

# The Price of Disinformation

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*The general public is misinformed on a broad range of vitally important topics, such as what the true crime rates are, whether the COVID-19 vaccine is part of a conspiracy to control the population, and who won the last presidential election. There are myriad factors contributing to this epistemic crisis wherein large segments of the public form false belief on these and other major issues. One factor is the vast amount of intentionally false speech disseminated to mislead the public, often termed “disinformation.” Leaders in politics, industry, and the media spread disinformation for their own self-serving purposes. These purposes include turning a profit, growing an audience, and getting elected to office. Although the law prohibits “fraud,” the legal definition of that term—that determines to a great extent the scope of which deceptions are actionable and which are protected speech—is narrowly focused on personal fraud. Schemes to defraud that are aimed at the public at large, by contrast, are rarely labeled “fraud” and are often protected under the First Amendment. Accordingly, disinformation is often allowed by law, despite the fact that (1) it is often knowingly false and disseminated for profit or advantage, and (2) it harms individuals or society. These harms include millions of deaths from tobacco, opioids, lead, and sugar; environmental destruction from climate change; and threats to democratic institutions. This Article highlights the difficult First Amendment issues posed by disinformation and argues that, in the search for solutions, we must consider the staggering amount of harm caused by disinformation. No adequate solution has yet been found for the mass proliferation of false and misleading claims, which is worse in today’s digital world than ever before. Indeed, given the complex and multi-faceted nature of the issue, any solution to it must be carefully tailored to regulate only narrow and well-defined categories of speech that are or should be unprotected, while carefully protecting the bedrock constitutional right to freedom of expression. But at the same time, the discussion around how to solve this problem must take into account the injuries caused by allowing unfettered self-serving falsehoods to be spread by those who hold the public megaphone.*

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#### I. DISINFORMATION POSES DIFFICULT FIRST AMENDMENT ISSUES, AND NO ADEQUATE FIX HAS YET BEEN FOUND

Although crime rates in the United States are falling in almost all major categories, and are at historically low levels,<sup>1</sup> seventy-seven percent of Americans believe crime is going up.<sup>2</sup> In other words, people’s view of crime is sharply at odds with the reality. This is not an anomaly. People hold mistaken beliefs on myriad issues of national importance. For instance, more than half of Republicans polled in a recent national survey said they believed the 2020 presidential election was “stolen” through massive “fraud”<sup>3</sup> even though there is no credible evidence it was.<sup>4</sup>

1. Statistics released by the Federal Bureau of Investigation reveal that not only is crime dropping across nearly all major categories—as compared with last year, violent crime fell 8% and property crime fell 6.3%—but it is now at its lowest level since 1961. Ken Dilanian, *Most People Think the U.S. Crime Rate is Rising. They’re Wrong*, NBC NEWS (Dec. 16, 2023), <https://www.nbcnews.com/news/us-news/people-think-crime-rate-up-actually-down-rcna129585> [perm.cc/XP5M-L8CC].

2. In total, seventy-seven percent of Americans believe crime is rising. Jeffrey M. Jones, *More Americans See U.S. Crime Problem as Serious*, GALLUP: POLITICS (Nov. 16, 2023), <https://news.gallup.com/poll/544442/americans-crime-problem-serious.aspx> [perm.cc/8PEY-C9LP]. This includes ninety-two percent of Republicans, seventy-eight percent of independents, and fifty-eight percent of Democrats. *Id.*

3. Philip Bump, *Six in 10 Republicans Still Think 2020 Was Illegitimate*, WASH. POST (May 24, 2023), <https://www.washingtonpost.com/politics/2023/05/24/6-10-republicans-still-think-2020-was-illegitimate/> [perma.cc/R8M5-2CQ3]; see also Kimberly Breedon, *An International Law Perspective on Political Informational Warfare: The Challenges of Combating the Weaponized Use of Conspiracy Theories and Disinformation to Undermine Democracy*, 15 U. ST. THOMAS J.L. & PUB. POL’Y 632, 645 (2022) (discussing the “baseless” claim that Biden had “stolen” the election from Trump); Wes Henricksen & Broderick Betz, *The Stolen Election Lie and the Freedom of Speech*, 127 PENN ST. L. REV. PENN STATIM 111, 111–15 (2023) (discussing the same).

