systems accept as a given that those with power must be allowed to deceive the public and profit from that deceit. Chapter 4 discusses the many ways fraud on the public harms individuals and society. It presents an abridged catalogue of the damage those who defraud us are doing. Chapter 5 introduces the

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fraud law paradox whereby small frauds are punished and large frauds are rewarded. This chapter argues that, because the paradox is both unjustified and highly harmful, it should be abolished.

Whereas part 1 describes the problem, part 2, "Truth from Power," sets forth how we can solve it. I propose three steps, each forming a necessary part of the solution and each occupying its own chapter. First, we need to categorize and treat fraud on the public as identical to other kinds of fraud. I am not talking here only about the law but also about our sense of right and wrong, regardless of the law; we understand harmful lies to be offensive with one-on-one falsehoods, but we must do this also for falsehoods aimed at millions of people. Ultimately, to address fraud on the public, we must first recognize it as fraud in the first place. This step is discussed in chapter 6.

The second step toward a solution is to de-weaponize the First Amendment, the subject of chapter 7. Too often, the shield of free speech is used as a weapon to mislead and deceive, to acquire profit and power. Actionable fraud is already unprotected by the First Amendment. We must make a similar carve-out for fraudulent speech aimed at the masses.

The third step toward a solution is to enact laws that prohibit fraud on the public and punish those who commit it, as we do for actionable fraud generally. This is covered in chapter 8. Doing this would close the gaps in the law that currently allow harmful falsehoods, no matter how destructive or fraudulent, to flourish. Under these laws, courts would be tasked with determining the facts in each case, including whether the defendant purposefully deceived, the same way courts do in other fraud-based lawsuits.

Revising the law to close these gaps is no simple matter, though I endeavor to discuss it in the simplest possible terms. Distinctions must be drawn between, for instance, government speech and commercial speech. There are issues, for instance, with whether the First Amendment even applies to government speech per se. As for commercial speech, it receives less protection than political speech, and laws restricting commercial speech are subject to a lower level of scrutiny. Any discussion of expanding restrictions on any kind of speech, however, must be carefully undertaken to ensure such restrictions remain faithful to the fundamental free speech principles that have, for more than two centuries, protected us against censorship and control of expression and ideas.

The carefulness with which we must proceed requires us to look at all possible solutions, and not limit our options to prohibition and punishment.

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Creative fixes can, in some cases, protect against frauds aimed at millions; these might include warning labels, disclosures or disclaimers, or the inclusion of links to truthful information on the topic. Social media platforms have already begun to implement such measures in recent years. Creative solutions like these might help ensure the cure does not end up being worse than the disease. Bans should be imposed only where necessary to avoid significant harm, as is the case for frauds in general.

There are two dangerous pitfalls in modifying the law to address the problem: overreach and underreach. Overreach, meaning the law does too much, poses a threat to fundamental freedoms. This danger is widely recognized and heavily emphasized by my critics. But underreach, meaning the law does too little, also poses a threat—to health, life, property, and the environment. Both extremes, overreach and underreach, must be avoided. Today, however, we already sit at one of these extremes. The first step in solving the problem is to recognize the damage being done by those who defraud the public. We must accept that the system we now have is broken. Then, we must work to fix it.

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PART ONE

THE DISINFORMATION AGE

THE PROBLEM

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1

The Liar's Advantage

WHY FALSEHOODS ARE A BIGGER PROBLEM THAN EVER BEFORE

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People lie. They always have. But for almost all human history—the last two hundred thousand years, give or take—we have understood little about how lying works, on a societal or individual level, let alone what to do about it.

Unanswered questions abound. Why do people lie? How effective is lying as a tool for getting what you want? How good are we at detecting we've been lied to? Do lies harm us? Help us? Or both? What rules should we put in place to protect against lying and deceit?

This chapter aims to explore these questions. The focus is on lies and those who tell them. This is the starting point for any fruitful discussion of fraud because lying is a core component of, and prerequisite to, fraud. But we must be clear about what we are, and are not, talking about when we talk about lying.

A lie is a statement by one who does not believe it but intends to make someone else believe it.[1] A lie thus has three parts: (1) a message (2) communicated to another by a speaker who does not believe the message to be true but (3) intends to cause listeners to believe it to be true.

Typically, one tells a lie to gain a benefit. A student might lie to her professor about why she was late to class so she will not be marked tardy or absent. A patient may lie to his dentist by claiming he flosses every day because he is embarrassed by how infrequently he actually flosses. A wife

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might lie to her husband by telling him he looks particularly sharp one day, when he really looks the same as always, to boost his confidence or just make him smile. A woman having dinner at a friend's house might say the food is delicious when she does not particularly like it, simply out of courtesy.

These examples consist of people telling a lie to gain a benefit. But they are not examples of fraud, which involves two additional components. First, there must normally be a tangible benefit for the liar, like money, property, market share, a job, or political office. Second, we normally apply the fraud label only to deceits that cause nontrivial harm. None of the examples above were fraud, though each was a lie.

The distinction between falsehoods and fraud is crucial. A central thesis of this book is that the law fails to adequately deal with large-scale harmful falsehoods primarily because the issue has been framed around "false speech"—that is, around lies—whereas a more helpful framing would be around "fraudulent speech." False speech has full First Amendment protection. Fraudulent speech has none. So, calling a scheme where one deceives for gain or profit and causes harm "false speech" rather than "fraud" not only misses the mark but provides unwarranted protection for the one profiting from the scheme.

To understand why this distinction proves so vital—and so destructive—in today's world, one must gain a firm handle on how lies and fraud work. Lies today spread further and faster than ever before. Twenty-first century digital technologies, such as predictive, personalized algorithms and artificial intelligence, have radically changed the manner and speed with which we may be manipulated.[2] Thus, while lies are ancient, many dangers they now pose are new. It is thus necessary to understand lying and liars to appreciate the threat we now face.

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WHY WE LIE

The first lie I remember telling my mom was when I was about six years old. She asked me one night to take the bacon grease outside and dump it out. The grease was in a heavy cast-iron skillet, and I picked it up with both hands, holding it ever so carefully. I had to walk slowly with it, squeezing the warm handle and staring at the liquid fat ready to splash out with any sudden movement. To get outside, I had to pass through the garage. But

instead of passing through, I stopped inside the garage and glanced back at the door to the house to make sure no one saw me. The coast was clear. I flung the panful of bacon grease into a corner of the garage onto a pile of boxes.

As I put the empty pan into the sink, my mother asked, "Did you dump the grease outside?"

"Yes," I said.

My mom discovered my lie a few days later. She had left the garage door closed that day and the sun had come out. The garage heated up like a greenhouse. The muggy air in the garage brought the bacon grease to life, filling the garage and house with a pungent, rotten odor. My mother, mystified by the smell, followed it to a corner of the garage where she saw what I had done. Unbeknownst to me, the boxes contained blankets, and the liquefied fat I'd dumped on them had entered the boxes and stained the blankets.

My mom, understandably, was livid. But what angered her more than the stained blankets and the bad smell was the fact I had lied to her. She could not fathom it. She asked me how I could lie *to my own mother* with a straight face. I gave her my list of excuses, which were all true though none was an adequate justification. It had been freezing cold out that night. It had been dark. I was afraid to go outside because of the coyotes. The forest, which surrounded our rural house, scared me at night. And truthfully, I had had no idea dumping the grease there would make any difference, let alone do damage. I had thought it was harmless.

My mother grounded me, if I remember correctly, for about one hundred years, give or take.

But recent discoveries in child psychology appear to show that my mother may have gotten it wrong. It turns out that lying in childhood, even to one's parents, is not only normal but a healthy sign of cognitive development. In one recent study, researchers concluded that young children who are better at lying "were more skilled in memory tests and verbal creativity." This, some now believe, might give them an advantage. Why? Because "children who are good liars become better thinkers and develop better memories."[3] This may translate, as the child grows, into greater social, professional, and financial success later in life.

This overturns long-held myths about lying, such as that it is always a bad thing and that children who do it are likely to grow up to be pathological liars or miscreants. These are outdated assumptions. We now know that

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deceiving one's own parents is part of a child's normal, if not necessary, social development. Lying is natural. Many children begin lying before they can talk. Babies aged between seven and twelve months fake cry and fake laugh to get attention, use eye contact as a distraction technique to hide what the baby is doing with their hands, and pretend to see something interesting to throw off an adult's attention so the baby can grab or get rid of an item without being seen.

It is important for children to learn to lie well because, as adults, we frequently use falsehoods to function in society. And the lying we learn as children determines, in part, how well we lie as adults. Childhood lying requires cognitive abilities that are important for social development.[4] To be good at lying, a child must master, for instance, "mind reading." This is the cognitive ability to understand that others do not know, and cannot know, what you're thinking or what you know. A child must also master "self-control." This is the ability to regulate one's own facial expression, tone of voice, word choice, and body language to convince the listener to believe what you're saying. This makes the child, and the adult they grow into, better able to navigate social interactions. It is not just that we need these skills to tell falsehoods per se; rather, it is important to communicate in a manner that makes people buy into what you are saying, whether it is true or false. In either case, if you are not believed, you have failed to communicate effectively.

Recent research has debunked other myths. One is that children are bad at lying. This is false. By age ten, most lie as well as any adult. Another myth is that lying is learned only from other trouble-making children. This is false. The impulse and ability to lie occur without any model to learn from or any instruction on the topic.[5] Yet another myth is that children are taught to lie by movies or by society. This is false. Children lie with equal frequency across cultures, races, languages, religions, and genders. It happens the same all over the world.

The ability to deceive develops as a child grows. At two years of age, at least 30 percent of children lie. The other 70 percent appear not to. At three years old, 50 percent lie. At four, 80 percent lie. And from that age on, the lying continues to increase. Among adults, lying is effectively universal.[6] We will talk about adult lying later in this chapter and throughout the book.

But we are not quite done talking about our smallest liars. The ways children lie are incredibly insightful to understanding how deception works.

As children age, not only do a greater percentage of them lie but their

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techniques become more sophisticated. At age two, shortly after beginning to speak, children tell *primary lies*. Primary lies are deliberately untrue statements, often to conceal a transgression, which do not take believability into account. Children at this age generally do not grasp the concept of credibility. This results in lies adults easily see through and often find endearing.[7]

One toddler, for instance, told his mother that the sugar all around his mouth was there because he tripped and his face landed on a donut. A three-year-old girl, when asked by her dad how a doll's legs and head had gotten torn off, claimed that zombies had done it, and another insisted she *had* cleaned her room but then quickly added, "and you can't go in there." A four-year-old in California told her mom she had not eaten the missing cupcake but that a horse had entered the kitchen, opened the refrigerator, and taken it.[8]

By age five or six, however, children graduate to telling *secondary lies*. A secondary lie is not so easy to debunk. This is because children, by this age, have mastered "mind reading" (knowing that others don't know what you're thinking) and "self-control" (using facial expression and body language to convey believability). They've figured out how to tell a lie convincingly. Remember that toddler who claimed a horse ate the missing cupcake? Had she been a bit older, she might have claimed instead that her younger brother had eaten the cupcake. This tiny change in the lie represents a great leap in cognitive development. This turns the lie from something easily debunked to something easily believed.

But children do not begin lying like adults until about age seven. At that age, they begin figuring out how to tell *tertiary lies*. Tertiary lies are where a child not only tells a lie that makes sense but also conceals and supports the lie by maintaining consistency between the initial lie and follow-up statements and responses.

Think once more about that toddler who wanted to conceal that she ate the cupcake. If she were over the age of seven, her lie would have likely been much more believable. Not only would she have claimed her brother ate the cupcake but, if prodded, she might also have added other details that support her lie, like that she did not even know about the cupcakes, or if she did know, she could not have reached them, or she might have claimed she was feeling sick to her stomach and so wouldn't eat a cupcake even if offered to her, or that her brother liked cupcakes more than her and stole them all the time. These supporting "facts" would be consistent with

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the lie, supporting it and making it more convincing. If the girl's mother, unconvinced, asserted to her daughter that she had cupcake frosting on the side of her mouth, the girl, sensing her mother's bluff, might very well have stuck to her story and insisted, poker-faced, that such a thing would be impossible since she hadn't touched, let alone eaten, the cupcake.

Not all children lie equally well. Neither do all adults. Yet, while not everyone can come up with spontaneous justifications that support their lie, pretty much everyone lies skillfully when motivated to do so. It is virtually impossible to detect a well-executed lie, even one told by a child. In a series of studies, it was demonstrated that no group of adults could effectively detect lies told by children over seven years old. These studies took groups of adults differing in education, profession, and relationship to the children and measured how well different groups could detect the children's lies. The adult lie-detector groups included undergraduates and law students, social workers and child protection lawyers, judges, customs and police officers, parents observing other parents' kids, and even parents observing their own kids. Each of these categories of adults was able to detect children's lies between 48 percent and 53 percent of the time.

To put that in perspective, if you flipped a coin to choose whether a child was lying or not, you would, by statistical probability, detect the lies 50 percent of the time. But even those adults trained in lie detecting techniques, and even the child's own parents, could only detect children's lies at about the same rate as random chance.[9] Children are *that* good at lying.

The ability to deceive begins in childhood. It does not end there. It just gets stronger.

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LIE DETECTION

As a child grows into an adult, they get better at lying. But they get no better at detecting when others are lying to them.

This is inevitable if you think about it. We could not develop one capability *and* the other; the two are mutually exclusive and zero-sum. The better people are at lying, the worse they must be at detecting lies. Every lie is told to another person, and if their lie detection ability is strong, the other's lie-telling ability would be weak. So, to say people are expert liars is another way of saying they are pitiful lie detectors. One being true automatically makes the other true as well.

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This reveals something we have known since antiquity but rarely think about: people are thoroughly gullible. This trait was not studied until recently. Dr. Timothy Levine compiled and examined four decades of deception detection research, including hundreds of individual studies, to look at how well individuals detect lies. The people in the collected studies were from widely varying backgrounds (education level, career paths, lie detection training) and widely varying relationships between the speaker and listener (ranging from friends, family members, and intimate partners to police officers, prosecutors, and intelligence agents). In the aggregate, across hundreds of studies, people were able to detect lies about 54 percent of the time.[10] This number held steady regardless of whether the lie was read, seen, or heard and was consistent across cultures, languages, and geographic regions.

Once again, we see our lie detection ability is only a smidge north of random chance. To determine if someone is lying, flipping a coin is about as effective as human perception, skill, and intuition.

But Dr. Levine concluded the number is likely lower. That is, the 54 percent number *overstates* our lie detection ability. Why? Because the studies underlying that number were set up specifically to measure lie detection ability, which involved telling test subjects to look for deception. It was under those conditions, when the test subject was *told* they might be lied to, that lies were detected with barely above random chance accuracy.

It is true that our lie detection ability (or inability) can be gleaned to some extent from studies designed to measure the trait. However, Levine went beyond these studies and looked at another set of studies, those *not* aimed at measuring lie detection per se, but that nevertheless involved lying to participants. In these other studies, researchers lied to participants as part of the setup, creating a fictional environment for the study's purpose, which was something other than deception detection. Levine pointed out that these other studies can also be analyzed as lie detection studies, although they are "usually not thought of as such."

In these studies, the test subjects discovered they were being lied to approximately zero percent of the time. That's right—zero. A coin flip, in other words, would have been vastly more accurate at detecting lies than the test subjects were in studies that more closely parallel real life.

In the real world, we are rarely warned, prior to interacting with someone, that there is a good chance they will lie and that we should therefore be on the lookout to see if they lie or tell the truth. Instead, we simply

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accept as true most of what people tell us. When we read, see, or hear a message, our default response is to accept it as true, or at least truthfully communicated. We assume the good faith of those communicating with us. It is no surprise, then, that subjects who are not warned they may be lied to almost never pick up on the fact they are lied to.

Stanley Milgram's electric shock experiment, one of the most famous social science experiments in history, provides a helpful case in point. Milgram, like many, had been dismayed by how ordinary people in Nazi Germany did horrible things to other human beings during World War II, only to later claim they had done it because they were "following orders." Milgram wondered if that might hold as true for Americans as it did for Germans. And so, near his Yale laboratory in New Haven, Connecticut, he set up an experiment to test this hypothesis.

Volunteer test subjects were obtained through an advertisement. These volunteers were told scientists were testing people's ability to remember word associations by using electrical shocks as an incentive. When each test subject arrived, he (all were men) was seated at a table with a list of word associations in front of him. He was told he would play the role of "teacher" and that he must read the list to another volunteer, the "learner," who would memorize the associations. Then, after the learner was ready, the teacher would begin to quiz the learner on the word associations. Every time the learner got an answer wrong, the teacher was told to flip a switch to deliver an electric shock to the learner. The shocks began at 15 volts and increased incrementally up to 450 volts, which can be lethal. Unbeknownst to the teacher, the learner was not a test subject at all but rather an actor hired by Milgram to pretend he was being shocked every time the "teacher" hit the switch.

Thus, the only person actually being observed and studied was the teacher, who was told that it was the learner they were studying. The true purpose of the experiment was to test the teacher's willingness to inflict suffering or even death on another human being if he was being ordered to do so by an authority figure. As such, every time the teacher objected to delivering the shock, particularly when it was getting near 450 volts, an authority figure in a white lab coat calmly ordered the teacher: "Please continue" or "You must proceed." Each protest from the teacher elicited the same flatly delivered order to continue.

A majority (65 percent) of the forty "teachers" who participated were willing to go all the way to 450 volts, even as the shocks elicited cries,

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screams, complaints of a heart condition, and finally silence from the learner. The experiment proved Milgram's hypothesis correct. Regular people really do produce suffering and death in others if they believe they are following orders.

But the experiment demonstrated another, unintended result: the test subjects failed to recognize *they* were the ones being studied. They did not realize they were being lied to. They accepted the authority of the scientist and the pain and suffering they inflicted as real. Their deception detection rate was at or near zero.

That was also the case for the hundreds of other experiments examined by Levine. These results reflect something deeply true, and perhaps deeply troubling, about people in general. In Levine's words, "We are hardwired to be duped."[11] We possess no reliable ability to detect we are being deceived.

When I told my mom I had dumped the bacon grease outside, she could not tell from my words, voice, facial expression, or body language that I was lying. Lies look indistinguishable from truth. Yet, while people cannot "see" a lie, most people believe they can. They look for deception cues, or "giveaways." These are verbal and nonverbal cues we associate with lying, include averting the eyes, blinking, fidgeting one's hands, appearing nervous, shrugging, smiling, repeating words, pausing while speaking, changing one's voice tone or pitch, misspeaking or speaking too fast, and saying "uh" or "um" too many times. People in cultures all over the world have similar, though not identical, laundry lists of so-called deception cues. None are reliable.[12]

A meta-analysis of studies from sixty-three countries revealed that people the world over fail to rely on accurate measures of truthfulness. Instead, people everywhere "are more likely to attribute deceit to speakers who avoid eye contact, shift posture more often, take longer to respond, talk faster, make more speech errors, have more pauses and hesitations, have less plausible content, contradict themselves, are less conversationally involved, convey uncertainty in their voices, are less friendly and cooperative, and act nervous."[13] Not one of these behaviors, or any other behavior we associate with lying, actually correlates with untruthfulness. True, some people do avert their eyes when they lie. But others avert their eyes when telling the truth. The same can be said for all so-called deception cues. Accordingly, these cues we rely on turn out to be worthless.

Training does not help. Even prosecuting attorneys, judges, and law

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enforcement officers who have received training to detect deceit, and who work day in and day out with suspects and witnesses whose credibility is critically important, are poor at lie detection. This inability to detect lies is so hardwired into us it might be impossible to overcome through education or training.

Are there reliable ways to detect lies? Yes—three of them. They are, however, imperfect and rarely available.

The *first* is to know the truth of the matter lied about. So, if someone tells you the car is green but you are standing next to it and you see the car is red, then you can conclude with confidence the person is lying. This was how my mother discovered I had lied about the bacon grease. At the time I told the lie, she had no way of knowing I'd lied. She likely would never have caught me had she not smelled and saw the truth for herself a few days later.

Although knowing or learning the truth is a reliable way to detect deception, in practice it is rarely an option. We have personal knowledge of so few things. The overwhelming majority of the information we hear, see, and read pertains to matters outside what we can know for certain or observe firsthand.[14] Also, we are susceptible to being wrong ourselves if we do not have firsthand knowledge. So, while knowing the truth can be effective in debunking a lie, it is, in practice, rarely available.

The *second* way lies can be reliably debunked is by confession. If a liar confesses, it exposes the lie. Without a confession, it is, in most cases, impossible to know with certainty if someone lied because we almost never know the truth for certain. A confession itself can be false, but we won't open that can of worms here.

Apart from knowing the truth or obtaining a confession, the *third* and final legitimate way to detect a lie, though considerably less reliable, is to identify a motive. This is, of course, far from foolproof. Just because someone is motivated to lie does not mean they are lying. However, motivation is often far more reliable than the deception detection cues we actually rely on, like averting one's eyes or speaking too fast. If a person is motivated to lie, knowing this is a helpful indication (though no guarantee) the person may be lying.[15]

So, why don't people lie more often then? That is, if there is so much to be gained from lying, and it is so easy to get away with, why be truthful at all? In short, because even if you could get away with it almost all the time, lying is not the smartest decision for most people most of the time.

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For the average person, lying too much, or about the wrong things, is a very bad idea.

HARMLESS AND HARMFUL LIES

Once you accept that people are experts at lying and inept at detecting lies, the inevitable prediction is people will lie whenever it suits them. This turns out to be true. But, for most, this does not mean lying all the time, which one might expect. Although the *chances* of being caught in a lie are small, the *consequences* of being caught are sometimes huge. This is particularly true if you are caught in a lie by those close to you, like your boss, your spouse, or your best friend. Or, as I so painfully learned as a six-year-old, by your mother. So, even if you can generally lie and get away with it, it quickly becomes clear that, for most people, it is not beneficial to lie all the time, or even most of the time, at least not about important matters.

But it *is* beneficial to lie frequently about little things, particularly if those things are difficult to corroborate. We call these little fibs "white lies." Nearly everyone tells white lies multiple times throughout the day. Most of these are harmless, or even helpful—a net positive for the liar, the lied-to, and society. Here is a partial list of white lies we tell one another on a day-to-day basis:

- "It's nice to meet you."
- "Of course, I remember you!"
- "The traffic was horrible."
- "I'm five minutes away."
- "Your hair looks amazing."
- "Have you lost weight?"
- "That [dress/suit/skirt] makes you look skinny."
- "You have such a lovely home!"
- "That was my idea."
- "Oh, yeah, that makes sense."
- "This is my top priority."
- "I forgot to do that thing you asked me to do."
- "I barely ever go on social media."
- "Sorry, my phone died."

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- "My computer died."
- "The program crashed."
- "It all got erased and I had to start over."
- "I thought I already sent that email. It must be stuck in the outbox."
- "This is the best gift ever!"
- "I can't come into work. I'm sick."
- "My kid is sick."
- "My dog is sick."
- "I don't really care about politics."
- "I wish I could make it to the meeting, but I've got a [fill in the excuse]."
- "No, officer, I have no idea how fast I was going."
- "Let's keep in touch."
- "I'll call you later."
- "I love it!"
- "I'm from Canada." (Used often by Americans abroad.)
- "I'm fine."
- "I'm listening."
- "I'm busy that day."
- "The kids and I didn't just watch TV the whole time you were gone."
- "I've slept with [number of] people."
- "Sex with you was amazing!"
- "I wasn't checking him/her out."
- "Your cooking is delicious."
- "I would love to hang out after work sometime."
- "Don't worry, it's okay."
- "That was funny."
- "Tell me the truth, I won't be mad."
- "I didn't throw it away."
- "I've been swamped lately."
- "Just kidding!"
- "I didn't do it."
- "Yes, I have read and understand the terms and conditions."

This list could go on for many pages.[16] We frequently tell white lies like these to smooth over a conversation, keep an interaction pleasant, or maintain a relationship. In short, everyday lies are fundamental to human cooperation, which many have identified as our species' most important asset.[17]

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There are myriad factors that contribute to our ability to cooperate on a mass scale. One is fibbing—how we lie and believe the lies of others. This helps lubricate social interactions and keep interpersonal connections strong and running smoothly between family members, friends, coworkers, and total strangers.

Of course, white lies are not necessarily always harmless. Some, like Sam Harris, claim we would be better off eliminating even white lies from our lives. Harris argues for total honesty under almost all circumstances.[18] But that position cannot square with the social reality that lies are an important part of the way we interact. Would we even *want* total honesty from everyone at all times? Alain de Botton insists love means sparing those you care most about from total honesty and openness. If you love someone, he insists, you should decidedly *not* dump all the ugliness you're capable of onto that poor person. You owe it to them to be dishonest in a loving way.[19] For the most part, well-socialized individuals operate this way—not only with those they love but with everyone with whom they interact. If you take others' feelings into account, you will say things that make the interaction more pleasant, or at least palatable, for the listener.

In a typical ten-minute conversation, we tell an average of two to three white lies. We don't even really think of these as "lies" most of the time but rather as mere fibs or exaggerations. Whatever we call them, most of these little untruths improve the interaction for both parties. And though we do fib quite frequently, we tell the truth far more often, particularly about matters of consequence.[20]

It is obvious why. Even if we get away with it, lying has a cost. Every lie we insert into a conversation creates a problem. From then on, we must remember the lie and be careful to adhere to it. For most, this is too difficult most of the time. Moreover, if the truth later comes out, which it sometimes does, the cost for having lied is even greater. The liar suffers twice. First, the listener's discovery of the truth ruins what the speaker had intended: the listener no longer believes what the liar wanted them to believe. Second, exposure of the lie also exposes the speaker as a liar. When you find out you have been lied to, you are probably not happy with the liar. This discovery breaks trust and may sour your relationship. You will be more skeptical of what the liar tells you, at least for a time, if not forever. It might end your relationship altogether.

And there are yet other reasons most of us keep our lies to a minimum. If you go to a coffee shop and place an order for a grande caramel

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macchiato, you might very well lie about pleasantries like how great of a day you're having or how happy you are to see the barista, but you will almost certainly be truthful when you place your order. If the barista asks for any clarification, you won't think twice about telling the absolute truth about what you want. In such circumstances, which are common, we take great care to be perfectly honest. If we lie, we make it more difficult for ourselves to get what we want. This applies broadly to many interactions, both commercial and social, with intimate friends and family as well as with total strangers. We most often want people to know what we truly think, like, or want. Very often, if we mislead others about these topics, we deprive ourselves of something we desire or need. Most of the time, it pays to be truthful.

This is true for most people, but not for everyone. To some, lying is not an occasional stopgap to help smooth out a conversation, transaction, or relationship. Rather, it is a tool to manipulate others into helping the liar gain money, employment, promotion, power, sex, or anything else they desire. These individuals are "prolific liars." Unlike most people, prolific liars tell a huge number of lies, big and small. In fact, although prolific liars are few, they tell more lies than everyone else combined. Accordingly, "a relatively small group of people in our society is responsible for the vast majority of the lying and dishonesty."[21] In fact, less than 5 percent of people—the prolific liars—tell most of the lies, including the ones that are most harmful.

Two recent studies, one in the United States and the other in the United Kingdom, which surveyed thousands of adults, revealed just how unevenly distributed lying is among the population. It turns out the majority of people tell a statistically insignificant number of daily lies of consequence—falsehoods that rise above the level of a fib—somewhere between zero and two per day, while a tiny fraction of adults tell more than twenty lies per day, in some cases far more than twenty. Numerically, this means prolific liars, though few in number, tell more lies than everyone else combined.[22]

And this is what makes prolific liars so dangerous. They are the exception to the rule. They exploit the fact we are hardwired to believe what others tell us. This hardwiring helps us interact with most people at home, at work, and out in the world, but when dealing with prolific liars it opens us up to manipulation and deceit.

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THE ACCELERATING SPEED OF LIES

Lies have always spread quickly. Most are familiar with the apocryphal Mark Twain quote that says, "A lie will travel halfway around the world while the truth is pulling on its boots." Twain never actually said this. But the fact the quote is nevertheless widely attributed to him makes it all the more apt. Many others throughout history have made the same observation; for instance, in 1710, 1820, and 1859.[23] And they were right. Lies are fast. Truth is slow.

But what does this really mean? Obviously, there is no difference in the actual speed by which a false statement or a truthful statement travels through the air, over a wire, or on a page. But lies *do* spread faster from person to person, are repeated more often, are believed more quickly. This makes a lie appear to travel faster when, in fact, the only difference is the speed by which we believe it and repeat it. Like a virus, a lie spreads not of its own volition but by people's unwitting assistance.

In today's digital world, this has become a far greater problem than ever before. Lies travel far faster than in Twain's time. We spend a large part of our days staring at screens. We read news, scroll social media feeds, watch YouTube videos, and use search engines to look up anything we might be curious to know. We read, see, and listen to words put on the Internet by people we've never met. We spend a shocking amount of our time online doing this. The latest figures on average daily screentime, depending on how you look at them, are either horrific (as in, I can't believe we spend so much time online) or comforting (at least I'm not alone). Even before the COVID pandemic, Americans were spending an average of eleven hours per day looking at a screen, between their laptops, smartphones, tablets, and TVs. That number has since increased. Although data is still coming in, studies are showing a remarkable increase in use of screened devices, and one study of two thousand adults revealed an average of fifteen hours per day staring at screens. Of course, some of this time is now spent on Zoom conferences, phone calls, and otherwise remotely working or studying. However, studies on usage reveal, not surprisingly, that we are spending more time on apps and watching YouTube than we were just a year ago. We are increasingly eager to absorb content aimed at our eyes and ears. About 30 percent of adults say that they are online "almost constantly," although many more likely do not want to report it.[24]

Given what we now know about how poor we are at distinguishing

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falsehoods from truth, the sheer amount of time we spend staring at screens and absorbing information, much of it false, should alarm us. We are hardwired to believe most of what we read, see, and hear, whether we want to or not. Truth bias and truth-default ensure we will remember many lies as true, *even if they are explicitly labeled false*.[25] Thus, what we consume with our eyes and ears paints our picture of perceived reality, regardless of how true or false it might be or whether it is said in good or bad faith.

In recent years, false and misleading content online has been rising sharply. A team of MIT researchers studied the remarkable increase in purposefully false claims—as distinguished from spin, bias, and mistakes—spread on Facebook, Instagram, Twitter, and other platforms. The falsehoods, which the study called "fake news," consisted of "entirely fabricated and often partisan content presented as factual." The researchers examined 126,000 stories tweeted by about three million people more than 4.5 million times. They found that falsehoods, lies, and baseless conspiracy theories travel "farther, faster, deeper, and more broadly than the truth." Sound familiar? They also discovered falsehoods are 70 percent more likely to be retweeted on Twitter than the truth and reach their first 1,500 people six times faster. Furthermore, untrue stories also had more staying power, carrying onto more "cascades," or unbroken retweet chains. The speed of lies online increases even more with political news and information than with other kinds of information. Interestingly, the researchers noted that auto-generated media posts (i.e., bots) tended to spread true and false information at the same rates, meaning human beings were most responsible for speeding up the spread of false information.[26]

Why we spread lies faster than truth is yet to be fully explored. Clearly, however, there are several factors. One is that people are drawn to stories that are novel and unusual. People want to hear and read about news and gossip that surprises and shocks. Fake news, conspiracy theories, and outright lies generally fit this bill far better than boring reality. Moreover, people are drawn to, and share more often, stories that affirm their beliefs. This has always been true, and probably always will be.[27] People simply "prefer information that confirms their preexisting attitudes, view information consistent with their preexisting beliefs as more persuasive than dissonant information (confirmation bias), and are inclined to accept information that pleases them."[28]

Lies are nothing new. The digital world, however, is. And this digital world has made new tools available to those who seek to mislead for their

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own gain or advantage. These tools include people's personal data and search history and powerful algorithms designed to increase engagement, not to mention weaponized trolls, bots, and fake news.[29] This new arsenal, available to a select few, allows prolific liars who hold power or influence to manipulate public opinion for self-serving purposes.[30]

This is uncharted territory. Those who have the enormous resources and clout to speak to the masses, which I refer to throughout this book as *leaders*—a term that encompasses not only those in politics but those who own and run corporations and media platforms as well—possess unprecedented access to our thoughts, beliefs, and desires, and they are using these, collected using powerful algorithms that crunch unfathomable amounts of personal data, to manipulate us for their own ends.

The results? People absorb a frightening amount of disinformation daily. Often, they—*we*—buy into it. We are living in what some call the post-truth world, where truth may not have changed but our ability to find it, and recognize it, is vanishing quickly. The ramifications are vast—and scary.

But it's even worse. Not only are human nature and new technologies on the liars' side but so too is the law. The First Amendment actually protects those who spread and profit from harmful disinformation, but leaves to fend for themselves those who fall victim to it. This gives those who wish to manipulate the public for their own ends an insurmountable advantage. They are rewarded for their deceit.

Is it hopeless? Are those who mislead and manipulate the public destined to prevail?

The answer depends largely on whether lies disseminated to the public are viewed as a problem of "false" speech or a problem of "fraudulent" speech. There is a world of difference between these two ways of framing the problem, at least in the First Amendment context. If it is viewed as "false" speech under the First Amendment, the law will continue to bend heavily in favor of those who spread profitable falsehoods. If, instead, it is viewed as "fraudulent" speech, the law might, through carefully and narrowly-tailored means, be modified in favor of protecting those who are duped.

But to call it fraudulent speech, we must first determine if spreading disinformation can, indeed, be fraud. To answer this question, we must first gain a clearer picture of just what fraud is and how it works.

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2

When Dishonesty Crosses the Line

HOW FAILING TO UNDERSTAND FRAUD RESULTED IN LAWS TOO WEAK TO FIGHT IT

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Lying is almost always legal, and for good reason. Most lies are harmless, many even helpful. And given how often we are untruthful in everyday interactions, any attempt to outlaw all falsehoods would never work. Any possible benefit of doing so would be vastly outweighed by the harm. The same principle applies to prohibiting no lies at all. Allowing people the freedom to utter every falsehood under the sun would be disastrous.

Imagine a reporter who publishes a story claiming his neighbor molested multiple children when in fact the reporter knew his neighbor hadn't, or at least had no reason to believe his neighbor had. Or what about a witness who takes the stand in court and, knowing her friend committed a murder, falsely claims her friend was with her at the time of the crime, providing an alibi. Or what about a used car salesman who knows that a vehicle's brakes stop working when driving downhill but advertises it as having brakes that are "like new" and "in perfect working order."

Each of these lies is too harmful to allow. This is reflected in the fact each is prohibited by law. The three would, respectively, meet the elements of defamation, perjury, and false advertising and may run afoul of other laws as well. The risk of harm each lie poses outweighs the benefit gained by allowing people the freedom to tell such lies.

Many discussions around dishonesty center on asking whether it is wrong or unethical to lie. For Immanuel Kant (1724–1804), telling a lie violated

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the categorical imperative. As Kant put it, "By a lie a human being throws away and, as it were, annihilates his dignity as a human being."[1] Thus, one "who does not himself believe what he tells another" violates a fundamental principle. Accordingly, Kant views telling a lie as always morally wrong.[2] Francis Bacon (1561–1626) arrived at the same conclusion. He compared lying to adding an alloy to a gold or silver coin, for though it may strengthen the metal, it in all cases destroys the precious metal's purity.[3] While Saint Augustine (354–430) recognized the complexity of the issue, that "it makes a great difference with what intention and on what subject one lies," he concluded, nevertheless, that "every lie is a sin."[4]

But posing the question on lying in terms of ethics or morality only makes sense if one is looking at it from a philosophical or religious perspective. If one is looking at the law, exploring the morality or ethics of lying misses the point. Indeed, such questions are moot. Being dishonest is normal, inevitable, and commonplace. That is, right or wrong, lying happens. There may be interesting philosophical differences between, say, lying about being stuck in traffic or about having eaten a cookie versus lying about being faithful in a relationship or about having graduated from an elite college. But such moral discussions hinge on subjective judgments. Our gut feelings tell us which lies are morally wrong and which are not.

If we are to make progress on what to do legally about dishonesty, we must move beyond gut feelings. We must ground our discussion in something more tangible.

The important question, then, is not whether a lie is wrong or unethical—such questions may be unanswerable in any case—but rather whether a lie is too harmful to allow. Virtually all lies are at least minimally harmful. The harm ranges from infinitesimal to extreme. Some cause intangible harm to feelings or rights. Others cause harm to health. Some cause death. Even the most benign white lie often causes hurt feelings if the dupe learns they were lied to, even if the lie was for their own good. Being lied to carries with it harm in all, or almost all, circumstances. So, restricting all "harmful" lies would be akin to restricting all lies, which, as just discussed, is impossible and undesirable.

So, how *wrong* any particular lie is has little value from a legal perspective. When one steps back and looks at the subject of lying in society, the conclusion they typically arrive at, which legal thinkers have arrived at for thousands of years, is that there are lies we must allow and others we cannot. The ones we cannot allow are simply too harmful to individuals and society.

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We do not have one name for this category of unallowable lies; we have several. There are the three already discussed: defamation, perjury, and false advertising. Then there are others. Take, say, false claims made to incite a crowd to violence, false threats against others, lies that cause severe emotional distress, and falsely impersonating an FBI officer or any federal government worker. Each of these are lies that are too harmful to allow, as determined by society and dictated by law.

Fraud is a category of specific falsehoods that we determine too harmful to allow. To recap, fraud occurs where a liar deceives a dupe for advantage or profit and causes nontrivial—and usually unacceptable—harm to the dupe or to others. The amount of harm caused by this kind of lie is precisely what makes it fraud or not. If it causes merely trivial harm, it is not normally considered fraud. It is generally not illegal either. But the more harm it causes, the more likely we will view it as fraud, which we generally aim to prohibit and to avoid falling victim to.

But, unlike the other categories of prohibited falsehoods above, fraud covers a vast cross-section of behavior—when one deceives another in a harmful, self-serving manner. How can we reliably and fairly determine which frauds to prohibit and which to allow? Societies have struggled with this question for thousands of years. Not only was fraud already rampant before money was invented, when merchants bartered weights and measures of commodities and metals[5]—indeed, it has been noted that fraud was likely the driving force for the invention of coin and paper money to reduce deceit in one-on-one transactions—but fraud can be found even further back in history than that.

There are references to fraud, and evidence of it, in the oldest writings ever uncovered. There is an impressive array of deceit, for instance, in the *Epic of Gilgamesh*, the oldest written story, and in *The Iliad*, *The Odyssey*, and numberless other ancient stories predating the Bible.

The Bible, of course, is no exception. Its opening book, Genesis, describes the creation of the human race by way of two deceptions: the devil deceives Eve into taking and eating the forbidden fruit, and Eve, in turn, deceives Adam into eating it as well. There are dozens of stories of deceit in the Bible, as well as rules and teachings condemning dishonesty. The Eighth Commandment states, "Thou shall not bear false witness against thy neighbor."[6] The Book of Proverbs contains a list of behaviors or actions that are an "abomination unto" God, which include "a lying tongue" and "a false witness that speaketh lies."[7] Like the Bible, other holy books

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contain similar references to deceit, as do numerous other ancient texts. It would be a monumental task to catalogue the fraud and deceit in archaic literature and scripture.

For as long as we have dealt with deception, we have imposed laws to thwart it. We know this because the oldest legal codes ever uncovered, inscribed onto clay tablets and stone slabs, prohibit specific categories of lies. The Code of Hammurabi from ancient Sumer, which may be the oldest known complete set of laws—though other *partial* legal codes have been found—dates to four thousand years ago. It contains 285 laws, "arranged almost scientifically under the headings of Personal Property, Real Estate, Trade and Business, the Family, Injuries, and Labor." In many respects, Hammurabi's code is "more advanced and civilized than that of Assyria a thousand and more years later, and in many respects 'as good as that of a modern European state.'"[8]

Its first four laws prohibit specific falsehoods. The first three forbid, on pain of death, falsely accusing another of certain crimes. The fourth law prohibits "bearing false witness" about silver or grain.[9] This law, an early analogy to today's fraud law, took aim at two of the most common ways Sumerians deceived for profit. First, by way of falsifying the weight or quality of silver, where minute differences "make a great difference in the value,"[10] and second, by way of exaggerating the weight or quality of grain. In both cases, it was an arduous task to get accurate measurements.

Take silver. "Before the institution of coined money," unless a buyer or seller went through the "tedious and difficult operation" of weighing and assaying the metal, "people must always have been liable to the grossest frauds and impositions, and instead of a pound weight of pure silver," they "might receive in exchange for their goods an adulterated composition of the coarsest and cheapest materials, which had, however, in their outward appearance, been made to resemble" that metal.[11]

Grain likewise provided opportunities to profit through deceit. Putting a thumb on the scale; adding water, sand, dirt, or other cheap, heavy substances to the grain; or exaggerating the weight or quality of a consignment of grain proved too tempting to pass up for many looking to pad their profits. These practices were early versions of today's fraud schemes, and Hammurabi's fourth law was aimed at curbing the practice. This means the oldest complete legal code, and one of the oldest *writings* ever recovered, has as one of its first laws a law against deceiving for profit.

This shows how little we have progressed on this front in the past four

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millennia. The same problem still plagues us; people still, if given the chance, manipulate and deceive to obtain what they want, regardless of the harm they cause. We continue to be duped, and to suffer damages. We, as a society, are still grappling with just how to rein in some of the most harmful frauds.

Historian Robert Leflar remarked that "fraud and misrepresentation are as old as human communication."[12] With language came new opportunities to deceive for profit. Evidence shows us that early humans exploited these opportunities. Fraud, then, has been integral to human interactions throughout history. But what if it was older even than the advent of "human communication"? What if this impulse and ability to dupe others to get what we want is not thousands of years old but millions? Would that change how we think about the problem? Would this insight help move us closer to finding a workable solution?

WHAT OTHER MAMMALS TEACH US ABOUT HUMAN FRAUD

Dr. Marianne Heberlein, a researcher in the Department of Evolutionary Biology and Experimental Studies at the University of Zürich, noticed one of her dogs do something odd. She was in her backyard with her two Irish Terriers, Peri and Hira. Peri, a male, was sleeping in the spot both dogs preferred. Hira, a female, was standing nearby when she suddenly began growling at the trees behind the backyard and took a few steps toward them. Marianne looked to see what Hira was growling at but saw nothing. Then Hira barked and ran four or five steps toward the trees. That's when Peri jumped up and began barking, running across the yard. The moment Peri did this, however, Hira darted to the sleeping spot and plopped down.

Poor Peri stood there barking at the top of his lungs for a good minute. Marianne, who watched the whole thing unfold, knew he was barking at nothing. She watched Peri trot back to the sleeping spot, only to find it now occupied.

The first time Marianne saw Hira deceive Peri in this way, it caught her attention. As a canine behavior expert, she was struck by just how human-like it appeared to be. Hira had planned out and executed a brilliant deception that worked so well, not only did she get what she was after but her victim, Peri, had no idea he had been duped. Hira scammed Peri out of

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the sleeping spot in this manner a number of times, but Peri never caught on.

Dog owners have been surprised to see such calculated deceit among dogs probably for as long as humans have been keeping them as pets. One dog owner was astonished how one of his dogs would run to the front yard and bark at nothing, which would cause the other dog to run to the front to bark, leaving the first dog free to run back and steal the other dog's food.[13] Dogs deceive not only each other, but also their owners—to get more food, to get a treat, to go for a walk, to go outside, or to come inside. Elisha Stynchula, a certified dog trainer and dog owner, was surprised by how her dog would often use body language and whimpering to get more food. "In my household," she said, "my dog will try and tell my husband I didn't feed him dinner if my husband comes home after I fed the dog." "He's a smart dog and loves food," she added, "so he will try to get two dinners if he can."[14]

But Heberlein was skeptical. People, she knew, project human emotions, intentions, and abilities onto animals. We see ourselves in them. Some of the oldest stories, like Aesop's fables and classic Greek mythology, and art, like cave paintings and ancient Egyptian frescos, contain anthropomorphism—a fanciful blending of humans and animals. We like to think animals are more like us than they really are. Nowhere is this truer than it is for our pets.

As a canine behavior expert and a scientist by training, Heberlein was well aware of this impulse. Nevertheless, she could not shake the feeling that what she saw Hira do really was quite humanlike, a kind of intentional manipulation we think only humans capable (and guilty) of. Heberlein strongly suspected that what she was seeing really was conscious deception by one dog of another. But could she prove it? She decided to test her hypothesis in a controlled experiment.

Heberlein and a group of researchers at the University of Zürich gathered twenty-seven dogs of different breeds to find out if they had the capacity to use deceit to get something they want—a sausage. She and her researchers put two boxes on one side of a room, one with a sausage in it and the other one empty. All dogs were trained to follow a simple verbal command; when any trainer said, "Show me the food," the dog led the trainer to the box with the sausage in it. It was repeated multiple times to ensure every dog knew what to do on hearing the command.

Next, each dog was paired with two human partners, one generous and

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the other selfish. When the generous partner told the dog "Show me the food," and the dog led her to the box with the sausage in it, as the dog was trained to do, the generous partner took out the sausage and gave it to the dog. But when the selfish partner said, "Show me the food" and the dog led her to the box with sausage in it, the selfish partner took the sausage out and put it in her pocket, withholding it from the dog.

If, however, the dog led either partner, generous or selfish, to the empty box—that is, the wrong box—the partner would show the dog that the box was empty and leave the sausage-containing box untouched. Then, in the final step of the experiment, the dog would be returned to their owner, and the owner would go and look in both boxes. If the sausage was still in its box, the owner would take it out and give it to the dog.

Heberlein put each dog through the whole scenario with the generous and selfish partners numerous times. It always began with the command "Show me the food." At first, the dogs led both partners to the correct sausage-containing box. The generous partner each time gave the dog the sausage. The selfish partner always withheld it.

Then, the dogs began changing their behavior. During the course of the two days, one dog after another began deceiving the selfish partner by leading her to the empty box, knowing they would later get the sausage from their owner. These same dogs, however, continued being truthful with the generous partner. Every dog knew what the command "Show me the food" meant. They knew what they were supposed to do.

But as the experiment wore on, more and more dogs—and finally, *most* dogs—misled the selfish partner, steering them to the empty box. The experiment showed that at least some dogs certainly do, under the right circumstances, deceive to get something they are after. In this, they are far from alone.

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It is not just dogs. Other mammals deceive in a conscious way to obtain things they want. Indeed, several species of primates, like chimpanzees, deceive in ways even more similar to humans. This should not surprise us, since we share 98.6 percent of our DNA with them. Humanlike conscious deception has been observed time and again in chimpanzees. In one experiment,

> food was hidden and only one individual, named Belle, in a group of chimpanzees was informed of the location. Belle was eager to lead the group to the food

> but when one chimpanzee, named Rock, began to refuse to share the food, Belle changed her behaviour. She began to sit on the food until Rock was far away, then she would uncover it quickly and eat it. Rock figured this out though and began to push her out of the way and take the food from under her. Belle then sat farther and farther away waiting for Rock to look away before she moved towards the food. In an attempt to speed the process up, Rock looked away until Belle began to run for the food. On several occasions he would even walk away, acting disinterested, and then suddenly spin around and run towards Belle just as she uncovered the food.[15]

Similar deceptive tactics have been observed in other chimpanzees, in the wild and in captivity. A chimpanzee named Nim Chimpsky, for instance, was trained in American Sign Language and learned 125 signs. Several trainers observed that when Nim got tired or bored of learning, he would sign the words for having to go to the bathroom even though he did not have to go. He pretended to have to pee to end the lesson. Nim also once ate a bowl of cereal that was not his, then hid the bowl in a deep sink and hurried back to the very same spot he was at before. When asked about the cereal by a trainer, Nim lied about who ate it and where the bowl was.[16]

This is common behavior among primates. The chacma baboon, for example, native to southern Africa, has been observed exhibiting a wide variety of "intimate tactical deception" techniques. There are so many ways chacma baboons deceive one another that researchers Richard Byrne and Andrew Whiten decided to classify the techniques into categories, including: using warning screams to trick other baboons to run away so that the screamer could access buried food; using an exaggerated "looking" gesture, which in an honest context would mean detection of a predator, produced by a juvenile to avoid attack by an adult male; recruitment of a "fall-guy," a third party used to distract or draw attention or aggression away from an individual; and using one's own movement pattern to draw group mates away from food caches.[17] Byrne and Whiten even broke these categories into subcategories, including the type of modality used (e.g., vocalization, arm movements, facial expressions) and what the action would have signified if observed in an honest context. The sheer number of different ways baboons dupe one another is impressive but not surprising. After all, baboons, like chimpanzees, are closely related to humans, sharing 94 percent of our DNA.

Like chimpanzees and baboons, gorillas have been observed consciously

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deceiving. Two gorillas seen doing this were Koko and Michael. Koko, a female western lowland gorilla, was born at the San Francisco Zoo and lived most of her life in Woodside, California, at the Gorilla Foundation's preserve. She learned to "speak" with trainers using more than one thousand signs from American Sign Language. In addition to the signs she could make, she also demonstrably understood an additional two thousand words of English. This put Koko's vocabulary at the level of a typical three-year-old human. She also scored between 70 and 90 on various IQ tests. One researcher who worked day to day with Koko, Mary Lee Jensvold, observed that[18]

> Koko and the other signing apes absolutely use language the same way people do. She was commenting on the world around her and signing about her activities, her day and her thoughts. I liken it to talking to a child—not because she wasn't mature, but because she was in a dependent relationship. The conversation you would have with her is like the conversation you would have with a child or an elderly person in your care.

One time, Koko broke a toy cat. When trainer Francine Patterson asked Koko who had broken it, Koko responded by signing, "Kate did it." Kate was another trainer. Patterson thought it might be a mistake or an error. But when she pressed, Koko eventually gave in and admitted she had broken the toy. On another occasion, Koko sat on the kitchen counter and caused it to cave in. When Patterson arrived and saw the broken counter, she asked Koko what happened to it. Koko signed, "Kate there bad." Once again, Koko later admitted it was her, but not until trying her best to pin the blame on someone else.

One of Koko's lies was recorded on video. When Patterson reprimanded Koko for chewing on a crayon, Koko replied, "lip," and began moving the crayon as if she was applying lipstick. When pressed, however, Koko signed, "bite" and "hungry." Another time, Koko was trying to break a window screen with a chopstick. When caught, Koko signed, "smoke mouth" and pretended to smoke a cigarette. Patterson recalled another time Koko lied while playing a game of tag with trainer Eugene Linden: "In her excitement, Koko gave Eugene a small bite when he caught her. 'What did you do?' I demanded instantly. *Not teeth*, was her innocent explanation. 'Koko, you lied!' I replied. *Bad again Koko bad again*, admitted a contrite Koko." Perhaps Koko's most famous lie is known as "the sink incident."