4. See, e.g., *US Dominion, Inc. v. Newsmax Media, Inc.*, No. CV N21C-08-063 EMD, 2022 WL 2208580, at \*14 (Del. Super. Ct., 2022) (“In June, 2021, the Republican-led Michigan Senate Oversight Committee released a 55-page report, which found no evidence of widespread or systemic fraud in

In another recent poll, which asked respondents how many unarmed Black men were killed by the police in 2019, more than half of “very liberal” respondents estimated the number to be over 1,000 (and more than twenty percent of these respondents estimated the number killed to be over 10,000).<sup>5</sup> The actual number unarmed Black men killed, according to the *Washington Post* police shootings database, was fourteen, while the number of unarmed White men killed by police that year was twenty-five.<sup>6</sup> On these and many other significant issues, alarming numbers of Americans, both sides of the political aisle, strongly believe proven falsehoods.<sup>7</sup>

The reasons for widely-held false beliefs have been long understood<sup>8</sup> and well studied.<sup>9</sup> In short, because people lack firsthand knowledge about most matters, including major societal issues like crime rates, election integrity, and police violence, they form beliefs on these subjects based on what they read, see, and hear

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Michigan’s prosecution of the 2020 Presidential Election.”); Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265, 269 (2022) (noting that “no evidence emerged anywhere in the United States of significant fraud or other problems in the administration of the 2020 U.S. presidential election”).

5. David Griffith, *Half of Survey’s Very Liberal Respondents Believe 1,000 or More Unarmed Black Men Killed by Police in 2019*, POLICE MAG: PATROL (Feb. 25, 2021), <https://www.policemag.com/patrol/news/15310860/half-of-surveys-very-liberal-respondents-believe-1000-or-more-unarmed-black-men-killed-by-police-in-2019> [perma.cc/B2Y9-EW97].

6. Donald W. Bohlken, *What Do the Statistics, Not the Stereotypes, About Killings by the Police Tell Us*, DES MOINES REG. (Sept. 19, 2020), <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2020/06/29/police-and-racism-what-statistics-show-stereotypes/3274391001> [perma.cc/T9R5-SFDW]; see also *Fatal Force: Police Shootings Database*, WASH. POST (Dec. 31, 2024), <https://www.washingtonpost.com/graphics/investigations/police-shootings-database> [perma.cc/7C DW-SDNS] (last visited Jan. 4, 2024). A Harvard study published in 2019 concluded Black people are no more likely to be killed by police officers than White or Hispanic people, although “[B]lack and Hispanics are more than fifty percent more likely to experience some form of force in interactions with police.” Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. POL. ECON. 1210, 1210, 1220–23 (2019). Relatedly, a 2019 study on racial bias in policing found “that [B]lack suspects were no more or less likely to have weapons drawn against them than other suspects.” John L. Worrall, Stephen A. Bishopp & William Terrill, *The Effect of Suspect Race on Police Officers’ Decisions to Draw Their Weapons*, 38 JUST. Q. 1428, 1428 (2021), <https://doi.org/10.1080/07418825.2020.1760331> [perma.cc/XX7X-WB2R].

7. See *supra* notes 5–6; Aaron Blake, *A Pollster Tested 8 Pieces of Covid Misinformation. On 6 of 8, More Republicans Said They Were True Than False*, WASH. POST (Nov. 8, 2021), <https://www.washingtonpost.com/politics/2021/11/08/sobering-poll-gops-embrace-coronavirus-misinformation/> [perma.cc/4AG6-XHZK] (poll found more than half of Republicans believed COVID-19 falsehoods).

8. See Sarah Barringer Gordon, *The Creation of A Usable Judicial Past: Max Lerner, Class Conflict, and the Propagation of Judicial Titans*, 70 N.Y.U. L. REV. 622, 635 (1995) (“By the 1920s, [there was a] realization that propaganda . . . shaped public desires and predilections.”); WALTER LIPPMANN, *THE PHANTOM PUBLIC* 112–14 (1927) (describing how propaganda is used by government and private interests to manipulate the public); FREDERICK E. LUMLEY, *THE PROPAGANDA MENACE* 45 (1933) (noting that propaganda is a major force affecting public opinion).

9. See, e.g., Herman C. Beyle, *Determining the Effect of Propaganda Campaigns*, 179 ANNALS AM. ACAD. POL. & SOC. SCI. 106, 106–13 (1935); Melvin R. Marks & Wilson L. Taylor, *A Methodological Study of the Effects of Propaganda*, 65 J. SOC. PSYCH. 269, 269–77 (1965); *United States v. Haldeman*, 559 F.2d 31, 154–55 (D.C. Cir. 1976) (discussing how “[d]uring World War II, a team of psychologists studied the propaganda effect of orientation films,” and were surprised to learn how deeply the intended message penetrated test subjects’ minds, even long after the propaganda) (discussing RUDOLF FLESCHE, *THE ART OF CLEAR THINKING* 165–66 (Collier-MacMillan 1969)).

about what others say about these topics.<sup>10</sup> As noted by Sam Harris, “Our minds continually consume, produce, and attempt to integrate ideas about ourselves and the world that purport to be true.”<sup>11</sup> But not all ideas people are exposed to are true, or even truthful. Rather, much of what one learns—from the news, from social media, from family, friends, and colleagues—is inaccurate. Learning a falsehood results in becoming less informed.<sup>12</sup> It would be helpful if people possessed an ability to tell what is true from what is false. People possess no such ability. Thus, they have no consistently reliable way of knowing whether what they read, see, or hear is real or fake, whether the person communicating the message is telling the truth or lying, or whether the communicator is even a person at all.<sup>13</sup> People do not form beliefs based on what is objectively true—something that the scientific method is well equipped to do<sup>14</sup> and others are not—but rather on what they *perceive* to be true based on available information.<sup>15</sup> Accordingly, rather than forming beliefs on objectively verifiable facts, we instead form beliefs based on “a variety of subjective, personal, emotional, and psychological” factors.<sup>16</sup>

The result, as discussed in this Article’s opening paragraph, is a public misinformed on issues of critical importance, resulting in large part from consuming falsehoods disseminated to the public known as “misinformation” and “disinformation.”<sup>17</sup> What to do, if anything, about misinformation and disinformation has become one of today’s most pressing topics.<sup>18</sup> In recent years, it

10. See Michael Curtis, *Introduction*, in WALTER LIPPMANN, PUBLIC OPINION xvi (Transaction 1991) (1922) (noting, “[t]he real external environment is too big, too complex and too fleeting for direct acquaintance by citizens” and “[t]he key problem. . . [is] people take as facts not what is, but what they perceive to be facts”); LIPPMANN, *supra*, at 3–5 (telling about an isolated island where, at the start of the first World War, English, French, and Germans lived together in harmony until six weeks into the war, when they learned they had, for six weeks, been mortal enemies, and noting that “whatever we believe to be a true picture, we treat as if it were the environment itself.”).

11. SAM HARRIS, THE MORAL LANDSCAPE 14 (2010).

12. See TIMOTHY R. LEVINE, DUPED: TRUTH-DEFAULT THEORY AND THE SOCIAL SCIENCE OF LYING AND DECEPTION ix–xii, 3–14 (2020) (noting, *inter alia*, “We all are perceptually blind to deception. We are hardwired to be duped”).

13. See *id.* at 3–14, 17–26.

14. See Steven R. Salbu, *Off-Label Use, Prescription, and Marketing of FDA-Approved Drugs: An Assessment of Legislative and Regulatory Policy*, 51 FLA. L. REV. 181, 197 n.100 (1999) (referring to the scientific method as one “in which “[t]he objective data determine what is to be accepted as scientific truth” (quoting Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1, 73 (1994))).