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One day, Koko ripped her sink out of the wall and tossed it a few feet away. When the keeper arrived and saw the torn-out sink, she asked Koko what had happened to it. Koko, who had an innocent look on her face, pointed at her kitten, All Ball, who was sitting nearby, and signed, "Cat did it."

Clearly, lying and deception are not as uniquely human as we once thought. Mammals like dogs, chimps, baboons, and gorillas convey falsehoods to others of their same species and to humans, and that they do so to create a false belief in the mind of the dupe. And this behavior is every bit as deceptive, and as *consciously* deceptive, as anything humans do. That is, these animals, and almost certainly others, determine that something they want can be obtained through deceit, and they use deceit to get it. But though we associate deceitful behavior in humans as wrong, unethical, or immoral, these judgments are a human invention and are, therefore, meaningless when applied to nonhuman animal behaviors. Thus, even if we determine a particular manner of deceit to be contemptible between humans, something we should prohibit and punish, that same deceit cannot be judged the same way when applied to, say, dogs or gorillas.

It is one thing to recognize humanlike behavior in other animals. It is another to judge those animals for transgressing human-made rules of acceptable behavior.

Instead, we can learn about ourselves from what we see in these animals. They are teaching us a crucial lesson—if only we listen. Their behavior teaches us about our own deceitful impulses and vulnerabilities. Why? Because the fact these mammalian relatives of ours exhibit the same opportunistic dishonesty we recognize in ourselves means that our ancestors, going millions of years back, very likely duped one another in a similar manner.

The last common ancestor (LCA) we share with canines lived one hundred million years ago. This number is important. Why? Because scientists frequently observe traits we share with other species and draw conclusions about those traits based on how long ago we shared a common ancestor with those species, such as gender identity and gender differences in bonobos (LCA eight million years ago), personality traits in mammalian farm animals (LCA varies), personality traits in squirrels (LCA eighty-eight million years ago), and even hierarchical societal structures in lobsters (LCA 350 million years ago).[19] We have learned much about our own

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cognitive abilities, biological traits, and societal structures from studying these traits in other animals, and most particularly other mammals.

Accordingly, evidence strongly suggests we and our ancestors have lived with, and fallen for, consciously deceptive behavior for at least one hundred million years. If we disregard canines and accept only great ape deceit analogies, this still puts the age of our conscious deception trait at no less than between eight and twenty million years. In any case, the problem is millions of years old. And throughout that vast expanse of time, through ages and epochs we cannot even fathom, we and our ancestors have been manipulating one another with actions and words to deceitfully obtain things we desire and deprive others of things rightfully theirs.

Conscious deceit has profited those who carry it out, and harmed those who fall for it, since long before our species invented language (about two hundred thousand years ago), or first stood upright and walked on two legs (about six million years ago), or lost our tail (about twenty-five million years ago). Our ability to deceive, and inability to detect deceit, are traits deeply ingrained in us. They are integral to how we operate, think, and interact. We cannot hope to suppress or extinguish these traits any more than we can suppress or extinguish other fundamental human impulses, like the drive to accumulate wealth or status, or to own a home, or to take care of one's own family and raise one's own children, or to fall in love or find meaning in life. These feelings and motivations are hardwired into us. So, too, is dishonesty and vulnerability to the dishonesty of others. Recognizing this, and coming to grips with it, might help us figure out how seriously we should take the dangers posed by harmful dishonesty, and what measures we should take to protect ourselves against those dangers.

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DEFINING THE PROBLEM

We humans think we are special, and not without good reason. After all, we rule the planet and are capable of feats unmatched by any other animal on Earth. We are progressing, in many areas, at breathtaking speed. In the past couple of centuries, our science and technology have revealed where diseases come from, what we are made of, and how vast our universe is. We can fly, in a few hours, across an ocean. We send satellites into orbit and astronauts to the Moon. We converse with people on the other side of the planet as if they were next to us. Devices we carry in our pockets

and purses give access to unlimited knowledge, endless entertainment, and instant communication. In myriad ways, we are, in historical perspective, godlike in our understanding of the world and ourselves. Indeed, we know unimaginably more, and can *do* unimaginably more, than we did a mere century ago.

But while we have advanced light-years in some areas of knowledge, in others we have advanced mere inches, if at all; for instance, we know little more today than we did thousands of years ago about what drives us, what makes us happy, what is the best and worst we are capable of, what the nature of virtue is, who makes a good leader, or what makes a good life. Anyone who has read even a sampling of, say, Aristotle or Plato grasps how stunningly little we have advanced regarding conduct, character, and ethics in the past two millennia, if not the past ten millennia. Many modern social and political problems, and our supposedly modern solutions to them, can be found well-articulated in ancient writings.

This book's aim is to address an ancient problem. The goal is not only to discuss it in a new way and bring it to the attention of more people but also to propose solutions to it, which might, if not solve it, at least make it less of a burden on individuals and societies. But let's be clear what the problem is and what it is not.

The problem is not that people are deceitful or that we too-easily fall for the deceits of others. Although these things are true, they are not problems to be solved. Rather, they are simply part of our nature—so ingrained in us that, even if they constitute a "problem," it will not likely be "solved" any time soon.

Instead, the problem this book aims to address is the avoidable harm now being done by dishonesty on a mass scale that is not only permitted, but rewarded. The problem, then, is that some of the damage being caused today by lies and deceit is unjustifiable and should be redressed by the laws aimed to curtail harmful dishonesty. This will require changes to the law, and I endeavor to suggest what changes to make so that the desired end result has a fighting chance of coming to fruition.

This is important now because, although fraud has existed in all societies and indeed predates human society, it poses a new threat many fail to recognize. This threat stems from the mismatch between scientific and technological advancements on one hand and unchanging human nature on the other. In the past century, there have been two revolutions in the way information is disseminated. In the early 1900s, it was the invention of TV

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and radio. In the early 2000s, it was the expansion of the Internet and social media. The combined effect of these two revolutions opened up vast new avenues for deceit while providing no new protections for would-be victims. Richard Sherwin, a scholar of law and popular culture at New York Law School, notes that the danger we now face from the spread of harmful lies "is particularly acute in a digital communication ecosystem where proprietary algorithms funnel and shape political discourse to advance not truth, but profit derived from maximized attention share online."[20] This makes those who seek to profit by deceit more dangerous than ever. Fraud now poses a threat to safety, liberty, and democracy where in prior eras it posed a threat primarily, and almost exclusively, to one's pocketbook.

But why call it fraud? There are so many other possible words to choose from, such as *dupe*, *con*, *scam*, *swindle*, and *bamboozle*. But, of all such synonymous terms, *fraud* is the one most used, and this makes it, if not the best choice, at least the most popular. *Fraud* is used more than twice as frequently as *deception*, three times as frequently as *scam*, and five times more frequently than *deceit*.[21] There are dozens of words that mean roughly the same thing as fraud in English. None is as widely used.

This is not surprising, given its deep history in our language. The word *fraud* traces its roots to Old French, *fraude*, by way of Latin, *fraudem*. The word entered the English lexicon by the mid-thirteenth century.[22] The term's usage changed little over the centuries, adapting primarily to incorporate the new ways people deceive one another in a gainful manner, and today it is the go-to word when referring to the myriad ways people swindle and scam. It is not limited to a particular law or legal standard. *Fraud*, as a stand-alone word, is far broader than any law on the books; when *fraud* is used in the label of a tort or a crime, it is, or should be, always accompanied by some clarifying label: bank fraud, election fraud, insurance fraud, securities fraud, common law fraud (or common law deceit), wire fraud, mail fraud, conspiracy to defraud, and so on. Thus, fraud describes a category of behavior larger and broader than any law; it describes unacceptably harmful deceptions in general, some of which are also prohibited by law.

To be illegal, as mentioned earlier, fraudulent behavior must meet the elements of a crime or a tort. If it does, it is not merely fraud but *actionable fraud*. But most fraud is not actionable. Put another way, most fraud is legal.

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"IT MAY BE IMMORAL, BUT IT APPEARS TO BE LEGAL"

Politics is the art of obtaining and holding power through nonviolent means. This usually involves a lot of lying—not because those who seek to govern are any more dishonest than anyone else, but because if popular support is the measure of success, which it always is in a democracy, then, to win, a candidate must convince voters that they are superior to the others seeking power. How does one convince voters of this? Step one is to forget what the truth might be—which is messy, nuanced, and most inconvenient—and to instead carefully craft a narrative where the candidate plays the hero and their opponent the villain. In real life, there are no heroes or villains. But people view the world in terms of heroes and villains, good and bad, us versus them. To enter a political contest, one must consent to engage in the fairy tales in which the voters already believe.

Telling fictional stories has always been integral to politics. Serving the public always involves dishonesty—even for those who truly aim to selflessly serve. To put into place programs and systems that assist the downtrodden or needy, one must first gain the power to do so, and power can be gained only through political processes.

Whether for admirable aims or abominable ones, lies have always walked hand in hand with politics. In recent years, however, a new kind of deceit has accompanied campaigns. It involves lying—not to draw potential voters in or to sow divisions but to swindle supporters out of money.

A scheme to trick political donors into giving more money than intended was detailed in a *New York Times* article by Shane Goldmacher. When supporters went to donate to the presidential campaign of Donald Trump, usually in response to an email, text message, or social media post, the donor would be taken to a web page containing a series of checkboxes, and the donor had to click through this screen to donate. The checkboxes on the page were auto-checked. Each had lengthy instructions next to it. And it was not clear, even after reading these instructions, what the checkbox meant and whether unchecking it meant "opt in" or "opt out." Written in bold was a warning: "If you uncheck the box, we will have to tell Trump you are a defector."

Donors, who were supporters of Trump and wanted to donate to his campaign, were left confused about what to do, and thousands of them left

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the checkboxes checked. After all, they did not want Trump to think they were a defector.

One auto-checked box made the donation a recurring gift. This meant the donor "opted in," often without knowing they had done so, to donate monthly, weekly, or, in some cases, daily. Another auto-checked box doubled the donation amount for recurring donations.

Using this tactic, and others like it, Trump's campaign targeted retirees, veterans, and chronically ill individuals who were more vulnerable. The result? Trump's campaign collected millions of dollars that donors never intended to donate.

In one case, a sixty-three-year-old man named Stacy Blatt, who was fighting cancer and living in hospice care in Kansas City on less than $1,000 per month, decided to donate to Trump after hearing, on the Rush Limbaugh radio show, that Trump badly needed campaign cash. Blatt made a one-time donation of $500. Or so he thought. Unbeknownst to Blatt, "another $500 was withdrawn the next day, then $500 the next week and every week through mid-October, without his knowledge—until Mr. Blatt's bank account had been depleted and frozen. When his utility and rent payments bounced, he called his brother, Russell, for help." The Blatts learned the Trump campaign had withdrawn $3,000 in under thirty days, so they called their bank to report that they were, in their words, "victims of fraud."[23]

"It felt like it was a scam," Blatt's brother said.

Blatt was not alone. Thousands were duped. In fact, it was estimated that about 3 percent of all credit card fraud claims in the United States in 2020 came from automatic donations made to Trump.

Victor Amelino, a seventy-eight-year-old in California, made a one-time $990 online donation to Trump. But because he failed to uncheck a box, the payment recurred seven more times, adding up to almost $8,000. "I'm retired," Amelino said. "I can't afford to pay all that damn money." Like Blatts, Amelino felt betrayed. The ones running the website, he said, were "bandits." Ron Wilson, another Trump donor, called the donation website "predatory." Wilson, an eighty-seven-year-old retiree in Illinois, made a series of small contributions totaling about $200. Within a couple months, however, the Trump donor platform "had withdrawn more than 70 separate donations from Mr. Wilson worth roughly $2,300."

Stephanie Ruhle, a host on MSNBC, interviewed Goldmacher about his *New York Times* article. Goldmacher recited a few of the tactics the Trump

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campaign used to target vulnerable and unsophisticated individuals. He explained how victims were duped out of what little money they had. Ruhle shook her head in disgust. She then remarked, "It may be immoral, but it appears to be legal."[24]

This remark captures the crux of the matter. Today, so much of the fraud we are exposed to, and directly targeted by, causes unacceptable harm but is nevertheless legal. We may not like it, but because it runs afoul of no law, we are forced to live with it and to suffer whatever injuries it inflicts.

This is not a Trump problem. Or a political problem. It is not unique to one politician, to one party, or to one side of the political aisle. It is not unique to politics at all. It is widespread. And it appears wherever people or groups have access to the public megaphone and where there is profit in convincing people to believe a falsehood.

This does not mean *all* politicians, *all* business leaders, or *all* media are engaged in out-and-out fraud. They are not. Honest people exist—and not just at the bottom of the economic scale. Some at high levels of government, industry, and media pursue power and profit in good faith. The problem, however, is that the guardrails put in place to keep people honest, and to hold them to account for harmful deceit, are simply not there for those who speak to millions.

Because dishonesty is allowed, it is widespread. And it should surprise no one that a great number of leaders in politics, business, and media frequently turn to fraud to further their agenda or bottom line.

In a way, this does not necessarily make the loophole in the fraud laws unique. It is a frequent refrain that laws imposed on the weak do not apply to the strong. There are myriad ways the political system, the justice system, law enforcement, the courts, and the law in general, both criminal and civil, are heavily weighted in favor of wealth and power.[25] The reasons, which are complex, involve, for example, money in politics, lobbying, gerrymandering, the public relations industry, and an economic system favorable to ever-increasing concentrations of wealth.[26] So, the inequalities of fraud law, the way it heavily favors wealthy and powerful interests, arguably puts it in conformity with the general trend.

But while this is arguably true, the inequality of fraud is in some ways unique—and uniquely problematic—due to the interplay between the rigid nature of law and the fluid and ever-changing nature of fraud. Those who defraud do so in such varied and imaginative ways that all such deceits could never, due to their sheer diversity, fit within any particular law. No

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law can be made to encompass every harmful dishonest act. But even if such a law could be designed, it would soon be outdated because the methods of deceit are ever-expanding and transforming. "Manipulation," Cass Sunstein notes, "has so many shades."[27]

Schemes to deceive, unlike the law, can, and do, take whatever form and shape best suits them from moment to moment. The law remains, by necessity, rigid. And in this frozen form it can only prohibit well-defined categories of conduct, which must be clear and unmistakable and which cannot be too broad or vague. Whereas a new fraud scheme can be thought up in the moment, and can be molded and shaped as it is carried out, putting a law in place to address that scheme is a slow and cumbersome reaction, which can be accomplished only through a lengthy political process. Thus, by necessity, actionable fraud is always only a small subset of fraud, similar to the way fraud is only a small subset of the much larger universe of falsehoods and lies.

The following diagram gives a rough visual depiction of the relative size and scope of lies, fraud, and actionable fraud (see figure 2.1).

This diagram is based not on empirical data but on a rough estimate of relative occurrence. The outer circle, which is largest, contains all lies. Within that is the middle circle, which contains all frauds. And within that is the smallest circle, which contains all actionable frauds. Each circle sits fully within the next larger one. Thus, every fraud involves lying, but most lying does not amount to fraud. Every actionable fraud is fraud, but not every fraud is actionable. Each smaller circle represents only a fraction of the larger one within which it sits.

When Stephanie Ruhle lamented that the campaign donor scam "may be immoral, but it appears to be legal," she was talking about conduct that falls inside the middle circle but outside the smallest circle. It was fraud, but not actionable.

This is the problem with fraud targeting the public at large. Too often, such large-scale frauds are not actionable. They are therefore permitted. This is the central problem this book aims to address: the law fails to protect us from some of the most harmful large-scale frauds. One reason this threat has largely flown under the radar is that most understandably see fraud through the lens of those who are duped. But to appreciate how to address fraud most effectively, including fraud on the public, we must first step into the shoes of those who do it. We must think like a fraudster.

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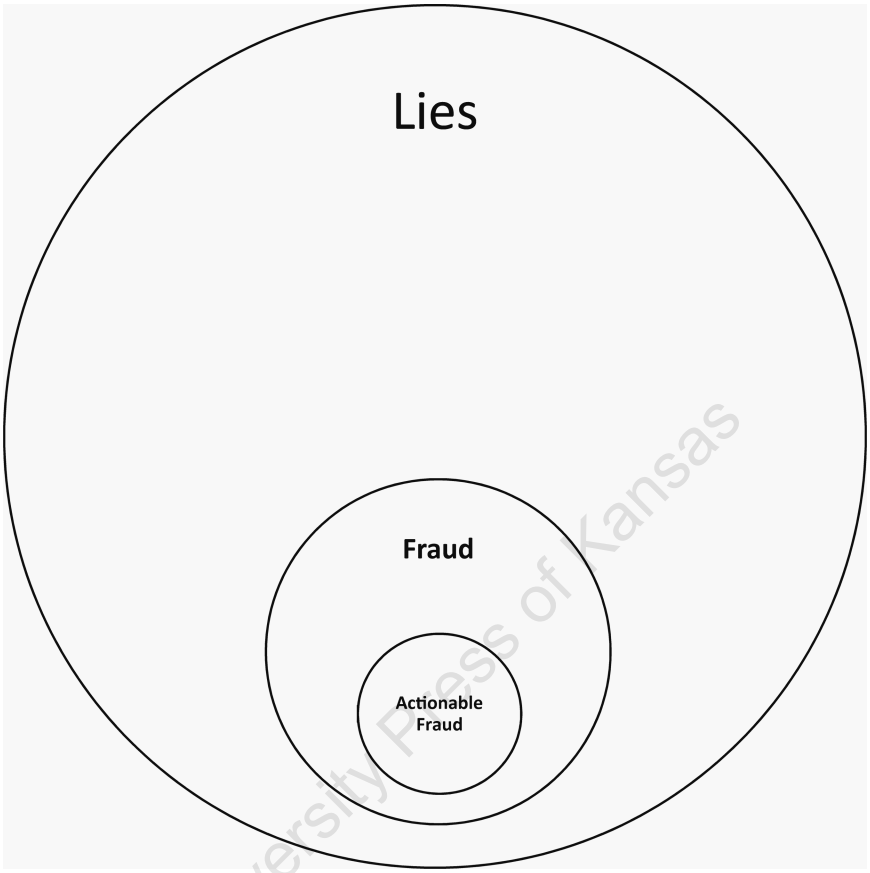

Figure 2.1. All frauds are lies, but not all lies are frauds. All actionable frauds are frauds, but not all frauds are actionable. Source: the author.

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EVERY FRAUD STARTS WITH EVASION

When we think of a particular fraud scheme, or for that matter about fraud in general, our attention tends to be drawn to the betrayal involved. It is what most interests and bothers us. And because we focus our attention on the deception, we tend to make this the principal focus how we think about fraud—from how it is carried out to how best to address it.

But this overfocus on deception misses a critical point. In every fraud scheme, the last thing we consider—but the first thing the fraudster considers—is that to succeed, they must, first and foremost, profit from it. That

means they must get away with it. Thus, fraud is actually centered not on *deception* but *evasion*. This element—evasion—though central to every fraud, is never listed in any legal claim or dictionary definition of the term.

Accordingly, descriptions and definitions of fraud only ever capture half the picture. They set out a list of elements to be met, or describe conduct that must occur, to constitute "fraud." On the other hand, the hidden element, evasion, captures what must *not* occur for the liar to profit from it. This makes evasion not just a necessary element of fraud from the fraudster's perspective but indeed *the most important* element. That it is never recognized as such, let alone incorporated into legal approaches to fraud, benefits the liar.

A liar can accomplish evasion in either of two ways: they must either go undetected or, if caught, avoid punishment.

The first option, avoiding detection, is always preferable. No need to worry about punishment if they are not caught. But if they are caught, they are forced to opt for the second alternative, avoiding punishment. To accomplish this, the liar must establish that their conduct was not *actionable* fraud. If their fraud was legal, no punishment can be imposed. If successful, this allows the liar to avoid paying a penalty for the fraud. They succeed in this task by winning in court or by making clear they would win if taken to court. Failure to accomplish evasion by either manner—avoiding detection or punishment—renders the fraud unprofitable.

This may seem obvious when it comes to actionable one-on-one frauds, which are now generally prohibited by law. But evasion is frequently overlooked and ignored when it comes to frauds aimed at deceiving the public at large. These frauds, which I call *fraud on the public*, often do not fit in any existing prohibited fraud category, such as common law fraud, securities fraud, or false advertising, and nor do they fit into any other category of unlawful speech, such as defamation or incitement to imminent violence. In short, most fraud on the public is not actionable. This gives those who carry it out a free pass to defraud with impunity. Evasion is assured.

This happens right out in the open. We frequently find falsehoods, if looking for them, reported alongside truthful information in the news, on social media and other online platforms, and by word of mouth. Of course, a falsehood alone never amounts to fraud. But while not all falsehoods one finds in the media or online are fraudulent, some of them are. Politicians purposefully spread falsehoods to manipulate public opinion in their favor. Corporations purposefully spread falsehoods, often through public

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relations campaigns, to increase profits and shareholder value, to sell units and to smash competition. Pundits, podcasters, and commentators purposefully spread falsehoods to gain viewers and, therefore, revenue.

But why would the law treat a fraud aimed at millions different from one aimed at a single person? Multiple reasons. One is that those with the power to spread profitable falsehoods to the masses have vast resources, and those resources allow them not only to devise and carry out carefully tailored schemes that straddle the line of illegality but also to influence, if not dictate, where the line of illegality is drawn. (The line of illegality, in figure 2.1, is the rim of the smallest circle.) Such influence on the law is accomplished via campaign contributions, lobbying, judicial appointments, and other means.

Another major reason stems from how and when fraud law first emerged and the way the law later developed. Although there have been laws against fraud at least since the Code of Hammurabi, modern fraud law, as it exists today and is applied in the United States and all common law jurisdictions around the world, was invented with the stroke of a judge's pen in London in 1789 (in a court case I will describe in the next section).

The way our modern fraud law was created, and how it developed since, has strongly influenced how it is applied today—and how it is not.

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THE LAW'S EXCESSIVE FOCUS ON PERSONAL FRAUD

Actionable fraud is prohibited for the same reasons other harmful human impulses are restricted: to protect victims and society. Due to human nature, some people will, if allowed, deceive to get things they want, regardless of the damage they cause. Fraud law aims, and to some extent succeeds, in curtailing some ways people defraud one another.

People possess numerous destructive impulses, and the law often steps in to stop people from acting on these and to protect those who would fall victim to them. These impulses include, for instance, stealing, trespassing, or damaging other people's property. It also includes assault, murder, rape, and incest. As a society progresses, so to do its restrictions on these and other harmful behaviors.

The law, of course, is not perfect. In some cases, the law overcorrects when put in place to suppress human impulses. For instance, the law stepped in to prohibit one from marrying a person of a different race.

The law also made it a crime to engage in homosexual activity. Although these laws prohibited certain human impulses that some deemed "harmful," most today agree these restrictions did not help make society safer, happier, or better. They did not protect victims. Instead, they were oppressive and counterproductive. One can think of numerous laws, past and present, that overreach like these. Clearly, not *all* laws put in place to suppress hardwired impulses necessarily help society. But many laws do. We are certainly better off suppressing the impulses to rob, assault, or murder.

Like robbery, assault, and murder, fraud is a hardwired human impulse whereby one, seeking personal advantage or satisfaction, harms another. Like robbery, assault, and murder, fraud encompasses a broad spectrum of wrongful activity, which varies from highly harmful to minimally harmful.

Take robbery. There is a vast difference between stealing someone's car and stealing an air freshener out of their car. Should one be put on trial and imprisoned for both of these acts? Perhaps they should for the former, but should they for the latter? As for assault, there is an important distinction between accidently bumping into someone on the sidewalk and purposefully punching them. Murder, too, has degrees. Is it murder to use a contraceptive while engaging in sexual intercourse? According to some, yes. But this point is certainly debatable.

Fraud, like other harmful impulses, has degrees. The law distinguishes between lies that are harmful but legal, on one hand, and those too harmful to allow, on the other. But a survey of the diverse laws covering fraud reveals a troubling inconsistency. The law generally prohibits one from defrauding an individual in an unacceptably harmful way, such as soliciting funds for a fake charity; charging an "advance payment" to a victim while promising them a share of a large sum of money to be obtained later, which the fraudster knows is false; or emailing a victim pretending to be a prince or government official in need of a bank account into which the fraudster will deposit funds. All of these are clearly not just fraud but actionable fraud. However, the law does not prohibit a fossil fuel executive going on TV and claiming scientists do not yet know if climate change is happening; or a police department releasing a public statement claiming a suspect killed by police died of a "medical emergency" and "resisted arrest," when neither of these things are true; or a US senator claiming publicly to be in favor of canceling student loan debt for "all borrowers" while, at the same

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time, accepting campaign money from the largest student loan creditors and voting *against* canceling any student debt.[28]

Time and again we see the same trend: the more victims one defrauds, the more likely the liar will avoid legal repercussions. This result stems in large part from how laws on fraud were established in the first place and how they have evolved in the years since.

The constellation of laws against harmful deceit we today refer to as "fraud law" traces its origin to a single court decision in 1789, in London. Although there had, long prior to then, been legal prohibitions on certain kinds of fraud—such as fraud in connection with a contract—in the common law world, there had never been any general prohibition on fraud per se. So, it was generally perfectly legal, prior to 1789, to intentionally deceive others even for self-serving purposes if no contractual relationship existed between the fraudster and victim. Victims were not compensated, but blamed, for their injuries. Those who fell for a scam bore the loss.

A 1789 case in the King's Bench Court invented the modern concept of fraud being actionable, even if no contract was entered into between the fraudster and victim. That case, *Pasley v. Freeman*, arose from simple facts.

A customer entered a dry goods store owned by John Pasley and ordered "divers . . . goods, wares, and merchandizes" totaling "£2634.16s.1d," which in today's US dollars would equal to well north of $100,000.[29] Pasley did not know this customer. So, he required the customer to bring in a personal reference to give assurances the customer could, and would, pay what he owed. For this purpose, the customer brought in Joseph Freeman.

Freeman promised Pasley that the customer had sufficient money to pay, that he was a man of integrity, and that he always paid his debts. These assertions were false. But because Pasley did not, and could not, know this, he went forward with the transaction and allowed Pasley to leave with the "goods, wares, and merchandizes."

When the customer failed to pay—indeed, he disappeared, never to be seen again—Pasley turned to the courts to get the money owed him. Normally, he would sue the nonpaying customer. But Pasley could not collect from a customer he could not find. Instead, he sued Freeman, the credit reference who had falsely vouched for the customer. Indeed, Pasley learned

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that Freeman had *knowingly* made false assurances about the customer's creditworthiness. He had lied. Freeman had known, at the time he made his statements to Pasley, that the customer was *not* trustworthy and would almost certainly never pay what he owed.

The trial court threw the case out. There was no law against deceiving another in a harmful manner unless the wrongdoer and victim were parties to a contract. And because the store owner and Freeman had no contract between them, there was no valid claim. Case dismissed.

The store owner appealed to the King's Bench Court. There, Chief Justice Lord Kenyon, whose pen would create a brand-new tort, reversed the lower court's ruling, not based on any interpretation of law or precedent but by ignoring both. Kenyon began his opinion by agreeing on a key point with the lower court; he conceded that no law supported Pasley's claim. No contract, no cause of action. But then Kenyon insisted that although there was no law, there was nevertheless a "principle" "that wherever deceit or falsehood is practised to the detriment of another, the law will give redress."

Based on this "principle," which had, up to then, existed perhaps in people's minds, but not in any judicial opinion or statute, the Chief Justice invented a new law under which Freeman could be, and was, held liable to pay the store owner's damages. The law Lord Kenyon created, the tort of deceit, serves as the basis of all modern laws aimed at stopping fraud. It was stated as follows: "A false affirmation, made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit. In such an action, it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is." Let us pause a moment to appreciate Freeman's shock and disappointment. He had broken no law. The judge had thrown out the case against him. But then, at the highest court, another judge picked up his pen and literally made up a new law under which he now *was* liable—and liable not for any profit *he* had made: he had gotten nothing out of it. He was liable, rather, for the ill-begotten gain of a third party, the customer. Freeman was made to pay what someone else owed. Why? Simply because his lie caused the plaintiff's loss. From then on, *Pasley* stood for a new principle, now codified in law, that lying has its limits. Where your lies harm others, this will, if the elements of fraud are met, be actionable.

Today, two-and-a-half centuries later, the general parameters of the law

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laid down by Chief Judge Kenyon still hold true in all common law jurisdictions. All the legal claims descended from Kenyon's pen are, taken together, the entirety of actionable fraud.

In the decades following *Pasley*, the tort of deceit (also known as common law fraud) was brought into clearer focus through hundreds of judicial decisions. These clarified points left open for debate by Kenyon's initial principle-based rule.

It was clarified that the defendant must have made the falsehood knowingly or recklessly. It was clarified that the plaintiff, who is the victim, must rely on a belief in the truthfulness of the falsehood. It was clarified that damages may be awarded only where they result directly and proximately from the victim's reliance on the falsehood.

And, although not directly stated, these clarifications had the cumulative effect of shaping the law to apply most directly to deceptions made one-on-one. This made sense—at the time. During the latter part of the 1700s and the earlier decades of the 1800s, when the law was taking its final, and still-current, shape, when judges were, with each decision, clarifying exactly what the parameters of the law are and how it should be applied, which kinds of deceits fall within it and which kinds do not, these clarifications were all made in an era where deceits were almost without exception carried out in personal interactions.

There was no electronic communication. There was no mass media, no telephone, no Internet. And so, this ancient impulse, throbbing most strongly in prolific liars, manifested itself most often in face-to-face deceptions. Patent medicine hucksters went town to town and door to door. Others aiming to scam sold dupes tracts of nonexistent or unusable land, or promised them unrealistic returns on fictitious investments, or sold them horses or livestock that were older, sicker, or weaker than promised. These were the fraud cases being brought to court. Time and again, judges worked to shape existing law to fit the facts before them.

Along the way, however, a new method for defrauding people became available as a result of new methods of mass communication. This new method, which did not conform to the way fraud had been carried out in the past, involved the marketing, selling, and purchasing of securities, such as stocks and bonds. With the rise of the securities markets, all kinds of fraud opportunities arose. The way these new frauds were carried out only rarely

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involved face-to-face communication. More often, it was done remotely. The fraudster typically disseminated falsehoods, not targeted at one person but at the public at large, only needing someone, anyone, to believe them and buy into them, and act in reliance on them, by either buying or selling a particular security. This involved, not one identifiable victim but millions of potential victims.

This was not something the fraud laws had been developed to handle. Predictably, the laws failed miserably at stopping, or even having any significant impact at all on, securities fraud.

Existing law was so deficient, in fact, that in the early twentieth century every state in the United States passed securities fraud laws to address it. Every single state. Then, in 1933 and 1934, Congress passed two pieces of legislation targeting securities fraud and creating an entire government agency, the Securities and Exchange Commission, or SEC, to investigate and prosecute securities fraud cases. The combined effect of these state and federal government actions removed securities fraud entirely from the common law tort of fraud and moved them into a whole new area of law created to address this particular kind of fraud.

Why was traditional fraud law so powerless against securities fraud?

It's simple. The traditional fraud laws were crafted to address face-to-face deceits, like those involving the sale of horses and land. The law almost totally ignores the kinds of deceits aimed at the public at large, which is how securities fraud schemes often work.

Yet, incredibly, this is where the development and evolution of fraud laws ended. It has remained static to this day and unchanged—except a carveout for securities fraud—from the days of horses and buggies.

This is a generous gift to those who seek to profit through deceit of the public at large. The avenues open to them have expanded marvelously in the ensuing years, beginning with the invention and expansion of mass communication in the 1900s and the invention and expansion of the digital world in the 2000s. The options for duping people have multiplied exponentially, particularly for those with the wealth and power to spread messages to millions. For this reason, leaders who speak to the masses have power at their fingertips unimagined in prior ages, the ability to manipulate public opinion, action, and voting at their whim, to use falsehoods to mislead in any manner they desire, with almost no limits on the ways they may do so, regardless of how self-serving or harmful those falsehoods may be.

While this is good news for those with access to the public megaphone,

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it is bad for everyone else. Because with no reliable way to discern fact from fiction, truth from lies, we are at the mercy of those who shape the information we consume. Though one kind of fraud on the public, securities fraud, has been attended to, most other kinds of fraud on the public are protected by law rather than restricted by it. This injustice results in large part from the law's undue focus on personal fraud.

This green light to defraud the public will lead, indeed already is leading, to disaster—for individuals and society. The law allows falsehoods that undermine democracy, and further erode equality and justice, but history teaches us the pendulum does not swing forever in one direction. It reaches a climax in its upward trajectory, stops, and falls with accelerating force in the other direction. Only time will tell if that will occur with regard to fraud on the public. But the fact it is illegal to defraud *some*one but legal to defraud *every*one cannot and should not be sustained.

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3

Defrauding the Public

HOW AND WHY LEADERS DO IT

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When you take the well-established principles we have covered thus far—that people lie to get things they want, that we are hardwired to fall for lies, and that when self-serving lies cause too much harm they amount to fraud—and you apply these principles to lies told on a mass scale, a funny thing happens: the principles vanish. We no longer follow them. We see and agree on these principles wholeheartedly only in frauds targeting individuals. But when a fraud is broadcast to millions, we seem to forget there *is* such a thing as fraud and put other labels on these falsehoods, like misinformation, disinformation, propaganda, and fake news.

But these words serve only to muddy the waters when it comes to fraud. In effect, they cover the fraud up. But applying such terms to what is going on does not make fraud any less fraudulent.

Nevertheless, ill-defined jargon cannot be the sole culprit for our failure to see the largest fraud schemes as fraud. Why do we fail to recognize a phenomenon going on all around us and one regularly reported on in the largest news sources? In short, because it happens so often and is so out in the open. We are bombarded with lies calculated to mislead us, and it happens so frequently that most, understandably, conclude it must be normal in a free society—the natural order of things, if not necessary. The price of liberty. It would—so this line of thinking goes—be a mistake to call them, or treat them as, fraud. The best course of action is no action, to let

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falsehoods fly unabated, because the state has no business choosing what is true or false. To protect our freedom, we should accept, or at least ignore, harmful falsehoods because they are a necessary evil.

This view is widespread. I once held it myself. But, after years of researching the methods leaders use to spread self-serving lies for their own benefit, at the expense of everyone else, I no longer share that view. Intentional deceit is not normal or necessary, much less healthy, for a functioning political, economic, or media system. Fraud is fraud. Just because we allow it to go on does not mean we should.

This is difficult for many to grasp—not for lack of examples but an overabundance of them. To list examples would be counterproductive because no list could possibly give justice to the sheer size and scope of the falsehoods we are bombarded with daily. Any such list would be woefully incomplete. On the other hand, to give no examples would give an equally inadequate picture.

Take a very small sample of cases reported on in a single newspaper on a single day.

On the day I wrote the first draft of this chapter, the 20th of May 2022, I went, as I often do, to the webpage of the *Washington Post*, one of the nation's leading papers. Yes, I am well aware of the *Post*'s perceived political and corporate biases. However, no media source, nor any person for that matter, can claim absolute objectivity. I read the *Post*, as I try to read any news source, with a grain of salt while trying to view and interpret it in context.

I read the *Post*'s home page with a particular goal in mind: looking for stories that touch on falsehoods disseminated on a mass scale. I did not click beyond the home page in this search. I did not need to. I found a large number of articles prominently displayed on the landing page of the *Post*'s website.

That particular day's *Post* contained a plentitude of articles and opinion pieces that pertain, directly or indirectly, to purposeful efforts to mislead the public.

One of the top articles was by Meryl Kornfield: "U.S. Surpasses Record 100,000 Overdose Deaths in 2021."[1] This article covers the status of the opioid epidemic, frequently labeled the "worst health crisis in American history." Importantly, the crisis is unique to the United States. The opioid industry manufactured it here, launching and sustaining a disinformation campaign to downplay and hide the addictiveness and dangers of opioid

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painkillers. This "marketing" push resulted in massive over-prescription. Those responsible, including the Sackler family, made billions.

That was the first relevant headline I noticed in that day's *Post*. Here are some of the others:

- "Earth Given 50–50 Chance of Hitting Key Warming Mark by 2026" by Seth Borenstein.[2] This article discusses the disastrous course we have taken, by our leaders' decisions, as a result of the fossil fuel industry's campaign to raise doubt about the certainty and causes of global warming.
- "Nearly Half of Republicans Agree with 'Great Replacement Theory'" by Philip Bump.[3] This story covers how nearly one in three Americans now buys into a baseless conspiracy theory being spread in right-wing media and, more recently, by Republican leaders, whereby Democrats are allegedly funneling immigrants into the United States to "replace" other Americans with "more obedient voters from the Third World."
- "Inside the Republican Campaign to Take Down Madison Cawthorn" by Isaac Arnsdorf.[4] Cawthorn is a freshman congressman who has spread provably false claims about himself, his opponents, and numerous public policy issues. Recently, he falsely claimed to have witnessed other members of Congress snorting cocaine and taking other hard drugs and claimed to have been invited by other members of Congress to an orgy.[5]
- "The Supreme Court: Unreachable, Inaccessible and Frightening" by Robin Givhan.[6] Givhan's piece discusses the Court's politicization and the recently leaked opinion purporting to overturn *Roe v. Wade*. The fact both events were ultimately the result of a scheme to mislead the public by Senator Mitch McConnell and other Republicans, whereby that party blocked President Barack Obama from filling a vacant seat on the Court by lying about the propriety and precedent of presidents filling such vacancies during election years, was not mentioned in the piece.

Scrolling just a couple inches down on the *Washington Post* home page, readers encounter an entire panel dedicated to COVID vaccination rates and the status of infections state by state. Like the *New York Times*, CNN, Fox News, and numerous other leading news media, the *Post* has included a

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dedicated section for COVID since shortly after the pandemic began in 2020. COVID has been a fertile topic for disinformation from both sides of the political aisle. Two examples should suffice. From the Right, former president Donald Trump and Republican leaders spread false claims about the pandemic being a hoax perpetrated by Democrats, about vaccines being a plot by Bill Gates to install microchips into people's bodies, and about horse worm medicine and homeopathic remedies being more effective against the virus than the vaccine. From the Left, presidential candidate Joe Biden claimed that if former president Trump "had done his job, had done his job from the beginning, all the people would still be alive. All the people. I'm not making this up. Just look at the data."[7]

The last article from the home page of the *Post* that I will mention, and the seventh to cover a major fraud on the public, was an opinion piece by Max Boot: "We're in Danger of Losing Our Democracy, but Most Americans Are in Denial."[8] Boot outlines the risk posed by Republicans continuing to embrace the falsehood that the 2020 election was "stolen" by Joe Biden through "massive fraud" perpetrated by the Democrats, a falsehood now commonly referred to by many pejoratives, such as the Stolen Election Myth and the Big Lie. Not only has Trump never conceded the election but "fealty to the Big Lie has become a litmus test for Republican candidates because it has become gospel for Republican voters." As a result, "most Republicans have tacitly accepted that inciting an insurrection is no big deal."[9] This would have been unthinkable just a few short years ago, before the Trump era of politics, but this is what disinformation produces: a view of reality so warped the unthinkable becomes the "new normal."

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The seven headlines discussed barely scratch the surface, providing a glimpse into the newsworthy effects of fraud on the public. They do not fully illuminate the root problem, however. After all, what does the opioid industry's marketing practices have to do with calls to overturn an election? Or, for that matter, what relevance does a stolen seat on the Supreme Court have to the fossil fuel industry's global warming doubt campaign?

The first chapters explained why deceit is a serious problem (chapter 1) and defined what fraud is, and why it poses a greater threat today than ever before (chapter 2). This chapter will discuss how all of us fall victim to fraud on the public by answering three questions:

- *Who defrauds the public?*
- *How do they do it?*
- *Why do they do it?*

WHO DEFRAUDS THE PUBLIC?

Anyone can deceive an individual, because we all speak with individuals. But those who speak to the masses can deceive on a far greater scale. They, and only they, can spread a message to a large enough portion of the public to accomplish whatever they are after—profit, elected office, viewership, and so on.

This elite group is small and exclusive. It includes (1) those involved in the political process, whether an officeholder, a candidate, a campaign, or a party; (2) large corporations and those who work on their behalf, such as officers and directors, trade groups, lobbyists, and paid experts; and (3) traditional media and social media firms and those who work there or use the platform to reach a mass audience, such as pundits, editors, reporters, influencers, and popular podcasters. I refer to this elite group in shorthand as *leaders in politics, business, and media*.

Let me be clear. Not all who occupy these positions of power defraud the public. We are all, rich and poor alike, both honest and dishonest to varying degrees. It is oversimplistic to claim, for instance, that "all politicians are liars" or "all CEOs are crooks." Such cynicism is not only oversimplistic but can become its own self-perpetuating prediction. Human nature is never so simply or easily labeled or summarized. Just because politics often involve lying does not mean all politicians, or "all" of any category of people, are purely honest or dishonest.

But while not all leaders in politics, business, and media are out-and-out liars, it can, nevertheless, be confidently stated that few outside these groups—with some exceptions I will touch on later—have access to the public platform necessary to carry out a fraud on the public.

And just as not all political, corporate, and media leaders are fraudsters, neither is every false message fraudulent. Of the messages that are fraudulent, not all should be actionable. There are nuances here that must be explored.

We all spread falsehoods, and sometimes we do this without knowing it. A false message alone does not equal fraud, much less actionable fraud.

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The First Amendment should, and does, protect viewpoints and opinions, no matter how baseless, mistaken, or wrong. Fraud on the public describes only conduct by political, business, and media elites who purposefully spread a false or misleading claim to deceive people for gain and who *either* know the claim is false *or* spread it with reckless disregard to the truth or falsity of the claim. In other words, the conduct I label *fraud on the public* includes only such conduct that would constitute "fraud" if carried out one-on-one. Expressing an opinion or sharing a viewpoint as part of a political or marketing campaign, no matter how baseless, wrong, or dangerous, does not amount to fraud, unless all fraud elements are met.

Let us turn now to the three groups who carry out the majority of fraud on the public, because they are, for the most part, the only ones who can. These are politicians, the media, and corporations and those who work on these groups' behalf.

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Political Leaders, Campaigns, and Organizations

To enter politics, as a candidate, on behalf of a political party, or in furtherance of a movement or agenda, requires one to commit to a particular message: saying, writing, and even thinking in line with what is already presupposed to be the correct answer.

Say you run for office. The aim is to prevail over all opponents. Thus, you must, if you are to be effective and ultimately successful, communicate always in a manner that will help bring about the result desired. Truth or falsity of the message has no relevance per se. Instead, each message's effectiveness is measured by whether it gets you closer to your political goal and how well it does in this task.

This, of course, might very well not be the way a politician thinks about their campaign, their candidacy, or their goals, and they might, instead, strongly believe they are fighting for truth, justice, equality, and so on. However, elections are not decided by who is most right, or who has the best ideas, or who will best bring about truth, justice, or equality. Rather, elections are decided by votes. And so, the candidate able to get the most votes, and ensure the fewest votes for opponents, is declared winner. Thus, if a campaign is to have any hope of success, it must be geared toward meeting this objective.[10]

In any contest where one is pitted against another, victory is determined not only by the traits of the competitors—their relative intelligence, skill,

and strength—but also by tools and methods used. Take tennis. If two players compete, skill plays a huge role in who will win. But what if one player is playing with a state-of-the art racket while the other has one that is outdated and broken? All other things being equal, this disparity in racket quality could easily be the deciding factor of who wins.

If we use one-on-one combat as an analogy, the point is even clearer. If two individuals fight one another, size, strength, skill, and stamina are important factors. But what about weaponry? If one has a knife, the other must generally also have a knife, or some other weapon, to stand a chance. If one has a sword, the other must generally have something equal to that; a knife will stand little chance against a sword. And if one of them has a gun—you get the point.

In a contest of popularity, which is what political campaigns are in democratic societies, victory depends on winning votes, to convince people to desire Candidate A over Candidate B, and any tool or method that achieves this must, to compete, be used. Thus, imagine if Candidate B is allowed to spread false or misleading messages that elevate Candidate B's public image and damage Candidate A's public image. In that case, Candidate A must counter this attack with their own falsehoods. Countering falsehood with fact works far better in theory than it does in the real world, let alone in a political contest. We are more easily, and more quickly, persuaded with simple lies than complex truth. Although truth might win the test of time, lies will win the next election.

This has always been the case, although there have been vigorous disagreements about what to do about it, if anything. There are two major approaches to lying in politics. The first, which traces its roots at least as far back as Plato, holds that leaders should be allowed to lie because falsehoods are necessary to lead. The other approach, which is much more modern, holds that lying in politics presents a moral conundrum every bit as problematic as lying in other areas of life, and, where such lies cause harm, they should be restricted. This view was articulated by Sissela Bok. We may, for simplicity, call these the Platonic and Bokian approaches, respectively.

In Plato's *Republic*, the Athenian philosopher maintained that "noble" lies are necessary to keep social order and cohesion. People, Plato argued, must be told that gods made some to rule society, others to work, others to fight, and so on. These myths are necessary, according to Plato, so people will accept their place in society. Aristotle took a more nuanced

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approach but did so in a manner consistent with the Platonic view. In *On Rhetoric*, Aristotle distinguished between lies told for a wrongful purpose and those told for a benevolent purpose. Wrongful lies, according to Aristotle, amounted to coercion while benevolent lies were part of "sincere dialogue." Indeed, many prominent Athenian thinkers such as Aeschylus, Sophocles, Thucydides, and Plato distinguished between wrongful and benevolent persuasion.[11] Of course, Aristotle considered falsehoods disseminated by leaders to fortify their own rule to be of the benevolent sort, needed to keep social order.

Echoes of this line of thought are observed throughout history, and not only in monarchies, aristocracies, and oligarchies. Certainly, in those societies where a tiny minority holds all power, it is necessary for rulers to tell lower classes they have blue blood, or were chosen by God, lest the people suspect the power and riches held by those at the top is not deserved. But the "noble" lie idea is not limited to such societies. Many who hold power in democracies embrace this line of thinking.[12]

The "noble" lie idea was advanced and outwardly expressed by leading public intellectuals like Harold Lasswell, Walter Lippman, Edward Bernays, and Reinhold Niebuhr, each of whom played a prominent role in shaping the modern public relations and advertising industries. Each argued that "intelligent manipulation" of the public is not only permissible but necessary for a functioning democracy.[13] According to this view, democracy and freedom are not values to be preserved but "threats to be avoided." As summarized by Chomsky,

> Walter Lippmann . . . described what he called "the manufacture of consent" as "a revolution" in "the practice of democracy." . . . And he said this was useful and necessary because "the common interests"—the general concerns of all people—"elude" the public. The public just isn't up to dealing with them. And they have to be the domain of what he called a "specialized class." . . . [Reinhold Niebuhr]'s view was that rationality belongs to the cool observer. But because of the stupidity of the average man, he follows not reason, but faith. And this naive faith requires necessary illusion, and emotionally potent oversimplifications, which are provided by the myth-maker to keep the ordinary person on course . . . you have to control what people think. And the standard way to do this is to resort to what in more honest days used to be called propaganda, manufacture of consent, creation of necessary illusion. Various ways of either marginalizing the public or reducing them to apathy in some fashion.[14]

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This view, though rarely expressed out loud today, is widely held, as demonstrated by efforts to disenfranchise voters, reduce voting rolls, and suppress votes. Every effort to reduce voting—holding elections on Tuesdays, requiring voter registration, imposing voter ID laws—is an endorsement of this view, that the ruling class must not be beholden to the public, that people are simple and unworthy of participating in public affairs. Leaders, according to this approach, are not only justified in lying but have an ethical duty and a responsibility to lie.

Sissela Bok rejects this deference to power and replaces it with skepticism. Why, she asks, should we expect leaders to lie for the good of the people? Before dismantling Plato's approach, Bok summarizes it:

> They argue that vital objectives in the national interest require a measure of deception to succeed in the face of powerful obstacles. Negotiations must be carried on that are best left hidden from public view; bargains must be struck that simply cannot be comprehended by a politically unsophisticated electorate. A certain amount of illusion is needed in order for public servants to be effective. Every government, therefore, has to deceive people to some extent in order to lead them.[15]

Bok turns the analysis on its head, suggesting we put ourselves in the shoes of the dupe, those "who experience the consequences of government deception." Whereas the Platonic approach takes the leaders' perspective, Bok takes the people's. Seen from below, the Platonic "arguments are not persuasive."

The principal problem Bok found with the widely held view that political leaders must be allowed to spread "necessary illusions" and "emotionally potent oversimplifications" is that, all too often, "deceit for private gain masquerades as being in the public interest." But even where deceit *is* carried out for an unselfish motive, it "corrupts and spreads," becoming a tool those in power use to help themselves rather than those they serve.

Does Bok call for a ban on all political lies? Far from it. Her nuanced approach recognizes the well-studied "differences among societies in the kinds of deceit that exist and the extent to which they are practiced, differences also among individuals in the same government and among successive governments within the same society." "This," Bok argues, "strongly suggests that it is worthwhile trying to discover why such differences exist and to seek ways of raising the standards of truthfulness."

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Thus, there are two well-defined avenues: the Platonic approach, which says we must allow leaders to create "necessary illusions" by telling "noble" lies, and the Bokian approach, which says we should "seek ways of raising the standards of truthfulness" in our leaders.

Given that these views represent two extremes of a spectrum, one would expect the laws to fall somewhere in between, but that is not the case. The law chooses one side and embraces it wholeheartedly.

Which side? One need not wade deeply into the First Amendment jurisprudence to discover that lying and deceit are allowed overwhelmingly in politics and government. Dozens of laws against lying in campaigns have been enacted over the years, and most have fallen, cut down by the sword of free speech. This leaves those seeking higher office, or pushing an agenda, free rein to mislead and manipulate the public. A recent poll shows that more than two-thirds of Americans support the criminalization of lying by politicians, and there has been an avalanche of articles and essays calling for restrictions on political lies.[16]

With so much popular support for reforms, might we expect change? Only if we ignore history. The Platonic approach to lies by politicians and leaders is deeply entrenched and unlikely to be dislodged. Supporters of the status quo argue that while we may prohibit and punish falsehoods in other areas, lying must not be touched in public affairs. But allowing all falsehoods by public officials and political candidates has, in recent years, created ever-greater threats to public health and well-being, as well as to democratic institutions. Lies that deprive people of health, property, or fundamental rights should not be given a pass simply because they are uttered by one seeking power rather than profit. Schemes to mislead by those holding or running for office, or by those in league with them, should be held to a standard of truthfulness and good faith the same as anyone else given the privilege, and corresponding responsibility, to speak to the public.