15. See Curtis, *supra* note 10; LIPPMANN, *supra* note 10.

16. MICHAEL SHERMER, THE BELIEVING BRAIN: FROM GHOSTS AND GODS TO POLITICS AND CONSPIRACIES—HOW WE CONSTRUCT BELIEFS AND REINFORCE THEM AS TRUTHS 6 (2011). See also Timothy R. Levine, *Truth-Default Theory (TDT): A Theory of Human Deception and Deception Detection*, 33 J. LANG. SOC. PSYCH. 378, 378–92 (2014) (introducing Truth-Default Theory, which holds people default to truth when receiving new information and do so for evolutionary adaptive purposes).

17. In this Article, the following definitions apply: “Misinformation” is the dissemination of false information with the intent to pass it off as truth. “Disinformation” is the dissemination of false information, which the spreader either knows is false or spreads with reckless disregard to its falsity, with the intent to pass it off as truth. See, e.g., Charles R. Corbett, *Chemtrails and Solar Geoeingineers: Governing Online Conspiracy Theory Misinformation*, 85 MO. L. REV. 633, 652–53 (2020) (defining both terms); Janet L. Dolgin, *From Smallpox to Covid-19: Social and Legal Responses to Vaccinations and Vaccine Mandates*, 41 QUINNIPIAC L. REV. 407, 450–51 (2023).

18. See Dhruva Krishna, *Deepfakes, Online Platforms, and A Novel Proposal for Transparency, Collaboration, and Education*, 27 RICH. J.L. & TECH. 4, 85 (2021) (“Much of the American public believes that misinformation and ‘fake news’ are major threats.”); Brandy Zadrozny, *Disinformation Poses an Unprecedented Threat in 2024—and the U.S. Is Less Ready than Ever*, NBC NEWS (Jan. 18, 2024), <https://www.nbcnews.com/tech/ai-disinformation-poses-unprecedented-threat-2024-rcna123456>.

has been one of the most-discussed items in the news.<sup>19</sup> And the idea that we must do something about it is one of the few things Americans on both sides of the political aisle agree on.<sup>20</sup>

The vast majority of all adults (eighty-three percent) say that “the spread of false and inaccurate information in the United States” is a “major problem.”<sup>21</sup> Moreover, this sentiment is shared by people across the board; eighty-four percent of Black adults, seventy-six percent of Hispanic adults, and eighty-five percent of White adults agree on this.<sup>22</sup> So, too, do over eighty-eight percent of Democrats and Democrat-leaning independents, and eighty-one percent of Republicans and Republican-leaning independents.<sup>23</sup> The numbers are equally high for both adults with a college degree or higher, as well as adults with a high school education.<sup>24</sup>

Scholars and courts have, for decades—and increasingly in recent years—said that we need a solution to this “major problem.”<sup>25</sup> We have not found one yet. One reason is the strong speech protection afforded to misinformation and disinformation under the First Amendment.<sup>26</sup> Within the freedom of speech framework, restrictions on disseminating misinformation and disinformation are most often analyzed “as content-based limitations on personal expression.”<sup>27</sup> “Content-based limitations on speech are presumptively unconstitutional and will be upheld only if they can satisfy ‘strict scrutiny,’ the highest standard of

[www.nbcnews.com/tech/misinformation/disinformation-unprecedented-threat-2024-election-rcna134290](https://www.nbcnews.com/tech/misinformation/disinformation-unprecedented-threat-2024-election-rcna134290) [perm.cc/M6XP-LCF9] (“Disinformation poses an unprecedented threat to democracy in the United States in 2024, according to researchers, technologists and political scientists.”).

19. See Wes Henricksen, *On the Legality of Defrauding the Public*, 107 MARQ. L. REV. 1043, 1074–76 (2024) (discussing numerous news stories involving disinformation published around the same day in the *Washington Post*).

20. Ashley Kirzinger, Shannon Schumacher, Liz Hamel & Isabelle Valdes, *KFF Misinformation Poll Snapshot: Public Views Misinformation As A Major Problem, Feels Uncertain About Accuracy Of Information On Current Events*, KFF (Dec. 15, 2023), <https://www.kff.org/report-section/kff-misinformation-poll-snapshot-public-views-misinformation-as-a-major-problem-findings/> [perma.cc/ZG34-PHZT].

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. See Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1849 (1995) (“We need solutions to public disinformation and misinformation.” (quoting Claudia Puig, *FCC Chief Wants Talk Radio Shows To Deal in ‘True Facts’*, L.A. Times, Oct. 14, 1994, at D2)); Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815, 853–57 (2020) (arguing some harmful government disinformation should be unprotected because it undermines democratic self-governance); Udo Fink & Ines Gillich, *Fake News As a Challenge for Journalistic Standards in Modern Democracy*, 58 U. LOUISVILLE L. REV. 263, 263–72 (2020) (noting disinformation can disrupt the democratic process, and examining potential solutions); *Matter of Giuliani*, 146 N.Y.S.3d 266, 283 (App. Div. 2021) (“One only has to look at the ongoing present public discord over the 2020 election, which erupted into violence, insurrection, and death on January 6, 2021 at the U.S. Capitol, to understand the extent of the damage that can be done when the public is misled by false information about the elections.”).

26. See Carl H. Coleman, *Physicians Who Disseminate Medical Misinformation: Testing the Constitutional Limits on Professional Disciplinary Action*, 20 FIRST AMEND. L. REV. 113, 130 (2022) (“A basic tenet of First Amendment law is that, rather than imposing penalties on persons who communicate potentially dangerous messages, the appropriate response to misinformation is to counter it with messages that are accurate—i.e., to engage in ‘counterspeech.’”); *U.S. v. Alvarez*, 567 U.S. 709, 727 (2012) (plurality opinion) (“The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth.”).

27. Coleman, *supra* note 26, at 129.

constitutional review.”<sup>28</sup> Under strict scrutiny, the government must prove the speech restriction is necessary to achieve a compelling state interest, and that it is the least restrictive means of achieving that interest.<sup>29</sup> As noted by the Supreme Court, “strict scrutiny leaves few survivors.”<sup>30</sup>

This framework provides a relatively straightforward approach to misinformation, per se, which, by definition, includes both intentionally false and unintentionally false speech.<sup>31</sup> Falsehoods clearly are, and in many cases clearly should be, strongly protected speech, unless they fit into an unprotected category.<sup>32</sup> After all, the First Amendment absolutely protects people’s right to be wrong, and jealously guards individuals’ right to express their wrongheaded belief.<sup>33</sup> Moreover, the term “misinformation” is an evolving term with no broadly accepted definition.<sup>34</sup> Thus, although there may be narrow sub-categories of speech within misinformation that might present an interesting First Amendment question, misinformation itself is too broad and vague a category to regulate under current jurisprudence.

Disinformation, on the other hand, presents a more difficult First Amendment question. It, unlike misinformation, includes only intentionally false speech (i.e., lies).<sup>35</sup> Lies are not treated with the same level of deference as mistaken falsehoods.<sup>36</sup> Lies associated with a “legally cognizable harm” fall outside the First Amendment’s protections.<sup>37</sup> Legally cognizable harm includes defamation, fraud, and any other “injury that supports standing to pursue a cause of action.”<sup>38</sup> According to some justices, a lie may also lose its First Amendment protections if

28. *Id.*

29. *McCullen v. Coakley*, 573 U.S. 464, 478 (2014).

30. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 455 (2002).

31. *See* definitions provided *supra* note 17.

32. *U.S. v. Alvarez*, 567 U.S. 709, 721–22 (2012) (plurality opinion) (holding false speech is not an unprotected speech category).