Likewise, the consequences of spreading harmful falsehoods should, for the sake of justice, correspond to the threat they pose. We must distinguish, for instance, between a leader falsely denying a consensual extramarital affair, on one hand, and a leader falsely claiming that their opponent cheated to steal an election, on the other. One of these falsehoods poses a far greater threat to society than the other. The more harmful a fraud is, the more serious the consequences should be for disseminating it.

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The Media

The media, like politicians, frequently disseminate falsehoods to the public. And they do it for the same underlying reason politicians do: they are allowed to. Because they are allowed to lie, they find it often to their advantage to do so—to gain viewers, to generate clicks, to increase engagement, to boost ad revenue.

Indeed, the two—media and politicians—often work hand in hand. This is because the media, which comprises all major communication outlets and platforms used to deliver information to the public, including print, broadcast, and digital, is, by definition, the means for politicians, or anyone else, to disseminate messages to the public. This is the case for truthful messages, as well as false. If any message, true or false, is aimed at the public, it can arrive at its destination only through the media.

Media may disseminate their own messages or serve as a platform for messages disseminated by others. Politicians, too, serve as a platform for others' messages, such as those pushed by their donors and wealthy supporters, who may, for instance, favor corporate tax cuts and deregulation of industries. Unlike politicians, however, media sometimes serve as a "pure" intermediary for messages others spread, having no volition or intention of its own. A politician or a corporation might create and disseminate their own message—which may be true or false—using the media as an intermediary to spread their message to the public by putting corporate spokespeople on TV or publishing an op-ed in a newspaper or posting a message in a social media feed.

In other instances, a media company is not merely a platform for others' messages but a speaker who creates and disseminates its own message. For instance, if someone selling "healing crystals" tweets on X (formerly known as Twitter) claiming their crystals are proven scientifically to cure cancer, X in that case is merely serving as an intermediary for the company to spread its false claim. But if the CEO of X uses their official account to retweet that message, then X will have become a speaker spreading that false claim, rather than a mere passive intermediary.

A recent Brookings Institution study highlights the difficulties one encounters trying to parse these two roles of media—intermediary and speaker. The study examined the role traditional media and podcasters played in spreading the lie that the 2020 presidential election was rigged or stolen. The authors of the study, Valerie Wirtschafter and Chris Meserole,

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compiled a dataset of the most popular political podcasters in the United States and analyzed which episodes included an endorsement of false electoral claims. One result of the study was that a handful of "popular podcasters on the right" "were largely responsible for the proliferation of electoral misinformation during this period." The "episodes that endorsed false or misleading electoral narratives had broad cross-platform reach, with total audiences on Twitter and YouTube in the tens of millions."[17] In the days following the November 2020 election and leading up to the January 6 assault on the US Capitol,

> anyone listening to the Mark Levin podcast heard claims that in Georgia "they have well over a hundred thousand examples of people who voted that were dead, who were too young to vote," while the Trump adviser Peter Navarro insisted to Sean Hannity that there was an "absolute flood of illegal ballots into Arizona, Georgia, Michigan, Nevada, Pennsylvania, in Wisconsin, in amounts more than enough to tip the balance to Joe Biden. It was an illegal stolen election."

Leading traditional media reports reflected the podcasts. TV shows hosted by Rush Limbaugh, Sean Hannity, and Glen Beck, for instance, endorsed election falsehoods in about half of their episodes between the 2020 election and the January 6 attack on the Capitol.

The media was a key player in spreading the stolen election lie. *Washington Post* columnist Max Boot put it bluntly: "Trump couldn't have incited sedition without the help of Fox News."[18] Fox News, in this case, stands in as a representative of the right-wing media sphere more broadly, where false claims of a stolen election proliferated.

Some such media claims might be accurately framed as part of a political movement or campaign. Others might more accurately be framed as separate from any political messaging process, independently generated by the host of the show. In any case, mass media as an industry, including print, publishing, TV and radio broadcasting, advertising, and digital media, comprise, collectively, the second of the three major actors responsible for spreading harmful falsehoods that amount to fraud on the public.

Corporations

The third and final major group that carries out fraud on the public is *business*: large corporations and their owners, officers, and directors; big

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banks and others in the finance sector; and leading industries, along with those working on the industries' behalf. I will, for simplicity, refer to these entities and individuals collectively as *corporations*, similar to how I discussed *the media* above.

Like politicians and the media, corporations spread profitable falsehoods because, with a few exceptions, it is profitable and permissible for them to do so. Notably, Adam Smith, writing at the dawn of the Industrial Revolution, warned that because business owners' interests are at odds with the public good, the policies they advocate must be scrutinized closely.[19] As with politicians and media, we should approach the falsehoods corporations spread not with moral judgment but with a view to reduce harm; not to condemn the liar but to protect would-be victims.

It would do little good to blame corporations for spreading falsehoods that generate profit. Where such falsehoods are allowed by law, they are required by it. Why? Because a corporation's officers and directors owe a fiduciary duty to the corporation and its shareholders. Most legal scholars agree this duty obligates them to maximize shareholder value (or at least to do so by all lawful means).[20] Thus, corporations are often, in effect, required to lie, at least to the extent they can do so lawfully.

Not all lies that might profit a corporation are lawful. Laws covering consumer protection and false advertising restrict the ways corporations may lie. So, while businesses are free to make favorable puffery statements about their products, such as claiming the product is "the best" or "amazing" or "the number one recommended," outright falsehoods about a product's attributes, benefits, or dangers are often prohibited by law, particularly if the false or misleading claim could harm consumers or other businesses.

It is also unlawful to make false or misleading assertions in product descriptions.[21] This is where a company claims a product has benefits or features it lacks or that the product is of a higher quality than it actually is. This includes, for instance, misusing terms like "organic," "light," or "natural"; falsely claiming endorsement from scientific or medical authorities; and using misleading illustrations, photographs, or coloring in product descriptions.[22] Yogurt maker Dannon was, in 2010, "ordered to pay about $45 million in damages to plaintiffs in a class action lawsuit alleging false claims about two yogurt products, Activia and DanActive. Advertisements for the products claimed the products had 'clinically proven' health benefits. The company charged more for the products, and consumers were

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induced to purchase the products, based on these claims. In addition to monetary damages, the court ordered Dannon to modify its advertising."[23] These claims centered on Dannon claiming specific health benefits from probiotics in these yogurts. As part of a settlement with the Federal Trade Commission, Dannon agreed it "will stop claiming that one daily serving of Activia relieves irregularity, and that DanActive helps people avoid catching colds or the flu."[24]

Another way companies may not lie is through deceptive pricing, like hidden fees and surcharges. For instance, when a store claims to sell goods at "wholesale prices" or that it is having a "going-out-of-business" sale, if those statements are untrue, they may be tortious, criminal, or both.

Another deceptive pricing tactic—ostensibly against the law, but nevertheless widely used by companies in the telecommunications and airlines industries—is "cramming." This is where the price a customer is shown (for, say, cell phone service or airplane tickets) is later, unbeknownst to the customer, inflated with unexpected fees or costs. I will say more about cramming in chapter 5.

Consumer protection laws also prohibit displaying deceptive measurements or quantities in a product description, which make a product seem larger or smaller than it actually is; using deceptive comparisons to mislead consumers about the relative attributes of one company's products in relation to a competitor's; and misleading customers about guarantees or warranties covering a product purchased, such as by failing to specify what remedy would be provided in the event of a defect or damage, and then declining to provide any remedy when a claim is made. Other laws prohibit companies from deceiving customers in specific contexts, such as car sales by auto dealers and individuals; purchasing and selling stocks, bonds, and other securities; credit card agreements and fees; health-care advertising and medical practices; contests and sweepstakes; construction contractor business practices and price quotes; investment advisors; mortgage lending; and telemarketing and spam emailing.[25]

These laws, which restrict some of the ways corporations mislead, may give the impression that corporations should be stricken from my list of purveyors of fraud on the public. After all, these myriad prohibitions on lying in business must keep corporations honest, right?

Not even close.

Not one of these laws stopped the fossil fuel industry from misleading the public for decades about the existence, causes, and seriousness of

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global climate change. Nor did it stop the sugar industry from carrying out a decades-long campaign to hide the health risks of sugar while redirecting the public's attention to fat. Nor did it stop the opioid industry, or the tobacco industry, or the pesticide industry, or the baby powder industry, or the asbestos industry, each of which carried out campaigns to mislead the public to hide grave health dangers posed by their products, including hiring "rented white coat" scientists and researchers, funding biased studies, engaging public relations firms, and lobbying state legislatures and Congress.

Each of these industries carried out a focused and sustained effort to convince the public of the truthfulness of a known falsehood to make more money. To use a term recently coined, each of these was a *public deception scheme to conceal product dangers*, or PDCPD scheme.[26] PDCPD schemes are one way, though certainly not the only way, corporations defraud the public without running afoul of the law.

PDCPD schemes always work the same way, regardless of industry. They occur when a product is both profitable and destructive. But its destructiveness is not apparent to most people; the causal connection between the product and its harm can be bridged only with science. The companies that make and sell the product exploit this by telling the public the science linking the product to its harm is unsettled or unknown when, in fact, the science is well-enough established to warrant restricting or banning the product, as well as imposition of liability for harm caused by it. This is where scientific doubt campaigns come from: the corporate message does not square with what scientists know, which the industry itself is well-aware of. This makes the campaign of scientific doubt misleading or false, though it is usually legal. This allows those carrying out PDCPD schemes to accomplish *evasion*, meaning they get away with it, because even if they are caught red-handed, there is no law to hold them liable.

Another way corporations profit from falsehoods is by spreading self-serving lies aimed at deregulation, often peddled to the public on false pretenses that it is for the public good when in fact its benefits are primarily to the industry's bottom line. Yet another is the frequently made claim that massive infusions of public money into corporate pockets benefits regular people.

One example occurred following the mortgage-backed securities financial collapse of 2007 and 2008. Wall Street banks misleadingly bundled low-quality investment securities, which contained high-risk mortgages

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lent out to people unlikely to be able to repay them, mislabeled them as safe investments, and sold and resold these high-risk securities at a great profit. When the scheme came crashing down, the housing market followed, then the job market and the economy. The financial collapse of 2007 and 2008 saw millions lose their homes and their jobs.[27] In response, the federal government passed a $700 billion relief fund, used mostly to inject capital into banks and other financial institutions. It was reported shortly after that the bulk of these funds went directly into the pockets of the very banking executives who caused the financial collapse in the first place. A *New York Times* review of investor presentations and conference calls by executives of two dozen US banks found that "few cited lending as a priority. An overwhelming majority saw the bailout program as a no-strings-attached windfall that could be used to pay down debt, acquire other businesses, or invest for the future."[28]

Citigroup, for instance, lost $18.7 billion during 2008 and received $45 billion in bailout money. With that bailout money, it paid officers and employees $5.33 billion in bonuses in 2008. In fact, 738 of its employees received bonuses of at least $1 million.[29] Merrill Lynch lost a whopping $30.48 billion in 2008 and received an undisclosed percentage of its parent company Bank of America's $45 billion in relief funds. During that year, Merrill paid $3.6 billion in executive bonuses, including 696 bonuses of at least $1 million. This same story was repeated over and over, with numerous other banks.

Similarly, the federal government passed a massive bailout tax relief package in 2017, purportedly to give relief to working families and regular Americans. But, as leading economists predicted, the overwhelming majority of the economic benefits from the tax cut went to, and continue to go to, the wealthiest 1 percent. Not only did the economic relief go to wealthy people and corporations right from the get-go—65 percent of the money went to those in the top 20 percent of earners while the top 1 percent alone received over 20 percent of the money—but the tax cuts themselves were designed to favor the wealthy even more heavily in the long run; all individual tax cuts were set to expire within ten years while corporate tax cuts were made permanent.[30]

Like the 2008 bank bailout and the 2017 tax cut for the rich, the 2020 Payment Protection Program (PPP) was yet another government stimulus spending bill that was, according to its advocates, designed to help regular folks through a tough time but ended up unsurprisingly being a boon for

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the rich. Of the $510 billion doled out by the program, over 70 percent of it went to the top 20 percent of earners. In other words, as MIT economist David Autor pointed out, "the distribution of Paycheck Protection Program loans overwhelmingly accrued to high-income households." As a result, "the gusher of stimulus money Congress provided to offset the COVID recession during [2020 and 2021] included hundreds of billions of dollars for wealthy Americans, with little benefit to the ordinary workers the money was supposed to help."[31]

These kinds of government spending packages sold to the public as being "for the greater good" but which are in fact "handouts for the wealthy" comprise their own category of fraud on the public, wherein the private sector and government work hand in hand. In a similar vein, big industries, from banking and finance to soft drinks and fast food, lobby the government to reduce regulations, which remove protections for consumers, the public, and the environment. These efforts of corporations to enrich themselves at the expense of individuals and society involve numerous efforts to spread messages, not only to lawmakers but to the public, to convince people that these measures are for their own good when in fact they are good primarily for the industries that lobby for them.

Corporations, in short, do what politicians and the media do: they use their access to the public megaphone to spread falsehoods that further their bottom line. But the aims of corporations are, in a way, somewhat simpler. Politicians seek political office, greater control of and power over the political process and the electorate, and, to some extent, the pushing of an ideology or worldview. The media seeks to gain a greater number of viewers and clicks, increased market share, greater influence and impact, and higher ad revenue. Corporations seek profit (i.e., to maximize shareholder value) pure and simple.

These three groups overlap and together represent the vast majority of those with the resources and influence to either speak to large segments of the public or to pay others to do so on their behalf. Thinking of them in these separate groups is helpful, even though they often work together and frequently even spread the same message. Others defraud the public as well, such as police departments that put out press releases with falsehoods to cover up police violence and criminal activity and writers and editors of history books who knowingly or recklessly falsify or remove historical information to push an agenda or prop up a myth. There are yet others who we will get to in time. But these three—politicians, the media, and

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corporations—are easily the most significant and account for the lion's share of the fraudulent messages disseminated to large segments of the public.

HOW DO THEY CARRY IT OUT?

Fraud on the public is, like one-on-one fraud, the purposeful deception of others for one's own gain. However, the intended victim is not one person but multitudes of people. The aim is to spread the message far and wide using all available means. Fraudsters go on TV and lie or have others lie on TV for them. They publish false or misleading claims in newspapers, magazines, blogs, and books. They tell their lies on the radio, on YouTube, on podcasts, or at political rallies. If they don't want to spread the lies themselves, they have others handle it for them, either because the lies also benefit those others or because the liar pays them—a scientist, an expert, a researcher, a journalist, a politician—to interface with the public and spread the profitable falsehood on the liar's behalf.

These large-scale lies reach us the same way all information, true or false, reaches us. We read about it. We hear about it. Someone else sees it and shares it with us. They tell us over the phone. They share a link. We see it in a social media feed, or in a newspaper article, or in a blog post. It finds us the same way information always does. Wherever an audience can be found, wherever people consume information, that is where those who spread profitable falsehoods aim their message. So, if you want to know where you might find disinformation calculated to manipulate your ideas, behaviors, and choices, it's simple: you find them wherever you get your news, ideas, gossip, and entertainment.

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WHY DO THEY DO IT?

Asking *why* someone says or does something is a tricky business, but particularly so here. Discussing the motivations held by large groups, such as politicians or corporate executives, is even more difficult than identifying the motivations of an individual. Nevertheless, there are clear patterns when it comes to what drives leaders to mislead, and knowing and understanding them helps give a clearer picture of how and why fraud on the public happens.

Two obvious motivating factors jump out: financial profit and political gain. The first is particularly glaring. Fraud on the public, like one-on-one fraud, often involves a desire to enrich oneself. No big news there. Almost as obvious as a motivating factor is the desire to acquire political power or push a political agenda.

So, why don't we just close the book on the *why* question and move on? Why not simply say they do it for money and power, that fraud is fraud at the end of the day, no matter how big or small it might be? These things are mostly true, after all. And so, it is tempting to simplify the issue down to a slogan. But while slogans might capture a truthful essence about a subject, they also often miss important nuance and detail.

There are two reasons we do not skip over the *why* question. First, there are important clarifications that need to be made about the two prime motivating factors—money and power. Second, apart from these two, there are two other significant aims of those who mislead the public that deserve mention, and they have no direct connection to money or politics. These are impeding justice and manipulating history. The former is done to evade legal recourse, while the latter is done to spread and justify an ideology. These two round out the four most common motivations behind schemes to defraud the public.

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For Financial Gain

Making money is the principal purpose of numerous schemes to defraud the public. There are diverse and creative ways this is done. Schemes to defraud the public for financial profit include PDCPD schemes, like those carried out by the fossil fuel, opioid, and sugar industries, as well as corporate welfare schemes, such as that carried out by the banking industry following the 2007 financial collapse. But it also includes falsehoods spread by social media and traditional media. The industry leaders in each space are, after all, for-profit corporations. Their purpose is to make money.

Disseminating information is an industry like any other. And as happens in other industries, falsehoods sometimes help the leaders in this industry capture more audience, market share, and ad revenue. I am not talking here about instances where a social media platform is serving as a forum for third parties to disseminate their own messages, such as when X or YouTube serve as conduits for people's tweets and videos. The issue of how much control a platform must exercise over content others post on the

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platform is a separate discussion. Rather, I am talking here about where the media themselves are the spreaders of disinformation.

Examples abound. For instance, a couple years ago radio host Rush Limbaugh told his millions of listeners that Hurricane Irma, which was approaching Florida, was a liberal hoax. He blamed the panic it was generating on the liberal media and repeatedly implored his audience to ignore the warnings to evacuate. He said all this from his studio in Palm Beach. Within minutes, he himself fled from Florida to escape the storm's path.[32]

This particular falsehood might make for a colorful anecdote—radio host tells listeners, including many in Florida, that the approaching hurricane is a hoax minutes before fleeing the state to get out of the storm's path—but it is not at all surprising. We know falsehoods flow endlessly from some of the biggest names in media. But it feels different coming from a radio host than it does from a big corporation. After all, the causal connection between a falsehood like this and the revenue it generated is not direct. It involves the creation and packaging of a particular brand, in this case Limbaugh's brand of political and social commentary, and the delivery of the message to millions of listeners. They tune in to hear messages they find appealing, messages that confirm their beliefs and biases. But does this make the audience a willing participant in the scheme? In some cases, it might. But "willing" might be a bit strong of a word for it. People are often far too busy with their own family, work, and life to reflect on the truthfulness or falsity of the messages they consume. Thus, it is fanciful notion to imagine a listener openly and knowingly acknowledging the likely falsity of the radio host's message but listening to it anyway. People simply tend to buy into messages that align with their prejudices and predisposed beliefs. Certainly, people have the ultimate responsibility for the information they consume and the messages they believe. But as discussed in chapter 1, we are not endowed with reliable lie detection abilities.

Moreover, these false and misleading messages are pumped out to people all the time. Breitbart News falsely claimed Hillary Clinton's presidential campaign was funded by Saudi Arabia. CNN falsely reported that Trump aide Anthony Scaramucci was involved in a Russian hedge fund under Senate investigation. Slate falsely reported Trump created a secret internet server to covertly communicate with a Russian bank. Radio host Hal Turner falsely claimed that people with the COVID vaccine are being "tracked in real time via 5G cellular, and all that data can be hacked

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into to track you."[33] Examples of provably false claims in the media are everywhere.

Although the individual motivating factors are complex, the top-down pressure from the owners, directors, and officers of the large media corporations to increase audience and generate clicks and views drives journalists and other content creators to focus on stories and narratives more people want to view, regardless of importance or truthfulness. This "tension" between the profit motive and journalistic standards and ideals is well understood.[34] But while a tension may exist for journalists and reporters, a corporate shareholder has no conflicting motives. For-profit corporations have their purpose right in their name. Falsehoods that media spread are typically for financial profit.

Moreover, any other scheme whereby one disseminates a false claim to mislead the public to turn a profit would likewise fit into the category of fraud on the public for financial gain.

For Political Gain

The idea of lying to the public for a self-serving purpose often brings to mind politicians—and for good reason. "If you took all the deception and fraud out of politics," Thomas Sowell noted, "there might not be a lot left."[35] Politicians lie to the public as a matter of course. If such a lie causes unacceptable harm, it would be, under my definition, fraud on the public for political gain.[36] The political gain could be winning an election, generating support for a particular policy or agenda, or increasing support for a political party, platform, or candidate more broadly. Examples include the Republican chair for Bexar County, Texas, telling an audience and TV viewers that the COVID pandemic was a Democratic hoax and imploring everyone to take their protective masks off; Senator Marco Rubio claiming President Barack Obama wants to "take away our guns"; President George W. Bush and his administration claiming Iraq possessed weapons of mass destruction as a pretext for the American invasion of Iraq; campaign workers for Democrat Doug Jones creating a Facebook group called "Dry Alabama," which purported to be an alliance between teetotalers and Jones's Republican opponent, Roy Moore, but which was actually an effort by Jones to get moderate conservatives to vote Democrat; and Joe Biden claiming in September 2020, that if former president Trump "had done his job, had done his job from the beginning, all the

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people would still be alive. All the people. I'm not making this up. Just look at the data."[37]

Fraud on the public for political gain is carried out using a range of techniques, including demonizing marginalized groups such as immigrants, racial and ethnic minorities, and the LGBTQ+ community; making baseless and bad faith accusations against political opponents and opposition parties; manufacturing outrage regarding trivial or nonexistent problems; and utilizing rhetorical weaponry in bad faith, such as making false equivalencies or whataboutisms. These politically motivated deceptions have caused myriad horrors, from genocides to military invasions.[38] The fact the end goal is not pecuniary does not make these frauds any less dangerous. Nevertheless, whether any such scheme should be subject to speech restrictions depends on a careful examination of the speech involved, the harm or potential harm it poses, and a First Amendment analysis of any law, rule, or regulation restricting such speech.

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To Inhibit Justice

Another form of fraud on the public consists of spreading disinformation to cast a false light on, to cover up, or to otherwise influence how a court would rule on a criminal or tortious act. This is fraud on the public to inhibit justice. In recent years there have been a handful of well-publicized cases of police departments engaging in this kind of scheme. They do this by disseminating false information about actions by police officers who injured or killed civilians, most often during the act of arresting or transporting suspects.[39] In the case of George Floyd, a man arrested on suspicion of having used a counterfeit twenty-dollar bill at a food mart, the Minneapolis Police Department released an official statement claiming Floyd had "physically resisted officers" and that he had died in a "medical emergency." Several videos of the incident later emerged that showed clearly Floyd had cooperated with police and that he had been murdered by Police Officer Derek Chauvin when Chauvin pressed his knee heavily onto Floyd's neck for nine minutes and twenty-nine seconds. Had the videos not emerged, the public would almost certainly have had little choice but to buy into the falsehoods in the police department statement.

Incidents like this one occur with frightening frequency. Rather than go through a laundry list of them, I will just mention one more. In Tacoma, Washington, another man, Manuel Ellis, died while being arrested.

The Tacoma Police Department released an official account of how it happened. It said Ellis had attacked police officers and that no officer placed a knee on his head or neck. Three witnesses came forward, all asserting the official police account was false. Ellis did not attack the officers. Instead, police officers had, with uncalled-for violence, attacked him. And not only did a police officer put a knee on Ellis's neck, but the evidence also later proved it was the knee on his neck that killed Ellis; he died of asphyxiation. Ellis's last words were "I can't breathe, sir!"[40]

It is not just police departments—political leaders also make false claims to the public to interfere with justice. Trump, for instance, while running for and serving as president praised former Navy SEAL Eddie Gallagher while Gallagher was on trial for heinous war crimes; pressured military courts to take legal action against Lt. Col. Alexander Vindman, who had criticized Trump; and bullied a US district judge who issued a ruling unfavorable to Trump by claiming the judge was biased, calling him "Mexican," and suggesting the judge should be investigated.[41] Although such statements were also clearly for political gain and/or for profit, the fact they involved meddling in the justice system means their aim was also to inhibit justice.

To Falsify History

For most of the twentieth century, public school children in the American South were taught the Civil War had little, or nothing, to do with slavery. Teachers instructed students that slavery barely existed in the South, that slavery was not that bad, and that under slavery, blacks "were the happiest set of people on the face of the globe—free from care or thought of food, clothes, home, or religious privileges."[42] They taught that whites were the superior race. In many schools, the whole curriculum covering American history was sanitized to glorify southern white culture and slaveholding while conflating white indentured servitude with the African slave trade.[43]

These false assertions grew out of a decades-long effort to rewrite history following the Civil War. This is often referred to as the "Lost Cause." It "had its roots in the Southern search for justification and the need to find a substitute for victory in the Civil War." As one author observed:

> In attempting to deal with defeat, Southerners created an image of the war as a great heroic epic. A major theme of the Cult of the Lost Cause was the clash of

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> two civilizations, one inferior to the other. The North, "invigorated by constant struggle with nature, had become materialistic, grasping for wealth and power." The South had a "more generous climate" which had led to a finer society based upon "veracity and honor in man, chastity and fidelity in women." Like tragic heroes, Southerners had waged a noble but doomed struggle to preserve their superior civilization. There was an element of chivalry in the way the South had fought, achieving noteworthy victories against staggering odds. This was the "Lost Cause" as the late nineteenth century saw it, and a whole generation of Southerners set about glorifying and celebrating it.[44]

Although the Lost Cause was created and supported in many ways, including by erecting statues and other monuments to Confederate heroes, one of the most pernicious ways this was accomplished was by enshrining false narratives in textbooks used throughout the American South until the late twentieth century. These were called Lost Cause textbooks.

It is difficult to know the extent of the harm caused by spreading this falsified version of history. It is clear, however, that it has had a radical effect on Americans' failure to adequately understand race and history. A Pew Research poll in 2011, for instance, found 48 percent of Americans thought the Civil War was mainly about states' rights—including 60 percent of those under age thirty—while only 38 percent thought it was primarily about slavery.[45] These opinions do not square with reality. The Confederate leaders' own words show slavery was the central issue of contention between the Southern and Northern states, and that it was the motivating cause for secession and war. The poll results are understandable, however, given that southern students were fed Lost Cause propaganda for generations.

This was one of many instances where those motivated to erase or rewrite history have spread lies about the past to benefit themselves, spread their ideology, or solidify their own place in the societal hierarchy. This happens frequently, however, with groups who impose their own ideology, agenda, or beliefs on others by way of academic curricula. This may also be done by inserting or excising curricular material pertaining to critical race theory, LGBTQ+ issues, or abortion for political or ideological purposes.[46]

Falsifying history overlaps with other kinds of fraud on the public. Motivations are frequently mixed. For instance, an oil company duping the public into believing scientists were "divided" on the global warming

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question in the 1990s is an attempt to defraud the public, both for profit and to falsify history.[47] Politicians who disseminated the same climate doubt as part of a political campaign were motivated by both falsification of history and gaining or retaining political power.

In this chapter, we have covered *who* defrauds the public, *how* they carry it out, and *why* they do it. This helps explain how deceit on a mass scale operates. But it does not, by itself, give any compelling justification for why we should amend the law to address it. To understand why this issue is an urgent problem and in need of remedial legislation or judicial interpretation, we must examine the ramifications of the status quo. We must look at the harm it causes—who it hurts and how badly it hurts them. Only by appreciating the seriousness of the threat can we choose what we should do to avoid it.

The harm fraud on the public causes is vast and takes many forms. Some, we have already touched on: terminal and chronic illnesses, birth defects, and a vast array of other health maladies, suffered not only by those duped but also by others. Then there is the loss of money to those selling products whose dangers they hide. Other harms include environmental destruction, climate disruption, the weakening and loss of faith in democratic institutions and processes, the undermining of rule of law, loss of individual autonomy and agency, a reduction in tolerance and an increase in prejudice and bigotry, exacerbation of wealth inequality and injustice, and a diminishment in individual and societal knowledge and access to truthful information.

These will be the subject of the next chapter. A complete catalogue of these harms would be massive. I will not attempt to list them all. Rather, I will give selected examples, beginning with leaded paint and running through a short list of some of the prominent ways people and society are harmed by fraud on the public.

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The Price of Disinformation

COUNTING THE HARMS OF FRAUD ON THE PUBLIC

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One morning in 1991, a fourteen-month-old boy, who I will call "Elijah," was rushed to the emergency room in Milwaukee, Wisconsin. He was burning with fever. His mother's first thought was it must be the flu. The doctor on duty, however, suspected a different culprit. He had seen cases like this. To him, it looked like lead poisoning.

Young children from low-income neighborhoods, a profile Elijah fit, were all too often exposed to lead in their home. This was particularly true in Milwaukee, which had lead poisoning levels three times the national average. The doctor ran a blood test. Blood lead levels are measured in micrograms of lead per deciliter of blood (μg/dl). The Center for Disease Control (CDC) considers any lead in the body toxic. The only "healthy" amount of lead is none. However, anything above 10 μg/dl causes permanent damage to a child's brain development. Elijah's blood lead level was 18 μg/dl.[1]

Elijah was put on chelation treatment. This is where drugs are administered intravenously to purge the body of heavy metals. These drugs are engineered to bind to heavy metal molecules, creating a waste product, which exits the body through urine. It is not a pleasant process. As one expert put it, chelation is "a very painful procedure."[2] Apart from a burning sensation near the injection site, it also causes fever, headache, nausea, and vomiting.[3]

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The lead entered Elijah's body the usual way. The home he and his family lived in, a rental house at 2652 North 37th Street in Milwaukee, had, unbeknownst to Elijah and his parents, been painted with white lead carbonate paint. But how did it end up in Elijah's body? Had he eaten paint chips?

The paint-eating theory was often put forward in lead poisoning cases at the time because of a widespread misconception, promoted by the lead industry, that children were usually at least partly to blame for their poisoning because it resulted from eating paint chips, something "normal" children don't do. There was no evidence Elijah had ever eaten paint. Indeed, his parents never believed the paint-chip-eating theory. They kept a close eye on Elijah, and there were few places, if any, he could reach in the house (at fourteen months old) that might allow him to break off and ingest chips of paint.

Elijah was hospitalized again a couple months later with elevated lead levels in his blood. Deciding the problem must be the house itself, the family moved to a new rental house a mile and a half away, at 2654 North 25th Street.

They hoped things would get better. They got worse.

Elijah was hospitalized several times over the next two years, his lead levels alarmingly high every time doctors measured them. At twenty-two months, Elijah was diagnosed with a blood lead level of 40 µg/dl. When he was two years old, it was 36 µg/dl. At two years and seven months, his blood lead level was 27 µg/dl. Then on August 5, 1993, at age three years and two months, Elijah was hospitalized for five days after he was diagnosed with a blood lead level that reached 49 µg/dl. Levels this high can be lethal. Elijah underwent emergency chelation treatment, again and again. He continued to suffer elevated blood lead levels until he was six years old.

Between the 1920s and 1990s, lead poisoned millions of children in the United States. Victims tended to come from poor homes in large cities. The common thread between them was not children who eat paint—a condition known as pica—which is far rarer than the lead industry led the public, and doctors, to believe. Rather, the common thread between all victims was that they lived in homes painted with white lead carbonate paint.

Over time, old paint crumbles. Some of it turns into dust. This dust, which is virtually invisible, settles onto the floor of the house and onto

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items inside the home, such as carpet, furniture, and toys. If a child crawls on the floor or plays with a toy and then sticks their fingers in their mouth, lead enters the body. The effects were devastating and widespread, leading to millions of children suffering permanent neurological defects. "The scope and gravity of lead poisoning prompted the United States Department of Health and Human Services to say in 1991 that childhood lead poisoning was 'the most important environmental health problem for young children.'"[4]

In the usual pattern, this public health crisis was man-made. It was created by an industry with a product (paint containing white lead carbonate) that sickens and kills in a manner invisible to most victims while the industry itself knew full well the harm its product was wreaking. The leaded paint industry followed the typical playbook. They did not stop the manufacture or sale of their dangerous product, or phase it out, or warn the public. The industry chose to do none of those things. Rather, it launched a massive campaign to mislead the public by hiding the dangers and amplifying the product's positive attributes. The leaded paint industry even went so far as to make it appear lead was *beneficial* to children. This involved numerous marketing and public relations messages and merchandise aimed at creating and reinforcing the idea lead is a friendly and integral part of many of the products we, and our children, love. To amplify this message, the leaded paint industry created and funded pamphlets, magazines, articles, op-eds, ads, state and federal lobbying, an industry advocacy group called the Lead Industry Association (LIA), public relations campaigns, academic research by bought-and-paid-for scientists, and on and on.[5]

Today, anyone willing to look at the evidence will find a wealth of damning statements made in writing by industry executives that made clear the industry knew of the dangers by the end of the nineteenth century, and even acknowledged this in writing as early as 1904, but, as usual, the industry's approach to the danger was to see it as a danger *to the company's bottom line* rather than a danger *to public health*. Economic alternatives existed to using lead in white paint. The industry, however, chose slightly higher profits over safety. In one exchange from 1939, now in the public record, leaded paint industry executives said that lagging sales of leaded paint were unacceptable, that sales must be increased, for not only would this generate higher revenues from paint sales directly but it would also boost the value of lead mining company stocks in which the industry was heavily invested.

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The industry knew the dangers but shrugged them off. In fact, industry executives mocked victims while rejecting the idea of addressing the problem they were causing. For example, the LIA's director of health and safety, while discussing the costs to the industry of childhood lead poisoning in 1955, scoffed at the idea these poisonings might cost the industry hundreds of thousands per year. He acknowledged the health dangers but thought it did not actually pose much of a financial liability.

> With us [the LIA], childhood lead poisoning is common enough to constitute perhaps my major "headache," this being in part due to the very poor prognosis in many such cases, and also to the fact that the only real remedy lies in educating a relatively uneducable category of parents. *It is mainly a slum problem with us*, estimated by [Robert] Kehoe[6] to run into four figures annually, and as *we have no monopoly on either substandard housing or substandard mentalities* in the USA, the quoted figure of six seems to be patently absurd.[7]

In other words, because lead poisoning happens mostly in so-called "slums," the victims pose little threat, either legally or financially, to the industry.

Elijah and his parents sued the seven major leaded paint manufacturers, alleging they "conspired over the years to obscure and conceal lead's dangers." The lawsuit sought damages from those ultimately responsible for creating the danger in the first place, the ones who put the lead in the paint and marketed and sold it to house painters throughout the country while at the same time misleading the public and lobbying the government.[8]

Elijah and his family made a strong case. Both houses they had lived in were painted with white lead carbonate paint, which one of the defendants had undeniably manufactured. Both houses contained lead paint dust. Expert after expert testified it was lead from these houses that poisoned Elijah.

One expert who testified in the case was Dr. John Rosen. In the mid-1990s, he was the foremost expert on childhood lead poisoning. He had treated more than thirty thousand lead poisoned children. Dr. Rosen testified that, of all cases he had seen, Elijah's "was one of the worst in terms of how long it lasted and what the levels were."[9] In fact, Elijah was poisoned throughout the most vulnerable period of his brain development: the first three years of his life. As a result, Elijah was afflicted with "a

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constellation of neuropsychological sequelae, including mild mental retardation, ADHD, and behavior disorder."

But though the court acknowledged Elijah's injuries, and acknowledged the manufacturers' lead paint caused the injuries, the court nevertheless rejected the plaintiff's claims. The manufacturer defendants filed a motion for summary judgment. The court granted the motion. Elijah's claims were dismissed. He and his family filed several appeals, even taking the case up to the Wisconsin Supreme Court, but all appellate courts upheld the trial court's dismissal of the case. Elijah and his family never recovered a dollar from those who knowingly put his health, and the health of millions of other children, in danger.

Elijah is one individual whose health was harmed by falsehoods disseminated by one industry. But this is a common story: people sickened or killed by leaders who lie to push their agenda, to get elected, or to sell dangerous products. Leaded paint is just one of the culprits.

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HARM TO HEALTH AND LIFE

Anti-Vaccine Disinformation

The restrictions mandated in response to the COVID pandemic were remarkable in several ways. For over a year, the world seemed to have largely shut down, or at least shut itself in. Offices and schools closed their doors. Meetings, outings, family engagements, and dates were done via phone or online video. Children stayed home and attended class on their computers.

Another remarkable thing that occurred during the pandemic was that the spread of disinformation led to hundreds of thousands of unnecessary deaths. That is not to say that all reports labeled "disinformation" were false or misleading. Indeed, many of the reports pointing fingers at others for spreading disinformation were themselves spreading disinformation. The information environment was, to say the least, confusing for many people, and sifting through it was difficult. Knowledge of the effectiveness of masks and how exactly the virus spreads evolved throughout the pandemic, particularly in the early months. But studies now show that deaths increased unnecessarily in the United States due to leaders focusing more on denying the pandemic's existence and politicizing it than on taking measures to slow the spread.[10]

However, beginning in early to mid-2021, when vaccines became

widely available, right-wing politicians, pundits, podcasters, and others in the conservative media sphere spread a massive amount of false and misleading anti-vaccine claims. This was not confined to the far Right. Mainstream Republicans and their allies spread these anti-vaccine messages far and wide, pushing the idea that the vaccine was a plot by "liberals," "progressives," "globalists," or "Democrats," or by Bill Gates, or by George Soros, or by any one of the other boogeymen manufactured for right-wing scare tactic talking points.[11]

The result was predictable. A gap between vaccination rates in liberals and conservatives emerged. There had been no gap prior to the disinformation. In swift fashion, however, the political right became anti-vaccine, at least regarding the COVID vaccine, and this diminished vaccine rate killed hundreds of thousands. There were over a million deaths from COVID in the United States during 2021. Experts now estimate about a third of them could have been prevented if vaccination rates had not been pushed down by falsehoods about the vaccine. This amounts, by one count, to a little over 319,000 preventable deaths in 2021 caused primarily by vaccine disinformation.[12]

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Opioids

The opioid epidemic is unique to the United States. Why? Because in America, opioid makers were permitted to defraud the public in ways prohibited elsewhere. Beginning in the 1990s, the opioid industry spent millions to mislead the public about the dangers posed by its painkilling drugs. By 2004, Purdue Pharma's OxyContin was the most abused drug in the United States.[13] For years now, opioids have killed around 150 Americans per day, and, in 2021, the opioid death toll exceeded one hundred thousand. Overdose deaths have now surpassed deaths from car accidents, AIDS, and diabetes.[14] The opioid epidemic, caused by a small handful of giant pharmaceutical companies, has been labeled "the worst public health crisis in American history." Although Americans make up only 5 percent of the global population, Americans consume 80 percent of the world's opioids. For the most potent and dangerous kinds of opioids, the synthetic variety, the numbers are worse. Americans consume 82 percent of the world's oxycodone and more than 99 percent of its hydrocodone.[15] Beginning opioid use is a death sentence for thousands and a one-way ticket to addiction and misery for millions of others. This and

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other dangers were never mentioned in the opioid makers' marketing and public relations materials.

Sugar

The sugar industry is another recent example of a recently uncovered fraud on the public destructive to human health. Between 2012 and 2017, a professor at the University of California, San Francisco, uncovered a cache of documents revealing that the sugar industry had, for decades, misled the public about the health dangers of sugar. The sugar industry, Dr. Cristin Kearns discovered, had launched a campaign in the 1960s to counter "negative attitudes toward sugar" in part by funding sugar research that produced favorable results. The campaign was orchestrated by John Hickson, a top executive at the sugar association who later joined the tobacco industry.[16] As part of the sugar industry campaign, Mr. Hickson paid two influential Harvard scientists to publish a major review paper in 1967 that minimized the link between sugar and heart health and shifted blame to saturated fat. The conflict of interest was not disclosed.

The campaign worked. Over the past fifty years, consumption of sugar has tripled worldwide. The rise in consumption was particularly sharp in the United States, in both children and adult diets. Moreover, there have been even sharper increases in the consumption of certain, more harmful sugars like high-fructose corn syrup (HFCS). HFCS, in fact, can now be found in a wide array of processed foods and beverages, like juices, yogurts, cereals, and breads. The United States leads the world in added sugar consumption, as the only country where more than six hundred calories of added sugar are consumed per person per day nationwide.[17]

As we now know, this rise in sugar consumption came with a high cost. Recent reports have identified sugar as the single leading nonregulated component contributing to the spike in metabolic syndrome diseases such as diabetes, hypertension, lipid problems, cardiovascular disease, and nonalcoholic fatty liver disease. The other two contributing factors, tobacco and alcohol, are already heavily regulated (though each presents its own case study in fraud on the public). Sugar has been a leading cause in the rise of obesity and metabolic syndrome diseases, which have also sharply driven up the cost of health care in the United States.[18] Accordingly, we all pay a price for it.

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Fossil Fuel

Around the time Dr. Kearns discovered the evidence implicating the sugar industry, a group of journalists uncovered evidence implicating the fossil fuel industry in a conspiracy to mislead the public in a manner eerily similar to that by the sugar industry. In 2015, the *Los Angeles Times* and Inside Climate News independently uncovered internal corporate documents from ExxonMobil showing that it, the world's largest oil company,[19] had funded a massive campaign of climate change deception beginning in about 1990 and continuing through at least 2010.[20] Like the sugar industry's public deception, ExxonMobil spent millions to pay Harvard-affiliated academics to shill for the industry by publishing papers that supported the corporate campaign of climate change doubt.[21] As it had in the sugar and opioid industries, the public deception centered on downplaying, hiding, and outright lying about the product's dangers.

Like sugar and opioids, the fossil fuel industry's deception harmed millions. Sea-level rise, more frequent and stronger extreme weather events, heatwaves, droughts, floods, and massive population displacement are all projected to take place in the coming decades.[22] Needless to say, these have a significant adverse effect on the health and lives of millions. According to recent estimates, global warming now kills nine million people per year.[23] Most of these deaths are caused by small particle respiratory infections and related respiratory illnesses. In recent years, this has amounted to one in every five deaths worldwide: "Without fossil fuel emissions, the average life expectancy of the world's population would increase by more than a year, while global economic and health costs would fall by about $2.9 trillion."[24]

Understandably, then, National Geographic recently called climate change "the greatest threat to human health" on the planet.[25] Thus, although the environmental threats from "the most profitable fraud in history" have long been well-known, the threats to human health and life have only in recent years come to light.

Leaded Gas

Lead, a known poison, was purposefully added to gasoline and then pumped out of exhaust pipes all over the world for almost a century. It poisoned the air, land, and sea. Everyone alive between 1940 and 1990 suffered at least

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minor lead poisoning. Those making money off leaded gas spent millions to hide the dangers of their product. As a result, they made billions.[26]

Lead was not, and never was, a necessary ingredient of gasoline. In fact, lead is *bad* for car engines, a fact pointed out by leading automotive experts. But while lead is bad for cars and even worse for human, animal, and plant life, it was a goldmine for those making and selling it. General Motors (GM), DuPont, and Exxon launched a public relations campaign to convince the public that tetraethyl lead, or TEL, one of the most dangerous forms of lead ever discovered, is the only way to make gas perform well.[27] They called it a "gift from God."[28] The companies were lying. Lead did nothing that other alternative additives could not do. This was admitted by GM at the time (in private) and later confirmed when, following the ban on leaded gasoline in the '80s, gas companies phased out leaded gas without delay or issue.[29]

So, why did they use lead? It was patentable.[30] Many other effective fuel additive options at the time were alcohol-based but there was no way to exclusively produce or distribute them. Only TEL, which GM and DuPont patented, could be controlled and, therefore, exploited for profit.[31] These companies held the exclusive right to make it, mix it with gasoline, and sell it to service stations and drivers.

Many knew the dangers of TEL before its use in gasoline: GM, DuPont, and Exxon. Internal memos and correspondence now in the public domain confirm these companies knew the dangers. In March 1922, for example, before the patent application was even filed, Pierre du Pont wrote to his brother Irénée du Pont, the DuPont company chairman, that TEL is "a colorless liquid of sweetish odor, very poisonous if absorbed through the skin, resulting in lead poisoning almost immediately." DuPont, GM, and Exxon would, in the coming years and decades, adamantly deny any knowledge of TEL's risks.

The dangers of TEL were known outside of the leaded gas industry as well. Leading US public health experts railed against the idea of putting lead into gas. These included Alice Hamilton, the first woman appointed to the Harvard faculty, and Yandell Henderson of Yale, the country's foremost expert on poison gases and automotive exhaust. Henderson, for example, warned that by putting lead in gas "the atmosphere might be polluted to such an extent along automobile thoroughfares that those who worked or lived along such streets would gradually absorb lead in sufficient quantities to poison them in the course of months."[32] Henderson then made a prediction:

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> Perhaps if leaded gasoline kills enough people soon enough to impress the public, we may get from Congress a much-needed law and appropriation for the control of harmful substances other than foods. But it seems more likely that the conditions will grow worse so gradually and the development of lead poisoning will come on so insidiously (for this is the nature of the disease) that leaded gasoline will be in nearly universal use and large numbers of cars will have been sold that can run only on that fuel before the public and the Government awaken to the situation.
>
> This is probably the greatest single question in the field of public health that has ever faced the American public. It is the question whether scientific experts are to be consulted, and the action of Government guided by their advice, or whether, on the contrary, commercial interests are to be allowed to subordinate every other consideration to that of profit.[33]

As Henderson correctly pointed out, lead builds up in the body over time, slowly poisoning people.[34] Like tobacco, asbestos, fast food, and other health hazards that kill or sicken over a long period of time, lead poisoning is often a slow-moving bullet. That makes it no less dangerous. Most who are poisoned do not know it. We now know, however, millions had their lives altered or ended because of the lead that built up in their bodies due to environmental exposure from car exhaust.[35]

Leaded gas, like sugar, tobacco, fossil fuel, and other products sold through PDCPD schemes, caused massive and widespread harm to health, life, and the environment. The causal connection between the product and its harm was invisible to the public but known to scientists and experts. Although leading toxicity and environmental experts pushed to keep lead out of gas, the industry used its influence to push regulators to ignore their product and paid their own experts and think tanks to produce studies, articles, and media talking points that raised doubt about the harm caused by leaded gas.[36]

A group of "rented white coat" scientists shilled for the leaded gas industry and were paid whopping fees for their efforts.[37] These famously included Thomas Midgley and Robert Kehoe.[38] Midgley has been described as, among other distinctions, "The Man Who Harmed the World the Most" and "The Man Who Poisoned Us All."[39] Kehoe, for his part, is credited with making leaded gas possible and profitable for its entire existence, from the mid-1920s to the 1970s. It was another scientist, Clair Patterson, who heroically stood up to Kehoe and the leaded gas

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industry, who both began and finished the fight to remove lead from gas once and for all.[40]

Lead poisoned people all over the world. In the 1960s, Clair Patterson proved that lead levels in humans were, on average, six thousand times higher than they had been in preindustrial humans. The only source of worldwide lead came out of car exhaust pipes. Some of it settled in the proximity of the roads and highways on which those vehicles traveled. But some of the lead floated up into the atmosphere, where it was carried by winds, rivers, and currents. Scientists spent decades studying how many people were poisoned by lead and what effect the poisoning had on individuals and societies.[41]

In short, lead permanently stunted neurological development in millions of children and caused permanent learning disabilities, mental impairment, anxiety disorders, and a significant drop in IQ level during the second half of the twentieth century. The presence of lead also increased violence and criminality, not only in individuals but in entire communities. This was measurable. Violence and criminal activity dropped in the ’80s and ’90s in specific communities at the same time, and in the same proportion, that lead levels went down. There were also many thousands of worldwide cases of acute lead poisoning from TEL in gas, ranging from fuel spills to gas pumping accidents. Once again, those responsible were not punished for the deceit; they were rewarded richly for it.[42]

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Tobacco

In 1969, the British American Tobacco company prepared a memorandum reviewing the current state of the tobacco industry’s public image and its future. In the memo, the author noted, “Our consumer I have defined as the mass public, our product as doubt, our message as truth—well stated, and our competition as the body of anti-cigarette fact that exists in the public mind.” The author then added, “Doubt is our product since it is the best means of competing with the ‘body of fact’ that exists in the mind of the general public. It is also the means of establishing a controversy.”[43]

The tobacco industry figured out—though they were neither the first nor the last to do so—that if they simply raised doubt about studies linking smoking and cancer, this would give people inclined to smoke a viable excuse to do so even if they knew about the studies pointing to the smoking-cancer link. Doubt was enough. Tobacco sellers did not need to prove

tobacco was safe; rather, they shifted the burden to scientists to prove tobacco was *not* safe. This was the same tactic—the Kehoe Paradigm—used by the leaded gas industry and others to avoid regulation and liability.[44]

Tobacco companies deceived the public into believing smoking was safe, or at least not "proven" to be harmful. More than twenty million Americans, and over one hundred million worldwide, have died from lung cancer and other illnesses resulting from firsthand and secondhand tobacco smoke.[45] All of these illnesses and deaths can be traced back to the tobacco industry's purposeful fraud, by which it convinced the public, the courts, and government leaders and regulators, that the health effects of smoking were not scientifically certain enough to justify taking action against, or regulating, the industry.

Those harmed or killed, and their survivors, began suing tobacco companies in appreciable numbers beginning in the 1950s.[46] The first wave of tobacco litigation consisted of personal injury suits that followed the publication of several scientific studies, which sounded grave warnings of the health hazards of smoking.[47]

However, as Christine Hatfield notes, "The tobacco companies prevailed in these early cases because plaintiffs were unable to prove a causative link between smoking and cancer."[48] The second wave of tobacco litigation was also largely composed of personal injury suits and began in the 1980s. Michael V. Ciresi and his coauthors observed that "in the wake of the 1964 and subsequent surgeon general's reports and the federally-mandated warning label on cigarettes, the tobacco industry began arguing that the hazards of smoking were 'common knowledge' and, therefore, smokers who continued to smoke were merely exercising their 'freedom of choice.'" "Thus," they added, "the tobacco companies, not without a certain audacity, seamlessly shifted their battle cry from the first wave of litigation—'smoking doesn't cause cancer'—to their battle cry in the second wave of litigation—'everybody knows' that smoking causes cancer."[49]

In the 1990s, after the public finally learned that the tobacco industry deliberately concealed the health dangers and addictiveness of tobacco and purposefully designed cigarettes to be addictive, states brought suits against Big Tobacco.[50] In 1994, Mississippi attorney general Mike Moore filed the first of what would become several ultimately successful lawsuits against tobacco manufacturers.[51] Rather than relying on the normal product liability laws, Moore focused on a different kind of claim, public nuisance, which focuses on damage done to the public rather than damage

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to a particular individual. This helped Moore avoid the problematic need to prove specific causation of harm to a particular individual, as well as the defenses the industry had relied on successfully for so long, such as assumption of risk.[52]

Forty other states filed similar lawsuits within three years.[53] States sought recovery under a diverse range of theories, including "deceptive advertising, antitrust violations, federal Racketeer Influenced Corrupt Organizations (RICO) claims, unfair competition, a variety of fraud allegations, and in at least two states, Florida and Massachusetts, statutory claims based on the enactment of specific health care cost recovery legislation."[54]

Courts never reached the merits of these claims because in June 1997 the parties agreed to a global settlement requiring tobacco companies to pay more than $368 billion over twenty-five years. After Congress failed to approve the settlement, the tobacco companies settled with four states individually (Mississippi, Minnesota, Florida, and Texas) for approximately $40 billion total. The tobacco companies then entered into the "Master Settlement Agreement" with the remaining states in the amount of $206 billion—with a total settlement amount of $246 billion spanning at least twenty-five years.[55] This was the largest civil settlement in US history.[56]

Tobacco companies were ultimately convicted of criminal violations for their deceptive practices. In 2006, a federal district court held tobacco companies liable for violating RICO by fraudulently covering up the health risks associated with smoking and for marketing their products to children.[57] While it is true tobacco companies are no longer 100 percent immune from liability, it is a sobering fact that, before the industry paid one penny in damages or settlement, tobacco had killed over one hundred million people worldwide.[58]

What ties tobacco together with other PDCPD schemes is the fact that those harmed by the product were, for decades, blocked from seeking compensation. The industries selling the product causing the harm overwhelmed individual plaintiffs in court. Justice in court, as one author put it, "was simply beyond the ability of a single individual human being to afford."[59]

The same was true of victims of leaded gas, as it was for the victims of other PDCPD schemes carried out over the past century. Accordingly, tobacco companies made, and continue to make, billions defrauding the public. Many other industries have misled the public about dangers posed by their products, resulting in cancers, birth defects, and numerous other

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chronic and terminal illnesses. These include birth defects and terminal cancers tied to pesticide exposure; mesothelioma, lung cancer, ovarian cancer and laryngeal cancer tied to asbestos exposure; ovarian cancer tied to talcum baby power; lung, heart, brain, and gum illnesses tied to using e-cigarettes and vaping; and numerous other health maladies tied to unhealthy or dangerous products sold to the public as safe, such as soft drinks, artificial sweeteners, fast food, processed food, and prenatal drugs.[60]

HARM TO THE ENVIRONMENT

Lying to cover up the dangers posed by a product, or the processes through which it is extracted or manufactured, is one of the ways industries cause a vast array of environmental harms. Pesticides, for instance, poison the air, soil, and water both above and below ground. Some of the chemicals that make their way to people and animals by way of air, soil, and water are proven carcinogens, triggering cancer in several ways: disrupting hormones, damaging DNA, inflaming tissues, and turning genes on or off. The public, however, remains largely ignorant of these dangers, and "exposure to these chemicals is widespread."[61] Pesticide companies, which possess vast amounts of data on this subject, do not respond by warning the public or making their products safe. They most certainly do not stop manufacturing or selling them. Instead, they do everything in their power to keep the public in the dark and keep regulators off their back. But the pesticide industry is not unique.

Numerous industrial waste by-products contaminate our drinking water.[62] Smokestacks and vehicle exhaust pipes pump out air pollutants, like sulfur dioxide and nitrogen dioxide, which form smog in and around cities and acid rain all over.[63] Slash and burn agriculture on an industrial scale causes deforestation, erosion, animal and plant extinction, and air pollution. Drainage and runoff from mining operations poison groundwater with arsenic, sulfuric acid, and mercury. Aerosol cans spray chlorofluorocarbons, or CFCs, into the air, opening a hole in the ozone layer of the atmosphere. Far more products and processes than can be listed here kill off plants and animals, alter landscapes, contaminate communities, infect the air, and cause illness and death, disproportionately affecting poorer individuals, communities, and countries.[64]

But one environmental cause overshadows them all, at present, which is

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climate change and its resulting effects, such as melting glaciers, sea level rise, and stronger and more frequent heatwaves, fires, hurricanes, and other extreme weather events. The fossil fuel industry holds the dubious distinction of being today's public environmental enemy number one.

Of course, the environmental harms that actually matter to most people, as opposed to the far smaller number of environmental activists, are the ones that harm human beings. What generally worries us most about a frog species that might go extinct, or a patch of forest that might be cut down, or a lake that might become more acidic is its effect on *us*.

Humans have been wrecking "the environment" for millennia. By ten thousand years ago, humans, who were spreading around the world, had killed off roughly half of all large mammal species outside Africa by overhunting or outcompeting them.[65] (The large mammals in Africa had the advantage of evolving alongside Homo sapiens over many thousands of years, thereby developing a natural fear of, and defenses to, humans' slowly improving intelligence and hunting techniques.) We can scarcely imagine the impacts this must have had on food chains and on all kinds of other plants and animals. But lest we judge our ancient relatives too harshly, it should be noted that "humanity has wiped out 60% of mammals, birds, fish and reptiles since 1970."[66] We now kill so many species so frequently that it is impossible to get an accurate measure. Harvard biologist E. O. Wilson estimates that thirty thousand species per year (or three species per hour) are being driven to extinction, many thousands of times greater than the natural rate.[67]

The cause of this is no great mystery. There are now billions of us on Earth, and we occupy an ever-greater portion of the planet. Everywhere we are, every minute of the day—where we sleep at night, where we work, eat, drive, date, study, read, and shop—was once untouched nature, and it was wiped out in a cataclysm we call *development*. The animals and plants were ejected or, more often, eliminated and in their place was installed some form of humanmade structure, whether it was an office building, a shopping mall, a school, a highway, a parking lot, a park, or a "cute but spacious four bedroom, three bathroom home, with a bright kitchen, new floors, open floorplan, and spectacular mountain views!"

For the most part, we don't see this destruction; we simply enjoy the fruits of it. True, when we do happen to witness such "progress" firsthand, it can be jarring, as a familiar patch of nature is erased before our eyes. Two personal experiences come immediately to mind. The dirt road I grew

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up on outside Spokane, Washington, surrounded by forest, was paved, the forest cut down, and a new subdivision with luxury homes was built in its place. In Orlando, Florida, where I teach law, my faculty office used to look out on subtropical hammock forest, but one day a construction crew arrived, cut down all the trees, removed the vegetation, leveled the now-empty plot of land, and erected a four-hundred-unit apartment complex surrounded by a parking lot.

Most often, we do not witness land development. Thus, it does not move us. Instead, we are more bothered by environmental impacts that harm, not our sense of harmony or beauty but our financial or physical well-being. These impacts include, according to the UN, reducing quality of life and cutting life expectancy worldwide, increasing the risk of some diseases, lowering the quality of our food, reducing medicinal options and possible future cures, and introducing additional risks to health and safety.[68] In this way, environmental harm is not clearly distinguishable from other tangible harms to people, except that it reaches by air, water, or soil.

Some scoff at environmental harm, thus ignoring injuries to people and communities. They underappreciate what is at risk. Others, however, appear to *over*appreciate, or at least overexaggerate, the risk.

Take climate change. For decades, the public was kept ignorant of global warming and the fossil fuel industry's role in causing it. Once these facts came to light, however, much of the truth about climate change was, and still is, accompanied by unhelpful rhetoric. This over-alarmism might help excite the progressive Left but only at the expense of handing ammunition to those catering to the conservative Right. Alarmism over climate change has, as a result, not helped bring about much-needed policy changes to address the problem. Noam Chomsky, who has made great contributions in many fields, fanned these flames when he called climate change a "threat to the perpetuation of organized human life" on par with nuclear war.[69] In a recent interview, Chomsky, who is merely articulating a message being spread by many others without his platform, responded to a question about how journalists should report on the topic.

> Every single journal should have a shrieking headline every day saying we are heading to total catastrophe. In a couple of generations, organized human society may not survive. That has to be drilled into people's heads constantly. After all, there's been nothing like this in all of human history. The current generation has to make a decision as to whether organized human society will

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> survive another couple of generations, and it has to be done quickly, there's not a lot of time.

Chomsky here echoes sentiments that have become mainstream in certain elite circles, including environmental scientists and legal scholars. It is common, and taken as gospel truth, to call climate change an "existential threat." Academics and experts use rhetoric like this even in serious scholarly literature.[70]

But climate change's parade of horrors is bad enough without such exaggeration. Will a global temperature rise of five degrees end the human race? Almost certainly not. But it will make life more difficult and less enjoyable for many, will precipitate mass displacement and migration, and will harm, directly or indirectly, billions. As mentioned in the introduction, climate change already kills millions per year. This fact, bolstered by scientific studies, should be shouted from the mountaintops. Calling climate change the end of humanity, however, smacks of doom-and-gloom embellishment.

These remarks will likely be attacked from the Left. But environmental harm need not be exaggerated, nor should it be ignored.

Those who profit from products and business models that cause environmental harm take advantage of how difficult it is to establish with certainty the causal connection between the root cause and the resulting injury. The connection is sometimes empirically impossible to prove. For instance, a forest fire, a hurricane, and a particular tidal flood cannot, with certainty, be tied to the CO_2 emissions that caused the warming that ultimately contributed to the harm. We can say with certainty that anthropogenic global warming is a significant contributing factor, and that it is making extreme events like these stronger and more frequent. But the nature of such events makes the causal connection, at best, uncertain.

This does not necessarily mean those who cause the harm should, or will, be let off the hook. Indeed, Professor Aisha I. Saad has done great work on this front, arguing recent "advances in climate science overcome key challenges to U.S. climate tort lawsuits by making it possible to attribute specific climate damages to human contributions to greenhouse gases."[71] Likewise, Jessica Wentz and Benjamin Franta have proposed a number of ways that plaintiffs who sue fossil fuel companies "can establish a causal nexus between public deception and damages, drawing from past litigation, particularly claims filed against manufacturers for misleading

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the public about the risks of tobacco, lead paint, and opioids."[72] In this fast-evolving area of law, there are reasons for hope. Nevertheless, given the history of tobacco, lead paint, and opioids, it will clearly be a long, drawn-out war to hold fossil fuel companies meaningfully accountable. At a minimum, this would mean depriving them of some (or much) of the ill-begotten trillions they raked in, and continue to rake in, off the success of their climate doubt campaign.

My aim, though not strictly limited to environmental harm, is nevertheless strongly influenced by, and builds on, others' work in environmental science and law. Accordingly, if we are, by whatever means, able to slow or stop a significant proportion of fraud on the public related to processes and products that are profitable and highly destructive to the environment, we will greatly reduce environmental damage and thereby also improve human health and life.

HARM TO PERSONAL AUTONOMY

Fraud often causes outwardly observable and measurable harms, like being deprived of money or property. But there are hidden harms, as well. The act of defrauding another imposes covert, bad faith influence over the victim's decision-making process. This means surreptitiously manipulating the target's desires, beliefs, emotions, and behaviors.[73] Thus, according to Professor Helen Norton, an eminent First Amendment scholar, the key features of the deceit "are thus a speaker's *hidden* efforts to shape listeners' decision-making that *target* and *exploit* those listeners' vulnerabilities in ways that the targets are not consciously aware of, and in ways that those targets could not easily become aware of if they were to try."[74]

These kinds of harm to one's own free will and self-determination might be invisible to others, but, to the target who is duped, they are as real as any outwardly obvious injury.

Consider the case of Professor Sally Smith (who is real, but that is not her real name). What happened to Sally a couple years ago caused her to view fraud in a new light.

Sally, a tenure-track law professor at a large university, received an email one afternoon from the dean of her law school. Sally was busy prepping her next class, but once she saw the email, she could not ignore it. She was in her first year at the university and was eager to show she belonged

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and was a team player. She stopped her work and opened the email. In it, the dean said, "Good afternoon, Sally. Are you on campus by any chance? Please let me know because I need help with something. Thanks."

Sally responded right away by email, saying she was happy to help and asked what the dean needed. The dean explained that they were preparing for a university event that evening, for donors, alumni, and students, and that they needed a couple more gift cards for a raffle they were holding. The dean asked if Sally could pick them up because the dean's assistant was out of the office. The dean added that the expense would be reimbursed from the dean's account, not from Sally's faculty funds.

Sally could not say no. As the newest member of the faculty, she felt—and justifiably so—that any misstep with senior faculty, let alone with the dean, might come back to haunt her when she went up for tenure in a couple of years. She agreed to do it. She went to the campus bookstore, just steps from her office, and bought two $100 gift cards and, as requested, sent pictures of the cards the dean said they needed for the online display.

When Sally arrived at the dean's office, she was told by the dean's assistant there had been no emails. There was no event. There was no raffle. The dean was in her office, and she emerged and told Sally the same thing. "I think you go scammed," the dean added.

When Sally returned to her computer, she scrutinized the emails she had received and saw that although they were carefully designed to look like they had come from the dean, and even worded to sound like the dean, they were from someone else—someone Sally had never met and never would, someone who had just robbed Sally of $200.

When Sally told me what had happened to her, it was clear she cared far less about the $200 than about the humiliation of being scammed. Nevertheless, I asked her point blank which one "hurt" her more: the loss of money or the violation of her trust.

Without hesitating, she told me the money was irrelevant next to the worry and stress it had caused her. "Not that I have that kind of money to throw around," she added. "And having money taken from you is horrible. But I went through hell for almost a week after that. I lost sleep. I had headaches. It affected my health. I thought the dean must be convinced I'm an idiot. It was horrible, and I'm still pissed off about it. And it happened three years ago."

Sally was particularly worried about being thought of by the dean or others as stupid or undependable. Sally said she, herself, would have probably

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thought this about anyone falling for an email phishing scam if it had not happened to her. Sally said she also felt used. That is, not only was she humiliated and self-conscious about what others now thought—which was an ongoing issue between her, her dean, and her colleagues—but she was also hurt by what the scammer had done to her. She felt violated. A total stranger had tricked her into working on their behalf, taking her away from a productive afternoon and forking money over. It enraged her whenever she thought of it. The experience left her suspicious and skeptical, particularly of emails. She felt she must be always on guard.

These harms, which cannot be measured or quantified, eclipsed the harms Sally suffered that can be measured or quantified. The unseen is not unfelt. The same is true not only for frauds that target one person, as in phishing scams, but so too for fraud targeted at the public, such as lies about the certainty and causes of climate change and false claims about a "stolen" election.

Whenever we are deceived by those seeking to profit off our gullibility, we are exploited by those who stand to profit off our vulnerabilities.[75] We are taken advantage of, robbed of our dignity of independent thought. Lies, by their nature, assault the autonomy of the one lied to.[76] This is necessarily true for any lie, but this principle is amplified where a lie is aimed at manipulating the dupe for the profit of the liar.

A personal fraud is an assault on one. A fraud on the public is an assault on thousands or millions. It attacks the autonomy of the whole population vulnerable to buying into the falsehood. Lies spread to profit off our gullibility destroy public confidence in all kinds of sources of information, from the news media to public officials, and these falsehoods give the impression that "everyone is lying" or "all of it is lies." In an ironic twist, the cynicism caused by those spreading self-serving falsehoods actually makes it even easier to defraud others because when objective sources of information seem untrustworthy, people gravitate instead toward partisan sources whose messages they are predisposed to agree with. This makes it easy for leaders to defraud because they can simply mix profitable falsehoods in with partisan rhetoric.

One of the foundational principles on which the American democratic system was based from its inception was the idea that freedom of expression must be protected because the government must not be given the power to determine the truth. The truth-finding role is best left to the people. But if those with the power to speak to the people are given free rein

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to spread profitable falsehoods as if they were truth, and if millions believe those falsehoods to be truth, then the danger we are supposed to be protected against has already come to fruition. Those with power are already dictating "truth." And this false "truth" always favors the ones imposing it, not those on whom it is imposed.

This makes fraud on the public a grave danger to free speech. These kinds of falsehoods do not contribute to the marketplace of ideas nor to the search for truth; instead, they poison the marketplace of ideas and destroy any chance we have of finding any "truth" other than that dictated by those in power.

In a true marketplace of ideas, where we are free to pick and choose which ideas to accept and which to discard, falsehoods aimed at defrauding millions of people disrupt the market the same way financial fraud disrupts financial markets. Falsehoods calculated to deceive have no place in the marketplace of ideas because they are not true ideas at all. They are lies posing as ideas. Allowing politicians, corporations, and the media to spread such falsehoods robs us of the ability to know what is happening in the world and ultimately what is true. Thus, although difficult to measure, this inevitably causes a great deal of harm to knowledge, truth, and autonomy.

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HARM TO DEMOCRACY

When those serving in or seeking office tell self-serving lies to the public, they undermine democratic institutions. This should be self-evident. After all, democracy is rule by the people, and where people are manipulated by those who rule them, this destroys the very basis on which democracy is founded by replacing the will of the people with the will of leaders. Those who defend politicians' ability to spread lies, no matter how damaging, are the ones who stand to benefit most from lies, whether bad faith attacks on opponents or minority groups, false claims made in campaign ads, or policies purportedly to help regular folks but which, in fact, overwhelmingly benefit those at the top. Those who seek office to govern in good faith fight to prohibit lying in politics. Those who seek office for power, or to use it to amass wealth or influence, fight to keep lying legal.

Professor Norton observed that lies by those in government inflict "democratic harm." Such lies "deny the public the information necessary to

hold the government accountable for its misconduct, undermine citizens' ability to make informed voting choices, sabotage the policymaking process when participants cannot rely on others' assertions, and foster public cynicism about (and disengagement from) democratic self-governance."[77]

Another leading scholar in this area, Caroline Mala Corbin, wrote about the dangers of allowing "the government's deliberate dissemination of false claims on matters of public interest." In a recent article, she sounded the alarm that this problem has worsened in recent years. It certainly has. Such falsehoods, Corbin notes, pose a danger to democratic functions and institutions. As Corbin explained:

> We are able to hold our government officials accountable because we can vote them, or those who appointed them, out of office. In order for our consent-by-vote to be genuine, we need to know what those entrusted to serve us have done. By making it harder to unearth the truth and harder to see it and believe it when it does see the light of day, government propaganda hampers this fundamental democratic process.[78]

Corbin then enumerates the ways that fraud on the public by those in or seeking office, which she calls "government propaganda," undermines democratic processes and institutions. "To start," Corbin says, "it shields elected officials from accountability by obscuring their misdeeds." This destabilization of truth "not only hinders the press's ability to perform its watchdog function, but also discourages people from even seeking the truth in the first place." This undermines the necessary underpinnings of any democratic system of government. "Instead of an informed electorate giving or withholding its genuine consent at the ballot box, an ill-informed electorate may be giving or withholding a manipulated or falsified consent."[79]

Democratic self-government depends on a well-informed public able to understand what public officials are doing and what they stand for. This informs voters who to vote for. Purposeful manipulation of the electorate disrupts—or destroys—this self-governing principle by robbing the electorate of the necessary knowledge to meaningfully participate in the democratic process.

The destruction of democratic institutions and systems can, and has, led to tyranny. Examples of this happening abound.[80] Tyrannical leaders depend on falsehoods and fabrications to glorify the leader and the party; to

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invent foreign and domestic threats; to falsely accuse opponents of treason, corruption, and stupidity; and to normalize the regime and its policies.[81]

Adolf Hitler, who rose to power inside a democratic system of government before dismantling its democratic institutions and instituting a dictatorship, committed to writing how he believed lies were a key ingredient to gaining and maintaining power. In *Mein Kampf*, Hitler wrote about a political principle he claimed holds true,

> that in the big lie there is always a certain force of credibility; because the broad masses of a nation are always more easily corrupted in the deeper strata of their emotional nature than consciously or voluntarily; and thus in the primitive simplicity of their minds they more readily fall victims to the big lie than the small lie, since they themselves often tell small lies in little matters but would be ashamed to resort to large-scale falsehoods.[82]

He observed that "the broad masses of the people are not made up of diplomats or professors of public jurisprudence nor simply of persons who are able to form reasoned judgment in given cases, but a vacillating crowd of human children who are constantly wavering between one idea and another."[83] This, according to him, makes people manipulable through the use of "propaganda." To accomplish this aim, Hitler asserted that "the Press" is "a 'Great Power' within the State."[84] "As a matter of fact," he says, "its importance is immense. One cannot easily overestimate it, for the Press continues the work of education even in adult life."[85]

The Nazi Party relied on falsehoods and manipulation of public thought and action, not only in the party's rise to and consolidation of power but also in perpetrating one of history's greatest crimes against humanity, the Holocaust.[86] Nazi leaders deceived Germans to amass political support in Germany, and they also deceived German, Eastern European, and Soviet Jews to hide the fact the Nazis were massacring them.[87] They, and the public at large, were lied to on a mass scale, never shown the true nature and full horror of what was transpiring. As historian Timothy Snyder put it, "Disinformation was the key to the entire operation."[88] In his book *On Tyranny*, Snyder put forth a maxim for cutting through disinformation as a way of avoiding tyrannical movements. "Believe in truth," Snyder wrote. "To abandon facts is to abandon freedom. If nothing is true, then no one can criticize power, because there is no basis upon which to do so. If nothing is true, then all is spectacle. The biggest wallet pays for the most

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blinding lights."[89] The Nazi regime, as tyrants before and after, built its political power on lies diffused at scale designed to capture popular support.[90]

Tyrants today follow the same playbook. The leader of North Korea, like his father and grandfather before him, bombards his people with propaganda through state-sponsored news reports, textbooks, and public announcements rife with provably false claims calculated to boost loyalty and eliminate dissent.[91] Putin in Russia, the Castro regime in Cuba, and the Communist Party in China—each of these have likewise carefully crafted an information bubble within their borders to brainwash the domestic population into believing fictions that favor the ruling despot.[92] Permitting intentional falsehoods by those seeking or holding power erodes democratic safeguards and helps open the door to aspiring despots. Thus, erosion of democratic institutions and the threat of tyranny are additional threats we open ourselves up to by allowing leaders to defraud the public.

GUN VIOLENCE

With guns, we have yet another issue, like climate change, that for a long time was nonpolitical, and by its very nature *is* nonpolitical, but was turned into a hot-button political issue through an industry disinformation campaign to swing public opinion and policy. In both cases, the industry stood to profit by spreading doubt about the damage wrought by the industry's products. In both cases, the industry aimed its megaphone at the political Right. In both cases, the industry got what it wanted.

The weapon that the gun industry used is the Second Amendment. That amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Professor Erwin Chemerinsky observed that, for over two hundred years, the amendment was understood to mean what it says: "It's a right to have guns for militia service." Indeed, "from 1791, when the amendment was ratified, until June of 2008, not one federal, state, or local gun regulation was struck down by the United States Supreme Court."[93] In the past couple of decades, the mainstream political Right have twisted the amendment's words, through tortured interpretation and at the insistence of the gun lobby and its allies, to provide a guarantee that every individual has a fundamental right to own unlimited firearms, including military-grade assault rifles. This resulted in the Supreme Court's ruling

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in *District of Columbia v. Heller*, which, for the first time, "interpreted the Second Amendment as an individual right to possess a weapon for self-defense outside of the context of service in a well-regulated militia."[94]

How did the gun lobby accomplish this? How did it get the Supreme Court's conservative justices to ignore historians and to side instead with partisan activists?[95] It was done the way it always is: by spreading falsehoods to further its agenda.

Conservative former chief justice of the Supreme Court Warren Burger, who was appointed by a Republican, Richard Nixon, bristled at the gun lobby's dishonesty. He wrote, "The very language of the Second Amendment refutes any argument that it was intended to guarantee every citizen an unfettered right to any kind of weapon he or she desires. In referring to 'a well regulated militia,' the Framers clearly intended to secure the right to bear arms essentially for military purposes."[96] Chief Justice Burger spent years pushing back against the movement on his own side of the political aisle as it pressured lawmakers and courts to expand gun rights by shifting the meaning of the Second Amendment. In 1991, he sat for an interview on PBS where he clarified his views: "The gun lobby's interpretation of the Second Amendment is one of the greatest pieces of fraud, I repeat the word fraud, on the American People by special interest groups that I have seen in my lifetime."[97]

The gun lobby accomplishes this in a predictable, if not by now wholly expected, way. Any time a mass shooting becomes national news—which certainly can't happen with each mass shooting, given these events now occur more than once per day[98]—the gun lobby and its allies push their agenda through "the distortion of complex, painful events to fit an opportune political narrative."[99] When a gun is used to kill people at a concert, teenagers at a birthday party, or children in school, and this tragedy becomes a significant news event, there is always an immediate messaging push, always with the same talking points, to dispose of common sense and push political buttons. False and misleading statements flood the news and social media feeds, and the end aim is always accomplished. The gun industry is left alone, its political allies keep their supporters enraged, and the number of guns keeps on increasing, creating a problem unforeseen by the Founders and at clear odds with the very language of the amendment used to justify it.

The result of this fraud on the public is thousands of unnecessary gun deaths per year. America stands alone with its gun death epidemic. In 2020,

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more than 45,000 Americans were killed by a gun. In 2021, that number topped 48,000.[100] In America, and only in America, guns are the leading cause of death for children and teens: "In no other similarly large or wealthy country are firearm deaths in the top four causes of mortality let alone the number one cause" of death among children and teens.[101]

The solution to the gun violence problem, like all real solutions, must be arrived at through careful study, discussion, and debate. It is not a matter of liberals versus conservatives. Neither side is entirely "right" or entirely "wrong." But the problem today is that the study of the issue has been stifled, and the discussion and debate have been poisoned by bad faith accusations and misleading claims.[102]

The uniquely large number of gun deaths in America is yet another harm caused by letting leaders mislead millions of people for their own political and financial aims.

We have now touched on *who* defrauds the public, *how* they carry it out, and *why* they do it in chapter 3, as well as *what harm* they cause in this chapter. Harm is key because any change to the law whereby freedom is restricted must be justified by a corresponding, and proportional, alleviation of harm to individuals or society. In the case of fraud on the public, the harm to both—individuals and society—is extraordinary. Deceit by leaders poses dire threats to health, life, property, the environment, democracy, and numerous other rights and freedoms. In the next chapter, I will explain how and why the law has, to date, ignored these threats almost completely.

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5

Fraud Law Paradox

HOW IT WORKS, WHERE IT COMES FROM, WHAT WE CAN DO ABOUT IT

par·a·dox

noun

A seemingly absurd or self-contradictory proposition that, when closely examined, proves to be well-founded or true.[1]

The American legal system, like most, prohibits fraud in a number of ways. Every state has common law fraud as a civil claim available for victims, and there are numerous state and federal criminal codes prohibiting certain kinds of fraud. Fraud schemes that meet the elements of these laws are actionable. But the larger a fraud scheme is, the less likely it is to meet those elements. Put another way, the greater the number of people a fraudster targets, the more likely the fraud scheme is to be legal. This is the primary reason small frauds are generally prohibited while massive ones are generally permitted. I call this the *fraud law paradox*.

But is it truly a paradox? To be a paradox, two requirements must be met. First, the statement must be absurd or self-contradictory. And second, the statement must be well-founded or true.

I freely acknowledge that it is an arguable point whether my paradox meets these elements. Let's look at the first element, that the statement is absurd or self-contradictory. The proposition is that the law punishes small frauds but rewards the largest. But is this result absurd—or simply expected?

There is certainly a valid argument that fraud law applying to regular people but not to those with wealth and power makes it ordinary, rather than extraordinary. Indeed, such unequal treatment is the norm in many areas of law. The bail system imposes oppressive obligations on the poor while not even inconveniencing the rich.[2] Legal costs, from parking and

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traffic tickets to administrative and court fees, can have life-altering effects on the poor but are irrelevant to the rich. Likewise, employers have far more legal bargaining power than employees. The same goes for landlords over tenants, as well as companies over customers and banks over clients. The cost of litigation ensures the wealthy and powerful hold a virtually insurmountable advantage in disputes against regular people. These are only a sampling of the ways that law works to the advantage of the wealthy.

Why should we expect fraud law to be any different?

This argument, however, falls apart when examined more closely. To begin with, although the law leads to unequal economic and political outcomes for the rich over regular and poor people, this does not necessarily mean the law itself is designed to further these inequalities—though in some cases it likely is. Moreover, these kinds of cherry-picked examples arguably paint a distorted picture of the law and legal system, amplifying unequal treatment in some instances while masking (or at least ignoring) equal treatment in others. Perhaps such amplification is justified. But whether or not it is, the law in some circumstances applies with greater force against regular people than it does against the wealthy and powerful. And while the inequality of fraud law fits this same mold, I argue it does not mean fraud law *should* fit that mold—and neither do most of us *expect* it to fit it.

It is one thing to observe that imposing a fine on criminal defendants, which must be paid to avoid being held in jail, will have a disproportionate effect on the poor—which it does—and another thing entirely to observe that a law against deceiving others in a harmful but profitable manner (i.e., fraud) is enforced against regular people but ignored when it comes to those with power and wealth. The former is arguably a natural or unavoidable consequence of economic inequality, which is extrinsic to the law. The latter is an artificial policy choice codified in law.

Thus, I argue that the fact fraud law punishes small frauds but rewards large ones satisfies the first part of the definition of a paradox. That is, it is self-contradictory, unexpected, and absurd. Indeed, upon closer examination, this paradox is highly offensive to an objective sense of justice and fairness.

This brings us to the second part of the "paradox" definition, which is that the proposition, although self-contradictory, is nevertheless well-founded or true. We must ask: Is it indeed true that small frauds are punished while large frauds are rewarded? I have repeatedly made the claim in this book that this is the case. But my claiming a thing to be true does not

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make it so. There must be objective facts to prove it. It must be true, not only to those who believe it to be so but also to those who do not.

Thus far, I have presented a significant amount of evidence about the ways leaders in politics, business, and media purposefully spread falsehoods to gain profit, audience, and political office, or to achieve some other aim, and in the process cause major harm to health, life, and other important rights, as well as to the environment. So, does this prove that fraud law ignores, and thereby rewards, those carrying out the largest frauds?

I am far from confident such a proposition could ever be "proved" unequivocally. Rather, judging that this is the case, or that it is not, requires interpretation. Nevertheless, I believe the case for the proposition can be laid out more strongly than I have done so far. As I hope to show in the first part of this chapter, not only is it true those who carry out some of the largest fraud schemes are given the green light to do so, with the full consent and blessing of the law, but, indeed, the inequality of the law can be observed in instances where the law is applied to the same two parties, one powerful while the other is not.

Imagine Party A, who is powerful or wealthy, commits a fraud against Party B, who is a regular person, but that in another instance Party B also commits a fraud against Party A. That is, there is fraud between the same two parties. Does the law treat them equally? In many cases, it does not. Seeing how fraud going one direction is treated versus fraud going the other direction provides a clearer insight into the paradox at work between the same two parties on the giving and receiving end of two separate fraud schemes, one a fraud on an individual and the other a fraud on the public. Such instances serve as examples that are as close as one can come to a controlled experiment to see how the law applies to one instance of fraud versus the other, when in both cases it occurs between the same two parties and involves the same overarching relationship, whether between a phone company and its customers, between police departments and suspects they arrest, or between politicians and voters.

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HOW THE PARADOX OPERATES

Phreakers and Crammers

In the 1970s, a phone call from Manhattan to Queens ran between three and five dollars per minute. That works out to about nineteen to thirty-two

dollars per minute in today's dollars. A call from Minneapolis to St. Paul costed about the same. As did a call from Dallas to Fort Worth. This was not unique to cities. It was the same all over. Calling someone in another state, another county, or even in the next town over was deemed "long distance" and therefore expensive, because it crossed an imaginary line drawn by Bell Telephone, which in the United States and in many parts of the world held a monopoly on telephone service.

Back then, calling your friend across town or your sister in the next county required a minute-by-minute cost-benefit calculation. You weighed the value of talking against what "Ma Bell," as the company was popularly referred to at the time, billed you for it.

A group of young tech enthusiasts engineered a device called a "blue box," which bypassed Bell's long-distance toll collecting system. It did this by way of sound. A user would attach the blue box to a telephone, which allowed the blue box to emit beeping sounds that mimicked tones Bell used to route and charge long-distance calls. The whole Bell system worked on tones emitted at particular pitches. What the blue box did was emit tones identical to Bell's, which tricked Bell's system. The blue box would emit the tone to open a long-distance line by way of a toll-free number and allow the line to stay open to be used to make long-distance calls for free to other numbers. Using a blue box, a caller could make all the long-distance calls they wanted without paying Bell a penny.

The total cost of the parts needed to build a blue box ran between thirty and thirty-five dollars. The instructions for building the device were circulated widely among computer enthusiasts and technology clubs. Those not inclined to build their own blue box could buy one ready to use for around $100 to $150.

When they first appeared in the early '60s, blue boxes were exclusively built and used by a small group of telephone hackers focused on exploring (and exploiting) the telephone network, who called themselves "phreakers." In the early 1970s, a college dropout in Cupertino, California, named Steve Wozniak quit his job at Hewlett-Packard and began building blue boxes, which his friend Steve Jobs sold for $150 per unit. They sold two hundred units and split the profit fifty-fifty. (Jobs later told his biographer that if it hadn't been for Wozniak's blue boxes, "there wouldn't have been an Apple."[3])

Woz and Jobs had tapped into the rapidly growing market for blue boxes. No longer the exclusive realm of phreakers and electronics enthusiasts,

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regular folks were, by then, buying and using them by the thousands to bypass Ma Bell's charging system.

Jim Newman, a resident of Little Rock, Arkansas, was one such regular guy. Jim bought a blue box in 1974 "so that he could make calls to his family."[4] By 1974, however, Bell was going after blue box users, which were cutting into the company's profits. Indeed, Bell went after them aggressively. Bell had installed a massive, automated detection system to monitor calls nationwide to look for activity that a blue box was being used. Lines suspected of using the device were tapped and monitored, often with Bell security officers listening on the calls.

Jim's calling and routing patterns caught Ma Bell's attention. The company tapped his phone line, recorded the tones his phone emitted, and listened in on his conversations for two weeks. After gathering evidence against Jim, Bell turned its findings over to the FBI's Little Rock field office, and from there the FBI listened in on calls and built up its case. A search warrant was obtained, and federal law enforcement agents entered Jim's home and seized his telephone along with the blue box device. He was arrested.[5]

Jim was charged with wire fraud and put on trial before a jury. He was convicted and sentenced to two years imprisonment. He appealed, but his conviction was upheld.[6]

That was how Jim's case ended. He was convicted of fraud and imprisoned. Why? Because he had purchased and used a widely available device to save money to call his family. He was far from alone. Bell throughout the 1970s spent enormous resources on tracking down and prosecuting those it suspected of bypassing its toll collection systems. During that decade, hundreds were convicted and imprisoned for using blue boxes to avoid paying long-distance fees.[7]

That was the story of the phreakers. Now, let us turn to the crammers, with whom I have personal experience.

I received a cell phone bill in the mail not too long ago. The bill charged me more than I was expecting. This was not unusual. It's been happening for as long as my wife and I have had cell phones. Cell service providers always seem to overcharge us. If the cell company, whichever one we happen to have at the time, tells us we will pay sixty dollars a month, the bill comes out to ninety dollars. If they promise $100 per month, the bill ends up being $135 or $140. My wife and I have switched cell service providers several times. We always end up overcharged.

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When our cell phone bill arrived on this occasion, the fact we were being overcharged did not surprise me. But the amount we were being overcharged did. Our bill had more than doubled. I carefully read every item on the bill, something I will admit I do not usually do. But the amount we were being charged was far too high.

I scoured the bill, trying to figure out what things like "Min. Use Fee," "Activation," and "Misc. Admin. Charge" meant. Were these charges always on my bill? Had I simply overlooked them before? And what, exactly, was I getting for these apparent add-ons?

I called the company. Of course, I had to jump through hoops to talk to someone who would actually listen to my questions, let alone respond to them. It took a few phone calls and several lengthy waits on hold, but I finally got through. I was told two of the mystery charges were for services I had enrolled in. I did not recognize either service, and I explained I had never enrolled in either of them.

The customer service rep said that, according to my account, I had. I asked if this had been done automatically, perhaps without my knowledge or consent, and she told me I might have enrolled in them by accident. I told her I hadn't. This back and forth went on for a while. I was then transferred to a higher-up manager but was then, after a few minutes, transferred back to the rep I had spoken to previously. She asked me if I wanted to unenroll in the services, and I told her, "Yes."

"Great," she said in a cheery voice. "Let me just take those charges off for you."

That was it—at least for two of the ghost charges on my latest bill. However, I'd paid those unauthorized charges for months. I insisted that I be compensated for those prior months' charges but was told, cheerily, that the rep's hands were tied. Her system wouldn't allow it. Two other mystery fees, however, were, according to the representative, "standard" and "required" and were in no way an error. I had, she said, agreed to them by signing up for their service. Essentially, they came with the account.

I threatened to take my business elsewhere—again, this is very unlike me, but I was genuinely exhausted of the runaround at that point. She was unfazed. I was bluffing, and I think she knew it. In the end, I gave in and continued paying those other two mystery fees. What else could I do?

But really, I wanted to know. What could I do *legally* about these mystery charges added to my bill? How could I rectify this injustice? I learned quickly the answer was simple: I could do nothing.

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The racket these cell phone companies were running has a name, and, although it is in some cases arguably illegal, phone companies get away with it routinely. "Cramming" is the practice of adding unauthorized charges to a customer's account. According to the Federal Communications Commission, or FCC, "cramming has harmed tens of millions of American households." I was far from alone.

However, I was also far from comforted. According to the American Law Reports, "Deception is the hallmark of cramming. Crammers often rely on confusing telephone bills to trick consumers into paying for services they did not authorize or receive, or that cost more than the consumer was led to believe."[8] Cramming has increased in recent years as more customers are moving to electronic billing and automatic bill pay. Cell phone companies have strongly encouraged customers to enroll in auto-pay, sometimes by adding a service charge to payments not done through auto-pay. By having bills automatically paid, customers check the itemized bill less often, something I am personally guilty of. That was how I had missed those phantom charges added to my bill. I had, like many people, been too busy to sit down and go line through line on every monthly phone bill.

After learning what others had gone through when dealing with crammers, I discovered I had actually gotten off easy. Often, when a customer notices unauthorized charges and contacts her phone company about it, she is told she must contest the charges with a third-party biller. Third-party billers are often difficult, if not impossible, to locate or contact. Even if a customer gets through to them, they frequently insist the customer authorized the charges through a text message, email, or by clicking the form agreement at the time of enrolling either with the phone company or setting up the online account. For many, fighting the charges is a frustrating and unwinnable battle.[9]

Maybe the phone company can get away with such deceit with other people, I decided. But not with me. I am, after all, an attorney. I decided to look into filing a claim or even taking the phone company to court, if it came to that. I went on Westlaw and LexisNexis—the two leading professional legal research databases—to work out a game plan. Instead, I quickly learned suing a phone company for cramming is almost always a losing proposition. It costs far more to file a case and litigate it than could possibly be won in damages. The items phone companies cram onto bills are, as they were on mine, typically twenty to forty dollars here and there. This money matters to regular folks. But even if these amounts were

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charged for six months or a year, suing to get the money back often costs ten or twenty times the amount sought, if not more.

Class action lawsuits are made for this. When huge numbers of people lose small amounts of money due to the actions of the same wrongdoer, a class action suit can bring those people together into a unified lawsuit. Out of the winnings, each individual plaintiff can recoup at least some of their losses. This, too, was a dead end. Although dozens of class actions have been filed against phone companies for cramming, plaintiffs rarely prevail. Crammer class actions are often dismissed or decertified—that is, the court either throws the case out or refuses to allow the suit as a class action. Even if a claim has merit, each individual plaintiff is often forced to sue on their own. This costs far more than there is to gain.[10] In the rare case a class action suit is allowed and goes on to prevail, despite the odds, court costs and fees eat up the lion's share of the winnings. "Successful" plaintiffs end up, after years of litigation, receiving pennies on the dollar for the money overcharged.

This disparate treatment of phreakers, on one hand, and crammers, on the other, shows exactly how the law treats those with power who defraud in a radically different manner from those who defraud without power. This reveals the paradox in operation. As between Party A (the phone company) and Party B (the phone customer), when Party A defrauds Party B, the law allows it, either by design or by operation, but when Party B defrauds Party A,the law steps in and punishes the fraudulent conduct. Party A gets away with fraud and is rewarded for it. Party B, on the other hand, is penalized.

Party A, therefore, is incentivized to defraud Party B. Party B, however, is deterred from defrauding Party A, not only by law and custom but by the consequences at stake. Party A makes billions off cramming. Party B gets arrested, convicted, and jailed in great numbers for using blue boxes.

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Suspects and Police Departments

In chapter 3, I briefly touched on how, in the killings of George Floyd in Minnesota and Manuel Ellis in Washington State, both at the hands of arresting police officers, each respective police department released a public statement containing material falsehoods that covered up the police officers' crimes. In both cases, the police department deceived the public, as well as prosecutors, judges, and juries who would later review the case to determine the officers' culpability. These two cases of fraud on the public

by police departments to cover up crimes committed by officers are not unique.

Many such cases were reported in the media in just the past few years. In such cases, police departments appear to regularly falsely claim the suspect (who was killed by police) "resisted arrest," "became violent," "charged police," "tried to flee," or some other such pretext for police violence against the suspect. And it is often reported, falsely, that the suspect died, not from a chokehold, repeated tasering, or beating at the hands of police but rather as a result of a "medical emergency" or "natural causes." These include, for instance, the police killings of Breonna Taylor, Tony McDade, Darryl Williams, Deven Guilford, and Keenan Anderson.[11]

The prevalence of such cases, where police claim the suspect resisted arrest but body camera footage or witnesses later reveal this to be a lie, has come to light recently and is now being studied. But it is almost certainly not a new phenomenon and surely occurred long before body cameras and smartphone cameras came into wide use. There has not yet been a comprehensive study of such cases—that is, the great number of studies on instances of police violence and police killings has not, to date, been tied to and studied alongside the falsehoods police departments spread to cover up officer misconduct. Thus, although it is common to see such falsehoods presented in the media, it is difficult to pinpoint how prevalent or widespread this problem is, particularly because the police violence cases that come to light and get significant media attention are only a tiny fraction of the actual instances of police violence cases overall.

Based on how frequently such high-profile cases reveal police department falsehoods, however, it is reasonable to conclude it is a common occurrence that when police officers act in a wrongful or criminal manner, and cause physical or emotional harm or harm to property or other individual rights, there is a demonstrated track record of police departments either lying to the public to cover up the police misconduct or simply remaining silent and not divulging the facts that the public (and courts) should know about what occurred.[12] Such silence, which deprives the public and others of the truth, amounts to lying; in both cases, the public is misled for the benefit of the police officers and the police department.

These deceptions operate as a particularly egregious fraud on the public with numerous deleterious effects. It allows law enforcement perpetrators to avoid punishment. It robs victims, or their families, of compensation for violence committed by government agents. And it deprives society of

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criminal punishment for those law enforcement officers who commit criminal acts.

Yet, notwithstanding the frequency such self-serving falsehoods are disseminated, there appears to be no legal penalty imposed on police departments that defraud the public in this way. No liability. No accountability. No punishment. Indeed, there appears to be no real negative consequences at all and, therefore, no incentive to be honest with the public and tell the truth about what occurred. The law leaves these police departments to be as dishonest as they choose. In other words, we accept and endorse these lies from law enforcement departments. We reward them. Perhaps we do not like the lies, perhaps we abhor them, but because they are aimed at the public rather than at an individual we shrug them off. *That's just how it is*.

But now let us consider the obverse, which certainly also occurs—that is, let us consider what happens when a suspect or arrestee, or any member of the public, tells a lie with regard to their own arrest or the grounds for it. You already know before I tell you what will happen to a suspect or member of the public who lies about an arrest, or about police officers' conduct, or about the circumstances or details of allegedly illegal activity, or about any interactions with law enforcement. They, unlike the police department, are not only punished but punished severely.

There are numerous laws on the books, which are used frequently, that prohibit lying by suspects, arrestees, criminal defendants, witnesses, and any other member of the public—anyone, in other words, other than police departments—who make a statement about an investigation, a case, or the conduct of police officers. These kinds of lies are often called "obstruction of justice." The laws prohibiting these kinds of lies rest on the idea, which is not wrong, that where one lies to the police about any ongoing matter, it poses a threat to the integrity of the justice system. It hinders the administration of justice. Thus, laws have made it a crime to lie to the police, to lie to the court, and to lie to a grand jury.[13]

Moreover, a federal statute prohibits obstructing an investigation by making "any materially false, fictitious, or fraudulent statement or representation."[14] Numerous states, likewise, have "false reporting" statutes, which impose criminal penalties on anyone who knowingly makes a false statement to law enforcement.[15] Indeed, some states have multiple statutes that cover this ground. Washington State, for instance, has one statute that makes it a crime to "knowingly make a false or misleading material statement to a public servant," such as a police officer—Wash. Rev.

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Code, § 9A.76.175—and another that makes it a crime to "willfully hinder, delay, or obstruct any law enforcement officer in the discharge of his or her official powers or duties"—Wash. Rev. Code, § 9A.76.020. Making a misstatement to police in that state is grounds for prosecution under both criminal statutes.

Then there are laws that make it a crime to make a false statement specifically when filing a police report. Most states, if not all, have such laws.[16] The penalties for lying in a police report include both criminal fines and imprisonment.

Under the federal obstruction of justice statute used to prosecute those who make a false statement in a police report, the maximum prison sentence is ten years.[17] The states are similarly unforgiving for those who lie to the police. In Arkansas, each count of lying in a police report is punishable by up to six years in prison and a fine of up to $10,000.[18] Georgia's false reporting statute, which encompasses falsehoods not only in reports to law enforcement but also in communications with numerous government agencies and departments, provides that those convicted may "be punished by a fine of not more than $1,000.00 or by imprisonment for not less than one nor more than five years, or both."[19]

These laws do not sit idle on the books. They are regularly used in prosecutions for false statements made to police, in reports filed with law enforcement departments, and in statements by suspects, witnesses, and members of the public in myriad contexts. People go to prison for lying to the police. When people lie to the police, it is a crime, just as it is a crime when one lies in court or in any proceeding under oath (perjury) or when one lies to the IRS (tax fraud).

Lying to the police, or obstruction of justice, is a serious crime that, depending on the context and surrounding facts, can be a felony punishable with years in prison. Yet, when police departments release statements to the media and to the public, in which they lie about their own police officers' conduct and cover up criminal acts, those falsehoods are frequently not only allowed and unpunished, but widely believed, and have a major impact on subsequent media reports and legal proceedings. These falsehoods made by police departments *also* obstruct justice, perhaps even more so than falsehoods uttered by individuals. Yet only one set of falsehoods is punished by law while the other set of falsehoods is, in effect, rewarded. Here, again, we see the fraud law paradox in operation.

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Voters and Politicians

In politics, too, the law punishes regular people who defraud the powerful but rewards the powerful who defraud regular people. As in business, banking, media, and police departments, the power*less* are punished while the power*ful* get a pass.

Who are the powerless versus the powerful in this context? In the political system, regular people are the voters who go (or don't go) to the polls. The powerful are the candidates and elected leaders, as well as those who work on their behalf and spread their political message. When a voter makes a false representation about an election, the law severely punishes them, but when a political leader makes false representations about an election, the law looks the other way.

As we did with phreakers and with suspects, let us begin with the powerless side of the equation—the voters. Consider the case of Crystal Mason. Mason, who had been convicted of a tax-related crime, completed her sentence in 2016 and was released. It was a presidential election year, and Mason's mother encouraged her to vote now that she had "paid her debt to society." Mason believed she was eligible to vote since she had completed her sentence. She also recalled having been *told* she was now eligible to vote upon release. So, she drove to what had been her last polling place, the Tabernacle Baptist Church, near her home in Rendon, Texas. She asked the poll worker there to look for her name on the voting registry. But her name was not on the list.

The poll worker said this often happens and suggested it might be because Mason had only recently become eligible to vote. And if that was the case, the correct procedure would be for Mason to fill out and submit a provisional ballot. The poll worker had a stack of them ready. "You should fill one out," the poll worker recommended, adding that if Mason's credentials checked out and she was in the system, then the ballot would be counted. If not, the poll worker added, the ballot would be discarded. This was standard advice. Provisional ballots are used frequently, not only in Texas but around the country. Voters cast many thousands of provisional ballots each election. Mason filled one out and handed it to the poll worker.

A couple weeks later, she was arrested. The charge? Voting illegally.

Every state has laws that determine if, when, and how former felons can vote. In Texas, convicted felons are prohibited from voting while they serve their sentence. But even once they have completed their sentence,

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they are still prohibited from voting while on parole, on probation, or under supervision until their conviction is "fully discharged." This quoted term, like so many legal terms, is open to wide interpretation and causes significant confusion. In Texas, once a convicted felon has "fully discharged" their sentence, "their right to vote is automatically restored." "However," the state's guidelines go on to caution, "it is not always clear as to when a sentence has been fully completed."[20] (Presumably, the state's official guidelines are using "fully completed" as a synonym for the term "fully discharged." Another point of confusion.) This was precisely what happened to Mason. Although she had been released from prison, and had fully completed her sentence, and had been led to believe her sentence was accordingly discharged, she remained, technically, under what is called in the federal justice system "federal supervised release." This, the Texas prosecutor determined, meant she was still "under supervision," and therefore her sentence was not "fully discharged." The prosecutor's position, however, is not settled law. It was his own subjective interpretation of the interplay between the federal term "supervised release" and the Texas term "under supervision." Litigation is ongoing on the question of whether these two terms are synonymous or not. But Mason was convicted before the courts even addressed that question.

Mason was convicted of violating Texas Election Code § 64.012(a)(1), which states a "person commits an offense if the person knowingly or intentionally" either "votes or attempts to vote in an election in which the person knows the person is not eligible to vote." Mason testified she did not "know" she was "not eligible to vote." Indeed, she cast a provisional ballot precisely because she believed she *was* eligible. She was hoping her vote would count. The court, however, determined it did not matter whether she knew she was ineligible, or even that she intentionally voted while ineligible. Her good faith was no defense. The court held it is enough that Mason knew she was on "supervised release," even though that term has no meaning in the Texas justice system and is open to interpretation. The fact this is not even a settled point of law seems not to have weighed heavily on the court's mind.

Mason's conviction for "knowingly or intentionally" voting while ineligible is manifestly absurd. She made a mistake. She did not intentionally do anything wrongful. But there are other problems with Mason's conviction. For instance, it is unclear whether she voted at all, since her provisional ballot was rejected.[21] In other words, Mason was convicted of

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voter fraud without ever having actually voted. Her rejected provisional ballot did not count and therefore did not affect the election. Another problem is that Texas prosecutors conflated "federal supervised release," which is simply part of the federal system of release, with the way Texas law defines "supervision" following release from prison, which imposes more restrictions than federal supervised release. This is another unresolved point of law.

Moreover, how could Mason have knowingly committed voter fraud if she believed she was eligible to vote? Intentional crimes, like this one, require the defendant to have known and specifically intended the violation of law. Mason did not intend to violate any law. The law Mason was convicted under is one of many laws passed by Republican-controlled state legislatures that critics argue are aimed at suppressing votes of people viewed as likely to vote for Democrats.[22]

The case of Crystal Mason is not an isolated incident. Others have been similarly charged with or convicted of voter fraud in recent years.

Dedrick De'Ron Baldwin, forty-six, of Gainesville, Florida, was awaiting trial for manslaughter when the Alachua County elections supervisor carried out a voter registration drive at the jail in which Baldwin was incarcerated. He was told he could register to vote because he was awaiting trial, and it is only after conviction that voting rights are removed. He registered and voted in the 2020 primary and general elections. Months later, he was charged with two separate crimes: registering and voting illegally. Prosecutors alleged he was ineligible to vote, not because he was awaiting trial for manslaughter but because he had, according to the Department of Corrections, unpaid fines from a twenty-eight-year-old criminal conviction totaling $494. And because his fines had not been paid, he was barred from voting. "They told us that if we weren't already convicted of our current crime then we were able to sign up and vote," Baldwin wrote from prison. "They probably signed 65 or 70 people up that day, so I don't understand how I can be charged with voter misconduct. All I was doing was what they told me I had a right to do."[23]

The Alachua County investigation into "voter fraud" that swept up Baldwin also ensnared ten others, who were likewise charged with voting illegally even though it is unclear any of them knowingly broke the law. In case after case, those charged were registered by volunteers who encouraged them to register and vote. In other words, not only did they cast their vote in good faith but they were also each *told* they were eligible and had

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a right to do so. But each was charged, nevertheless, because something technically disqualified them, such as decades-old unpaid fines.

The same thing happened to Pamela Moses. She registered to vote after an election official told her she was eligible to do so. The election official had made a mistake. The result? Moses was convicted of voting illegally and sentenced to over six years in prison. She, like so many others charged with voting illegally, had, years before, pled guilty to a felony. She served her sentence, was released, and was told she had had her rights restored. In fact, when she reached out to the state of Tennessee to confirm the restoration of her rights, the Corrections Department *and* the County Election Commission *both* certified that Moses had completed her probation and was eligible to vote. The County Election Commission had not even removed her name from the voting rolls. She was on the list of eligible voters. She registered and voted, based on these assurances. The officials who certified her eligible to vote later admitted they made a mistake. They were cleared of wrongdoing. Moses, however, was convicted of voting illegally and sentenced to six years and one day in prison.[24]

The list is long, of those charged and convicted of voter fraud, who believed and had every reason to believe that they were eligible. Numerous others, like Mason, Baldwin, and Moses, have recently been charged, tried, and convicted of voting or attempting to vote unlawfully, even though they casted their ballot in good faith.[25]

Regular people who commit dishonest acts in relation to elections are treated vastly differently, and far more harshly, than individuals with power. Indeed, regular people are harshly punished for small, or even inadvertent, accidental transgressions while powerful people deceive with impunity. Perhaps the single most prominent recent example of a powerful individual misleading the public regarding an election is former president Donald Trump.

In the lead-up to the 2020 election, Trump spread election fraud claims long before the election even took place. He claimed repeatedly the only way he would lose was if his opponent cheated or stole the election. Election night, November 3, 2020, ended without a clear winner. A major reason for this was the way mail-in ballots were collected and counted, which had become necessary due largely to the COVID pandemic. As a result, some states Trump was leading in after only in-person votes had been counted, such as Pennsylvania, he later lost to Biden because Biden had received more mail-in votes than Trump. (It had long been predicted Biden would outperform Trump in mail-in ballots.)

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Richard Hasen, in his book *Cheap Speech*, summarized Trump's false claims immediately following the 2020 election.

> By the Saturday after Election Day, it was apparent that Joe Biden had sufficient leads in enough states to win the presidency by an Electoral Margin of 306 to 232. Rather than concede the race once the outcome became clear and news networks had called it for Biden, Trump repeatedly and falsely claimed victory—even a "landslide"—arguing that the reported results were marred by fraud, pointing in part to his ephemeral Election Night leads, based on only partial vote counts in key states.
>
> He and his allies brought dozens of suspect lawsuits across the United States calling the election results into question, but once in court, his lawyers did not present any real evidence of significant voter fraud anywhere in the United States. When his lawsuits began to fail, he called on Republican state legislatures to thwart the will of the people by selecting phony slates of Trump electors for the Electoral College. He tried to pressure the Georgia secretary of state to "find" 11,780 votes—one more than Biden's margin of victory—to flip the results to Trump. He leaned on Republican governors and the U.S. Department of Justice to help in his efforts to declare the results fraudulent. About three weeks after the election Trump, without conceding, allowed the transition process to begin while still falsely claiming voter fraud.[26]

It did not end there. That had only been the beginning. Trump continued to spread false and misleading information about the election, both at rallies and on social media, particularly Twitter, for weeks. This bad faith spreading of baseless falsehoods intensified in the weeks leading up to Congress's ceremonial counting of the Electoral College votes. During this time, Trump invited supporters to Washington, DC, for a "Stop the Steal" protest to disrupt the Electoral vote-counting process. The House managers for Trump's second impeachment trial summarized the false claims Trump spread leading to the protest.

> By mid-December 2020, President Trump had spent months insisting to his base that the only way he could lose the election was a dangerous, wide-ranging conspiracy against them that threatened America itself. After the Electoral College vote, he channeled that fury toward January 6, which he presented as the final firewall against a historic fraud that "stole" their democracy. On December 19, he tweeted: "Statistically impossible to have lost the 2020 Election. Big

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protest in D.C. on January 6th. Be there, will be wild!" On December 26, he tweeted: "If a Democrat Presidential Candidate had an Election Rigged & Stolen, with proof of such acts at a level never seen before, the Democrat Senators would consider it an act of war, and fight to the death. Mitch & the Republicans do NOTHING, just want to let it pass. NO FIGHT!" Fourteen minutes later, he tweeted again: "The 'Justice' Department and the FBI have done nothing about the 2020 Presidential Election Voter Fraud, the biggest SCAM in our nation's history, despite overwhelming evidence. They should be ashamed. History will remember. Never give up. See everyone in D.C. on January 6th." And on January 1, he tweeted: "The BIG Protest Rally in Washington, D.C., will take place at 11.00 AM on January 6th . . . StopTheSteal!" That same day, Kylie Jane Kremer, the head of Women For America First—a group that had helped organize the Second Million MAGA March on December 12 (which ended in 4 stabbings and 33 arrests)—tweeted a link to the website "Trumpmarch.com." At the top of the post she added, "the cavalry is coming Mr. President!" President Trump retweeted her post, responding, "A great honor!"

As January 6 approached, and President Trump's other attempts to overturn the election failed (including his schemes at DOJ), he further escalated his call to arms. On January 4, he gave an angry speech in Dalton, Georgia, warning that "Democrats are trying to steal the White House . . . You can't let it happen. You can't let it happen," and "they're not taking this White House. We're going to fight like hell, I'll tell you right now." The next day, on January 5, he tweeted: "Washington is being inundated with people who don't want to see an election victory stolen by emboldened Radical Left Democrats. Our Country has had enough, they won't take it anymore! We hear you (and love you) from the Oval Office. MAKE AMERICA GREAT AGAIN!" Trump made it clear that his goal was to prevent the election results from being certified: "I hope the Democrats, and even more importantly, the weak and ineffective RINO section of the Republican Party, are looking at the thousands of people pouring into D.C. They won't stand for a landslide election victory to be stolen. @senatemajldr @JohnCornyn @SenJohnThune"[27]

Trump spent months spewing these and other lies—blatant, baseless, provably false—whose purpose was to mislead the public. These were not some kind of isolated mistake, or a slip of the tongue, or a momentary lapse of judgement. No, these falsehoods were calculated to deceive the public, to make people believe them, to make people act on them. Like any other fraud, the purpose of it was to benefit the one spreading the lies. There is

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far more to Trump's efforts to overturn the 2020 election, and as I write this, investigations, and a number of civil and criminal cases, are ongoing. Notably, however, not one claim against Trump rests on the fraudulent *message* he peddled but rather his *actions* in attempting to steal the election or file tax returns containing false property values. What is clear today is that we can easily compare the lies and deceit concerning an election by those who hold power, like Trump, with lies and deceit concerning an election by those who have no power and are regular people, like Crystal Mason, Dedrick Baldwin, and Pamela Moses.

This disparate treatment, whereby those with a more culpable mental state (purposefully spreading lies about an election) are ignored while those with a less culpable mental state (mistakenly casting a vote while ineligible) are harshly punished, seems, on the surface, to lack sufficient justification. But it makes even less sense when one looks at the relative harms caused by both kinds of lies. Certainly, those who commit voter fraud by casting an illegal ballot are not blameless and certainly they cause some—albeit very small, albeit hypothetical—amount of harm. But, at most, such harm is infinitesimal when compared with the vast cornucopia of harms caused by the lies Trump spread.

The laundry list of harms resulting from Trump's stolen election lie begins with the fact millions have bought into it. Every individual duped has had their personal autonomy and liberty assaulted. Next, the stolen election lie resulted in hundreds of proposed, and some passed, voter suppression laws aimed at combatting nonexistent voter fraud.[28] Thus, the *fictional* threat to democracy was used as a pretext to create a *real* threat to democracy—the mass disenfranchisement of voters. These laws primarily aimed to suppress votes among minority groups, college students, college graduates, and those living in and around cities.[29]

Trump's stolen election lie also caused the January 6, 2021, attack on the US Capitol. That day, after weeks of falsehoods about "massive fraud," Trump took the stage at the "Stop the Steal" rally in Washington, DC, where he told the crowd he would "never concede" the election, which he called "stolen." He called on Vice President Mike Pence to overturn the election results. He then told the crowd to "go over there" to the Capitol, and "if you don't fight like hell you're not going to have a country anymore," while calling Biden an "illegitimate president."[30] Other Republicans inflamed the crowd as well. The crowd then marched on the Capitol, overwhelmed the police, and broke into the building. Apart from widespread property

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damage and stolen items from the Capitol, five people died, including a Capitol Police officer. At least 138 police officers were injured, including fifteen hospitalized with severe injuries.[31] One DC Metro police officer, for instance, was hit six times with a stun gun, suffered a heart attack, and lost the tip of one of his fingers.[32] Another officer suffered two cracked ribs and two smashed spinal discs, another lost an eye, another lost three fingers, another was impaled with a metal fence stake, and a large number of officers suffered brain trauma, including several with concussions.[33]

The stolen election lie also caused economic harm, for instance, to Dominion Voting Systems. In the effort to spread the false claim that the election was stolen, Trump and other Republican leaders accused Dominion, a company that makes and sells electronic voting software, including voting machines and tabulators, of rigging the vote.[34] In the 2020 election, its devices and technology were used to process votes in twenty-eight states, including several swing states.[35] Fox News and other conservative media outlets served as a platform for Trump and his allies to spread blatantly false allegations about Dominion. These included, but were not limited to, accusations the company was founded and run by (dead) former Venezuelan president Hugo Chávez, that the votes it tabulated were counted overseas, that the company was owned by radical-Left extremists affiliated with Antifa, that the company had switched millions of votes from Trump to Biden, that the company was largely responsible for stealing the election away from Trump, and that its employees bragged about rigging the election in favor of Biden.[36] Right-wing media amplified these claims and repeated them. This led to Dominion's employees being stalked, harassed, and receiving death threats.[37] The company was forced to spend hundreds of thousands of dollars on security. But the resulting damage to Dominion's reputation, and therefore its ability to sell voting machines, amounted to millions of dollars.[38]

Notably, among the defendants Dominion sued for defamation—which included Fox News, Rudy Giuliani, and My Pillow CEO and Trump supporter Mike Lindell—was Trump lawyer Sidney Powell.[39] (Dominion accused all defendants of waging a "viral disinformation campaign" against the company involving "demonstrably false" claims.[40]) Powell, in response, raised a defense that her claims that the election was stolen were so false "no reasonable person would conclude that the statements were truly statements of fact."[41] You read that right. Powell admitted she purposefully spread demonstrably false claims on national TV about nonexistent

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widespread voter fraud, undermining the legitimacy of a presidential election and causing millions to believe a sitting president had "stolen" the election, as a *defense* to a defamation claim. Needless to say, spreading a dangerous lie should not protect one from liability; it ought to be the basis for liability.

The list of harms does not stop there. It continues: loss of faith in the electoral system, weakening of democratic institutions, worsening divisions between political and other groups, etcetera. So, I ask: When it comes to falsehoods and deceit in the electoral context, whose fraud causes more harm? The mistake made by Crystal Mason? Or the lies told by Donald Trump?

Once again, our laws are completely backward in this area. They prohibit and harshly punish small frauds of little consequence, which are carried out by regular folks, but permit, and thereby reward, massive and highly destructive frauds by those who hold the public megaphone.

This is how the fraud law paradox operates. It is wrongheaded. It is unjust. And it is dangerous.

AN UNSOLVABLE PROBLEM?

This book's title diagnoses the overarching problem. The phrase "in fraud we trust" reflects society's embrace of fraud as a way of succeeding in politics, business, and media. It is a diagnosis arrived at after years of research and thought on how those with the public megaphone are allowed to spread self-serving falsehoods to increase their own wealth and power, or to further some other political or ideological aim, while such harmful falsehoods are prohibited and punished when communicated on a far smaller scale.

We as a society have tacitly accepted fraud as a legitimate means of getting ahead but only by those at the top. This is not to say that this choice is the wrong one or that we are making a grave mistake—although I argue that both of these normative statements are true. Others might well argue we *should* allow those at the top to defraud the public. Perhaps that is how society operates best. Perhaps the alternative, holding those at the top to account for fraud the same way regular people are held to account for it, results in greater harm to individuals and society than the status quo. Perhaps stopping fraud on the public leads to tyranny rather than saving

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us from it. Perhaps it would erode our fundamental freedoms rather than bolster them.

Only a fanatic would pretend, or even believe, that they have the final one true answer to a complex societal question like this one. I make no such claim. I do not know for certain what the best path forward looks like, although I have ideas, which I will cover in detail in part 2. Instead, I begin with the observation that it is happening; fraud on the public is carried out with impunity, and it is almost completely permitted by law. This means the laws put in place to stop fraud simply allow it when perpetrated by those at the top. There are exceptions. It is not a simple, black-and-white issue. It is complex, and it must be analyzed and discussed with nuance and care. But the need for those caveats does not change the underlying fact: fraud law has a blind spot. It fails to recognize, let alone rectify, the largest and most destructive frauds. Whether this is ultimately a feature or a bug is up for debate.

But that debate is not even happening, in part because the treatment of this topic by experts is almost nonexistent. The term "fraud on the public" was frequently used by scholars from the mid-1800s up until the late 1920s.[42] Then scholars stopped using the term altogether. That is not to say scholars no longer wrote about the ways those with wealth and power spread self-serving falsehoods, but they did stop writing about the topic in a way that tied it to the "fraud" concept. There are two notable exceptions: securities fraud and conspiracies to defraud the public under the federal Racketeer Influenced and Corrupt Organizations Act (RICO Act).[43] In these two areas, scholars, legislators, and courts have always, and still do, tie together "deceiving the public" and "fraud."[44]

Outside these two areas, scholars have written about some of the ways those with wealth and power defraud the public, but always with a narrow focus. Scholars center their discussion and analysis on a narrow legal doctrine or on a particular industry. This book aims to fill a gap left by these disparate discussions; no one has yet unified the various ways leaders in politics, business, and media defraud the public under a single umbrella. Instead, the discussion has, to date, been splintered into different domains, each siloed off from the others in ways that not only fail to recognize but in fact hide how these distinct methods of deceiving the public overlap and interrelate with one another.

There is, for instance, a deep and rich scholarly exploration of how the fossil fuel industry misled the public and policymakers and what might be

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done about it. Professor James Weinstein, in *Climate Change Disinformation, Citizen Competence, and the First Amendment*, addresses the question of whether the First Amendment bars liability for large oil companies that misled the public on the existence, causes, and implications of climate change.[45] In short, Weinstein concludes it does. He argues that imposing liability on fossil fuel companies, like ExxonMobil, "for these alleged lies would violate a fundamental yet underexplored precept of American popular sovereignty positing that the people, not the government, are entrusted with determining the veracity of statements in public discourse."[46] In short, Weinstein reaches the opposite conclusion I do in this book. But while Weinstein's focus is not explicitly limited to the climate change doubt campaign, it is largely centered on it and therefore does not tie the discussion or analysis in with other areas of fraud on the public, such as those by other industries, by social media platforms, by politicians, or by police departments.

Others have likewise examined the legal ramifications, or lack thereof, arising from the climate change doubt campaign, including whether fossil fuel companies should be liable for the harm they caused. Some argue the industry should be liable, either under current law or under laws that should be enacted.[47] Others, like Weinstein, argue fossil fuel companies should *not* be liable.[48] To date, however, none has tied the climate change doubt campaign to fraud claims more broadly or clearly enough categorized the climate change doubt campaign as a "fraud on the public" akin to any other frauds.

Like those examining climate change doubt, scholars addressing other types of fraud on the public have, understandably, kept their focus narrow. This includes scholarly treatment of falsehoods spread on social media platforms, in political advertisements, by internet trolls, by those who spread "anti-cannabis propaganda" and anti-vaccine misinformation, by authoritarian regimes, by the government, by candidates for political office, and by the US president.[49] Disinformation is one of the most heavily scrutinized legal topics today. Yet, not only has no solution yet been found but many claim none ever will be, that disinformation is unsolvable, that all possible solutions are more dangerous than the problem.[50]

Nonsense. The lack of solutions has resulted from a failure to understand what the problem really is. The problem is not disinformation, or fake news, or propaganda, or any other concept that relates, in one way or another, to information that is wrong, mistaken, false, or misleading.

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That kind of information always has been, and always will be, in the air. If falsehoods were the problem, then yes, there could be no possible solution because falsehoods are simply a part of human nature. Falsehoods are inevitable. And in some cases, they are helpful, and even necessary, to human society and political discourse.

Falsehoods are not the problem. The problem, instead, is one we have grappled with, in many cases successfully, for thousands of years—harmful dishonesty. Not falsehoods per se, but the calculated use of falsehoods to profit at the expense of others. We have already put laws in place to stop people who seek to deceive others in a harmful, self-serving manner and to protect their victims. But the law we have now is not doing the job when it comes to fraud on the public.

FRAUD LAW'S BLIND SPOT

Thus far, we have discussed the fraud law paradox's outcomes—how it operates in the world, what it looks like, and what it does. But how to explain the laws that create the paradox? If my hypothesis is true, that fraud law applies almost exclusively to small frauds while ignoring, and therefore allowing, the largest and most destructive frauds, then there must be something about the way the law is *written*, or the way the law is *applied*, that explains this discrepancy. There might, on one hand, be something about how fraud law is worded that makes it particularly applicable to one-on-one frauds but inapplicable to fraud on the public. On the other hand, though the law's language might be arguably applicable to frauds of all kinds, both large and small, it might be applied in an uneven manner, meaning the problem is in how the law is interpreted as opposed to how it is drafted.

So, which is it? Is this a problem of how language is worded or of how language is wielded?

The answer is it is both.

The reason fraud law fails to prohibit or punish fraud on the public arises both from how the law is written *and* how it is applied. In short, the fraud laws are written in a way so as to make them most obviously applicable to one-on-one frauds, which makes sense, given the historical context through which they developed. Nevertheless, such laws could be applied to fraud on the public, and in some limited circumstances they actually are.

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But most courts most often interpret them as applying almost exclusively to personal fraud as opposed to impersonal fraud.

How Fraud Law Is Written

What kinds of laws are included within the term *fraud law*?

This question is not easily answered, even by legal scholars. Why? Because the word *fraud* is used in so many different areas of the law. It is, first and foremost, a tort law concept. Ever since Lord Kenyon's 1789 opinion in *Pasley v. Freeman*, there has been a civil cause of action whereby an injured person may sue someone who defrauded them and be awarded damages caused by the fraud. But "fraud" is also a criminal law concept. There are federal and state criminal codes that make it a crime to defraud another.

"Fraud" is also a consumer protection law concept. There are numerous statutes and regulations prohibiting unfair and deceptive business practices, as well as false advertising, that do not fit neatly into either the tort or criminal law contexts. Importantly, "fraud" is also a constitutional law concept. The First Amendment's rigorous protections for free speech has a handful of exceptions—categories of "unprotected speech" that the government may prohibit and punish without running afoul of the First Amendment. One category of unprotected speech is "fraud." This unprotected category of speech is generally understood to encompass the legal frameworks that make up the tort, criminal, and consumer protection species of "fraud."

All these areas of "fraud law" delineate the boundary of "actionable fraud," as portrayed in the illustration on page 55. Despite this multitude of fraud law concepts, no law specifically prohibits most frauds on the public. None of the numerous fraud laws have been interpreted to apply to fraud on the public. This is the law's blind spot.

But the numerous areas that the law *does* cover—including the tort, criminal, consumer protection, and constitutional components—together, and as a group, make up what I refer to as *fraud law*. Frauds that run afoul of any of these are *actionable frauds*. All other frauds, which fall outside the scope of these laws, are not actionable. This forest of laws that make up the collective category of fraud law might seem confusing—which it is—but it need not be. Fraud law can be greatly simplified by focusing on the tort law version of fraud, which all the others grew out of, tie into, and are intimately connected with.

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Courts and scholars often refer to the tort of fraud as "common law fraud" or "common law deceit," or just "fraud" or "deceit." Confusingly, the tort of fraud goes by other names as well.[51] For simplicity, I will refer to the tort of fraud—the civil claim whereby one may file a lawsuit to be compensated for harm caused by fraud—as *common law deceit*.

Once again, all criminal fraud laws and consumer protection laws that contain fraud-related components grew out of, and are in many ways tied into, the tort of common law deceit. Therefore, common law deceit serves as a helpful starting point when looking at the scope of fraud law as a general concept, including why the laws within this broad category are, or are not, applied to a particular category of fraudulent behavior. Thus, to understand why fraud on the public is not generally actionable, one should start with common law deceit.

All fifty states have their own common law deceit regulation—a law on the books—passed down from English common law, starting with *Pasley v. Freeman*. And all such regulations have the same elements. They are worded differently but are, for all intents and purposes, identical nevertheless.

Let's look at a couple of examples to get a sense of how common law deceit works. Texas's version of common law deceit, which courts in that state call "common law fraud," is defined as follows.

> To prevail on a common law fraud claim, a plaintiff must prove that (1) the defendant made a false, material representation; (2) the defendant knew the representation was false or made it recklessly as a positive assertion without any knowledge of its truth; (3) the defendant intended to induce the plaintiff to act upon the representation; and (4) the plaintiff justifiably relied on the representation, which caused the plaintiff injury.[52]

Although Texas lists four elements, several of the elements actually contain two or more distinct requirements. Other states use different wording to list the same requirements. Here is Arkansas's law on common law deceit:

> The five elements of the tort cause of action in deceit . . . are as follows:
>
> 1) A false representation made by the defendant. In the ordinary case, this representation must be one of fact.
> 2) Knowledge or belief on the part of the defendant that the representation is

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false—or, what is regarded as equivalent, that he has not a sufficient basis of information to make it. This element often is given the technical name of "scienter."
3) An intention to induce the plaintiff to act or to refrain from action in reliance upon the misrepresentation.
4) Justifiable reliance upon the representation on the part of the plaintiff, in taking action or refraining from it.
5) Damage to the plaintiff, resulting from such reliance.[53]

Whereas Texas lists four elements, Arkansas lists five. But this difference is not in the elements themselves but rather in the decision of how to split them up and divvy them out. Again, each state has identical requirements for this tort. Georgia, by contrast, lists nine elements:

> In Georgia, the essential elements of a cause of action for the common law tort of deceit based upon fraud have been stated to be:
>
> (1) a representation;
> (2) its falsity,
> (3) its materiality;
> (4) the speaker's knowledge of its falsity or ignorance of its truth;
> (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated;
> (6) the hearer's ignorance of its falsity;
> (7) his reliance on its truth;
> (8) his right to rely thereon; and
> (9) his consequent and proximate injury.[54]

The common law deceit regulations in all three states—Texas, Arkansas, and Georgia—are identical, albeit differently worded and numbered. For instance, Texas's element one ("that the defendant made a false, material representation") corresponds to Georgia's elements one, two, and three ("(1) a representation [by the defendant]; (2) its falsity, (3) its materiality").

It is easy to see, with the nine elements broken into their constituent parts, that they apply to one-on-one frauds. There is a speaker, who makes the false representation, and a hearer, who relies on it to their detriment. Moreover, element five requires that the speaker intended to cause the hearer to rely on the false representation. True, there may be some

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ambiguity that might allow argument room to assert that the falsehood might be relied on by a hearer other than the one targeted by the speaker. But this ambiguity is generally interpreted as applying only, or primarily, to circumstances where the speaker targeted the particular hearer who actually relied on the false representation. So, common law deceit very clearly covers one-on-one deceptions. But it almost never applies to circumstances where one puts a falsehood "out there" intending that *someone* rely on it. This requirement that the speaker have specifically targeted the particular hearer makes sense in the intentional tort context, where victims seek compensation for injuries intentionally caused to them as opposed to injuries caused by negligence.[55]

And this is perfectly logical when applied to one-on-one deceits. And it also makes sense to cut off liability for common law deceit, an intentional tort, in cases where the speaker did not intend to hurt anybody and did not even know their speech or conduct would likely result in harm to someone. In those cases, how can the one harmed claim they were harmed intentionally? At most, they may have a negligence claim.

But what about cases where someone makes a false representation to multiple people, or to a crowd, or to a TV camera, or on social media, and they know what they say is false and they intend that many people believe it and rely on it, and it is clear the falsehood will result in harm? In that case, is it not an intentional act that resulted in harm to the hearer(s) who justifiably relied on the false representation? Is lying to many people not every bit as intentional as lying to an individual?

If most courts do not treat such cases of mass deception as fraud, it is because this requirement, that a fraudulent representation must be aimed specifically at the one harmed, developed within a specific historical context: beginning with the *Pasley v. Freeman* case discussed in chapter 2. In short, it makes sense that the laws prohibiting fraud would focus primarily on one-on-one schemes given the origin of common law deceit in eighteenth century England. At the time, the problem people faced was being deceived in personal, one-on-one transactions. This was the precise danger Lord Kenyon, in *Pasley*, was addressing when he scrawled the opinion inventing the tort of common law deceit. This was why, prior to *Pasley*, there had long been a requirement that, to bring a fraud claim, the plaintiff and defendant had to have a valid contract with one another. After *Pasley*, the contract requirement was dropped, but the idea of two individuals interacting with one another in some direct way remained. Indeed, at the time,

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dealings were almost exclusively done face-to-face, given there were no telephones or other electronic means of communication at the time.

This is where our fraud law inheritance comes from. We are left with a legal definition, and a broad concept reaching out into many doctrinal areas, containing elements that made sense in a bygone world that would be unrecognizable to us, across a span of over two centuries, which has not been updated in almost all that time to reflect the ways people defraud in the modern world. We are left today with an outdated idea, which infects not only the tort but all other doctrinal areas where the concept has spread its tentacles. We have a law tailor-made for a horse-and-buggy society and we apply it, at our peril, to our current digital world.

One indication of the deficiency of our laws is supplied by a leading US legal encyclopedia, which compiles all American law into one set of books, arranged, like most encyclopedias, alphabetically. This is *American Jurisprudence*, currently in its second edition. It contains over 140 volumes, each containing around four hundred pages of dense summaries of the law. In those pages, how much space, do you suppose, is dedicated to addressing the law applying to fraud on the public? The answer is none. There is not one word of it. The closest it comes is in volume 37, section 14. There, the authors include a single sentence that reads, "A court will not lend its aid to enforce a transaction that would work a fraud on the public."[56] It cites a single Mississippi state court case from 1917 to support this statement.

This is an outrage. To think that the best our legal system can produce in response to the lies and disinformation monopolizing our minds, allowing those willing and able to lie for profit to make trillions of dollars and choose who our elected officials should be, as well as what policies those officials must adopt, is a single hollow sentence—it is, to put it mildly, not enough. If that is our protection against those bent on defrauding public at large, we do not stand a chance.

The sad truth is that the legal weaponry we possess to deal with fraud in the modern world has been passed down to us, unchanged, from more than two centuries ago. This makes us virtually powerless in the face of the barrage of falsehoods, misleading claims, and conspiracy theories we are bombarded with daily.

The key word here is *virtually*. Despite fraud law making itself far easier to apply to one-on-one frauds than to frauds on the public, those same elements could still be interpreted to apply to frauds carried out by spreading

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falsehoods to millions of people. Accordingly, if we look at fraud law's blind spot as being entirely a product of how the law is written, we are not seeing the full picture. It is also a product of how the law is applied. This becomes abundantly clear when looking at how securities fraud is handled, as well as how some courts have applied fraud laws to claims against the tobacco and asbestos industries.

How Fraud Law Is Applied

Fraud law is almost never applied in cases where leaders in politics, business, and media have purposefully defrauded the public and caused harm as a result of people buying into the falsehoods. Almost all fraud on the public is viewed as outside the scope of fraud law. It is not actionable. But on a couple occasions, and in some narrowly defined circumstances, fraud on the public has been considered inside the scope of fraud law.

First, and perhaps most importantly, courts have always applied the elements of common law deceit to securities fraud. This is significant because securities fraud most often involves one disseminating to the public at large false or misleading information about the value of a security or omitting material information from a news release or other public communication, and this misrepresentation or omission induces an investor to purchase or sell shares. Victims of securities fraud, unlike most common law deceit victims, often never meet the one who misleads them. There is typically no one-on-one communication. Instead, a falsehood is simply put into the air. And some who encounter the representation or omission act in reliance on it.

For over a century, such claims were addressed as common law deceit claims. This was the case in the United States all the way up until the early 1900s, when securities anti-fraud statutes were passed by states and by Congress. Today, securities fraud has been extracted from the realm of common law deceit and is now treated as its own kind of claim. Today, claims of securities fraud, in both the civil and criminal contexts, are handled by tailor-made executive agencies—such as the SEC, in the federal realm—whose purpose is to investigate and prosecute claims against those who commit securities fraud. Thus, securities fraud today has some elements that differ somewhat from common law deceit. Yet, securities fraud, even today, cannot be analyzed or prosecuted without proving the elements of common law deceit—except for the element of reliance.

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It is not that the reliance element is dropped, per se, in securities fraud claims. Rather, reliance is presumed in such cases because, when a false claim is put into the air, the market is deemed to have absorbed and incorporated the falsehood into the price of securities, thus ensuring every purchaser or seller of that security relied, either directly or indirectly, on the falsehood.[57]

Some state securities fraud statutes go even further. New York's securities fraud law eliminates the common law fraud elements of knowledge, reliance, and damages. Requiring three fewer elements to be proven than is the case for claims of common law fraud, New York's securities fraud laws are even "broader" than the federal securities fraud laws, "which themselves rely in modified form on the basic system of common-law actions."[58]

Criminal fraud laws also make use of the principles of common law deceit but do not necessarily require every element to be met. Wire fraud and mail fraud are two federal fraud statutes that criminalize, respectively, fraudulent schemes carried out over electronic communications and through use of the mail. While these criminal actions are based largely on the common law deceit elements, reliance is dropped as a required element because the focus of the criminal law is not to compensate victims (i.e., hearers) but instead to punish wrongdoers and to protect society.[59]

Occasionally fraud laws have been applied by courts to schemes to defraud the public at large. One leading example is the 2006 criminal conviction of tobacco companies for conspiracy to commit fraud. A federal judge held that tobacco manufacturers "have engaged in and executed—and continue to engage in and execute—a massive 50-year scheme to defraud the public, including consumers of cigarettes, in violation of [law]."[60] A federal court in New York held that in some claims against tobacco companies, the state's common law deceit action could be used by smokers injured by smoking to recover damages even if the tobacco companies' false representations were not directed specifically at the injured victim. The court held:

> It is not necessary that the misrepresentation be made directly to the party claiming to be defrauded. Thus, while some connection between accuser and the accused must exist, a cause of action will not fail merely because the party making misrepresentations did not communicate directly to those who relied on them to their detriment. Misrepresentations made to the public at large may

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> give rise to a claim of fraud so long as the plaintiff was part of the class of persons intended to receive the misrepresentations.[61]

Like New York, courts in Georgia have, on occasion, held that common law deceit may apply to schemes to defraud the public, at least in cases involving the asbestos industry. There a court held: "Even where the representations are made to the public at large, or to a particular class of persons, as long as they are given with the intention of influencing any member of the public or of the class to whom they may be communicated, any one injured through the proper reliance thereon may secure redress."[62] If any of these case holdings actually reflected the way fraud law is generally applied, it might eliminate the law's blind spot for fraud on the public. Alas, these isolated quotes do not reflect how fraud law is interpreted and applied. Instead, each statement has been narrowly construed to apply only to the facts in each particular case. Nevertheless, these quotes make clear that, at least in theory, fraud law could be more broadly interpreted. It could, but doesn't, cover fraud on the public.

Another major reason the law applies in an unequal manner to large and small fraud schemes is the First Amendment's free speech clause. This powerful safeguard for individual thought and expression has been used—and I argue *misused*—to provide almost absolute protections for a significant amount of speech involved in efforts to defraud the public.

THE WEAPONIZATION OF FREE SPEECH

The first ten amendments to the US Constitution are called the Bill of Rights. Its name comes from the fact its amendments confer certain individual rights. These include "the right of the people to keep and bear Arms" due to a "well regulated Militia" being "necessary to the security of a free State" (Second Amendment); the right to not have soldiers quarter in your home without your consent (Third Amendment); the right against unreasonable searches and seizures and the requirement to have probable cause for a search warrant or to arrest a suspect (Fourth Amendment); the right against self-incrimination (Fifth Amendment); the right to a speedy trial and, in criminal cases, the right to trial by jury (Sixth Amendment); the right to trial by jury in certain civil cases (Seventh Amendment); the prohibition against excessive bail or fines and against "cruel and unusual

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punishments" (Eighth Amendment); a declaration that these rights are not exhaustive, that states can grant additional ones (Ninth Amendment); and a clarification that powers not delegated to the federal government "are reserved to the states respectively, or to the people" (Tenth Amendment).

The purpose of the Bill of Rights is clear from the rights themselves. It protects us against those in power. The Fourth Amendment's prohibition against unreasonable searches, for example, protects individuals against possible abuses by law enforcement. Why was this right added? Because if allowed to, those in power intrude into where we live, work, and worship based not on reasonable suspicion of a crime but on a desire to target a political opponent, a personal enemy, a member of a marginalized group, or anyone else those in power wish to harass or harm.[63]

This protection against abuses of power is common to the other amendments, including the First Amendment, which provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[64] Accordingly, its protections against government abuses of power include freedom to exercise whatever religion you want, or no religion at all; the right against establishment of a state religion; freedom of speech; freedom of the press; freedom to assemble and to associate;[65] and freedom to petition the government.

The free speech portion of the First Amendment, called the "free speech clause," states that "Congress shall make no law . . . abridging the freedom of speech." This provision was added to the First Amendment in response to the historical speech restrictions in England, such as licensing and seditious libel laws.[66] Licensing was a requirement that anyone who wished to publish or distribute anything in writing must first obtain a permit, or "license," from the king. The permit could be granted or denied at the pleasure of the official reviewing the application. Once granted, the permit could be revoked at any time, again at the whim of the authorities.[67] This resulted in heavy-handed press censorship. Any newspaper critical of the government, or who said anything those in power did not like, could be banned from printing anything at all.

This "prior restraint" on speech—a restriction that stops speech even before it occurs—went hand in hand with the seditious libel laws, which punished speech after the fact.

The seditious libel laws in England made it a crime to say or write

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anything unfavorable about the state or its leaders.[68] This law rested on "the principle that the king was above public criticism and that, therefore, statements critical of the government were forbidden." Truth was no defense. In fact, since truthful accusations might do more damage to the government's reputation than false ones, they were treated with greater seriousness and punishment.[69]

In 1703, polemicist John Tutchin published a pamphlet that alleged the king and government officials of engaging in bribery and corruption. The allegations were true. At his trial, he was found guilty of seditious libel. The conviction was upheld on appeal. Chief Justice Holt dismissed the idea that truthfulness was a defense. The violation of law, he clarified, was not that Tutchin said something false but that he tarnished the reputation of those in power. The idea, largely accepted at the time, was that government cannot function if the public is allowed to criticize it. Justice Holt stated: "To say that corrupt officers are appointed to administer affairs, is certainly a reflection on the government. If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it."[70] Justice Holt wasn't done. He added that criticizing the state was "the worst of all offenses against established government."[71] "This has been always looked upon as a crime," Justice Holt added, "and no government can be safe without [the seditious libel law]."[72] It was thus illegal to picket or protest; to say unkind words about officials; to reveal misdeeds of those in power, even if, or *especially* if, the allegations were true; and to say, do, or insinuate anything that might hurt the government's reputation.

The free speech clause was a backlash against this kind of censorship. It was seen as necessary to protect the right of people to think freely and to speak their minds. Its purpose, then, according to Professor Zechariah Chaffee, was "to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible."[73]

As traditionally understood, the First Amendment, like other amendments in the Bill of Rights, is a shield for the people against those in power. It guarantees the right to picket, protest, march, assemble, and speak truth to power. It's why we can say "Fuck the President" without being imprisoned. It's why we can report on government corruption without being silenced. It's why we can protest a war without being arrested. It's why we

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can support any political party or candidate without being charged with subversion or sedition. It's why we can publish books and articles and social media posts critical of accepted orthodoxy without getting investigated or prosecuted.

True, the right to free expression is not unlimited. During wartime, for example, the United States frequently clamps down on freedom of speech.[74] And though one is rarely arrested for opinions in peacetime, many have, in recent years, suffered professional and personal repercussions for expressing unpopular views. Public figures and academics have been "canceled" because of what they said or wrote.[75] The First Amendment will generally not protect someone from being canceled, but that is not its job.[76] Its purpose is to protect against government censorship and official reprisal in response to private speech. On that front, it does an admirable job of protecting the right of the people to speak their minds. It is a valuable shield. We are lucky to have it.

However, while regular people have used it as a shield, as intended, corporations and political organizations have, in recent decades, increasingly used it as a weapon against the people it was put in place to protect. This began in the early 1900s, with the advent of the mass media industry, and is today a growing and ever-more-alarming problem. Numerous scholars, judges, and journalists have written about this dangerous trend. Professor Catherine MacKinnon, who teaches constitutional law at the University of Michigan and Harvard, pointed out that "the First Amendment has gone from a shield of the powerless to a sword of the powerful in the past hundred years."[77]

The claim that "it is my free speech right to say what I want to" has been embraced by the wealthy and powerful, not to defend the people telling truth to power but to dictate truth from those in power down onto the people. From the fossil fuel and sugar industries to Fox News and MSNBC, entities with enormous private power have claimed it is their right, just as it is for individuals, to say what they want. Often, however, they are not expressing an opinion or sincerely held view. Rather, they are pushing a narrative that they know to be false, but which serves their own self-interests, at the expense of the people to whom they speak. Some of the messages comprising this false narrative might well occupy the murky realm of half-truths and exaggerations. But an alarming number of the falsehoods broadcast to audiences are provably false statements of fact, disseminated in bad faith for self-serving purposes.

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Numerous courts, including the US Supreme Court, have discussed the weaponization of the First Amendment.[78] Professor MacKinnon gives an eloquent summary of the central problem:

> The freedom of speech has at the same time gone from a rallying cry for protesters against dominant power to a claimed immunity of those who hold dominant power. Thus weaponized, the First Amendment has morphed from a vaunted entitlement of structurally unequal groups to have their say, to expose their inequality, and to seek equal rights, to a claim by dominant groups to impose and exploit their hegemony.[79]

Protection *from* those in power has become a weapon used *by* those in power against the people it was put in place to protect. This flies in the face of freedom of speech and thought. Indeed, it results in the enshrining of the exact opposite principles for which these freedoms stand. It deprives us of autonomy, it inhibits the search for truth, and it destroys self-government by eliminating deliberative critical thinking and replacing it with received wisdom dictated in bad faith by those in power. This perversion of the free speech principle tramples precisely what the First Amendment was put in place to protect.

This has allowed wealthy corporations to deceive customers while those customers are prohibited from deceiving the corporations. It has allowed police departments to lie to the public to cover up crimes even though individuals are strictly prohibited from doing so. It has alloweda former president to spread falsehoods to overturn an election even though individuals are imprisoned for far smaller deceptions in connection with elections.

The weaponization of the First Amendment is a gift to the powerful and a curse for the rest of us. Many of those who hold the public megaphone use that enormous power and privilege to deceive their vast audience. By doing this, they gain money, power, and other benefits. The rest of us pay a heavy price. This weaponization has nothing to do with protecting our views and beliefs but is rather a cover for the powerful to manipulate public opinion for their own benefit under the banner of free speech. Those defrauding the public have turned the First Amendment into the opposite of it was designed to be.

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WHAT CAN BE DONE?

This is where we are. Voting while ineligible *by accident and in good faith* is a crime, and can result in imprisonment, while spreading to millions of people a *knowingly false and bad faith* claim that a political opponent "stole" an election is treated as a legitimate political tactic and can be the launching point for the next campaign. This is backward. The more culpable, purposeful, and harmful deceit is treated not only more leniently but with absolute immunity. It is not punished; it's rewarded.

This paradox may be absurd, but the question remains: What can we do about it? Any serious solution must be arrived at through the systems and institutions in place. The "tear it all down" mentality might excite people but carries risks that far outweigh the benefits. Thus, the problem could be solved, first and foremost, by Congress or by state legislatures, who are charged with writing the laws of the country. Secondly, courts could apply the law in cases before them in a manner that clarifies that those who defraud the public are committing fraud every bit as much as those who defraud individuals. And thirdly, the executive branch, which also plays a role in proposing legislation, signing bills, and investigating and prosecuting crimes, could also work toward pushing for an interpretation of current laws, or for a passage of new laws, that ensure those who defraud the public are no longer let off the hook. In part 2, I will present specific proposals for how legislators, courts, the executive branch, and regular people can work to solve this urgent problem.

Those bent on defrauding others can be stopped only by law. We cannot stop fraud by simply keeping on the lookout for it. We cannot rely on ourselves. Whether it is a run-of-the-mill scam artist duping victims out of money or an oil company misleading millions about the existence and causes of climate change, the fraudster will profit if the law permits it. To rein in fraud on the public, just as we do with fraud on the individual, we must rely on laws aimed at prohibiting and punishing harmful falsehoods.

History has taught us why and how we must guard ourselves against those deceiving us for profit. The question is: Have we learned?

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PART TWO
TRUTH FROM POWER
SOLUTIONS

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6

Call It Fraud

OTHER LABELS PROTECT THOSE WHO PERPETRATE IT

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When a politician claims, in bad faith and with no basis for believing it, that he won an election he lost, and he invents a story about his opponent leading a massive conspiracy to hack voting machines and switch millions of votes, he is not only lying but committing a fraud. It is fraudulent to gain through harmful deceit. It is fraudulent to manipulate for self-serving ends. Moreover, most who defend such a lie, claiming it is the politician's right to say it, are either complicit in the fraud or themselves victims of it. Some, no doubt, straddle the gray area between accomplice and casualty.

But let's be clear—a lie of this kind is not legitimate political dialogue. It is not a viewpoint or opinion. And it has nothing to do with expressing a thought, belief, or suggestion. It makes no contribution—*none*—to "the free trade in ideas."[1] Moreover, its utterance does not aid but disrupts the search for truth, one of the underlying justifications for protecting speech in the first place. The politician spreading the falsehood has no desire to get to the bottom of what really happened. Indeed, the lie is intended to achieve the exact opposite, to cover up what happened, to hide the truth.

It is not just politicians, of course. The same can be said for a company, or a whole industry, that raises doubt about the causal connection between the products it sells and the injuries those products bring about. If the industry is aware of studies demonstrating the causal link, what should we make of it spending millions to convince the public the science is unsettled? This,

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like the invention of a political conspiracy by a losing candidate, is a lie whose purpose is to profit the liar by exploiting the people.

The same can be said for any number of other falsehoods made up and disseminated by politicians, corporate agents, pundits, and others. We see these lies in the news and our social media feeds. We find them just about everywhere we turn to become informed about what is going on in the world.[2] Sometimes we recognize them as are lies when we see them, particularly if they happen to align with views or beliefs we disagree with. Sometimes, however, we ourselves buy into them. We all do.

But what should we call lies like these, which are diffused on a mass scale? We have many terms at our disposal, which we sometimes use to label these kinds of deceits, but none do a good job of identifying the true problem. We describe these falsehoods with terms like *fake news*, *propaganda*, *disinformation*, *misinformation*. Sometimes, we refer to those who spread them as engaging in doublespeak, brainwashing, or indoctrination. We may call such messages misleading, deceptive, inaccurate, or evasive.

We call it almost everything except what it actually is: fraud. This is a mistake. It is fraud when one deceives another for profit in a harmful manner. It is no less fraudulent when one deceives the public for profit in a harmful manner. The fraud may be actionable or not, but it is important to label unacceptably harmful deceits as fraud in either case, so we can understand the nature of the wrongful conduct at issue.

It is not necessarily self-evident why naming the problem might be so important. Indeed, some might view my call to label it *fraud* as a mere semantic exercise. It has no practical use or value, they might argue, and will change nothing. What you call a thing does not change what that thing is.

But words *do* matter. Hearing specific words can affect the way we feel, can brighten or sour our mood, make us feel relaxed and comfortable, or put us on edge. In one study, the specific "wording used before and during painful medical procedures" had a significant effect on "the painfulness and discomfort of the procedures."[3] That is, words affect our brain in real and measurable ways. In fact, "the choice of words can cause specific areas of the brain to activate," causing pleasure or pain, joy or grief.[4] Words we are exposed to influence how we view our surroundings, the people around us, and ourselves. The language we absorb and use sets limits on what we know and understand, which is no surprise given that the structure of our thinking is very closely related to the structure of our language.

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Given how strongly words influence how we view things, judge them, and understand them, I propose that calling the spread of harmful disinformation *fraud* not only deserves to be included in my list of solutions but that it is the most important solution among the bunch. It is a prerequisite to all others. If we cannot agree it is fraud, we will surely continue to ignore and allow it. If we cannot call it fraud, we are certain to continue to fall for it and to therefore suffer from it.

Our failure to call this kind of deceit what it is has hampered our ability to protect ourselves from it or even to recognize its true nature. Because we refer to it with imprecise and unhelpful euphemisms, like *fake news* and *misinformation*, we have put up with conduct that is, by any objective measure, unacceptable. We do not know we are being defrauded because no one is saying it. We must say it to recognize it.

Take, for instance, the recent (as of this writing) US House Select Committee in charge of investigating the January 6, 2021, assault on the US Capitol. This committee held hearings to bring to light the extent to which the attack was a planned and coordinated effort to overturn the presidential election and place the losing candidate in power. Mountains of evidence were brought forward to show Trump and his allies carried out a coordinated campaign of disinformation to mislead supporters into believing the election was stolen so they would support overturning it. Yet, not once in five days of hearings was the word *fraud* applied to the actions by Trump and his accomplices.

Rather, Trump's words were described as "misleading," "inciting," and "manipulative." They were called "false," and they were called "lies." They were never called "fraud."

However, the word *fraud* did appear over two hundred times during the hearings—not to describe what Trump did, but to describe the baseless allegations Trump made against the supposed conspiracy to "steal" the election. That is, the word was used by Trump and his allies. He, unlike the committee, understood the power of the fraud label. He understood this so well he made it a centerpiece of the message he spread to try to overturn the election and undermine democracy.

Trump used the word *fraud* dozens or hundreds of times to refer to a conspiracy he made up and had no evidence for—in other words, to describe conduct that was *not* fraudulent. But the committee never once used the word *fraud* to describe Trump's conduct and false claims, which, in fact, *were* fraudulent. It is not the House committee members' fault. They

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could not be expected to use a word to apply to conduct we do not, as a general matter, apply to such conduct.

This is the linguistic shortcoming we must remedy now. We need to stop calling it propaganda or disinformation or misinformation or fake news. We must stop calling it lies or, even worse, "apparent lies." These vague and weak labels only confuse the issue and give those who mislead a pass. If anyone swindles another for profit, or swindles a million people, it is fraud in either case.

Let's stop calling it by any other vaguely defined term. Let's call it what it is. Let's call it fraud.

First, calling it fraud will help us see the conduct for what it is, to recognize and understand it *so we can make sense of it*. Second, calling it fraud will help us identify it when it is aimed at us *so we can stop falling for it*. Knowing we are being defrauded is the first step in avoiding it. Third, we must recognize it as fraud *so we can address it*. If we keep thinking of it as simply opinion or rhetoric, legitimate speech we are all entitled to, we will continue to give a pass to those who defraud the public instead of taking meaningful action to prohibit or punish it.

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SO WE CAN MAKE SENSE OF IT

Ludwig Wittgenstein, a twentieth-century philosopher, was fascinated with the way words shape our thoughts and perspective. One of the contributions for which he is remembered today is the idea that language creates, and constrains, what we view as reality. "The limits of my language mean the limits of my world," Wittgenstein wrote.[5] More recently, linguists and cognitive scientists have, time and again, reached the same conclusion. Chomsky's theory of language development, now widely accepted among linguists, holds we are genetically programmed for language acquisition. If that is the case, and most now agree it is, it would mean words, in fact, *do* create our world and set its limits. One philosopher summarized this point as follows:

> We must be genetically pre-programmed to [acquire language]. Therefore, all human languages must have in common a basic structure that corresponds to this pre-programming. Now, this also has some very important negative implications. The chief of these is that anything that can't be accommodated to

> this structure, anything, so to speak, that can't be caught in the mesh of this particular network, is linguistically inexpressible and unintelligible to us. So, the general principles common to all languages set vital limits to our capacity to understand the world and communicate with each other.[6]

In other words, not only do we think in words, but words themselves determine our thoughts. Those words dictate what we perceive by labeling concepts, objects, ideas, and events. This creates our perception of the world, of our surroundings, of ourselves. Our perception, conveyed to us in words and understood by us in words, is all we know and believe. How this occurs might yet not be known, but, as with our inability to detect lies, we already understand the implications well enough. The words we use to speak and think, to a large degree, dictate what we know, think, and believe.

Because of this, words we use to describe a thing determine how we view and understand it. To see this in action, think about the historical unequal treatment of women in the workplace. Women entered the workforce in great numbers in the mid-twentieth century, a time when women were treated unequally in society in numerous ways. This mistreatment carried over to the workplace, where it took many forms. There was, for instance, unwanted touching, which included everything from a man putting his hands on a woman's shoulder, arm, or leg, to more aggressive, suggestive, or sexual contact running the gamut from gross to abusive. The mistreatment included lude, disrespectful, and abusive language and behaviors toward women. Sexual and sexist jokes were made either to women or in their presence. There were unwanted sexual advances, innuendos, and off-color discussions of sexual, sexist, demeaning, or offensive topics. There were comments about women's attractiveness, appearance, wardrobe, intelligence, and ability. Apart from individual conduct, there were structural aspects to it. Women were, across the board, treated unequally to men in the workplace. Women occupied lower positions than men and were widely viewed, by male colleagues and bosses—indeed, by society in general—as less intelligent, less capable, and less valuable. They were paid less. They were treated worse.

This unequal treatment was accepted as normal. Most people—men and women alike—saw no harm in it. It was not that women were blind to what was happening to them or that no one chafed at the unequal treatment. Rather, because of societal norms, it would have been taboo to call

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attention to behaviors the vast majority accepted as normal. It was, as they say, the way of the world. Certainly, it is easy to look back from our enlightened present to see, in hindsight, how awful and unfair the system was, to see how the unequal treatment was disgusting and unjust. But neither the average man nor the average woman back then would have seen it this way.

Oppression is rarely apparent to those suffering it, at least not without some active movement working to bring that oppression to light.[7] And so it was with sexism in the workplace. It stemmed from numerous deeply rooted societal norms, accepted uncritically. Men were breadwinners, women homemakers. Employers, therefore, prioritized the work and pay of men over that of women. One popular magazine, *Housekeeping Monthly*, advised women in 1955 to always let a husband talk first because "his topics of conversation are more important than yours," and a wife is to "never complain." "Don't complain if he's late home for dinner or even if he stays out all night," it goes on to say. "Count this as minor compared to what he might have gone through that day." It concludes by reminding women that "a good wife always knows her place."[8] This view predominated during the years women were entering the workforce. Not surprisingly, similar attitudes pervaded the offices, shops, and factories where women went to earn their living.

To quote a turn of phrase popular at the time: "It's a man's world."

In the 1970s, however, a new term arrived to describe what was going on at work—*sexual harassment*. Until the '70s, the term practically did not exist. By the middle of the decade, everyone was talking about it. There were investigative reports. Scholarly articles. Magazine pieces. Books, movies, and TV shows all broached the topic. People were talking about it, debating it, condemning it. Calling it *sexual harassment* changed how people even *thought* about it. Men behaving badly toward women went, in the blink of an eye, from normal to unacceptable. The term *sexual harassment* cast the behavior in a completely different light, one that far more accurately, and helpfully, reflected what was happening.

By 1975, there were serious efforts, by scholars and activists, to make sexual harassment illegal. That year, Professor Catharine MacKinnon began circulating a draft of her book, "Sexual Harassment of Working Women," in which she argued workplace harassment against women constitutes discrimination on the basis of sex, which should be, but was not then, prohibited under Title VII of the Civil Rights Act of 1964.[9] Up

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through 1975, every federal court that had addressed the issue had rejected MacKinnon's argument. But by 1978, three courts agreed with MacKinnon. In 1986, the Supreme Court in *Meritor Savings Bank v. Vinson* made it the law.[10] This had an enormous impact on workplaces throughout the country.

Alexandra Kalev and Frank Dobbin, writing in the *Harvard Business Review*, observed that within a few years of *Meritor Savings Bank*, most employers adopted procedures for protecting women from workplace harassment. By 1997, in fact, "75% of American companies had developed mandatory training programs for all employees to explain what behaviors the law forbids and how to file a complaint, and 95% had put grievance procedures in place for reporting harassment and requesting hearings."[11]

Though mistreatment of women at work has not disappeared entirely, workplaces look very different and far friendlier to women than they did before the movement to address sexual harassment. The recent #MeToo movement is a reminder that there is still work to do. Labeling wrongful and discriminatory behavior as sexual harassment was not a magic cure-all. But it did help reshape the way we think about and understand the behavior in question.

This has also been the case for other kinds of harmful conduct. Domestic violence is one. Had you uttered the words "domestic violence" a hundred years ago, folks would not have known what you were talking about. Wide acceptance of physical punishment in the home has been the rule of history, not the exception. This included corporal punishment of one's own children, and even of other people's children. A husband's right to physically punish his wife was enshrined in law, both civil and religious, for most of the past few thousand years. But once such behaviors were labeled "domestic violence," "spousal abuse," and "child abuse," it condemned these practices as barbaric. Almost no one would be in favor of any such practice, so labeled.

The word *discrimination* is another example. This includes unequal treatment of someone based on race or ethnicity, immigrant status, gender or sexual identity, or any number of other categories. The term *discrimination* is an important label that helps us understand the wrongness of certain behaviors and the ways we think and express ourselves, which cause unacceptable harm. Words like *racism*, *sexism*, and *homophobia* are other additions to our lexicon, and like other labels, they shape the way we think about certain behaviors and messages.

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What we call a behavior and words that cause suffering, anguish, and pain matter. For that reason, it is imperative we stop glossing over the purposeful swindling of the public by those who stand to profit or grow their audience, who spread ignorance and contempt while robbing victims of money, health, and dignity and that we call it what it is.

It is fraud, and that is what we should call it.

Words like *misinformation*, *disinformation*, and *propaganda* do not do it justice. Those feeble phrases are a gift to grifters. Not only are they a mouthful to say, thereby covering up the simple truth, but they also provide cover for those who knowingly deceive by making it appear more innocent than it really is. Calling fraud on the public *misinformation*, for example, is akin to calling sexual harassment "locker room talk" or "guys just being guys." It glosses over the harm, providing wrongdoers protection.

We must be truthful and precise about what is really happening, what the motivations are behind it, who profits off it, who is harmed by it, and what the nature and extent of that harm is. We must call it fraud because, quite simply, that's what it is.

SO WE CAN STOP FALLING FOR IT

One profits through fraud only if they can hide what they are doing. Fraud always relies on deceit, and deceit fails if discovered. Any time a dupe is made aware they are being duped, the jig is up. The fraud fails.

In fact, the very essence of fraud is the act of hiding two truths from the dupe—the truth about the matter at issue and the truth about the deceit itself. This is where the terms "confidence man" and "confidence scheme" come from. Those who aim to profit through deceit rely on the dupe's misplaced confidence. The dupe must believe the speaker and their message to be what they purport to be rather than what they are: a fraudster, on one hand, and a fraudulent scheme, on the other.

This is true for any fraud, including fraud on the public. But we rarely think about fraud on the public as targeting our tendency to be overconfident in our own judgments. To understand how we can misplace our confidence in an idea so easily, take climate change. When we think about this topic, its ramifications, causes, and effects, including how it fits into our life and worldview, the conclusions we draw appear to come from our own independent judgment. But this is only partly true. Although to a degree we

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do make up our own mind on topics like climate change, the conclusions we come to are strongly tied—if not inextricably linked—to information we are exposed to and absorb: what we read, see, and hear in the news, on social media, and in our everyday conversations. We often do not connect the conclusions we come to on climate change to a particular article we read or a particular podcast we listened to; we feel as if we have reached the conclusion using nothing but our own logic, reason, and intelligence.

It is well-studied, and long-understood, that when we consume information, in general, we selectively credit or discount evidence in patterns that reinforce beliefs we already hold or to which we are predisposed.[12] Because of this confirmation bias, "people tend to interpret new information in a way that confirms their existing beliefs."[13] Someone predisposed to view climate change as a hoax is likely to believe evidence for that conclusion, and someone predisposed to view climate change as an existential threat is predisposed to believe evidence for that. Accordingly, when someone tells us something we want to be true, we tend to believe it. And because we have no lie-detection ability, our confirmation bias pushes us to believe evidence we agree with, whether or not it is true.

Climate change provides an example where there is a major effort on both sides of the issue to defraud the public for the speakers' own self-serving purposes. The climate doubt campaign was adequately covered in the introduction. But activists and politicians on the Left have more recently spread a message of climate change alarmism in a strikingly similar manner to how the fossil fuel industry spread climate change doubt—by taking cherry-picked data to paint a false or grossly misleading picture for the purpose of furthering their own agenda.[14] Those on the Left frequently buy into the alarmism falsehood just as frequently as those on the Right bought into the denial falsehood. And of course they did. Most folks do not have time to investigate every assertion they hear. They make decisions on what to purchase, who to vote for, and what to believe based on a faulty assumption that they know truth when they see it. We all do this. No one is exempt. Falsehoods fly on both sides of the political aisle. We sometimes recognize those aimed at those on the other side, but we rarely see through those aimed at us. Instead, we enthusiastically buy into them.

Would we be less likely to buy into a falsehood if it was labeled, correctly, as fraudulent? Perhaps.

But it is difficult to say just how effective labeling false and misleading claims as *fraud* would actually be. Social media companies have recently

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tried attaching disclaimers or warnings to posts containing certain falsehoods about elections or about vaccinations.[15] They have also, in some cases, added links to objective information on the topic addressed in the post.[16] They have flagged or even removed certain falsehoods. None of these measures seems to have reduced the falsehood's effectiveness, however. In fact, this kind of fact-checking or disclaimer-adding has been shown to sometimes have the opposite effect as what was intended. Many who view such a disclaimer or warning cling even more strongly to the false belief than they would have without it.[17] According to one study, this reinforcement of the belief in the underlying falsehood occurred more frequently among men than women and among Republicans than Democrats or independents.[18]

To be clear, however, although flagging and fact-checking may, indeed, be part of the solution to harmful disinformation, they are likely insufficient in and of themselves, and they are not my focus in this chapter. Instead, I argue we should change the entire way we talk about and frame the discussion around harmful disinformation to highlight the harm being done and the predatory nature with which it is carried out. As long as we keep referring to it as fake news, propaganda, or other ineffectual euphemisms, there will likely be no meaningful improvement in the way the public understands what is going on.

But let us not take this idea too far. Calling the conduct fraud rather than misinformation will be no magic wand. It cannot be expected to end harmful disinformation any more than labeling sexist workplace misconduct "sexual harassment" could be expected to end unequal treatment of women at work once and for all. Using effective terminology does not make us immune to the evil. Reframing the discussion around *fraud* will not change the fact we are hardwired to believe, or stop us from selectively crediting or discounting evidence in patterns that reinforce beliefs we already hold. But if we begin to discuss how those who defraud the public are no different, and should be no less culpable, than those who defraud individuals, then at least there is a chance we will start to recognize the conduct for what it truly is.

Making this change will, over time, help at least some see and understand the problem and recognize it when they themselves are targeted by it. If adopted, it will be an important step toward getting people to think about the way those in power use us as instruments for achieving their own ends.

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SO WE CAN ADDRESS IT

James Baldwin said, "Not everything that is faced can be changed; but nothing can be changed until it is faced."[19] He was referring to racial discrimination and civil rights, but he was also pointing out a universal truth: as long as people failed to recognize *any* problem—in that case, racial discrimination—nothing would, or even could, be done about it.

This is why successful social movements always start by shining a light on the problem to be addressed. The first job of the labor movement was to bring to light unfair and unsafe labor conditions. The first job of women's suffrage was to show the public equal citizens were being denied the right to vote. The first job of the #MeToo movement was to show the public that sexual abuse and harassment was happening far more often, and to far more people, than many had assumed. In every case, progress on the issue is made only after the broader public, and then those who hold power, recognize the need to do something. Before a solution can be found, we must understand there is a problem in the first place.

I make no claim here that the problem at issue is analogous, similar, or of a comparable order of magnitude to any of the other societal issues that have given rise to prior movements. But in one way, at least, it fits in with them: the problem of fraud on the public stems from the fact people are totally unaware it is even happening, notwithstanding the fact it causes social ills ranging from cancer and overdose deaths to sea level rise and gun violence. It is largely responsible for a wide range of harms that, at the same time, allow those who carry them out to further enrich and empower themselves. And the only hope we have of solving it is to first wake up and see it is happening.

The way leaders deceive us for their own ends while causing harm deserves a label that reflects the malignant and predatory nature of their conduct. Avoiding the F-word has kept us from seeing the problem. We must use that word—*fraud*—because it is likely our best hope of generating legislative and judicial will to craft laws and court opinions that treat the problem in a manner that correlates with the danger it poses.

All other terms we have used, to date, to describe the act of misleading the public for selfish ends have failed. I'm sorry, but *misinformation* will just not do it. This and all other watered-down terms confuse rather than clarify, and they conflate two ideas that are materially distinct. Misinformation is far broader than fraud on the public; whereas the former

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term encompasses innocently shared false and misleading claims, the latter is restricted to purposefully and knowingly sharing false and misleading claims. Using watered-down terms takes us further from the solution rather than bring us closer to it.

To be clear, just because one carries out "fraud" does not mean that the fraud is necessarily actionable. Accordingly, the numerous claims Trump made that the election was stolen from him, which are knowingly false and therefore fraudulent, does not mean, necessarily, that there should be legal consequences for this conduct. Political speech should, and does, get the highest First Amendment protections. One reason for this is it is a dangerous and delicate business trying to parse knowingly false political speech from genuine views and opinions, no matter how false or wrong-headed they may be. Indeed, some argue the government should not be in the business of scrutinizing political speech, particularly when it comes to the truthfulness or falsity of it, because people must be permitted to speak their own political "truth" regardless of its factual correctness, and that such open dialogue contributes to the marketplace of ideas.[20] Whether any line should be drawn at all, regarding harmful falsehoods that are political in nature, remains an open question. Certainly, however, political speech deserves—indeed, needs—the high protections it enjoys under the First Amendment, and it is far from clear whether even knowingly false political speech should be actionable.

By contrast, however, in cases like the trillion-dollar fossil fuel fraud, such knowingly false *commercial* speech, I argue, should be actionable. "Under the commercial speech doctrine," one federal court noted, "commercial speech receives a lower level of constitutional protection than do other forms of speech more central to the concerns of the First Amendment, such as expressive, scientific, and political speech, and speech on matters of public concern."[21] Of course, the climate change doubt campaign was spread, not only by the energy industry but by aiders and abettors, such as right-wing politicians and pundits. When climate change falsehoods are spread by those in politics and media, the argument that such falsehoods should be actionable is weaker. This is because of the far greater protections for political speech, as well as speech of all kinds by the press. But where such falsehoods are spread by the companies themselves, or their agents, the weaker protections for commercial speech mean it is more likely that reframing such speech as *fraud* may lead to civil and criminal liability for these speakers.

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In all cases, calling it *fraud* will help us make sense of it, stop falling for it, and work toward solutions to address it. Will it solve the dilemma once and for all? Of course not. Matters of this magnitude are worked out, if at all, incrementally, over long periods of time. Calling it what it is will be merely a first step. It must then be followed by others. It is these other steps that may actually change the behavior of those who defraud for profit and power.

But here we face a double-edged sword. The changes to the law recommended in the chapters that follow offer a better future for individuals and society by restricting at least some harmful fraud on the public but carry a threat of new dangers if not implemented carefully. Expanding legal restrictions to new areas of speech, even if that speech causes grave injuries, must be done, if at all, within the freedom of expression framework we were fortunate to inherit from the framers. People's views and beliefs, no matter how wrong or offensive, must remain protected absolutely. Accordingly, any change to the law must carefully balance fundamental free speech values and rights, on one hand, with protecting individuals and society from those who deceive for their own advantage, on the other.

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7

De-weaponize the First Amendment

IT WAS NOT MEANT TO SHIELD THOSE WHO DEFRAUD

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There is a tension in the free speech clause of the First Amendment between the need to allow and protect ideas, views, and beliefs on one hand and the need to stop harmful speech on the other. Thus, although speech in general is protected absolutely, the Supreme Court has carved out a handful of exceptions. Each is a category of speech that, due to the harm it causes, justifies removing its constitutional protections. These exceptions include defamation, obscenity, incitement, and true threats.

Although there is a free speech exception for fraud, as discussed earlier, most fraudulent speech communicated to the public at large is not deemed to fit within this exception. Thus, while defrauding one person is unprotected speech, punishable under civil and criminal law, defrauding the public is generally protected. Those who exploit this loophole by profiting from defrauding the public are engaging in a weaponization of the First Amendment. In this chapter, I put forward two proposals for de-weaponizing the First Amendment. To meaningfully grasp how these proposals operate, one must first understand where the law stands now. So, I will put on my professor hat, and present to you—very briefly—the story of how the First Amendment law on falsehoods diffused to the public has developed up to the present.

We will cover four key cases, each one a chapter in the story of the law as it applies to "fraud on the public." To my knowledge, no law school

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class covers this topic the way I do here. Thus, you will be among the first to hear the story of how and why the law punishes small frauds but rewards the largest.

The first chapter in this story is the tale of Xavier Alvarez, a public official with a habit of telling wild, self-aggrandizing lies.

ALVAREZ AND ITS PROGENY

United States v. Alvarez*: US Supreme Court, 2012*

In 2007, Xavier Alvarez was determined to find a way to win elected office "after years of falling short politically."[1] And he found a way: telling lots and lots of lies.

It began with the ballot form he filled out to run for the office he sought, a seat on the Three Valleys Municipal Water Board in Claremont, California. On the ballot form, Alvarez listed his occupation as "engineer." This was false. Alvarez had never been a professional engineer and later admitted "he merely has an interest in engineering." He also claimed to hold an engineering degree from California State Polytechnic University, Pomona. This, too, was false. That school has no record of him ever attending, let alone earning a degree.[2]

Throughout the campaign, Alvarez lied habitually. Some of his claims were wild. He claimed he rescued an American ambassador during the Iranian hostage crisis. He claimed he had married a starlet from Mexico. He claimed he had played hockey for the Detroit Red Wings. And he claimed to have served in the US Marines, been wounded in combat, and won the Medal of Honor.

Alvarez squeaked out a victory. The vote count was 3,854 votes for Alvarez and 3,804 votes for his opponent, a victory margin of one-half of 1 percent.

On July 23, 2007, Alvarez attended his first water district board of directors meeting as an elected director. There, he introduced himself to those gathered and said, "I'm a retired Marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I'm still around."[3] Within days, local newspapers fact-checked Alvarez's false claims, reporting, truthfully, that not only had he never been wounded or won any combat awards but in fact he had never even served in any branch of the military. They also

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dug up and debunked many of his other lies, which he'd made throughout the campaign. Some of these pieces called him colorful names, like "jerk," "cretinous," and the "ultimate slime."[4]

Many were upset at Alvarez and called for him to step down. He refused. And the story would likely have ended there were it not for the Stolen Valor Act. That law made it a misdemeanor to "falsely represent . . . verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the armed forces of the United States." Under that law, lying about any military award can result in a prison term of up to six months. But lying about the Medal of Honor can result in imprisonment for up to a year.[5]

Alvarez, who had been recorded at the board meeting claiming he'd won the Medal of Honor, pled guilty to violating this law. He appealed, however, on First Amendment grounds. He argued that the law he violated was itself a violation of his right to free speech. The Supreme Court granted certiorari—the primary means the Supreme Court uses to review lower court decisions.

The *Alvarez* case, from the very beginning, sharply divided the justices, not only on how to rule but on what the issue in the case really was. Does it center on harmless white lies? Or on harmful, deceptive lies?

On one hand, Alvarez lied to get elected. Thus, he deceived to obtain public office, a tangible benefit for himself. Moreover, the false statements pertained to fact. They were not statements of opinions, views, or beliefs. And the subject of his falsehood, receipt of a high military honor, is not something someone is likely to be mistaken about. And lying about having won the Medal of Honor is a "slap in the face of veterans who have paid the price and earned their medals." Such falsehoods are far from harmless; in fact, Congress recognized that "the lies proscribed by the Stolen Valor Act inflict substantial harm." This includes not only tangible harm, whereby invented military honors are used to get jobs, contracts, government benefits, and other financial rewards, but also intangible harm to servicemembers and their families. Indeed, lies about military honors "debase the distinctive honor of military awards" and "damage the reputation and meaning of such decorations and medals."[6]

On the other hand, Alvarez's conviction was not based on the lies he told leading up to his election but one specific lie he made at the board meeting after he had already won the election: "I was awarded the Congressional Medal of Honor." And that particular lie on that particular day did "not

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seem to have been made to secure employment or financial benefits or admission to privileges reserved for those who had earned the Medal."[7] This was how a plurality of justices framed and approached the issue—no majority agreed on any particular approach—and this framing determined the outcome of the case.

Perhaps rightly, they saw this as a case testing whether a law could punish "falsity alone," where "there is no clear harm to the victims and no clear benefit to the liars."[8] Thus framed, it was a no-brainer that that First Amendment cannot allow suppression of every falsehood under the sun. After all, what about white lies? Can those be punished? What about all of the lies we tell throughout our lives, beginning in childhood? As one appellate judge in the *Alvarez* case noted when the case was decided on rehearing at the Ninth Circuit:

> What, exactly, [would such an] ever-truthful utopia look like? In a word: terrifying. If false factual statements are unprotected, then the government can prosecute not only the man who tells tall tales of winning the Congressional Medal of Honor, but also the JDater who falsely claims he's Jewish or the dentist who assures you it won't hurt a bit. Phrases such as "I'm working late tonight, hunny," "I got stuck in traffic" and "I didn't inhale" could all be made into crimes. Without the robust protections of the First Amendment, the white lies, exaggerations and deceptions that are an integral part of human intercourse would become targets of censorship.[9]

The Supreme Court issued a plurality opinion, onto which four justices signed, and a concurring opinion, onto which two justices signed. But though the plurality and concurring justices did not agree on how to frame the falsehoods at issue, or what test to apply to them, they agreed on one thing: the Stolen Valor Act violated the First Amendment.

The other three justices strongly dissented. They saw Alvarez's Medal of Honor lies as causing harm to victims and providing a clear benefit to the liar. They would have upheld the law, and Alvarez's conviction. But by a 6–3 vote, both the law and conviction were overturned.

Bottom line following *Alvarez*: the First Amendment does not allow punishing or censoring knowingly false speech unless it falls afoul of some other law, like perjury or fraud, or, at a minimum, either causes harm or is likely to cause harm. The more damage a falsehood causes, under this rationale, the more likely it is to shed its free speech protections. Because

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Alvarez's lies at the water board meeting were harmless, they were thus fully protected.

Susan B. Anthony List v. Driehaus: *Sixth Circuit Court of Appeals, 2016*

The next chapter in this story takes place in Ohio, which recently followed a nationwide trend to pass laws aimed at making politics at least a little more honest. Most states have now enacted statutes that directly or indirectly target at least some false statements in elections.[10] Ohio passed its own law to make it a crime to lie to get elected.

Ohio's statute prohibited certain falsehoods "during the course of any campaign for nomination or election to public office or office of a political party." In particular, the statute made it a crime for any person to "make a false statement concerning the voting record of a candidate or public official" or to "post, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not."[11] Individuals convicted under Ohio's "false political speech" statute could be sentenced up to six months in prison or fined up to $5,000.

In 2010, the Susan B. Anthony (SBA) List was the nation's leading antiabortion advocacy group. Since its formation in 1992, the SBA List's primary aim has been the promotion of antiabortion political candidates.[12] In recent election years, it has spent millions on candidates nationwide—all Republican. In the 2010 election, it took aim at Democratic congressman Steven Driehaus, who represented a heavily antiabortion district in Cincinnati, Ohio.

The SBA List purchased ad space on billboards around Cincinnati that featured a photo of Driehaus and said: "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion." The vote referred to in the ad was Driehaus's vote for a health-care reform bill.[13] But while it was true Driehaus voted for the bill, the claim that the bill allowed "taxpayer-funded abortion" was a lie. A court later ruled it was a false statement of fact.[14] Driehaus, sensing the impact such false accusations might have on his campaign, filed a complaint against the SBA List under Ohio's "false political speech" law. The SBA List, in response, counter-sued Driehaus, alleging what it had said was true, and even if it wasn't, the SBA List had a First Amendment right to express its views.

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As happens routinely when such laws are challenged in court, the trial court quickly struck down as unconstitutional the Ohio "false political speech" law.[15] On appeal, the Sixth Circuit agreed, but went even further. It cut the Ohio law to shreds. In doing so, the court said the *Alvarez* case—which, because it is a Supreme Court case, the Sixth Circuit is required to follow—stood for two important principles. First, the government cannot restrict false speech that does not cause some other legally cognizable harm. And second, the best solution to false speech is more speech, not less. According to the court, the First Amendment has "a preference for counteracting lies with more accurate information, rather than by restricting lies."[16]

The Sixth Circuit then said that, because the speech at issue—political speech—has the highest constitutional protections, any law restricting it is subject to the most scrutinizing review. In short, if a law aims to restrict political speech, false or otherwise, it must satisfy "strict scrutiny," an exceedingly difficult standard to meet. The way courts word this requirement is that laws that govern political speech or are otherwise content-based "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[17] Laws clearing this high bar are rare. The Ohio law failed the test. As a result, the court struck it down, in agreement with the trial court. The Supreme Court refused to grant certiorari, allowing the Sixth Circuit's ruling to stand. Driehaus lost reelection.

Bottom line following *Driehaus*: a law aimed at injecting at least some level of honesty into the political process failed. As a result, a partisan group was able to spread false claims about a public figure and to help their own candidate win the election. But this approach to political falsehoods ignores the fact that lies in politics are always, or virtually always, both harmful and aimed at gaining a tangible benefit. Such falsehoods harm the democratic process and undermine democratic institutions. Their aim is always to get something out of it—to swing public opinion in a candidate's, party's, or ideology's favor.

This case, following *Alvarez*, was the second straight win for falsehoods. Honesty, good faith, and truth lost once again.

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Wash. League for Increased Transparency and Ethics v. Fox News*: Washington Court of Appeals, 2021*

This next chapter takes us to early 2020. This was a time unique in modern history due to the worldwide coronavirus (COVID-19) pandemic that forced "the widespread closure of businesses, schools, social programs, and the suspension of court proceedings."[18] Governments ordered lockdowns. Face-to-face interaction was sharply restricted or outright banned. People were scared, and for good reason. After the disease was first detected in late 2019, it spread rapidly across the globe, killing over a million people in the United States and more than thirty million worldwide.[19] But, as often occurs when tragedies strike, some exploited it for political gain or to turn a profit.

Enter Fox News. About a month into the pandemic, while data about infection rates and deaths poured in, on-air personalities at Fox News launched a barrage of false claims that COVID was a "hoax" invented by liberals to undermine President Trump.[20] On March 7, for instance, Fox host Jeanine Pirro stated on her show that "the talk about coronavirus being much more deadly" than the flu "doesn't reflect reality." In fact, as was already widely reported, the coronavirus was somewhere between five and ten times more deadly than the flu.[21] On March 8, Fox host Pete Hegspeth stated, "The more I learn about coronavirus, the less concerned I am." On March 9, host Sean Hannity said, "They're scaring the living hell out of people and I see it as, like, 'Oh, let's bludgeon Trump again with this new hoax.'" On March 11, host Matt Schlapp stated, "It is very very difficult to contract this virus." On March 13, host Ainsley Earhardt stated, "It is actually the safest time to fly."[22] These false statements, along with a deluge of others, downplayed the danger and caused audience members to believe the whole thing was blown out of proportion, if not totally made up. Over time, this resulted in hundreds of thousands of unnecessary deaths.[23] The aim of these false and misleading claims was to create the impression that the "liberal media" was, once again, misleading the public to try to undermine the Republican president.

Although Fox News, like many media organizations, was well-known for spreading false and misleading partisan claims, these particular falsehoods, which were inflicting harm on public health in real time, prompted one nonprofit to file a lawsuit to stop the spread of these dangerous lies. The plaintiff was the Washington League for Increased Transparency and

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Ethics, or League for short. In its lawsuit against Fox, the League alleged that Fox News and its hosts violated state consumer protection laws by making on-air statements that downplayed the danger posed by the coronavirus, describing the pandemic as a "hoax," and accusing government officials and media organizations of exaggerating the danger. The relief it requested included, among other things, that the court enjoin Fox from airing further misstatements about the existence and dangers of COVID and that the court require the network to issue a retraction for its falsehoods.

Fox News raised the First Amendment defense. It argued everything it and its hosts said on air about the pandemic was protected speech. The court agreed.

In its holding, the Washington Court of Appeals held the free speech clause barred the League's claims. It based this ruling on two simple propositions. First, since the pandemic was a "matter of public interest," any speech that pertains to it holds the highest protections. In other words, it was akin to the political speech in the *Driehaus* case. That was the first rationale.

The second was that the falsehoods Fox disseminated about the COVID pandemic were fully protected for the simple reason they did not fit in any unprotected category. There are categories of unprotected and less-protected speech—incitement, obscenity, defamation, fighting words, etcetera. Fox's false claims about the pandemic simply did not fit into any of those categories. The court added that there is no "general exception to the First Amendment for false statements." This leads to the court's astounding conclusion, and holding, that "false statements about threats to public health, even if made recklessly," do not "fall within any exception to the First Amendment."[24]

Bottom line following *Fox News*: intentional and reckless falsehoods that threaten public health cannot be prohibited or punished unless they fit into one of the few narrow categories of unprotected speech.

In the cases we are examining, *Fox News* is the third straight win for falsehoods. Fraudsters: 3; victims: 0. Studies show that hundreds of thousands died on account of these bad faith lies disseminated to millions in the early days of the pandemic. Yet, courts bent over backwards to defend those profiting from the falsehoods while ignoring victims.

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Rodríguez-Cotto v. Pierluisi-Urrutia*: US District Court, Puerto Rico, 2023*

In 2017, two major hurricanes struck Puerto Rico in quick succession. In September of that year, Irma hit the island first on the 10th and then Maria on the 17th. The widespread, catastrophic damage earned Maria the title of "most destructive Atlantic storm on record." When the pounding flood-rains, one-hundred-mile-per-hour winds, and storm surges receded, Puerto Ricans emerged to find an unrecognizable, dystopian landscape. Trees were flattened coast to coast. Those left standing were stripped of their branches. Roofs were ripped from houses. Everywhere there was debris, death, and destruction. The power grid had been not just disabled here and there but entirely disconnected. There was no electricity on the entire island. Many residents, not to mention hospitals, schools, and businesses, did not get power back for months. Cell service was gone. Ninety-five percent of the island lacked potable drinking water. More than 97 percent of roads were impassable for weeks. Almost three thousand people lost their lives, and the property damage totaled $95 billion.[25]

The natural disaster was bad enough, but misinformation compounded the harm. Some falsehoods were, in all likelihood, inevitable. In the wake of any great tragedy, people try to make sense of it in their own ways, sometimes imagining or wishing for certain things to be true, grasping for answers to help comprehend the incomprehensible. But on top of the unavoidable *mis*information—unintentionally false and misleading claims—there was also an abundance of *dis*information—false and misleading claims made knowingly and often self-interestedly. Some, it turned out, profited from spreading false alarms about food shortages, government cover-ups and conspiracies, doctored statistics, and other baseless rumors that sowed panic, fear, and distrust.[26]

Two years later, a public emergency of a different kind hit the island: the COVID pandemic. This time around, the large amount of false and misleading claims making the rounds on social media and communications apps caused, in addition to unnecessary panic and fear, unnecessary deaths. Accordingly, the Puerto Rican legislature passed a law aimed at clamping down on at least some of the most harmful of such falsehoods. In its statement of purpose for the "false alarm" law, the legislature said it was necessary to address two concerns:

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> The first is that, despite the measures enacted to preserve the health, life and safety of all Puerto Ricans, through the Executive Orders issued to contain the exponential spread of COVID-19, some citizens did not abide by the guidelines, endangering their lives and that of other citizens negligently and irresponsibly. The second is the need to prohibit people from using social media or mass media to disseminate false information, with the intention of creating confusion, panic or collective public hysteria in our country while a state of emergency, disaster, or curfew is in force. Such conduct undermines the safety of the people and social order, and endangers the health and lives of citizens.[27]

Based on these concerns, and lawmakers' desire to address them, the Puerto Rican legislature passed Section 3654(a). This "false alarm" law made it

> a criminal offense for any person, natural or legal, who, after the Governor of Puerto Rico has decreed by executive order a state of emergency or disaster, to purposely, knowingly or recklessly: (1) give a warning or false alarm, knowing that the information is false, in relation to the imminent occurrence of a catastrophe in Puerto Rico; or (2) disseminate, publish, transmit, transfer or circulate through any means of communication, including the media, social networks, or any other means of dissemination, publication or distribution of information, a notice or a false alarm, knowing that the information is false, when as a result of such conduct, the life, health, bodily integrity or safety of one or more persons are put at imminent risk or public or private property are endangered.[28]

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Violating this law was a misdemeanor, punishable by up to six months imprisonment, a fine of up to $5,000, or both. If, however, the false alarm caused more than $10,000 in damage, the violation amounted to a felony, punishable by up to three years imprisonment.

Two journalists, with substantial assistance from advocacy groups like the American Civil Liberties Union, the PEN America Center, and the University of Georgia Law School First Amendment Clinic, filed a claim in federal court to challenge the "false alarm" law.[29] Neither of the named plaintiffs had been charged under the law. In fact, no journalist had been charged. Nevertheless, the journalist plaintiffs argued they were worried the law *could* be used to target them, and sued on that basis.

The court, relying heavily on *Alvarez*, held for the plaintiffs and struck

down Puerto Rico's "false alarm" law as unconstitutional. As happened in *Alvarez*, *Driehaus*, and *Fox News*, the court applied the strict scrutiny test and found the law failed to satisfy it. It also held the law to be vague and overbroad. It repeated many of the oft-uttered anti-speech-regulation phrases: "The remedy for speech that is false is speech that is true"; "The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight out lie, the simple truth," and so on.[30] In short, the court's take was that, in the face of falsehoods, even dangerous ones, the correct government response was not to go after those spreading lies but to disseminate its own truthful information. The assumption, as usual, is that truth will naturally and inevitably—or at least eventually—win out over falsehood.

In all fairness, the court's analysis is solid. The cases and scholars it relied on to support it are persuasive. And its holding might very well be correct under the First Amendment. Indeed, given the language of the statute and the arguments made by the parties, the court was left with little choice but to strike the "false alarm" law down. Accordingly, although it is in a new context, we find the same old result—attempts to stop or slow down harmful dishonesty fail under the First Amendment.

On one hand, this is something to celebrate. The free speech protections we enjoy under the First Amendment guarantee open and robust debate and dissent. They allow us the breathing space for views and ideas that the government, and others with wealth and power, might attack or censor. It protects the marketplace of ideas.

On the other hand, however, this is the source of a larger problem. While journalists and others are protected from government censorship for their views and beliefs—and while this also allows room for people to be wrong—those with wealth and power wield this same shield as a weapon to disseminate intentionally false messages to millions without legal risk, regardless of the harm they might cause. Therein lies the rub. While each of these four cases might arguably be correct, collectively they open the gate to fraud on a mass scale.

Bottom line following *Alvarez*, *Driehaus*, *Fox News*, and *Rodríguez-Cotto*: a law aimed at reining-in harmful large-scale lies virtually never survives constitutional challenge. It does not matter how harmful the lies may be, how many lives they ruin or end. It does not matter even if the lies cause urgent national and global problems. The law takes a hands-off approach to harmful large-scale lies and the liars who spread them. It protects those who defraud the public and ignores victims.

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WHY THE LAISSEZ-FAIRE APPROACH TO DISINFORMATION IS INADEQUATE—AND DANGEROUS

Our First Amendment jurisprudence time and again repeats the same solution to disinformation: leave it for the people to decide. Keep the government out of the business of picking and choosing what is true and what is not. That determination is best left up to each of us. We, the public, can best decide for ourselves who to listen to or ignore, who is right, who is wrong, and what is true. This is what we might call the laissez-faire approach to disinformation.

The appeal of this approach is that it is almost always the correct one. The government indeed *should* stay out of the business of determining truth. History has shown us that when the state is given the power to control what information the public receives, this power is inevitably abused. This principle is captured perfectly in the idea of the Ministry of Truth, which dozens of courts have invoked when striking down anti-disinformation laws. The idea is that allowing the state to determine truth or falsity is the equivalent of empowering an Orwellian Ministry of Truth. In George Orwell's novel *1984*, the Ministry of Truth is a powerful government organ whose purpose is to manipulate the information disseminated to the public to impose whatever "truth" is most convenient for the government at that time. Actual truth has no relevance. So, for instance, the Ministry might announce that 2 + 2 = 5, if that is what the leadership wants. It is illegal to contradict the Ministry of Truth, although its own "truth" often changes radically from one edict to the next.

This powerful metaphor serves as a guiding precept for courts and politicians, and it is indeed instructive and powerful. But it is also flawed, at least when applied to the problem of disinformation. Although establishing a government ministry to dictate truth would trample the very idea of free speech and thought, we already have a government body that determines what the truth is day in and day out—the courts. Every day, in every case before them, judges determine—they don't *dictate*, but they do *determine*—what is true and what is false in every case before them. That is what courts do. That is their purpose. Indeed, in lawsuits involving defamation, fraud, and other types of claims that turn on false speech, the truth or falsity of what a defendant said is a material fact in the case. That is, the court must make a finding that the defendant was being truthful or lying when they made particular assertions. Judges, juries, arbitration panels,

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and mediators all determine the truth of matters before them. In a very real sense, that is their core function. This does not mean that the government is inventing and imposing truth; it is simply the effective operation of a legal system in which someone must be tasked with determining truth and falsity, and our legal system—while not perfect—does a laudable job of accomplishing this task. And although the judiciary is certainly a branch of government, determining truth is precisely what we want and need courts to do.

But should courts at least be prohibited from determining certain kinds of truth? What about subjective matters of personal belief? Perhaps it is not the same thing for a court to determine, on one hand, who held the murder weapon during a killing and, on the other, whether abortion during the first trimester is a woman's right. It is easy to see how a court can, with confidence, decide the former question, which is a question of objective fact, while the latter question might give us pause because it depends on the judge's personal subjective views, opinions, and beliefs.

As long as we have human beings serve as judges, it will not be possible to remove human biases and beliefs completely from the judicial process. Thus, speech restrictions pertaining to philosophy, religion, history, the social sciences, or the arts must be closely scrutinized.[31] The more a matter involves opinion or conjecture, obviously, the less inclined we should be to hand over the truth-determination function to courts. This is particularly true in matters of pure opinion. On an issue like abortion, whether the choice to have one is a fundamental human right is largely a matter of opinion, but it involves certain matters of fact. The medical and scientific realities of reproduction and fetal development can be studied and measured. Many other political topics are of a similar nature, involving a mix of fact and opinion. Take climate change. Some claims about it boil down to opinion, but many others boil down to scientific fact. Thus, to relegate abortion or climate change to being pure "political" questions, which courts should not touch, is to oversimplify a nuanced topic.

The politicization of these and other topics has often been accomplished for the purpose of furthering someone's political or economic agenda. And this is where the laissez-faire approach fails. It applies a broadly true proposition—keep the government out of the business of determining truth—and applies it to a nuanced and complex issue. This hands-off approach allows politicians to make intentional false statements of fact to get elected to office. It allows corporations to spread false statements of

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fact to hide dangers posed by products. It allows media to broadcast and amplify knowing or reckless falsehoods to make money or push a political agenda. Thus, the approach fails, not only because it is wrong but because it doesn't work. It is rooted in the idea truth wins out over falsehoods in the marketplace of ideas. In reality, truth wins out, if at all, only in the long run while we make up our minds about all important matters in the short run. And once we've made up our minds, good luck trying to change them.

This failed approach to harmful disinformation is accomplished by flipping the principle of free speech on its head. While the First Amendment rightly has a high tolerance for honest beliefs, opinions, and views, no matter how offensive or wrong, this tolerance need not and must not, and indeed *does* not, extend to fraud—the purposeful spread of harmful, self-serving falsehoods. Yet, when those very same harmful, self-serving falsehoods are pushed out to the public at large, they are treated as if they were legitimate beliefs, opinions, or views. This laissez-faire approach to disinformation protects a category of speech that, by all accounts, has been considered outside the bounds of the First Amendment since it was first adopted.

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HOW TO RESCUE THE FIRST AMENDMENT

The free speech clause was never intended to safeguard bad faith falsehoods calculated to deceive, particularly where they deprive others of rights, property, health, or life. Yet, that is how it is now being (mis)interpreted. Those who purposefully deceive the public for their own benefit are engaging in "protected speech." Under the very principles on which the First Amendment rests, this makes no sense. Why should those who defraud *more* people and cause *more* harm receive *more* constitutional protection? There is no rationale for this. It is an affront to both logic and basic precepts of fairness and justice.

The solution? Fraud on the public should be treated like any other fraud, under the law in general and under the First Amendment in particular. Fraud on the public should be unprotected. This would enable states and the federal government to enact laws that prohibit this wrongful conduct and punish those who carry it out, just as they do with one-on-one fraud.

There are two ways to achieve this. The first option, and by far the most viable and likely, is for courts or Congress to clarify that fraud on the

public is unprotected because it fits into an existing exception to the First Amendment. The second option is to create a new category of unprotected speech tailored specifically for fraud on the public. However, new free speech exceptions are, for good reason, rarely created.[32] Therefore, applying an existing fraud exception is a far more feasible avenue.

Classifying "fraud on the public" as unprotected speech would be consistent with all major First Amendment policy justifications, such as enhancing democratic self-rule, furthering the search for truth, and advancing personal autonomy.[33] Moreover, the massive imbalance of power and information asymmetries in play justify, if not require, constitutional attention. As Professor Norton noted, "Differences in power and information sometimes matter to First Amendment law, permitting the government's interventions to protect comparatively vulnerable listeners. The same can and should be true of efforts to regulate manipulative speech."[34] Removing constitutional protections from fraud on the public will safeguard the people against leaders who seek to mislead; it will result in a more well-informed public; and it will help ensure the marketplace of ideas—political, commercial, or otherwise—is open to all opinions, beliefs, and views, not falsehoods disguised as them. The result would be a First Amendment that not only guarantees people can speak truth *to* those in power but that they can demand good faith and honesty *from* those in power.

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OPTION ONE: USE AN EXISTING FIRST AMENDMENT EXCEPTION

The most viable way of removing constitutional protections from fraud on the public—which should never have been given those protections in the first place—is to fit it into an existing First Amendment exception. The government can regulate speech that fits into most categorical exceptions, such as obscenity, defamation, and fighting words, as long as the government has a rational basis for doing so.[35] This is a far lower standard to meet than that which applies to protected speech—strict scrutiny—which requires that the regulation of speech be necessary to achieve a compelling government interest.[36] Speech restrictions subject to the rational basis test are, as a general matter, far more likely to be upheld than ones subject to strict scrutiny. Thus, the question of whether a law regulating fraud on the

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public will survive a constitutional challenge hinges first and foremost on whether the speech at issue fits into an exception or not.

Three exceptions bear discussion here: the fraud exception, the exception for harmful falsehoods that serve no legitimate interest, and the exception for commercial speech or, more narrowly, false commercial speech.

The Exception for "Fraud"

Actionable fraud is one of the traditional, time-honored exceptions to the First Amendment's free speech protections. As the Supreme Court has repeatedly made clear, "The government's power to protect people against fraud has always been recognized in this country and is firmly established."[37] This makes fraud akin to other categories of unprotected speech, like "fighting words" that provoke violence, incitement of imminent law-breaking, obscenity, and defamation. It is a category of speech totally outside First Amendment protections.

The rub here is that the fraud exception includes only actionable fraud. This makes the parameters of this category of unprotected speech both clearly defined and difficult to trace in their entirety. Actionable fraud and fraud-based claims and crimes include everything from common law fraud and state and federal securities fraud to consumer protection laws and conspiracy to defraud under state and federal racketeering laws.

These and many other similar laws fit within the fraud exception. To give a sample of just how many laws this truly encompasses, one chapter in the US Code, chapter 47 of volume 18, codifies forty distinct statute-based fraud claims. These include such diverse topics as fraudulent speech and conduct in connection with bank transactions, credit reports, federal housing, certification of checks, mortgages, farm loans, crop insurance, naturalization, government oaths, consular affairs, and highway projects.[38]

But among the hundreds of fraud-based laws prohibiting this and that type of harmful deceit, none take aim at fraud on the public. There is no law that clearly criminalizes making false "stolen election" claims, or prohibits an industry from spending millions on a public relations campaign to mislead the public about the dangers posed by the product they sell.

Does this mean harmful disinformation is *always* allowed by law? No. Some has, in fact, been prohibited and punished—most notably, falsehoods involved in the marketing and selling of asbestos and tobacco, as discussed

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in chapter 4. In narrowly defined cases, like where tobacco makers made specific false claims about the safety of cigarettes, courts have occasionally—after decades of inaction—extended the scope of civil and criminal liability to encompass those kinds of disinformation. Aside from here-and-there attempts to hold large-scale fraudsters to account, however, harmful disinformation remains generally outside the scope of actionable fraud and is therefore protected free speech. The tobacco industry, for instance, continues to mislead by way of marketing tobacco overseas and e-cigarettes domestically. It continues to rake in immense profits.[39]

But although harmful disinformation is generally allowed, courts have, on occasion, applied the fraud label to fraud on the public, as mentioned in chapter 4. A New York court held, regarding the tobacco industry, "Misrepresentations made to the public at large may give rise to a claim of fraud so long as the plaintiff was part of the class of persons intended to receive the misrepresentations."[40] Similarly, one court in Georgia held, with regard to the asbestos industry, "Even where the representations are made to the public at large, or to a particular class of persons, as long as they are given with the intention of influencing any member of the public or of the class to whom they may be communicated, any one injured through the proper reliance thereon may secure redress."[41] Florida courts have used similar language to describe how tobacco companies may have committed actionable fraud, either through fraudulent concealment or through a conspiracy to defraud the public.

These cases showing the idea of categorizing fraud on the public as actionable, and therefore as within the existing fraud exception, are not entirely unprecedented. It has support in existing state and federal jurisprudence, at least in the context of tobacco and asbestos fraud claims. This principle can, and should, be extended to cover all frauds "where the representations are made to the public at large."[42]

This is our best available method for de-weaponizing the First Amendment: to use the existing fraud exception to free speech.

The Exception for "Harmful Falsehoods That Serve No Legitimate Interest"

A second unprotected category of speech, which some, though not a majority, of Supreme Court Justices have recognized, comprises harmful false speech with little redeeming value. The Court has discussed this First

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Amendment exception a handful of times. Most recently, Justice Alito, in his dissent in *Alvarez*, joined by Justices Scalia and Thomas, explained its importance. There is "a long line of cases," Alito wrote, "recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest." Justice Alito went on:

> Time and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value. There is no constitutional value in false statements of fact. Spreading false information in and of itself carries no First Amendment credentials. The knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection.

Alito went on to note that "this recognition" is incorporated into numerous laws, such as those prohibiting fraud, perjury, and defamation, which "were in existence when the First Amendment was adopted, and their constitutionality is now beyond question." But a speech restriction need not have existed two-and-a-half centuries ago to be constitutional. Numerous civil and criminal speech prohibitions have been added to US law, which have been time and again upheld by the Supreme Court. These include, for instance, the torts of intentional infliction of emotional distress and false-light invasion of privacy and the crime of "knowingly and willfully" making any "materially false, fictitious, or fraudulent statement or representation" in "any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States."[43] Such statements are criminal even if not under oath, and no pecuniary loss need be proven for conviction. Many other speech restrictions have been adopted. "All told, there are more than 100 federal criminal statutes that punish false statements made in connection with areas of federal agency concern." Alito concluded, "These examples amply demonstrate that false statements of fact merit no First Amendment protection in their own right."[44]

His point was not that all lies are unprotected, but that false statements of fact enjoy less First Amendment protection than truthful speech. There is little need to protect false statements of fact, except in very limited special cases; for instance, where the falsehood serves a helpful or other legitimate purpose. Where a falsehood serves no legitimate purpose, however, and causes more harm than it is worth, there is little reason, if any, to protect it.

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This exception for harmful falsehoods serving no legitimate purpose is not limited to lies targeting individuals. It has been held to include "public deception." One example the Court gave is where one solicits donations to a fake charity. This makes it akin to securities fraud and other kinds of schemes where one spreads a harmful falsehood to the public. In other words, the exception of "false factual statements that inflict real harm and serve no legitimate interest" applies, at least in some cases, to harmful disinformation diffused publicly. Such disinformation, where it causes harm and serves no legitimate purpose, should not and cannot be protected speech.[45]

This exception represents the second-best option for de-weaponizing the First Amendment. I argue that even if fraud on the public does not fit into the "fraud" exception, it should fit within this "harmful falsehoods serving no legitimate purpose" exception. Scholars will be divided on these questions, and the debate will likely remain unresolved for years to come. However, there are strong arguments in favor of categorizing fraud on the public as fitting into both exceptions.

If it fits into either, fraud on the public can be prohibited and punished under law, so long as the government has a rational basis for doing so. Based on the enormous harm to individuals and society wrought by fraud on the public, I would argue the government's basis for regulating such intentional false speech is not merely rational but compelling.

The "False Commercial Speech" Exception

Beginning in the 1970s, the Supreme Court began recognizing that commercial speech holds First Amendment protections. Up to then, advertisements, promotions, and other purely commercial speech had never been considered the kind of speech the framers had had in mind when they adopted the amendment. But the approach the Court took to commercial speech differed from its approach to other kinds of protected speech. Its focus was not on speakers but rather on listeners. That is, it was not that corporations necessarily had an independent right to say whatever they wanted but rather that listeners of commercial speech (i.e., consumers) had a right to information from corporations so that they, the consumers of the information, could determine for themselves what products to purchase at what price.[46]

Unlike other kinds of speech, courts have repeatedly held that "com-

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mercial speech that is false or misleading is afforded no First Amendment protection at all."[47] Thus, false speech is often protected, but false *commercial* speech is not. Accordingly, many laws prohibit and punish false and misleading commercial speech while requiring companies to disclose truthful information where they might otherwise have preferred to remain silent. This includes truth-in-labeling laws, false advertising laws, mandatory warning labels, and requirements that food companies disclose—truthfully—the nutritional content of their products.

But how can this be? If companies are prohibited from lying, then how did the fossil fuel industry get away with its trillion-dollar swindle? And what about all the other companies that have misled the public about their products' dangers? What often happens is that the industry misleading the public either politicizes the issue of the harm their product causes or they mislead the public in such a hidden manner (for instance, by using surrogates) that it is nearly impossible to catch them in the act. The fossil fuel industry did both. The firms extracting and selling oil, gas, and coal paid lordly sums to turn the neutral scientific question of climate change into a highly charged political wedge issue. They also kept secret what they knew and did internally, and it was not apparent, for at least two decades, that what the industry was doing internally did not match up with the statements it and its agents made publicly.

This makes the false commercial speech exception problematic. On one hand, it clearly applies to where corporations defraud the public. On the other, it seems not to be of much use in some of the most harmful frauds big industry has carried out in the past few decades. Nevertheless, if courts were to more carefully consider communications made by private industry, directly or indirectly, as less-protected commercial speech, or wholly unprotected false commercial speech, this might capture at least some of the fraud on the public the largest corporations cook up and carry out. I would also add that, to do this, courts must not be duped into treating a commercial message—such as climate change doubt—as a political topic when in fact it was a cloaked commercial message masquerading as a political statement.

In any event, this exception would capture only one kind of fraud on the public: that carried out by corporations. Messages that originate in corporations are often passed through political and media channels. Accordingly, this exception might offer some relief from fraud passing through these nominally noncommercial channels as well.

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But let's assume for the moment that fraud on the public, in whole or in part, fits *none* of these exceptions. Does that destroy our chance of stopping it? No, but it does make it substantially more difficult. The other option would be to create a new category of unprotected speech.

OPTION TWO: CREATE A NEW EXCEPTION FOR "FRAUD ON THE PUBLIC"

One who sets out to argue for the creation of a new exception to free speech protections under the First Amendment faces not just an uphill battle but a nearly unwinnable one. This is not without good reason. Courts and scholars jealously guard the perimeters of the current free speech doctrine, understandably, because carving out new categories of unprotected speech has potentially enormous consequences. Thus, there is a heavy presumption against creating such new categories.

This does not make it impossible. The Supreme Court, from time to time, creates new unprotected speech categories. In fact, it has created just about all of them. But it does so only on rare occasions. The Court created an exception for child pornography in *New York v. Ferber*.[48] Likewise, the Court carved out exceptions for obscenity, fighting words, and incitement, in respective cases.[49] Far more frequently, it has redefined the parameters of these and other free speech exceptions. The line between protected and unprotected speech is always in flux but rarely moves in anything greater than tiny increments.

Thus, while it is true "the First Amendment stands against any freewheeling authority to declare new categories of speech outside the scope of the First Amendment," history shows that when the Court becomes convinced a new categorical exception is warranted, it creates it.[50] Once created, the Court then adjusts what those categories include in each case in which it interprets and applies the exception.

This often involves linguistic gymnastics. It is easy to see why. Think about the "fraud on the public" category. If the Supreme Court were to hold that this category of speech, however defined, is unprotected under the First Amendment, it is certainly a matter of interpretation whether doing this involves creating a "new" category or merely clarifying an existing one. It could be framed either way. Fraudulent speech is already unprotected. Thus, if a state or the federal government were to regulate fraud

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on the public, the Court has grounds to deem this within the government's power since it can regulate fraudulent speech under time-honored precedent. It could also rule that it is within the Alito-Scalia-Thomas-endorsed category of harmful falsehoods that serve no legitimate purpose. This way of framing the issue, fitting it into an existing exception, would, as discussed earlier, face less resistance than creating a new exception.

Moreover, as just discussed, if the Court were to specifically address *commercial* fraud on the public, it could, with relatively little resistance, assert—truthfully—that such intentional false speech fits into an existing exception. After all, false commercial speech is already unprotected.

But let's take the opposing view for a moment. Let's assume fraud on the public is not held to fit within any existing exception. What is the probability the Court might carve out a new exception for it? The probability is low. But its likelihood depends on several factors, which I will discuss briefly. In short, I believe there is a strong argument in favor of clarifying that fraud on the public is unprotected speech—even if it is a separate category of speech—not only because it is analogous to the fraudulent speech today unprotected but because categorizing it as unprotected would uphold and enhance First Amendment principles, and there are compelling reasons to do so.

Here, we must define just what we mean when we talk about "fraud on the public." Up to this point, I have treated it as an abstract concept. But an abstract concept will not suffice in any serious discussion proposing a hypothetical constitutional category of speech. Such categories must be meticulously well-defined. Boundaries must be clear. So, let's look at what the "fraud on the public" category of speech might look like as an independent legal definition. I will then briefly touch on a couple of arguments in favor of carving out this category as a new free speech exception.

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Defining "Fraud on the Public"

The first step in considering the creation of a First Amendment carve-out for fraud on the public is to define what the term *fraud on the public* should encompass. We are in a hypothetical world now where one can create legal doctrines out of thin air. How exciting—and scary. Scholars inhabit this world—a world of possibilities that, on occasion, have real-world impacts. Thus, while we may have freedom, we must be responsible to define this speech category in a careful and well-thought-out manner.

The term I propose to define here has never been defined by courts or legislatures. I do not profess it to be the best or most useful. It is simply *my* definition of a speech category I call *fraud on the public*.

A person's conduct amounts to fraud on the public where that person (1) purposefully disseminates a message to the public (2) that contains verifiably false or misleading information (3) with actual malice[51] (4) to obtain profit, benefit, or advantage or to intentionally mislead the public, (5) which results in, or likely will result in, substantial harm, and (6) such harm was reasonably foreseeable.[52] Although this definition is novel, it is grounded in well-established doctrines and definitions. Its elements reflect civil and criminal fraud and false speech laws, and the "actual malice" requirement conforms with the standard set forth by the Supreme Court in *New York Times v. Sullivan*.

Let me say a few words on each element to clarify what they mean and how they work.

Element 1: that a person purposefully disseminates a message to the public. This element zeros in on what the harmful conduct at issue is in this book: misleading or manipulating large numbers of people in a way current fraud laws do not cover. It distinguishes fraud on the public from other kinds of fraud, and particularly from those carried out in interpersonal interactions. It also clarifies that the message must be disseminated *purposefully* to the public.

Conduct that would satisfy this element includes, for example, publishing an op-ed in a newspaper, saying something in a TV interview, displaying a message on a billboard, speaking to an audience at a political rally, sending an email to a LISTSERV with thousands of recipients, or a public figure or public official posting a message on social media to thousands or millions of followers.

It would not include sending a false or misleading message by email to a small number of recipients. It would not include an individual who has fifty X followers posting a message to their X account. It would not address most communications we carry out in normal everyday life. The kinds of false and misleading messages we are worried about when it comes to fraud on the public are not those spread by individuals who act in their own individual capacity.

Rather, the problem is when those on whom the public depends for truthful information, those who speak to the public at large, or to large swaths of it, use their platform and megaphone to spread knowingly false

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messages to profit from others believing and buying into what they say. For example, if Person A, who is not a public official or public figure, posts something on their social media account and Person B, who is the governor of a state, reshares the post with their own followers through their official social media account, thereby disseminating it to millions of people, the dissemination of the message would satisfy the first element with regard to Person B but not with regard to Person A.

Element 2: that the message contains verifiably false or misleading information. Fraud involves communicating an idea or claim that is untrue or misleading. This falsity requirement has long been an element of civil and criminal fraud claims.[53] Falsity is also required for other torts, such as defamation and consumer protection claims. Fraud on the public must necessarily involve speech that is false or misleading, the same way other fraud-based claims require this. Moreover, this falsity requirement cannot be subjective; a court must be able to determine, based on the facts of the case and applying the law on the books, that the message was false or purposefully misleading.

What happens if a person spreading a false or misleading message sincerely believes the falsehood? This would affect the analysis of the third element, which requires knowledge and intent on the part of the liar. But it would not affect the analysis under the second element. This element centers only on the truthfulness or falsity of the message, not the wrongfulness of the intent or how it is spread. Moreover, an opinion that pertains to a subjective belief cannot, in most instances, be proven false. Generally, only assertions of fact can be proven false.

This falsity element has already been thoroughly interpreted and applied through thousands of fraud-based claims over the past two centuries, including common law fraud, securities fraud, and criminal wire and mail fraud, not to mention defamation and other claims involving false assertions. Accordingly, courts applying it can draw from a wealth of jurisprudence.

Element 3: that the false or misleading message be disseminated with actual malice. To satisfy the third element, the false or misleading message must be spread by one who either knows it is false or recklessly disregards its falsity. This element comes from *New York Times v. Sullivan*, in which the Supreme Court imposed the actual malice standard to libel, which is a type of defamation. Here, it stands in as a mental fault component, ensuring that no one who *innocently* spreads false or misleading information

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would be considered to have committed any kind of fraud, which requires a wrongful state of mind: intent to deceive. Actual malice "should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will."[54] Rather, it means that the speaker made a statement "with knowledge that it was false or with reckless disregard of whether it was false or not."[55] The Supreme Court has explained that reckless disregard means "entertaining serious doubts as to the truth of [the statement]"[56] or "purposeful avoidance of the truth."[57] Actual malice, while perhaps an "unfortunate" phrase given that it poses the risk of confusion, has the advantage of there being well-developed case laws interpreting and applying the phrase, particularly in claims for defamation, false-light invasion of privacy, intentional infliction of emotional distress, and regulation of false campaign advertising.[58] Moreover, leading scholars and at least some Supreme Court justices have endorsed the idea of regulating harmful falsehoods a speaker knowingly or recklessly spreads to the public.[59]

The necessity of this element can be easily illustrated. Imagine that an ice cream seller claimed that his main competitor, a woman who sells ice cream a block away, spits in all the ice cream she sells. He had no basis for saying this. He said it to make people who might be considering buying from his competitor to instead buy from him. If he were sued for deceptive business practices, and the plaintiff had the burden of proving that he knew what he said was false, he could easily, and truthfully, claim he did not know it was false. "For all I know," he could claim, "it might well have been true." Or he could simply claim to harbor an unreasonable subjective belief that she did spit in her ice cream or that he "heard" someone else say it or that "everyone is saying it" and he was merely repeating what he heard. There is always room for half-plausible deniability, and some liars are masters at exploiting this loophole.

This is true for perhaps most fraudulent statements. The liar rarely knows, to an absolute certainty, that the statement is out and out false, which gives the liar room to wiggle out of being proven to have knowingly lied. To stop fraudsters from getting away with fraud most of the time, the falsity requirement adds recklessness as an alternative way to satisfy the element. Thus, even if the ice cream seller who defamed his competitor did not know for certain he made a false accusation against his competitor, he was at least reckless in spreading such an accusation without knowing or having any reason for believing that what he said was true. Thus, recklessness must be part of any falsity requirement for fraud on the public.

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Element 4: that the message be disseminated to obtain profit, benefit, or advantage or to intentionally mislead the public. In keeping with the profile of most fraudulent speech, the one disseminating falsehood to the public must stand to benefit from people buying into the falsehood, most often by economic profit, political advantage, or some combination of the two.[60] Any self-serving motivation for spreading the falsehood, including to purposefully mislead the public, should fulfill this element.

Trump's lawyer, Sidney Powell, spread the false claim on numerous media outlets that Democrats "stole" the 2020 presidential election, that Joe Biden was not the legitimate president-elect, and that Dominion voting machines had been hacked and millions of ballots switched from Trump to Biden. Even if there was no pecuniary benefit to Powell, the false claims were certainly aimed at achieving professional, political, or ideological gain. She had an agenda. Spreading this lie had numerous political benefits, from simply generating greater political support for Trump and other Republicans to overturning the election. However, even if Powell was deemed to be seeking neither economic nor political gain, she was certainly purposefully misleading the public, as was later revealed in her own motion to dismiss Dominion's defamation claim against her.[61]

Element 5: that the dissemination of the message results in, or likely will result in, substantial harm. This element limits the definition to conduct resulting in actual damage and imposes a but-for causation requirement—but for the existence of *X*, *Y* would not have occurred. This ensures conduct is deemed to be fraud on the public only where it actually harms and where that harm is not de minimis. In other words, it applies only to the kind of conduct we are most worried about and against which we most need to protect ourselves. To satisfy this element, spreading the falsehood must result in substantial harm to persons, to property, to society, or to the environment. If the disinformation causes no harm, or the harm is de minimis, or if there is only a tenuous causal connection between the disinformation and the harm, there is far less justification to regulate it under the First Amendment. The Court, in *Alvarez*, has made clear that "mere" falsehoods—lies that cause no substantial harm—are protected speech.

The scope of what harms would qualify could take up its own chapter, if not its own book. In short, it should include any injury, loss, or damage, whether tangible or intangible, economic or noneconomic, resulting from the wrongdoer's purposeful deception of the public. The specific harm necessary would, of course, depend entirely on the category of law imposed.

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My proposal here is a category of speech, not a law. If a legislature passed a tort law that imposed liability for fraud on the public, the focus would be on harm to victims as measured for their compensation. If a legislature passed a criminal law, however, the harm issue would be framed from the societal perspective, since criminal laws are meant to protect not merely harmed individuals but society as a whole.

Regardless of whether a law restricting fraud on the public is of a civil or criminal nature, the purpose of this element is the same: to ensure the deception involved is not protected harmless speech.

Element 6: that the harm was reasonably foreseeable. This proximate cause requirement ensures that even if the disinformation spread to the public is a but-for cause of the resulting harm, the conduct should nevertheless not amount to fraud on the public unless the harm was foreseeable at the time of disseminating the message. This should be interpreted to be consistent with proximate cause doctrines in civil common law torts and civil and criminal statutes.

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The most compelling reason for creating a First Amendment exception for fraud on the public is that it will arguably stop many of the most destructive fraudulent schemes, which today are allowed to flourish. Fraud on the public deprives millions of health, life, property, and money; it lets wrongdoers escape justice; it has manifold destructive environmental impacts. And not only are people harmed en masse but those responsible are rewarded for causing the harm. The reasons for stopping this are self-evident.

But even apart from these obvious reasons, there are at least two other good reasons to carve out a "fraud on the public" exception. First, no First Amendment theory supports allowing or protecting unfettered fraud on the public. Second, the government has several compelling interests in stopping fraud on the public, meaning even if strict scrutiny is applied, a law prohibiting or punishing it could, and should, survive if narrowly tailored to achieve that interest.

Every Major Free Speech Theory Supports Prohibiting Fraud on the Public

Opponents of de-weaponizing the First Amendment argue fraud on the public is not the kind of expression intended to fall outside the free speech

clause. But how can we know whether this is true? We must look first at why we protect speech. This, in turn, reveals what kinds of speech should be protected and what kinds of speech were intended to be protected in the first place. Courts, scholars, and legislators have been debating the purpose of protecting free speech since the amendment's passage in 1791. There are only three widely-recognized theories for why free speech should be a fundamental right. They are (1) to maintain *self-governance*; (2) to help people *search for truth* in the marketplace of ideas; and (3) to protect *personal autonomy*.

Self-governance. "We Americans think of ourselves as politically free," wrote Alexander Meiklejohn, a leading First Amendment scholar, in 1948. "We believe in self-government. If men are to be governed, we say, then that governing must be done, not by others, but by themselves."[62] Meiklejohn was a leading proponent of the idea that the purpose of protecting free speech was to allow self-government, which he saw as the essence of democracy. "Self-government," he argued, "can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express."[63] Allowing the state to suppress speech disrupts self-government. If the people are to govern themselves, which in a democracy is the whole idea, their ability to do so rests on their access to knowledge and ideas that governing involves so that the choices made reflect the actual will of the people. If people are manipulated into believing falsehoods, or if those in power can hide what they are actually doing, then it is not a true democracy because those casting a vote are doing so not to express their true will but to fulfill the desires of those in power who manipulate them to vote a certain way. Voting has little to no value if voters are ignorant of what is at stake.

The speech we are most concerned with under this theory is speech that helps inform the public in a democratic society. Fraud on the public does the exact opposite. Its aim is to mislead, not to express an idea or opinion. A knowingly or recklessly false claim is the exact opposite of an idea or opinion—it is a falsehood dressed up to appear as if it were an idea or opinion. Its purpose is not to contribute to the debate or public dialogue. It is not to inform, argue, or debate. It is a device to manipulate. Intended to disrupt the democratic process, not further it. In his book *Free Speech and Its Relation to Self-Government*, Meiklejohn endorsed this assessment. As he puts it: "The manipulation of men is the destruction of self-government."[64]

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Meiklejohn recognized eighty years ago that fraud and manipulation are inconsistent with self-government.

Search for truth. The second major theory underpinning the free speech clause is that the search for and discovery of truth are impeded if views are purged from the marketplace of ideas. This theory has powerful intuitive appeal. It holds that allowing the government to pick and choose what ideas are valid, and therefore accessible to the public, is a very bad idea because the people are a far better judge of truth than any centralized authority (who has a strong incentive to censor speech it doesn't like or agree with or which is a threat to its power). The marketplace of ideas concept, discussed briefly in chapter 1, is based on the belief that if all speech is allowed, truth will ultimately win out over what is false. John Stuart Mill's book *On Liberty* has been particularly influential in making this idea popular. In the book, Mill wrote that

> the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

This theory has always had critics. But those critical voices are growing more numerous now in the digital age. Far too often lies win out over truth. And even if truth does win out eventually, falsehoods often do immense harm while the world waits for the truth to eventually emerge. Think of the Nazi antisemitic lies about the Jewish people during World War II. The Jewish people were blamed for Germany's loss in World War I. The Jewish people were blamed for Germany's economic woes. Many lies were told loudly and widely about Jewish people individually and as a group. These lies, as so often happens when one oppressed minority is attacked by opportunistic politicians, were bought into by millions of people and created an environment where the subjugation, and later extermination, of human beings was not only accepted but embraced and celebrated. It may well be true most of humanity has now come to recognize the lies peddled by the Nazis as false, and perhaps truth has, in the long run, won out. But that is of little comfort to millions of victims killed by actions resulting from those lies.

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History has shown, time and again, that truth too often comes far too late, if at all, when it competes with harmful falsehoods. But even if that weren't the case in history, it is certainly, and especially, true today. In today's digital world, where the content we consume operates in an attention-based economy, the content that rises to the top (and which is, therefore, put on our screens) is that which exaggerates and surprises, which pushes our emotional buttons, and which makes us feel like we are in the right, which makes us feel good. Truth is far too messy and nuanced to be able to compete with lies designed to keep us watching, scrolling, and clicking. Falsehoods now have so great an advantage over truth that, if one is not purposefully and tenaciously digging for it, it can be almost impossible to find.[65]

But even if we reject the lessons of history, and if we ignore the new realities of today's digital world, and we decide, nevertheless, to embrace the marketplace of ideas principle, flawed though it may be, the theory itself *still* does not support allowing fraud on the public. Fraud never contains a valid opinion or idea, much less truth. There is no possible way that permitting those in power to defraud the public helps those who are duped search for truth. It does just the opposite. Fraud impedes the search for truth. And it does so in a deplorable way. Spreading falsehoods to push one's own agenda poisons the marketplace of ideas by introducing bad faith lies into the mix of opinions, views, and ideas. So, instead of a battle of ideas there is a battle between genuine ideas and falsehoods masquerading as ideas. Falsehoods, because they are crafted to please and to appeal to people's cognitive biases and weaknesses, far too often win out over true ideas and end up becoming the genuinely held beliefs of those misled. Thus, the search-for-truth free speech theory *also* weighs in favor of restricting fraud on the public.

Advancing autonomy. This theory holds that the freedom to believe and to express one's beliefs is a human right. The first two theories, self-government and search for truth, emphasize utilitarian ideas for protecting expression. This theory, in contrast, recognizes expression is "an essential aspect of personhood and autonomy."[66]

This is not a new idea. Immanuel Kant explained in 1785 that "lies are morally wrong when speakers undermine listener autonomy by seeking to use their listeners as a means to the speakers' own ends, rather than treating listeners as ends in themselves."[67] This is always the speaker's aim when defrauding a victim. It is no less true when a speaker defrauds the public at

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large. Indeed, the danger is particularly high when the one pushing falsehoods does so not to an individual dupe but to the public at large, aiming to manipulate public opinion and collective mass action in their own favor. In that case, where the speaker holds immense advantage, both in terms of information and power, over the listeners, "their speech can more readily harm their listeners through deception or coercion." "In other words," Professor Norton writes, "they can mislead or muscle their listeners in ways that strike us as unfair and sometimes dangerous."[68] Whenever a politician, media figure, or corporation pushes their message out to the masses, the interaction is one-sided. The speaker holds virtually all power and information. The listener is at the mercy of the speaker.

Given all this, it is clear restricting fraud on the public would help protect individual autonomy, which is not only a Kantian ideal but one of the principal justifications for protecting the freedom of speech in the first place. Justice Thurgood Marshall observed the intrinsic importance of autonomy and self-expression in 1974, explaining: "The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity."[69]

Fraud on the public flies in the face of "the individual's worth and dignity." Moreover, fraud plays no part in "the development of ideas and a sense of identity." Quite the opposite. Fraud, including large-scale fraud, manipulates people's views and ideas. That is what deceit always does. It robs the individual of the power and freedom to make up their own mind using their independent judgment and replaces it with the speaker's own ideas and decisions, which are imposed on the individual in such a hidden manner the individual does not even realize they are being manipulated. This is an assault on our sense of identity and autonomy. When you learn you've been defrauded, you feel not only injured but violated. Someone used you for their own ends and took something of yours in the process. They invaded and assaulted your independent judgment.

Accordingly, the advancing-autonomy free speech theory *also* weighs in favor of restricting fraud on the public. Not one major free speech theory supports allowing those in power to defraud the public. Each theory, in fact, strengthens the argument that we should ban frauds of all shapes and sizes.

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Government's Compelling Interest in Stopping Fraud on the Public

Even if a state legislature were to pass a law prohibiting some category of fraud on the public, to survive a constitutional challenge it would—assuming it is a content-based regulation of protected speech—need to meet strict scrutiny. That is, it would need to be a necessary measure to achieve a compelling state interest.

What *is* a compelling interest? There is no one-size-fits-all definition. "Precisely what constitutes a 'compelling interest' is not easily defined," writes Eighth Circuit judge Clarence Arlen Beam. When the Supreme Court has attempted to define the term, it uses "equally superlative language," such as "interest of the highest order," "overriding state interest," and "unusually important interest."[70] But while difficult to define with precision, the magical term "compelling interest" is central to First Amendment analysis and jurisprudence. The term is intimately tied into the very reason we protect free speech in the first place.

As the Supreme Court has repeatedly insisted, "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[71] So, although courts generally presume a challenged regulation to be constitutional,

> when the [regulation] seeks to restrict and punish speech based on its content, the usual presumption of constitutionality is reversed. Content-based regulations (those laws that distinguish favored from disfavored speech based on the ideas expressed) are presumptively invalid, and the government bears the burden to rebut that presumption. The Supreme Court applies the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.[72]

Where a law restricts speech based on its content (i.e., the viewpoint expressed or the subject matter of the speech), it is most often dead in the water. The only way a content-based law can survive is if it passes the "strict scrutiny" test. In other words, it must serve a compelling state interest and be narrowly tailored to further that interest.[73]

If, however, a law restricting speech is content-neutral, meaning it treats all speech equally, then it is far more likely to be upheld as constitutional

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under the First Amendment. It must only meet intermediate scrutiny; no compelling interest is needed.[74] Examples of content-neutral restrictions include:

- No billboard signs allowed within five hundred feet of a state highway.
- No loud music or noise after 11:00 p.m. in a residential neighborhood.
- No parades allowed on the interstate highway.
- No distributing leaflets on a particular street between 10:00 p.m. and 6:00 a.m.

Each restricts speech without regard to the viewpoint or subject matter of the speech. In each case, "the government is ostensibly not concerned with what is being communicated; rather, the government is limiting speech for other reasons such as prohibiting a nuisance."[75]

By contrast, a law is content-based if it restricts "particular speech because of the topic discussed or the idea or message expressed."[76] Content-based restrictions include:

- A law banning protests against a war but allowing protests in favor of the war (this would discriminate based on viewpoint).
- A law banning protests regarding an ongoing war, whether for or against (this would discriminate based on subject matter).
- A law prohibiting former felons from profiting from writing about their past crimes (subject matter).
- A law banning the display of signs critical of foreign governments within a certain distance outside embassies (viewpoint).
- A statute criminalizing "indecent" or "offensive" messages (viewpoint).

In each case, the restriction on speech is based on the substance of the message rather than the method or manner in which the message is being expressed. Indeed, all of these have been, or would clearly be, held unconstitutional content-based restrictions on speech. Such laws rarely survive strict scrutiny.

With that background in place, let's turn to fraud on the public. Any law against fraud on the public would be, by necessity, a content-based speech

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restriction. Why? Because it restricts speech based on the message's fraudulent content. Thus, a law restricting such speech must pass strict scrutiny. It must be necessary to achieve a compelling interest. Examples of interests the Court has found compelling include "remedying the effects of past intentional discrimination," "securing diversity in higher education," "quickly and effectively removing the victims of child abuse from their parents," and "maintaining highway safety."[77]

Is there any precedent for the idea that stopping fraud is a compelling government interest? Yes, lots of precedent, in fact.

Courts have held governments have a compelling interest in "preventing fraud," "discouraging fraud," "preventing voter fraud," "maintaining a business climate free of fraud and deceptive practices," and preventing business transactions motivated by fraud.[78] That the government has a compelling interest in preventing fraud in numerous contexts is well-established in the case law. And if it is a compelling interest to prevent fraud in general, it must also be a compelling interest to stop the largest and most destructive frauds—causing myriad harms to health, wealth, life, property, and the environment. Stopping fraudulent conduct that causes so much injury and misery seems as compelling an interest as any other.

To survive strict scrutiny, in addition to the compelling interest, the law must also be narrowly tailored to further that interest. Whether the law is narrowly tailored will depend on the precise language of the law and the court's interpretation, analysis, and application of it. My proposed elements describing fraud on the public, which I am sure can be improved upon, might serve as an appropriate model to craft a narrowly tailored restriction.

This is how we de-weaponize, and thereby restore, the First Amendment. We flip it from how it is misused today, as a sword by those in power, to become again what it was intended to be, a shield for the people against those in power.

Of course, this de-weaponization cannot be the end of the story. It, alone, will not solve the ultimate problem. It is, however, a prerequisite to the final step; once the First Amendment is restored, thereby removing protections for fraud on the public, it would open the door for legislatures to pass laws to prohibit it and punish those who carry it out. I will now briefly discuss how these laws might be passed and how the approach and implementation of such restrictions might differ depending on the kind of speech involved.

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Prohibit Fraud on the Public

BY PASSING LAWS—AND ENFORCING THEM

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In part 1, I laid out the problem of *fraud on the public*. The problem thus identified, in part 2, I have discussed how to fix it. The first step is to change the way we think about fraud on the public, how we approach it, and what we call it to recognize it for the "fraud" it is (chapter 6). The second step is to resuscitate the purpose of the free speech clause, to get it to once again protect the people rather than protecting the powerful who defraud them (chapter 7). These measures will be of limited use, however, without taking the final step, which is to put laws in place that target fraud on the public and those who carry it out.

This means passing laws or interpreting existing ones to prohibit fraud on the public to the extent feasible. But let me be clear about what I am and am not saying here when I talk about *prohibiting* fraud on the public. Eradicating fraud entirely is a futile utopian aim; we cannot hope to eliminate fraud from humanity any more than we can hope to eliminate other harmful human behaviors. But the fact we might not stop all such destructive conduct does not mean we should not even address it. The precept of minimizing fraud, to the extent we can, should be a guiding principle, or North Star, which could help us understand in what direction we should be moving, and whether we are moving toward it or away from it. This principle—minimizing fraud—has been part of the legal landscape for centuries. And it is imperative we make every attempt to adhere to this

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principle, particularly regarding fraud on the public, not in spite of the First Amendment but *because* of it—to protect our right to make up our own minds on matters that affect our lives, to give us the freedom to think and decide issues for ourselves, to detoxify the marketplace of ideas, to remove the pollution of falsehoods and conspiracy theories so that true ideas have a chance to be seen. We must ban at least some of the most harmful frauds on the public to stop political, corporate, and media leaders from imposing their own self-serving "truths" on we, the people.

Are *bans* the only possible solution? Certainly not. Legal prohibitions should certainly be part of the solution, but this does not mean we must limit ourselves to such measures. After all, fraud on the public is a multi-headed beast, taking many forms and operating in numerous spheres. The laws put in place to address it should, ideally, nimbly target each kind of large-scale deceit. Just as laws now target insurance fraud, tax fraud, and Medicare fraud, laws addressing fraud on the public should target each kind of scheme the powerful employ to dupe the masses.

Short of bans, other, more speech-protective measures might include fact-checking, disclaimers, adding links to accurate and objective information, and public education campaigns. Many of these measures are already being tried, but for the most part have failed to make a significant impact.[1] Nevertheless, we should absolutely continue to attempt such measures, as there is still hope that solutions short of outright bans will have an impact on reducing fraud on the public. They will, however, be unlikely to suffice on their own.

As for the proposed laws, legislatures will need to tailor their precise language, and courts will need to interpret and apply them. The category of speech I propose in chapter 7 as my definition of "fraud on the public" might serve as a helpful guidepost for such laws, but there certainly is no one-size-fits-all solution. Such restrictions must be highly context-specific. The options for restricting, say, political speech are radically different from those for commercial speech. In many instances, the category of speech being restricted determines what can be done under the First Amendment to restrict it.

Political speech and speech involving the press, for instance, have the highest and most robust protections. On the other hand, commercial and government speech are each afforded less protection under the First Amendment, albeit in different ways. In this chapter, I will discuss some of the important aspects and challenges of four speech categories: political,

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government, media, and corporate. Scholars have done great work on these topics, and my brief summaries give only surface-level treatment to topics that each deserve their own book. Instead, I will simply give a snapshot introduction to each topic. Those interested in learning more can find additional resources in the selected bibliography at the end of this book.

POLITICAL LIES

Political falsehoods are as old as politics. Attempts to legally restrict campaign lies are also nothing new, in the United States and elsewhere. In some cases, attempts to restrict political falsehoods have infringed on rights even as those laws aim to protect them. Such false-political-speech laws also invite abuse. This has proven particularly true in recent years in countries lacking robust democratic institutions that keep a check on each branch of power.

In the United States, there have been both federal and state efforts to crack down on blatant and damaging political falsehoods. Indeed, most states have passed such laws. Have they worked? Anyone paying attention to the news, particularly in election years, will have to agree the answer is clearly no. Lying is still rampant in politics. Given the stolen election lie and the other blatant and damaging falsehoods candidates continue to spread, the attempts to rein in harmful falsehoods has failed miserably. Politicians lie today as much as ever. Why have attempts to stop these lies failed?[2]

One reason is the difficulty of determining political truth. It is easy to recognize lies by those on the other side of the political aisle or by those expressing an idea we disagree with. But we far less often recognize falsehoods told by those expressing views that reflect our own. Indeed, what constitutes a lie at all, at least in the political context, is highly contentious. Professor Catherine J. Ross lists several major categories of political falsehoods, including straight-out lies, intentional distortions, hyperbole, indirect prevarication, and "just bullshitting." Ross gives examples of each and explains why, in the political context, it is not so easy to draw the line demarking the boundary between what we should accept as free speech under the First Amendment and what we should properly restrict.[3] Consider the following examples:

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- A candidate for Congress, John Doe, claims his opponent, Jane Doe, "is on the side of terrorists" and points to the fact Jane Doe made no public statement in the aftermath of 9/11. In fact, Jane Doe was in college at the time and was in no position to make a statement of any kind on the subject, let alone a "public" one.
- A video is circulated showing a candidate for office coughing in a meeting. The candidate's opponent claims the candidate is purposefully spreading COVID or, at best, recklessly and negligently putting people's lives at risk.
- A Democrat says her Republican opponent "would love nothing more than to take away your freedom" because the Republican voted to ban books that discuss race and the legacy of slavery and consistently votes against LGBTQ+ rights.
- A Republican says his Democratic opponent "would love nothing more than to take away your freedom" because the Democrat voted to raise taxes and supports gun regulation.

Are any of these political claims even lies? If they are, are they the kinds of lies the law should address?

The problem is many political falsehoods, while almost certainly misleading and asserted in bad faith—their purpose being to make us believe something false—are nevertheless not the kinds of statements courts can easily determine with exactitude to be either true or false. Is there any truth to claiming an opponent "would love nothing more than to take away your freedom"? Of course not. The mental image conveyed by that statement certainly cannot be squared with the subjective intent of the politician it purportedly describes. So, it is false. It is also effective, playing on preconceived ideas and biases, punching emotional buttons, and generating animosity toward the opponent. What about claiming a cough proves an opponent is purposefully infecting people with COVID? Or releasing a campaign ad that claims an opponent will lead us to nuclear war, as Lyndon Johnson did in his famous "Daisy" ad? These ones seem somewhat more falsifiable, but both may also have a grain of truth, and in any event, they can be framed by the speaker as assertions of belief or opinion. This is often the case with political lies. A lie is rarely *all* true or *all* false. Rather, lies twist truth in ways that make the message misleading and manipulative. But again, where should, or could, we draw the line on such manipulative uses of language?

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So far, American courts have been clear: you can't. We are not, under current law, able to draw lines on where political speech crosses over into "false" territory. Each time a state has tried to draw such a line, the courts strike it down. At least sixteen states have, in recent years, enacted laws that prohibit certain kinds of false campaign speech. But not only does each of these laws regulate only a small sliver of campaign lies, many have been struck down when challenged, including Ohio's false campaign speech law, which was struck down in the *Driehaus* case.[4]

Like Ohio, Minnesota got fed up with lying in politics, and, in 1988, its legislature passed the Minnesota Fair Campaign Practices Act (FCPA), which made it a crime, and later a tort, to knowingly lie about ballot initiatives up for vote. The idea was if voters were going to decide a particular question at the ballot box, it should not be legal to knowingly mislead the public about the question they were to decide. This would deprive voters of the knowledge necessary to understand the ramifications of voting yes or no on it. On the face of it, the law seemed like common sense: "A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material . . . with respect to the effect of a ballot question . . . that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false."[5] The FCPA required the speaker either know the message is false or disseminate it with reckless disregard as to whether it is false. In doing so, the Minnesota legislature used the Supreme Court-endorsed *New York Times* "actual malice" standard. Surely, that would save the law if it were challenged in court, right?

Wrong. In *281 Care Committee v. Arneson*, the Eighth Circuit held the FCPA violated the First Amendment and struck it down. Why? Its first problem was it restrained *political* speech. And the Supreme Court has repeatedly emphasized that "the regulation of political speech or expression is, and always has been, at the core of the protection afforded by the First Amendment."[6] Political speech is special. It is given the strongest protections. Indeed, political speech is not only "the primary object of First Amendment protection," but indeed "the lifeblood of a self-governing people."[7] The Eighth Circuit put particular emphasis on the Supreme Court's *Alvarez* decision, which, as discussed in chapter 7, is the most current guidance we have on false speech from the highest court. But the

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Eighth Circuit in *Arenson* also made clear to distinguish the fact *Alvarez* dealt not with *political* false speech but with *pure* false speech. That is, nonpolitical false speech that caused no harm. Xavier Alvarez had merely lied about receiving a military decoration. Political false speech, by contrast, has greater protections. In fact, it has the most protections of any speech.

In *Arneson*, the Eighth Circuit applied this principle to the Minnesota law restricting falsehoods about ballot initiatives. The court there held:

> It is in the political arena where robust discourse must take place. And although there *are* certain outright falsities one could envision in the discussion of a proposed ballot question, especially when considering there are hotly debated sides to every issue, it seems that too often in that situation, the "falsity" deemed by one person actionable under [the FCPA] will be a statement of conjecture about the future state of affairs should the ballot question pass or fail. . . . Such "back and forth" is the way of the world in election discourse. Some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation. We therefore leave room for the rough and tumble of political discourse for the farfetched. Political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.

In its holding, the Eighth Circuit—unsurprisingly—relied on the marketplace of ideas notion. It assumes, once again, that truth will prevail. But the Supreme Court itself, in a majority opinion, recognized that "the truth rarely catches up with a lie," at least in the defamation context.[8] This begs a question: If truth does not prevail over reputational falsehoods—that is, falsehoods made in the defamation context—is there any reason to think truth will prevail over other kinds of falsehoods?

The court in *Arneson* held that because the FCPA restricted political speech, it must be subject to strict scrutiny. Remember, this means it had to further a compelling interest and be narrowly tailored to achieve that interest. The court held the FCPA did neither of these things and struck it down.

False campaign speech laws have been struck down in numerous other states, including Louisiana, Massachusetts, and Kentucky, as well as in the *Driehaus* case in Ohio.[9] True, the Supreme Court has not held that restricting false political speech could never be achieved constitutionally. But such restrictions keep getting struck down when challenged under the First

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Amendment, and the Supreme Court has not granted certiorari in these cases, amounting to a tacit endorsement of the appellate courts' rulings.

No fix has yet been found to address the problem of harmful political falsehoods. This is not for lack of trying. Not only have states repeatedly passed laws to address it, there have been federal efforts to fix it, and scholars have also put forth several good ideas. Two recent books on this topic are *A Right to Lie?* by Catherine J. Ross and *Liars* by Cass R. Sunstein. Ross asks whether the free speech clause allows any restriction on presidential lies and concludes it might. She proposes "a novel approach drawn from an obscure corner of First Amendment jurisprudence: the public employee speech doctrine." Ross limits the scope of her proposal to presidential lies. Her proposed solution rests on the fact individuals give up free speech rights when they work for the government. That is, "In contrast to the rest of us, who the government generally cannot punish for what we say, when public employees speak about topics related to their jobs, the Speech Clause does not protect them from retaliation by the government." Ross argues that, because presidents are also government employees, this exception could be used to restrict their false speech in ways that may be unavailable to restrict speech in general.[10]

Sunstein takes a different approach. Rather than focusing on presidential lies, he asks whether lies can and should be restricted at all and, if so, when. He asks these questions, however, in the same broader context as Ross, acknowledging that we are living in a uniquely dishonest time. Sunstein begins with a strongly worded caution: "Public officials should not be allowed to act as the truth police." He insists repeatedly the "best response to falsehoods is usually to correct them rather than to punish or censor them." He concludes, however, "that governments should have the power to regulate certain lies and falsehoods, at least if they can be shown to be genuinely harmful by any objective measure." False statements, he goes on to write, "are not constitutionally protected if the government can show that they threaten or cause serious harm that cannot be avoided through a more speech-protective route." Moreover, Sunstein later acknowledges, "There is also a strong argument in favor of ensuring that any regulation of falsehoods in politics is enforced by an independent agency, such as or akin to the Federal Election Commission."[11]

Dozens of scholarly articles have been written on this topic in recent

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years.[12] However, my approach differs from those others in an important way: by taking the debate on political falsehoods out of the false speech realm altogether, and instead approaching it as a fraudulent speech problem. Thus reframed—from *false* speech to *fraudulent* speech—it is clear only a narrow subset of false political speech is at issue, and that it is, by definition, both verifiably false or misleading and harmful. This makes my approach consistent with Sunstein's, I believe, insofar as it proposes only to restrict false speech that "can be shown to be genuinely harmful by any objective measure." My approach is also consistent with those of other scholars. Though they do not necessarily frame it in *fraud* terms, many propose similar threshold requirements to the elements I have proposed.

My approach, which would prohibit political falsehoods that meet the elements discussed in chapter 7, would almost certainly not stop all political lies, or even most. It might stop only a tiny fraction. But that fraction includes many of the most harmful political lies, such as claiming an opponent stole an election or that an ongoing pandemic is a hoax perpetrated by the opposing political party.

It is time to revisit the assumption more speech is always the best solution to false speech in the political realm. Given the dangers of political disinformation in today's world, it is critical we find ways to stop at least some of the most harmful falsehoods. One way to do so is to stop such falsehoods when they cross the line from merely false to fraudulent.

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GOVERNMENT LIES

Whereas *political* fraud on the public involves lies about elections, political opponents, and political issues, *government* fraud on the public involves speech by those who hold office or speak on behalf of local, state, or federal government. The two categories—political and government speech—are not, of course, mutually exclusive. However, these two categories of speech are treated very differently under the law.

Political speech has the strongest protections under the First Amendment. Government speech, on the other hand, is not protected at all—when the government speaks, such speech is generally outside the scope of the First Amendment. The Supreme Court has made clear "the Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."[13] The fact government speech is not subject

to the First Amendment creates a strange contradiction. When the government speaks, it is free to discriminate against viewpoints the way private speakers cannot. The prohibition against viewpoint-based censorship "does not apply when courts consider the government—rather than a private individual or entity—to be the speaker."[14] Whenever the government speaks, it is free to "impose content or even viewpoint-based expressive restrictions."[15] This means the government can, for instance, refuse to allow a confederate flag to be placed on a vanity license plate in Texas and refuse to allow a non-Christian religious monument to be placed in a public park where there is already a monument to the Ten Commandments.[16]

Because the government is speaking when it comes to license plates and monuments in a public park, it can discriminate against viewpoints (a Confederate flag) and religions (a non-Christian monument). It also can give public health advice, such as that children are required to receive certain vaccinations to attend public school without being forced to give airtime to vaccine critics or to open debate on whether such vaccines should be mandated. The government can declare war or invade a foreign country without having to engage in a debate on whether that war is necessary or whether invading a foreign country is a legitimate option absent an imminent threat. The government can prohibit criminal acts and impose criminal penalties without discussion or debate. As one scholar noted, "in order to function, government must speak."[17]

The nonapplication of the First Amendment gives the government wide latitude to express its views, even if those views discriminate against other people's or groups' views, beliefs, and opinions. But some, including Supreme Court justices, have argued the nonapplication of the First Amendment should cut the other way too. It should allow broader restrictions on government speech because such restrictions need not comport with any First Amendment analysis. If the First Amendment does not apply, then much stricter limits can presumably be placed on this kind of speech.

Justice Potter Stewart, for instance, asserted that "the First Amendment protects the press from governmental interference; it confers no analogous protection on the Government." Stewart went on to explain the government was exempt from protection under the free speech clause: "The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents."[18] This means Congress and state legislatures are free to pass laws that limit government speech, and indeed they have done so "often."[19]

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For instance, a Nevada law prohibited city council members from voting on a matter in which the member had, or was perceived to have, a conflict of interest. A council member challenged the law on First Amendment grounds. The Supreme Court rejected the challenge in strong terms. To begin with, the Court held, the First Amendment "has no application when what is restricted is not protected speech." When a legislator or council member casts a vote, they do so in their capacity as a government agent for the people. So, the Court strongly rejected the argument that legislative voting is protected speech, even if the vote expresses "deeply held and highly unpopular views." Elected and appointed officials have no "right to use governmental mechanics to convey a message."[20]

The law in this area is new and still evolving. Where its limits will end up is not yet clear. To date, "the Court has never expressly defined the extent of a [government's] First Amendment right to speak, nor whether it has this right at all."[21] The Supreme Court has, instead, repeatedly reserved that question for another day.

Some argue that day has come. The stolen election lie and other harmful falsehoods, spread in some cases by elected officials, pose growing threats to individuals and society, as well as to health, life, property, and the environment. Given the high stakes for allowing harmful disinformation, some are now arguing for restrictions on ways government speakers have contributed to spreading falsehoods.

Consider the recent arguments by leading scholars to begin reining in some of the harmful falsehoods by government officials. In their article "Lethal Lies," Claudia Haupt and Wendy Parmet take to task the recent "onslaught of misinformation and recurring lies from government officials, including the former President and his top health officials, about the pandemic." Haupt and Parmet argue that such state-sponsored health falsehoods hold little, if any, First Amendment value. Indeed, they argue, given that medical professionals risk malpractice liability for harming through knowingly false or reckless speech, so too, perhaps, should government officials responsible for informing the public about public health matters. The authors conclude that although current law does not recognize any tort for public health malpractice or public official informational fraud, it may be time to revisit this deficiency and, if warranted, fill the gap.[22]

Likewise, Caroline Mala Corbin recently came to a similar conclusion—in her article "The Unconstitutionality of Government Propaganda"—albeit by way of a different route. Corbin interprets the First Amendment's

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nonapplication to government speech as an impediment to restricting harmful government falsehoods. "Under the government speech doctrine, the Free Speech Clause does not apply to government speech, including government propaganda," Corbin writes. "It is time to revisit that conclusion." She argues that falsehoods disseminated by the government, which she terms "government propaganda," "ought to be regarded as covered by, and in violation of, the Free Speech Clause." Why? Because, according to Corbin, "Government propaganda sufficiently undermines the core goals of free speech such that the Free Speech Clause ought to address it."[23]

A diverse range of scholars, judges, journalists, and other experts, on both the political Right and Left, are exploring ways to address the growing threat of government disinformation. Though the solutions proposed differ, most agree at least that the problem is a pressing one and that it is at least worth exploring possible solutions.

Like political fraud on the public, government fraud on the public presents its own challenges. The alarming ways the government has, in recent years, bombarded the public with provable falsehoods that result in illness, death, confusion, and a crisis of democracy has made it urgent we find a way to restrict the ways the government can defraud the public. If, as Court precedent seems to indicate, the government speech doctrine opens the door to enacting such restrictions consistent with the First Amendment, that is what legislatures should do. The falsehoods spread by the government are at least as harmful as those spread by politicians and corporations. We should put a stop to at least the worst of them.

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MEDIA LIES

The media play a critical role, perhaps *the* critical role, in fraud on the public. Why? Because the media serve as the delivery system of all mass-communicated messages we consume each day—news websites, social media platforms, online videos, internet search engines, TV and satellite radio, podcasts. Every mass communication outlet and tool we use to find out what is going on, to connect with people, or to be entertained—these are our sources of knowledge, where we consume the news, analysis, advice, opinions, and gossip on which we form our beliefs. All of these outlets are, together, the mass media, providing the exclusive means to disseminate messages—true, false, and everything in between—to the public.

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The media act as a vector for disinformation. A disease vector carries and transmits an infectious pathogen to other living organisms. Mosquitos carry the malaria virus, deer ticks carry Lyme disease, and fleas carry bubonic plague. Those diseases could not spread to victims without the disease vector serving as carrier and transmitter of the pathogens. In the case of the media too, the vector surreptitiously delivers the contaminate to victims. Those infected go on to spread the contaminate to yet other victims, spreading person to person via the vector. Accordingly, those duped by political and corporate falsehoods are overwhelmingly infected by media sources at first, which are the near-exclusive means of transmitting information, thereby informing, or misinforming, those who consume the content.

For that reason, an effective solution to fraud on the public must involve finding ways to slow the spread of disinformation diffused through the media. Of course, any measure of this kind must be carefully designed to uphold press protections, to allow independent and free reporting, and to preserve the freedom to investigate, write, and speak about any topic or express any view, belief, or opinion. Freedom of press is enshrined not only as part of the freedom of speech under the First Amendment but as its own stand-alone constitutional guarantee. This reflects its importance to a free society. Good journalism is a national treasure. And government censorship of media is always a serious threat to this august institution. Any law restricting fraud on the public must correspondingly provide the strongest protections possible against government abuse of any such law so it cannot be misused to suppress speech those in power merely dislike.

Media serve a critical role in any democratic society. Government regulation of media should, therefore, remain restricted only to the purposeful or reckless dissemination of harmful falsehoods—that is, to fraud on the public under the chapter 7 elements. If a reporter makes a mistake, or turns out to be wrong, or is expressing an opinion, viewpoint, or good faith belief, none of those messages would touch on the concerns expressed in this book. Being wrong is a fundamental right. On the other hand, if a reporter, journalist, or podcaster causes damage by purposefully spreading harmful, self-serving falsehoods, this would be fraudulent.

Treating "the media" as a monolith oversimplifies a complex discussion. News organizations, after all, serve a very different role in society and in

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our everyday lives, from social media platforms. And social media platforms have widely varying purposes, business models, and delivery methods. Some focus on videos, photographs, and other visual content while others are text-based. Some center on friendships and family connections while others focus on workplace networks and other employment-related content. For that reason, solutions involving the media must be individually tailored to address each specific type of media and the ways each one spreads disinformation on behalf of users (as a platform) or creates and spreads its own disinformation (as a speaker).

The solution to media disinformation should be microtargeted at each media type. But the solution must also take into account the bigger media picture, which those examining the disinformation problem overlook too often.

The incentives for those who own the media—whether a giant cable news network with an audience of millions or a small-time YouTuber trying to grow their number of followers—are skewed to favor false and misleading claims. Why? Because media make money from increasing engagement—views, clicks, shares, likes, etcetera. The content that often gets the most engagement rarely takes the form of carefully and painstakingly created truthful reporting. Too often, it is just the opposite. Engagement is more effectively generated through content that excites, enrages, surprises, and shocks. Above all, it must entertain. It must satisfy the wants of the audience. And truthfulness, good faith, and honesty are rarely satisfying. We are won over far more easily with content tailored to our tastes, preferences, beliefs, and biases—content that pushes our buttons. Truth rarely does that. Truth is not designed to please anybody. It is nuanced. It is messy. It is often long-winded and complicated.

And so, in the very same way corporations are incentivized—indeed, legally bound—to do all in their power to legally increase profits and grow shareholder value, media companies and personalities have this very same incentive. But in the case of media, an increase in profit often comes primarily from increasing engagement. The more views, clicks, shares, or likes, the greater the market share and the greater the profits. Just as how in prior generations the media mantra was "If it bleeds, it leads," so today we hear the oft-repeated "Enrage to engage."

This incentive to increase engagement, like the profit motive of for-profit corporations, generally takes no account of externalities such as the harm caused to people and society. If, however, the harm cuts into profits,

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only then will harm enter the calculation—the "harm" at issue here being harm to their profits. Thus, the threat of losing audience or engagement is the most pressing concern of most media firms. Lose engagement and you lose the very purpose for which the for-profit media company exists. This makes the incentive to increase engagement irresistible—and understandable.

This is not because those who run media companies are "bad" or "unethical." It is the inevitable result of the incentives at work; those incentives leave no other choice for those running the media company. They must, for their own continued existence—both the existence of their job and the existence of the media firm itself—grow engagement by any means at their disposal. And if they fail or refuse to do so, they will be replaced by someone else who will, or at least will try.

These may seem like perverse incentives, but even if they are, they are no more perverse than the profit incentive that underpins all private industry, nor any more perverse than the power incentives underpinning politics. Thus, the forces that drive our society forward and shape our lives are enmeshed inside systems that demand those running media companies, running corporations, and running for office each pursue incentives to selfishly take as much of the pie for themselves as they can within the bounds of the law and leave as little for others as possible. Greed may not be "good," as Gordon Gekko claimed in the movie *Wall Street*, but it certainly is "human," and it operates as an irresistible force in some of our society's most powerful systems.

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Most alive today would agree social media presents a whole new set of problems no prior generation faced. The speed and reach of information is unlike anything in history. As has been discussed throughout this book, lies outpace truthful information. But social media, which spreads dis- and misinformation perhaps more than any other kind of media, is virtually immune from liability or penalty for content published on its platforms on account of the Communications Decency Act's Section 230. This has raised a host of issues in recent years pertaining to disinformation about vaccines, elections, fake medical cures, and many other topics. A wave of scholarship in recent years has discussed why and how Section 230 should be revised or repealed.[24] I will leave it to others to propose specific fixes to this particular problem. The discussions about and assessments of the

problems arising from the modern media environment, including social media, are beyond the scope of this book.

In short, my strong inclination would be that Section 230 should be either recrafted or dismantled. In its current form, it has made it far too easy for those seeking to defraud to the public to access the means to do so. I do not, however, consider Section 230 to be the central concern regarding fraud on the public since it involves third-party content on social media platforms rather than addressing the root source of false and misleading claims. Nevertheless, there are certainly available options for regulating social media companies consistent with First Amendment free speech and free press concerns. Experts have done the analyses and created proposals on this front, suggesting media companies should be treated like newspapers (because they exercise editorial control over content), or treated like the US mail system (because they merely serve as a channel through which information flows), or treated like no other existing entity (because they are their own thing).[25] Whatever solution is implemented with regard to social media, it must be flexible enough to evolve as the information environment evolves. The social media landscape today is a different world from what it was fifteen years ago. Who knows what it will look like fifteen years from now.

Another problem plaguing American media, social or otherwise, is the lack of standards for fairness and accuracy. The United States used to have what was called the "fairness doctrine," promulgated by the Federal Communications Commission (FCC), which was a policy that required broadcasters to both present controversial issues of public importance and do so in a manner that fairly reflected differing viewpoints.[26] It was abolished in 1987. This helped give rise to the modern hyper-partisan media environment we have today.

The fairness doctrine had two basic elements. First, it required broadcasters to devote some of their airtime to discussing controversial matters of public interest. Second, it required them to air contrasting views regarding those matters. There is plenty of debate as to whether this rule actually resulted in media networks presenting fair and balanced views to audiences. However, Sunstein predicted in 2001 that the demise of the fairness doctrine, which had opened the door to "issues-oriented" partisan programming was "likely to create group polarization."[27] Sunstein's prediction has proven remarkably accurate. Partisan polarization has worsened in the ensuing decades and is today more divided than in any other

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recent time. This was a predictable—and predicted—result of scrapping the fairness doctrine.[28] "The United Kingdom," notes *Washington Post* columnist Max Boot, "doesn't have its own version of Fox News, because it has a government regulator that metes out hefty fines to broadcasters that violate minimal standards of impartiality and accuracy."[29] Since the demise of the fairness doctrine, the United States has not grown back its set of regulatory teeth. Accordingly, something like the fairness doctrine would be a valuable component of any adjustment to the media environment where restricting disinformation is the goal.

My recommendation regarding any particular proposal would be to ensure that those whose conduct amounts to fraud on the public under the chapter 7 elements be deemed to be engaging in unprotected speech. What legal remedies or punishments follow from engaging in such speech will be up to legislatures to craft. That will depend on the language of the black letter law. The First Amendment should not shield those who defraud the public and cause massive harm as a result. This applies with equal force to those who own media companies. Thus, although the press must be protected against government censorship, control, or coercion, they should not be given the green light to defraud in ways that cause grave injuries. Those who carry out such frauds should be stopped, punished, and held liable.

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CORPORATE LIES

The final category of disinformation I will address—briefly—consists of falsehoods disseminated either by private industry or on its behalf. I call this category *corporate lies*. From a legal perspective, it is the least controversial of the four. People and political leaders rarely run to the defense of corporations spreading falsehoods. Unlike lies by politicians, government leaders, and the media, which people by and large see as inevitable or necessary, most people have little problem with the idea of restricting false and misleading claims by corporations.

One reason is that, fundamentally, corporate speech is always ultimately aimed at profit. Sometimes it is transparently so, such as an ad campaign to gain new customers, sell more products, or increase market share. Or it may be a message less directly related to profit, at least on the surface, such as a campaign to demonstrate how environmentally conscious a company

is or how much money it gives to charitable causes, like building hospitals for sick children or alleviating poverty in undeveloped nations. But corporate speech, by its very nature, must ultimately, and necessarily, be calculated to make money. That is the corporation's purpose, after all. And the same can be said for messages generated by anyone working on their behalf.

And whereas media speech could be viewed through the same lens—that is, there is a strong argument that there is no practical difference between messages disseminated by Coca-Cola and those disseminated by CNN—that is not how most view the dichotomy. Coca-Cola is viewed, rightly, as fundamentally out to make a buck. CNN is viewed, rightly or wrongly, as fundamentally furthering a sacred civic duty. The fact *both* are among the largest for-profit corporations headquartered in Atlanta, just blocks from one another, and are in most other ways functionally identical—one profits by selling sugary beverages and the other profits by selling ad space—is overshadowed by the fact only one of these companies, CNN, is seen as engaging in and being protected by a fundamental constitutional right.

Reporting the news is integral to democracy. The press informs the public about what is going on and spreads ideas and beliefs to the people so they can choose which to adopt and which to reject. This informs voters about the issues at stake in elections. It helps ensure elections are valid and meaningful. Government interference with the dissemination of ideas and beliefs, which all media are involved with to a greater or lesser extent, was rejected by the framers of the Constitution. That was a motivating factor for the creation and passage of the First Amendment: to stop government censorship and suppression of political speech.

And no matter how broadly one construes the political speech category, commercial ads do not fit into it. In fact, virtually no commercial messages do. Commercial speech is categorically *not* political. And for most of American history, commercial speech, as distinguished from political speech, had *no First Amendment protection at all*. None. Cities, states, and the federal government could pass laws restricting, or even banning, the ways companies may advertise, market, solicit, and label goods and services, and courts allowed all such restrictions without, it seems, even *thinking* about free speech let alone going through any First Amendment analysis.

That changed in 1976. That year, the Supreme Court in *Virginia State Board v. Virginia Citizens* struck down a state law that had made it illegal

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for pharmacies to advertise the price of drugs. The Court held that even though "the advertiser's interest is a purely economic one," "that hardly disqualifies him from protection under the First Amendment." Up until that case, it *had*, in fact, disqualified commercial speakers of free speech protections. The Court, seemingly self-conscious of the radical change it was making to the law, added, by way of justification, that the First Amendment protects not only the right of the pharmacist to display drug prices but also the right of customers to receive that information about drug prices.[30]

Since 1976, commercial speech has held limited, weak constitutional protections. They are markedly less robust than those for most other kinds of speech. Accordingly, when courts analyze a law restricting speech, it must be determined at the outset whether the speech it restricts is commercial. If it is, a less rigorous test applies. Thus, a law restricting commercial speech is—all other things being equal—generally more likely to be upheld than a law restricting any other kind of protected speech. But perhaps more importantly for the discussion here, the limited protections for commercial speech do not extend *at all* to commercial speech that is false or misleading. That is, "Under First Amendment doctrine, commercial speech that is false or misleading may be prohibited entirely."[31] False or misleading commercial speech can, consistent with the Constitution, be banned.

But if that is the case, how come the fossil fuel industry was able to mislead the public about climate change? How come the law allowed Big Tobacco to mislead about the dangers of smoking? How come companies regularly mislead the public in ways that result in public harms? There seems to be something missing. A contradiction. How can companies be prohibited from lying to the public, on one hand, but be routinely allowed to lie to the public in ways that cause widespread illness, death, and environmental destruction on the other?

Two reasons.

First, many messages corporations disseminate become "political" somewhere between the boardroom and the voting booth. Here's how it can happen. When the fossil fuel industry decided to defraud the public about global warming, it did so for the same reasons it makes any decision: for profit. But because it pushed its message to the public through political and media intermediaries, and it did so in a partisan manner, each side of the political aisle had distinct positions on the issue. This "politicized" it. Because global warming became a political issue—which did not happen

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by accident; the industry paid big money to politicize it—the false and misleading speech on global warming enjoyed all the protections of political speech even though it was 100 percent for the benefit of the industry that paid to generate and disseminate it.

Like fossil fuels, other giant industries do this kind of thing all the time: the big banks, big pharma, the pesticide industry, and on and on. This goes a long way to explaining why Wall Street firms can flood politicians with donations and campaign support and, in return, get tax cuts in many forms, from capital gains to corporate profits. Corporations are very often able to spread self-serving and highly profitable false and misleading claims because, ultimately, those claims are deemed political, not commercial.

The second reason corporations are so often able to mislead the public with profitable falsehoods, and get away with it, is that the misleading claims pertain to harms and dangers that are difficult to pin down and measure. Fossil fuels. Tobacco. Asbestos. Sugar. Soft drinks. Fast food. Leaded gas. Every single one of these products causes immense harm to human health and life. But to tie the harm caused to any particular consumption of or exposure to the product involves a long and complex chain of causation. The harms take a long time to develop, are difficult to measure, and are widely dispersed rather than concentrated on particular individuals. Each harm has many possible contributing factors.

This does not make the harms they pose any less dangerous. It does not make the threat any less urgent. But it does make it more difficult to pass laws aimed at stopping harm caused by particular products because the political will to make such changes cannot arise in an environment where the money being spent to let these industries continue their destructive profit-making models poses a near-impossibly high hurdle to political action.

Ultimately, however, the root problem we face with reining in harmful disinformation from corporations is the same we face with all other kinds. The law allows it. We can certainly hope or expect that those in corporate boardrooms and high-rise offices will act in an ethical manner. But we cannot count on it. The job of a for-profit company has nothing to do with public good. It is to generate profit and increase shareholder value. If a CEO were to, hypothetically, prioritize public health over profits, they would quickly be out of a job, replaced by another CEO who operated according to the incentives imposed on them by the for-profit system. The CEO's duty of loyalty is to the corporation and its owners, not to the public. The only real limits on a corporation's actions when it comes to protecting the

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public are those imposed by law. Because although a corporation is tasked with doing everything in its power to make money and increase value, it must do so within the law. Thus, our best hope to stop fraud on the public in the corporate realm, as in any other, is to impose legal restrictions on those who carry it out.

Those legal restrictions should be passed by Congress or by state legislatures. Although I argue they should, or at least could, consider my fraud-on-the-public elements from chapter 7 as a guidepost for how to tailor such laws, I did not, in that chapter or anywhere else in this book, propose exact wording for any civil statute or criminal code. Instead, I have proposed a category of unprotected speech—or, rather, arguably a subcategory of an existing category of unprotected speech—and legislatures could use it to create their own laws restricting fraud on the public.

I believe we should ban fraud on the public, just as we ban so many other kinds of fraud. But how we ban it and what language to use in regulations is up to legislatures and executive agencies to ultimately figure out.

These restrictions will almost certainly look very different in the realm of corporate speech than they do in the realm of other kinds of speech with higher protections. But this is an urgent task we have been delegated. We must, to protect victims, prohibit fraud on the public, punish those who perpetrate it, and provide an avenue for those it harmed to seek damages.

Politicians are, as I write, defrauding their way to office. Companies are defrauding their way to wealth. Media are defrauding to increase engagement. We face a choice. We can continue to reward those who defraud us with wealth, power, and platform or we can stand up to them and say, "No." We can demand good faith and honesty from those who hold the public's attention. We can stop them, and protect ourselves, if we work together and stand up for what is undeniably right.

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COMMISSION ON DEFRAUDING THE PUBLIC

In this chapter, I argue Congress and state legislatures could, and should, pass laws to make fraud on the public actionable as both a crime and a tort. Amending the law is the best option we have to slow the spread of harmful disinformation, to stop the scourge of deceit by those in power. It is urgent we do this. If we do, it will be up to legislatures to set the precise boundaries of such laws.

But even if a legislature passed one or more laws aimed at fraud on the public, such laws, in and of themselves, might not be sufficient to adequately address the problem. Let me explain.

The problem of fraud on the public is unlike most other kinds of wrongdoing the law aims to address. What makes it different is that those who perpetrate the wrongdoing at issue are often the ones in charge, not only of the lawmaking function and all other levers of government but also of the economic and financial systems and all major media. That is, those who defraud the public, and would be targeted by these new laws, are, by and large, those with the power and wealth to shape the lawmaking enterprise. It is doubtful, at best, to expect laws aimed at prohibiting what has been for decades accepted and allowed by those in power to stop them from doing what they are so used to doing. In many ways, the change proposed is not just a change to the legal structure but to the culture, or at least to the subset of it represented by the powerful. It has been taken for granted for decades that defrauding the public is a legitimate way to engage in politics, media, and business. To stop this, it *might* be enough to simply amend the law. But there are good reasons for believing this will not be enough.

After all, there are already laws on the books against defrauding the public, at least in certain contexts, and those laws have failed to stop many who hold the public megaphone. To give one example, the state and federal racketeering laws make it a crime to conspire to carry out fraudulent activity, which includes not only criminal or civil actionable fraud but also in some cases defrauding the United States or the public more generally. Thus, while the statutes themselves do not spell out "fraud on the public" per se, individuals and organizations have, on some occasions, been found guilty of racketeering because of their involvement in a conspiracy to defraud the public.[32] But such instances are the exceptions. The general rule is that those who speak to the public are generally free to spread self-serving false and misleading claims.

Two alternative conclusions can be drawn from this. Either the racketeering laws are not designed to actually address fraud on the public but rather some far narrower sliver of conduct within it, or the racketeering laws are designed to address fraud on the public but are simply not applied in a consistent or effective manner—meaning the racketeering laws are lousy at their job. In either case, neither racketeering nor any other criminal or civil law actually addresses the vast number of fraudulent messages spread to the public.

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An almost identical conclusion can be drawn regarding fraud laws in general. Although criminal and civil fraud laws can be, and sometimes have been, deemed to apply to fraud on the public, they, like the racketeering laws, have failed to stop the problem. Whatever laws we now have, which could in theory work, don't. They are not enough.

To address this problem effectively, we can look to an example of something that *has* worked well to rein in at least one kind of fraud on the public: securities fraud.

For well over a century, securities fraud claims in the United States and England were handled the same way as any other kind of fraud claim: under common law fraud.[33] If an investor was swindled while purchasing or selling stock in a company, the remedy was common law fraud. If a corporate executive engaged in insider trading, that, too, was handled by common law fraud.

This made sense, or at least seemed to, for a little while. After all, if one engaged in fraud, then should not fraud law (i.e., common law fraud) determine whether the conduct is actionable?

But by the early 1900s, it became obvious the then-current fraud law, which is virtually identical to today's fraud law, was woefully inadequate to address securities fraud. In fact, the law was so ineffective that, in a span of a few years, all states but one passed laws to specifically target securities fraud.[34] These laws provided a new statute-based fraud claim aimed at those who carried out fraudulent schemes in the purchase and sale of securities.[35] Then Congress passed the Securities Exchange Act of 1934 (the Act).[36] Section 10(b) of the Act prohibited securities fraud. Upon the passage of that law, and clarified by the adoption of Rule 10b-5 that same year, securities fraud was addressed from then on under Section 10(b). Accordingly, in a span of about two decades, securities fraud under American law was removed completely from the common law fraud realm and placed into the new state and federal securities fraud statutory frameworks.

This radical shift in the law responded to a radical flaw. Fraud law had never done a good job of protecting victims of securities fraud. Nor had it adequately protected society or the markets. The state and federal securities laws were "enacted largely due to the inadequacy of the common law of fraud in impersonal securities transactions."[37] The purpose of these new securities laws was "to prevent the sale of fraudulent securities,

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particularly to unsophisticated investors."[38] In fact, the state securities laws became known as "blue sky" laws because, as one commenter remarked, many securities salesmen were so dishonest they would sell "building lots in the blue sky."[39]

The result?

A new standard was imposed in cases involving securities that made it easier for plaintiffs to prove actionable fraud. Plaintiffs no longer had to prove all of the common law fraud elements. This made sense for securities fraud claims. After all, common law fraud developed to address primarily personal deceptions. Although securities fraud schemes such as insider trading and misleading statements in a prospectus are deceptive devices intended to defraud individuals, they are significantly distinct from the one-on-one schemes traditionally addressed by common law fraud. It is not surprising, then, that under the common law framework, "the unique factual circumstances of securities fraud made it difficult for plaintiffs to show the elements of reliance and intent."[40]

The new securities fraud laws relaxed the strict common law fraud elements in important ways, allowing harmed investors to seek redress, even where they could not satisfy all of the fraud elements.[41] Securities fraud law grew out of common law fraud and still closely resembles it in important ways.[42] However, courts have consistently held that Section 10(b)'s general purpose was to provide relief for victims that otherwise had no remedy in common law. The Seventh Circuit, for example, noted that "it is clear from such examination that the statute was meant to cover more than deliberately and dishonestly misrepresenting or omitting material facts which ordinarily are badges of fraud and deceit."[43] Knowledge of falsity or misleading character of statement and bad faith intent to mislead or misrepresent are not required to prove violation of Section 10(b), which prohibits manipulative and deceptive devices.[44]

In one early case decided by the US District Court for the District of Columbia, the court said, point blank, that securities fraud under the Act was *not* equivalent to common law fraud: The court held:

> Petitioner's argument in this court with all its many facets amounts to no more than a claim that common law fraud has not been proven and that the registration cannot be revoked without such proof. We must reject such a claim. . . . To say, as petitioner does, that every element of common law fraud must be proven in order to validate the revocation of a broker-dealer registration is to say that

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> Congress had no purpose in enacting regulatory statutes in this field and that its legislation in the field is meaningless. On the contrary, it has long been recognized by the federal courts that the investing and usually naive public needs special protection in this specialized field. We believe that the Securities Act and the Securities Exchange Act were designed to prevent, among other things, just such practices and business methods as have been shown to have been indulged in by the petitioner in this case. Those practices described above when viewed in the setting portrayed in this record can only be described as manipulative, deceptive, and fraudulent.[45]

Courts have now repeatedly held that proof of common law fraud is not required to sustain cause of action under Section 10(b).[46]

Under common law fraud, corporate insiders, broker-dealers, and others with greater information than the investing public could, and did, use that information, or disseminate false information contradicting the true information, to deceive investors. Yet, these deceptive practices often did not run afoul of common law fraud. Thus, when the new securities fraud laws were passed, although the new statutory securities fraud cause of action was similar to common law fraud in many ways, it also had important differences. The unique aspects of the capital markets caused different weight to be given to each fraud element as they were transferred into the world of securities fraud.[47] For instance, "materiality" of the falsehood was substituted in to replace the common law fraud requirement that the victim's reliance must have been "justifiable."[48] Similarly, securities fraud has a lower standard for reliance than common law fraud, "which has vast ramifications" in the securities fraud realm.[49] In common law fraud, a victim's reliance on a falsehood must be actual and justifiable; by contrast, liability in securities fraud may arise under presumed reliance according to the fraud-on-the-market theory, provided the misrepresentation is material. This makes it often not necessary to prove any personal reliance at all, as the entire investing public is presumed to rely on all publicly available information, no matter how truthful or false it may be.

This teaches an important lesson.

Securities fraud differs from other frauds primarily because it was, and is, often structured as a fraud on the public. The fact it operates as a fraud on the public sets it apart. This made it a poor fit for existing fraud law, which had developed primarily to address one-on-one fraud.

Although securities fraud was, in theory, actionable common law fraud,

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those who carried it out too often profited from it nonetheless. And those who fell victim to it too often were left without legal recourse. The law failed to effectively address it.

But the "fix" for the securities fraud problem involved more than simply changing the law. Apart from the new legal standard, a federal government agency was established to investigate and prosecute securities fraud: the Securities and Exchange Commission (SEC). The SEC is an independent federal agency, meaning that, while technically part of the executive branch, it possesses regulatory, rulemaking, and enforcement authority while remaining insulated from presidential control.[50] It has, since it was established almost a century ago, functioned in a manner most agree is politically independent. There have been no serious accusations of partisanship or corruption at the SEC. No one claims it is perfect. But, when compared with executive departments headed by a cabinet secretary, the SEC is broadly considered apolitical.[51]

The relatively effective reining-in of securities fraud did not happen by changing the law alone. Rather, it involved the establishment of an independent agency charged with investigating and prosecuting claims against those who engage in securities fraud.

Could a similar agency help rein in fraud on the public more broadly?

Some critics recoil at the idea of creating and SEC-type agency to address fraud on the public. One popular slogan is that any such agency would amount to a Ministry of Truth. Some of these concerns are well-placed. I share them. No one but a dictator desires a Ministry of Truth. But I wonder where these critics are when it comes to the existence and work of the SEC. They seem to have no problem with it. But that agency does, it seems, the very thing these critics decry. It investigates allegations of fraudulent schemes involving false and misleading claims *made to the public*. In cases where prosecution is warranted, the agency pursues civil actions. If warranted, it refers cases to the Department of Justice (DOJ) to prosecute criminally. The DOJ, then, like the SEC, makes a judgment call on whether actionable fraud took place. This involves, in part, determining that false or misleading claims or omissions were made, including whether such lies were made to the public.

Does this make the SEC or the DOJ a Ministry of Truth?

Or what about the courts in charge of hearing each case? In court, a

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judge or jury is tasked with determining the facts in the case before it. If the case involves, say, common law fraud, securities fraud, or false advertising, or any other fraud-based claim, the court must determine whether false or misleading claims were made. Does this make state or federal courts Ministries of Truth?

At some point, it becomes plain what is actually going on with the Ministry of Truth argument. It is a convenient boogeyman rhetorical tool. That does not mean it is not a valid concern. It is. But too often, it is a lazy accusation—easy to make but missing the point.

I do not advocate for the establishment of any such agency. But to discuss this issue requires at least thinking this possibility through. After all, others will propose it, even if I don't.[52] If, say, a state or the federal government actually *did* establish a commission on defrauding the public, or if it were to add a subdepartment of an existing agency to be tasked with this role, it seems clear it should be restricted in two important ways.

The first way it should be restricted is in its scope. Its charter and authority should be confined to fraud. It would be, indeed, a horrible and frightening thought if the government were to establish a commission to fight disinformation, misinformation, fake news, falsehoods, propaganda, or any other amorphous and hopelessly vague category of speech. Such a government agency could, and almost certainly would, be misused for the political aims of whoever is in charge. It would quickly become a tool to suppress and censor opponents. I include the topic of establishing an agency in this book primarily to warn against doing it in a manner that would make the cure far worse than the disease. If such an agency or subagency were created, the scope of its investigatory and prosecutorial powers must be narrowly tailored to address only fraud on the public, or some narrower category within it.

The second way such an agency should be restricted—and I argue *must* be restricted—is politically. It must be insulated from partisan meddling. Handing the government the power to prosecute some category of conduct called "fraud on the public" has enormous potential for misuse. This is actually where the Ministry of Truth critics make an important point. If any prosecutorial or judicial authority becomes infected with partisan political will, if it becomes corrupt, if it answers not to the law and to notions of fairness and justice but to the will of a leader or a party, then it would have ruinous consequences. Like any other government agency, but particularly those in charge of applying the law, politics make it not only ineffective but malevolent.

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Thus, politics must be kept out of such an agency. Indeed, the only reason it is even worthwhile to engage in this thought experiment is that the dangers and harms resulting from fraud on the public are so great today—not in theory, but in our daily lives—that solutions must not be discarded before we can be sure they are not worth the effort. I find it easy to dismiss most people's proposals for such an agency. But I also recognize that there is a "strong argument," as Professor Sunstein points out, "in favor of ensuring that any regulation of falsehoods in politics is enforced by an independent agency, such as or akin to the Federal Election Commission."[53] Like the Federal Election Commission (FEC), the SEC, too, serves as a model. The SEC, appropriately limited in scope and insulated from political pressures, has handled one type of fraud on the public for almost a century without incident. Accordingly, if the anti-fraud-on-the-public agency is both limited in scope and insulated from political pressures, I believe it might be of more help than harm. But the devil is in the details. The effectiveness of such an agency would depend on exactly how it was set up, how it was run, and who was put in charge.

THE SEARCH FOR SOLUTIONS WILL ALMOST CERTAINLY CONTINUE FOR DECADES TO COME

Agency or no agency, there is no easy fix for the problem of fraud on the public. It runs deep, involving traits we share that go back millions of years. We are incredibly vulnerable to deceit and yet, when it comes to fraud on the public, we have erected laws and societal norms as if we are all expert lie detectors. This has caused enormous individual and societal harm. It has given a green light to those who aim to profit off fraud. It has caused illness, suffering, death, and environmental catastrophe. For those with wealth and power, it has been a gift. We have no hope of overcoming it without changing our approach, and ultimately changing the law.

At a minimum, we need to refer to and treat the harmful disinformation politicians, the media, and corporations spread like any other kind of fraud. We should look upon it with just as much disdain and skepticism. We need to treat profitable falsehoods that cause widespread harm the same way we treat actionable fraud. This kind of harmful and manipulative speech should not be protected by the First Amendment. Like personal fraud, fraud on the public should fit inside the fraudulent speech exception. This

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would de-weaponize the First Amendment and shift its focus back to protecting the weak rather than empowering the strong. We must also pass laws to prohibit fraud on the public, punish those who carry it out, and compensate those it harms.

These are, of course, lofty ideas. Their success or failure will depend on how each is pursued. If the solutions to this problem are not implemented carefully, the cure might prove worse than the disease. This does not, however, mean we should throw up our hands and say it is no use trying. That would only reward the fraudsters who profit off the current system. It would also leave us and our descendants vulnerable. To protect ourselves against the menace of fraud on the public, we must first recognize it exists, and then we must do the hard work of finding the best way to stop it. This will take years.

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Conclusion

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In his book *The City of God*, Saint Augustine of Hippo told of a pirate captured by Alexander the Great's army and brought before the king. "When the king asked him what he meant by infesting the sea," Augustine wrote, "the pirate defiantly replied: 'The same as you do when you infest the whole world; but because I do it with a little ship I am called a robber, and because you do it with a great fleet, you are an emperor.'"[1] This apocryphal tale, written in the early fifth century C.E., captures an essential truth about the inequality of justice.

The same observation has been made by eminent thinkers since at least as far back as Ancient Greece. Thucydides wrote in his *History of the Peloponnesian War*, in the fifth century B.C.E., that "you know as well as we do that right, as the world goes, is only in question between equals in powers, while the strong do what they can and the weak suffer what they must."[2] Plato also observed the phenomenon and included a discussion of it in *The Republic*. In the fourth century B.C.E., he wrote:

> If you are caught committing crimes on a small scale, you are punished and disgraced; they call it sacrilege, kidnapping, burglary, theft and brigandage. But if, besides taking their property, you turn all your countrymen into slaves, you will hear no more of those ugly names; your countrymen themselves will call you the happiest of men and bless your name, and so will everyone who hears

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> of such a complete triumph of injustice; for when people denounce injustice, it is because they are afraid of suffering wrong, not of doing it.[3]

Russian novelist Fyodor Dostoevsky repeated the same idea over two millennia later in his 1866 novel *Crime and Punishment*, writing, "The ordinary must live in obedience and have no right to transgress the law, because they are, after all, ordinary. While the extraordinary have the right to commit all sorts of crimes and in various ways to transgress the law, because in point of fact they are extraordinary."[4] But perhaps the most well-known expression of this fundamental truth was written by the French biologist and philosopher Jean Rostand, who penned the following in France on the eve of the second World War: "Kill a man, one is a murderer; kill a million, a conqueror; kill them all, a God."[5]

Replace the word "kill" with "defraud" and Rostand's remark aptly captures the problem I set out to describe, discuss, and address in this book. The act of defrauding another person makes one a criminal. They are despised by others in society and held criminally and civilly liable under law. The act of defrauding millions, however, makes one a leader—of industry, finance, media, or state. And the act of defrauding everyone makes one, perhaps not a God, but the closest thing to it on Earth. Our laws today not only permit this but guarantee it. Diagnosing the disease is only the first step in the long journey toward finding the cure. Pursuing the cure to the disinformation disease is one of today's most pressing and formidable challenges.

I am hopeful we are up for it, that we will find a way to win the war on those defrauding the public, but I am under no illusions I will see this occur in my own lifetime. Instead, I see the next few decades as a period where society might, at best, begin to recognize that weaponized falsehoods pollute people's minds the same way mercury pollutes drinking water. Trace amounts might be tolerable, though the ideal level would be zero. If we look at the disinformation problem this way, it will change the way we think—not only about the problem but about possible solutions. And this—merely changing our perspective—will itself be a huge victory. This book, then, I hope will be part of a larger effort to nudge the thinking on, and discussion of, this problem in the direction of treating it as something that, the longer we live with it, the worse it will get.

I wish it were as simple as highlighting the causal connection between large-scale dishonesty and the harm it causes to individuals, society, and

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the environment. But because it is speech, those profiting off falsehoods enjoy the same protections as those expressing honest ideas and beliefs. For that reason, it is paramount that we treat the problem as one centered on *fraudulent* speech rather than merely on *false* speech.

I offer my definition of "fraud on the public" as a model—with plenty of room for improvement, I am sure—for scholars, courts, or legislatures to use in continuing the discussion and debate on this topic and hopefully to enact laws aimed at curtailing some of the largest and most destructive fraud schemes today's law endorses. I recognize my definition is, at best, a starting point, not the final answer. I aim only to contribute to the search for answers, to flip the way we frame and think about the issue on its head. I believe the way we address it today is backward. We should treat harmful disinformation not as automatically protected speech in need of a First Amendment exception; rather, when it involves purposeful deception that causes substantial harm, the disinformation should be analyzed as potentially fraudulent speech that, if it meets the elements, is unprotected under the First Amendment. This idea might appear radical to some, but this is in large part because the law today is so radically backward on this issue. All I propose is that fraud on the public be handled the same way as other fraud. The true difficulty lies in determining the correct parameters for what should constitute fraud on the public.

Establishing these parameters will take a careful balancing of interests. Sunstein's four-factor approach is a helpful starting point. He suggests looking at state of mind, magnitude of harm, likelihood of harm, and timing of harm.[6] These factors, at a minimum, must be weighed in the search for where we should draw the line between unacceptably harmful disinformation and the disinformation we must, despite its harmfulness, live with—that is to say, what the exact parameters should be for *actionable* fraud on the public.

As my own worst critic, I sincerely wonder if, perhaps, my critics are right. Maybe, as they argue, the system we have is the best we can do. Maybe we really must allow those with wealth and power to defraud the public at large, to manipulate the minds and actions of millions for self-serving purposes. Maybe the alternative—holding them accountable—will cause even greater harm. This, like all possible futures, is not yet known. And it is certainly not impossible. But even if that is the case, and my argument is wrong, I believe it is nevertheless at least worth opening one's eyes and seeing what is happening, recognizing it for what it is, even if there is little

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or nothing to be done about it. Because without even recognizing the problem, how can we possibly know if a solution might be found?

This is the most difficult hurdle to overcome when confronting this problem: many deny it exists. These folks appear to have no issue with politicians defrauding their way to public office, media defrauding viewers to generate clicks and views, and corporations defrauding millions to avoid regulation and increase profits. Personally, I find the harm caused by these mass scale frauds to be unacceptable. But others see it as not that big a deal or simply the way of the world.

Which of us is right? Likely, we both are—to an extent. That is, we are both right and we are both wrong. The truth usually lies somewhere in between the two extreme views on any big question. Our best hope of finding that truth is not by making bold claims but by stepping back and getting a broader view of the problem, by learning from history and making use of the latest knowledge, by engaging in debate and trying different approaches and options, keeping what works and discarding what does not.

I believe one day we will solve the problem of fraud on the public. One day, we will treat it the same way we treat small-scale fraud. It will never go away, but we will put laws in place to stop at least some of the most destructive instances of it. But how long will it take? The earlier we confront it and deal with it, the more harm will be averted. My aim is to help start the conversation so we can begin the search for solutions. I hope this happens soon. I hope we look at the emerging science on deception detection and realize just how gullible we are hardwired to be, not only to one-on-one lies but to disinformation aimed at the masses. I hope we learn how frequently those with the megaphone manipulate and mislead us, and how much damage those falsehoods cause. And once we realize we are being duped by those we trust, I hope this makes us angry enough to do something about it.

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Notes

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INTRODUCTION

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CHAPTER 1. THE LIAR'S ADVANTAGE

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CHAPTER 2. WHEN DISHONESTY CROSSES THE LINE

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CHAPTER 3. DEFRAUDING THE PUBLIC

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political question doctrine have led some commentators to declare the doctrine dead," see Beske, "Political Question Disconnects," 39. Even if the doctrine exists, however, it does not necessarily limit regulating political speech in any way inconsistent with my fraud on the public definition. The second objection is the idea that prohibiting false and misleading political speech, where such speech satisfies the elements of fraud on the public, might effectively include a substantial portion of all political speech. But if that is the case, it would mean truthfulness has no place in political speech. This, then, would be an argument for regulating fraud on the public, not against it.

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> In the long run, true ideas do tend to drive out false ones. The problem is that the short run may be very long, that one short run follows hard upon another, and that we may become overwhelmed by the inexhaustible supply of freshly minted, often very seductive,

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> false ideas. . . . Genocide is an example. . . . Truth may win, and in the long run it may almost always win, but millions of Jews were deliberately and systematically murdered in a very short period of time. Moreover, before those murders occurred, many individuals must have come "to have false beliefs.".

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CHAPTER 4. THE PRICE OF DISINFORMATION

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primary ways. First, the government regulators refused to ban, limit, or even regulate TEL in gasoline (Kitman, "The Secret History"). On the contrary, though the dangers of lead were known, US regulators sided with the industry for decades. This left the industry to essentially regulate itself. The second thing the US government did was it refused to fund any research into the dangers of leaded gasoline. Instead, all such research was underwritten by the leading leaded gas companies, and the results of this research were, not surprisingly, favorable to the industry. Clair Patterson testified as follows to a US Senate subcommittee on air and water pollution in 1966:

> It is clear, from the history of development of the lead pollution problem in the United States that responsible and regulatory persons and organizations concerned in this matter have failed to distinguish between scientific activity and the utilization of observations for material purpose. [such utilization] is not science . . . it is the defense and promotion of industrial activity. This utilization is not done objectively. It is done subjectively. . . It is not just a mistake for public health agencies to cooperate and collaborate with industries in investigating and deciding whether public health is endangered—it is a direct abrogation and violation of the duties and responsibilities of those public health organizations. In the past, these bodies have acted as though their own activities and those of lead industries in health matters were science, and they could be considered objectively in that sense.

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CHAPTER 5. FRAUD LAW PARADOX

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Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting): "There is no sugarcoating today's opinion. The majority . . . prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."

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CHAPTER 6. CALL IT FRAUD

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CHAPTER 7. DE-WEAPONIZE THE FIRST AMENDMENT

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48. New York v. Ferber, 458 U.S. 747 (1982).

49. *Alvarez*, 567 U.S. at 717.

50. *Alvarez*, 722.

51. The "actual malice" standard requires that the speaker of the falsehood either know it is false or communicate it with reckless disregard to its falsity. New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

52. This definition is tailored to conform to Supreme Court precedent. See *Alvarez*, 567 U.S. at 723, holding that "evidence that the speech was used to gain a material advantage" is a factor in favor of false speech being regulable under the First Amendment. It also substantially mirrors the definitions of common law fraud (in the tort context) and wire fraud (in the criminal law context). Listing the Illinois common law fraud elements, see, e.g., Duran v. Leslie Oldsmobile, Inc., 229 Ill. App. 3d 1032, 1039, 594 N.E.2d 1355, 1360–1361 (1992). Listing the elements of wire fraud, see United States v. Jinian, 725 F.3d 954, 960 (9th Cir. 2013). Discussing disinformation, a concept also incorporated into my definition of fraud on the public, see also Jason Pielemeier, "Disentangling Disinformation: What Makes Regulating Disinformation So Difficult?," *Utah Law Review* 2020 (2020): 919; Dean Jackson, "Issue Brief: Distinguishing Disinformation from Propaganda, Misinformation, and 'Fake News,'" National Endowment for Democracy, October 17, 2017, https://www

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54. Masson v. New Yorker Mag., Inc., 501 U.S. 496, 510 (1991).

55. New York Times Co. v. Sullivan, 376 U.S. 254, 279–280 (1964). Citing Masson v. New Yorker Mag., Inc., 501 U.S. 496, 510–511 (1991), noting that actual malice "means that the speaker must have intended to lie or acted with reckless disregard as to whether their statement was true or not," see Corbin, "The Unconstitutionality of Government Propaganda," 834–835.

56. *Masson*, 501 U.S. at 510: "The plaintiff must demonstrate that the author 'in fact entertained serious doubts as to the truth of his publication'" (citation omitted). See also Garrison v. Louisiana, 379 U.S. 64, 74 (1964): "Only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions."

57. Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 692 (1989): "Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category") (citation omitted). See also Corbin, "The Unconstitutionality of Government Propaganda," 835n142, summarizing the Court's holding in *Harte-Hanks*: "'The newspaper's inaction'—such as failing to listen to available tapes and interview a known key witness—'was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity' and amounted to actual malice" (quoting *Harte-Hanks*, 491 U.S. at 692).

58. Corbin, "The Unconstitutionality of Government Propaganda," 835, citing Lee Goldman, "False Campaign Advertising and the 'Actual Malice' Standard," *Tulane Law Review* 82 (2008): 902: "The Court, in Brown v. Hartlage, apparently imported the

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actual malice standard to state regulation of false campaign advertising," see Corbin, "The Unconstitutionality of Government Propaganda," 835. Establishing rule that a public official cannot "recover[] damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice,'" see *New York Times*, 376 U.S. at 279–280. Involving a *Time* magazine news story that misrepresented a family's experience as hostages, see Time, Inc. v. Hill, 385 U.S. 374, 378, 387–388 (1967). Involving *Hustler* magazine's parody ad of televangelist Jerry Falwell, see Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 48, 56 (1988). Noting that "the Court ruled that recovery of damages for 'false reports of matters of public interest' required proof that the defendant published the report with actual malice," and "the Court ruled that a public figure like Falwell could recover for IIED in such circumstances only by demonstrating that the defendant had made a false statement of fact about that figure with actual malice," see Nat Stern, "The Force of a Legal Concept: The Steady Extension of the Actual Malice Standard," *First Amendment Law Review* 12 (2014): 456 (footnote omitted).

59. See Cass R. Sunstein, *Liars: Falsehoods and Free Speech in an Age of Deception* (Oxford: Oxford University Press, 2021), 112: "Though *New York Times* applied the actual malice standard to libel, it might be expanded to cover many other false statements. If the speaker knew that his statements were false or acted with reckless indifference to the question of truth or falsity, the Constitution might permit the government to impose punishment, regulation, or liability."

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65. See Richard K. Sherwin, "Anti-Speech Acts and the First Amendment," *Harvard Law & Policy Review* 16 (2022): 369–370.

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66. Chemerinsky, *The First Amendment*, 9.

67. Helen Norton, "Powerful Speakers and Their Listeners," *University of Colorado Law Review* 90 (2019): 443n4, citing Immanuel Kant, *Grounding for the Metaphysics of Morals*, trans. James W. Ellington, 3rd ed. (Indianapolis: Hackett, 1993 [1785]), 63–65).

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69. Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

70. Republican Party of Minnesota v. White, 416 F.3d 738, 749 (8th Cir. 2005), quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995); Goldman v. Weinberger, 475 U.S. 503, 530 (1986) (O'Connor, J., dissenting).

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72. Ex parte Lo, 424 S.W.3d 10, 14–15 (Tex. Crim. App. 2013); see also United States v. Playboy Ent. Grp., Inc., 529 U.S. 803 (2000); Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622 (1994); Ashcroft v. Am. C.L. Union, 542 U.S. 656, 660 (2004).

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77. Abigail Hall, "Ending Intimate Partner Homicide: A Call for Reform of Kansas Protective Order Statutes," *University of Kansas Law Review* 63 (2015): 1119. For remedying effects of past discrimination, see also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007). For diversity in higher education, see Grutter v. Bollinger, 539 U.S. 306, 343 (2003). For child abuse, see Moore v. Sims, 442 U.S. 415, 434–435 (1979). For highway safety, see Mackey v. Montrym, 443 U.S. 1, 17–19 (1979).

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CHAPTER 8. PROHIBIT FRAUD ON THE PUBLIC

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8. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

9. Declaring unconstitutional Ohio statutes criminalizing false statements by candidates during political campaigns, see, e.g., Susan B. Anthony List v. Driehaus, 814 F.3d 466, 476 (6th Cir. 2016). Applying strict scrutiny to a misleading political speech regulation to find a "strong likelihood" that rule was unconstitutional, see Winter v. Wolnitzek, 56 F. Supp. 3d 884, 898–899 (E.D. Ky. 2014). Listing false political speech laws, including ones struck down in Louisiana and Massachusetts, see Ross, "Ministry of Truth," 383n94.

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20. Nevada Comm'n on Ethics v. Carrigan, 564 U.S. 117, 124–127 (2011).

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27. Cass R. Sunstein, *Republic.Com* (Princeton: Princeton University Press, 2001), 74. See also Marvin Ammori, "The Fairness Doctrine: A Flawed Means to Attain a Noble Goal," *Administrative Law Review* 60 (2008): 881; Ammori, "The Awareness Doctrine," *Harvard Law Review* 135 (2022): 1908.

28. Noting that "from the dawn of broadcasting until the late 1980s, the federal government vigorously employed substantive media regulations—legal guidelines about the substance of programming—to try to ensure that the broadcast industry would serve the public interest," see Gregory P. Magarian, "Substantive Media Regulation in Three Dimensions," *George Washington Law Review* 76 (2008): 845.

29. Max Boot, "Trump Couldn't Have Incited Sedition without the Help of Fox News," *Washington Post*, January 18, 2021, https://www.washingtonpost.com/opinions/2021/01/18/trump-couldnt-have-incited-sedition-without-help-fox-news.

30. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756–763 (1976) (cleaned up).

31. Serova v. Sony Music Ent., 13 Cal. 5th 859, 873, 515 P.3d 1, 8–9 (2022). See also 44 Liquormart, Inc. v. Rhode Island 517 U.S. 484, 501 (1996).

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32. Involving "an illegal scheme to defraud and cheat the investing public through false and materially misleading representations, " see Carter Footwear, Inc. v. Graystone World-Wide, Inc., 189 F.R.D. 328, 329 (M.D. Pa. 1999). For a RICO action involving an attempt "to defraud the public into thinking the subject lands were less contaminated than they really were," see Adams v. Ciba Specialty Chemicals Corp., No. CV 03–0566-WS-B, 2005 WL 8158577, at *2 (S.D. Ala. Feb. 21, 2005). Wherein RICO defendants allegedly "worked in concert to defraud the public and deceive regulators to prevent regulation that would have impeded their plan to keep selling to children," see In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prod. Liab. Litig., 533 F. Supp. 3d 858, 863 (N.D. Cal. 2021). Upholding a decision finding Philip Morris liable for RICO violations involving conspiracy to defraud the public concerning nicotine addiction, see United States v. Philip Morris, 566 F.3d 1095 (D.C. Cir. 2009). Discussing the tobacco industry's RICO conviction for defrauding the public, see Wes Henricksen, "Intended Injury: Transferred Intent and Reliance in Climate Change Fraud," *Arkansas Law Review* 72 (2020): 761.

33. Explaining that a securities fraud cause of action was originally based on common law fraud, see Mark A. Helman, "Rule 10B-5 Omissions Cases and the Investment Decision," *Fordham Law Review* 51 (1982): 399–400. Noting that common law fraud "served as the initial source of the elements of federal securities fraud," see Jill E. Fisch, "The Trouble with Basic: Price Distortion after Halliburton," *Washington University Law Review* 90 (2013): 900.

34. Paul G. Mahoney, "The Origins of the Blue-Sky Laws: A Test of Competing Hypotheses," *Journal of Law & Economics* 46 (2003): 229: "Between 1911 and 1931, 47 of the 48 states adopted statutes that regulated the sale of securities"; Jonathan R. Macey and Geoffrey P. Miller, "Origin of the Blue Sky Laws," *Texas Law Review* 70 (1991): 348–349.

35. Noting that New York's blue sky law "empowers the Attorney General to investigate and enjoin fraudulent practices in the marketing of securities" but does not eliminate common law causes of action and that "as is true of the federal securities acts, a variety of theories can be stated under the blue-sky laws," see Ronald E. Mallen, 2 Legal Malpractice § 13:163 (2021 ed.). See also Mahoney, "The Origins of the Blue-Sky Laws," 229; Macey and Miller, "Origin of the Blue Sky Laws," 348.

36. 15 U.S.C. §§ 78a and 78j(b), codified at 17 C.F.R. § 240.10b-5.

37. Noting that "Section 10(b) was enacted largely due to the inadequacy of the common law of fraud in impersonal securities transactions," see Paul N. Edwards, "Compelled Termination and Corporate Governance: The Big Picture," *Journal of Corporate Law* 10 (1985): 427. Discussing the growth of securities fraud cases brought under common law at the end of the 1800s and beginning of the 1900s, see Wes Henricksen, "Fraud Law and Misinfodemics," *Utah Law Review* 2021 (2021): 1247n90.

38. Mahoney, "The Origins of the Blue-Sky Laws," 229.

39. Mahoney, 229. See also Amanda J. Kiefer, "Kansas Blue Sky Is Not on the Market: The Deconstruction of Public Choice Theory through the Lens of the Kansas Blue Sky Law," *Washburn Law Journal* 42 (2003): 281: "The state security regulation is so named because the law was 'aimed at "speculative schemes which have no more basis

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than so many feet of blue sky.'"" (internal citations omitted). Noting that the first blue sky law "was designed primarily to protect purchasers of fraudulent securities from dishonest promoters who would sell shares in 'the bright blue sky itself,'" see Phillip Tocker, "The Texas Blue Sky Law," *Texas Law Review* 11 (1932): 102.

40. Ethan H. Townsend, "One Nation, Under Securities Fraud? The Third Circuit Notches a Win for Federalism in In Re Lord Abbett Mutual Funds Fee Litigation," *Villanova Law Review* 55 (2010): 1062.

41. See Townsend, "One Nation," 1062.

42. Brandon C. Helms, "The Supreme Court's Dura Decision Unfortunately Secures a Brighter Future for 10b-5 Defendants," *DePaul Law Review* 56 (2006): 203–204. See also Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 744 (1975): "It is not inappropriate to advert briefly to the tort of misrepresentation and deceit, to which a claim under Rule 10b-5 certainly has some relationship."

43. Kohler v. Kohler Co., 319 F.2d 634, 637 (7th Cir. 1963) (cleaned up).

44. *Kohler*, 319 F.2d at 637: The court there went on to state that "state court decisions involving fraud and misrepresentation are applicable only indirectly as supplementary aids in establishing standards of diligence. Congress has established its own standard which is to be measured by federal law interpreting the statute and the rule unhindered by restrictive applications of state common law." *Kohler*, 319 F.2d at 642.

45. Norris & Hirshberg, Inc. v. SEC, 177 F.2d 228, 233 (D.C. Cir. 1949) (capitalization cleaned up, footnotes omitted).

46. Baumel v. Rosen, 283 F. Supp. 128, 140 (D. Md. 1968), aff'd in part, rev'd in part, 412 F.2d 571 (4th Cir. 1969).

47. The torts of deceit and securities fraud are very similar, as is apparent in their shared elements. Both require (1) a misrepresentation, (2) the appropriate state of mind (scienter; i.e., knowledge of falsity and intent to deceive), (3) reliance on the misrepresentation, and (4) injury (5) caused by actions taken in reliance on the misrepresentation. Nicholas L. Georgakopoulos, "Frauds, Markets, and Fraud-on-the-Market: The Tortured Transition of Justifiable Reliance from Deceit to Securities Fraud," *University of Miami Law Review* 49 (1995): 673, 673n5.

48. Georgakopoulos, "Frauds, Markets, and Fraud-on-the-Market," 673, 673n5. Listing elements of private action in direct and personal transactions as "(1) a misstatement or an omission (2) of material fact (3) made with scienter (4) on which the plaintiff relied (5) that proximately caused his injury," see also Huddleston v. Herman & MacLean, 640 F.2d 534, 543 (5th Cir. 1981).

49. Georgakopoulos, "Frauds, Markets, and Fraud-on-the-Market," 673 (verb tense cleaned up).

50. Marshall J. Breger and Gary J. Edles, *Independent Agencies in the United States: Law, Structure, and Politics* (Oxford: Oxford University Press, 2015). Maintaining that "the Commission is an independent regulatory agency," see Andrew Downey Orrick, "Organization, Procedures and Practices of the Securities and Exchange Commission," *George Washington Law Review* 28 (1959): 52. Classifying the SEC as independent agency, see 44 U.S.C. § 3502(5). Stating "that it is commonly understood that the President may remove a commissioner [of the SEC] only for 'inefficiency,

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neglect of duty or malfeasance in office,'" see SEC v. Blinder, Robinson & Co., 855 F.2d 677, 681 (10th Cir. 1988).

51. "The SEC Is Not an Independent Agency," *Harvard Law Review* 126 (2013): 781–782.

52. This prediction was proven true prior to this book's publication. After writing this chapter, on April 27, 2022, the Biden administration established the Disinformation Governance Board (DGB), an advisory board of the United States Department of Homeland Security. The DGB was disbanded on August 24 of that same year.

53. Sunstein, *Liars*, 114.

CONCLUSION

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2. Thucydides, *The History of the Peloponnesian War*, trans. Richard Crawley (New York: E. P. Dutton, 1950), 403.

3. Plato, *The Republic*, trans. Francis MacDonald Cornford (Oxford: Oxford University Press, 1941), 25–26.

4. Fyodor Dostoevsky, *Crime and Punishment*, trans. Richard Pevear and Larissa Volokhonsky (New York: Vintage Books, 1993 [1866]), 259.

5. Jean Rostand, *The Substance of Man*, trans. Irma Brandeis (Westport: Greenwood Press, 1972 [1938]), 68.

6. See Cass R. Sunstein, *Liars: Falsehoods and Free Speech in an Age of Deception* (Oxford: Oxford University Press, 2021), 14–17.

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