33. *See* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”); *Anderson v. Holmes*, 16 F.3d 219, 220 (7th Cir. 1994) (discussing “the fundamental First Amendment principle that the government should not punish people based solely on the views they hold”); *Figueroa v. Kapelman*, 526 F. Supp. 681, 684 (S.D.N.Y. 1981) (holding that “punishing a prisoner for the mere expression of his beliefs violates the First Amendment’s guarantee of freedom of speech”).

34. *See* Richard Mackenzie-Gray Scott, *Managing Misinformation on Social Media: Targeted Newsfeed Interventions and Freedom of Thought*, 21 NW. J. HUM. RTS. 109, 113–14 (2023) (noting “[m]isinformation can be described in a number of ways, including context-specific definitions,” which leave open questions, including “whether misinformation includes misleading but not necessarily false information”).

35. *See* definitions provided *supra* note 17.

36. *See, e.g., Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971) (“Calculated falsehood, of course, falls outside ‘the fruitful exercise of the right of free speech.’” (quoting *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964))); *Alvarez*, 567 U.S. at 719 (plurality opinion) (indicating that lies associated with a “legally cognizable harm” fall outside First Amendment protection). “A ‘legally cognizable harm,’ as the Supreme Court uses the phrase, is simply an injury that supports standing to pursue a cause of action.” *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 792 (8th Cir. 2021) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992)).

37. *Alvarez*, 567 U.S. at 719 (plurality opinion).

38. *Animal Legal Def. Fund*, 8 F.4th at 792.

“the lie was made for the purpose of material gain.”<sup>39</sup> Several justices—although not a majority—agree there is a “long line of [Supreme Court] cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest.”<sup>40</sup> Two more justices have indicated that false speech regulations may survive First Amendment scrutiny where the falsehoods they restrict are likely to cause “tangible harm.”<sup>41</sup>

But while falsehoods that cause tangible harm might well be regulable, at least where the injury is legally cognizable, there are falsehoods purposefully disseminated for material or political gain, which cause harm to individuals or society, that keep full First Amendment protections. For example, while many states have passed laws banning certain kinds of political disinformation, such laws are often struck down as violating the First Amendment.<sup>42</sup> Even outside the political speech context, laws aimed at curtailing noncommercial falsehoods are also likely to be, and have been, struck down.<sup>43</sup>

In short, restrictions on intentional falsehoods disseminated to millions of people appear to be virtually untouchable under the First Amendment, unless they regulate only defamation, false light, incitement, or other well-established unprotected speech categories.<sup>44</sup> But how often do intentional falsehoods disseminated to the public fit into these narrow doctrines? Based on the proliferation of disinformation—not just misinformation—being communicated to the public through myriad media channels,<sup>45</sup> it appears that most disinformation is protected. There are, of course, laws against spreading falsehoods to benefit oneself while harming others; this is called fraud, or deceit.<sup>46</sup> It is a crime, and it is a tort.<sup>47</sup>

39. *Aharez*, 567 U.S. at 723 (plurality opinion) (citing *S.F. Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 539–40 (1987), where the Court upheld the prohibition of a nonprofit corporation from exploiting the “commercial magnetism” of the word “Olympic” when organizing an athletic competition) (internal quotation marks omitted).

40. *Aharez*, 567 U.S. at 739 (Alito, J., dissenting).

41. *Aharez*, 567 U.S. at 734–36 (Breyer, J., concurring).

42. See, e.g., *281 Care Comm. v. Arneson*, 766 F.3d 774, 784–86 (8th Cir. 2014) (striking down the Minnesota Fair Campaign Practices Act, which imposed criminal and civil liability for knowingly lying about ballot initiatives up for vote); *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 476 (6th Cir. 2016) (declaring unconstitutional an Ohio statute criminalizing false statements by candidates during political campaigns); *Winter v. Wolnitzek*, 56 F. Supp. 3d 884, 898–99 (E.D. Ky. 2014) (applying strict scrutiny to a misleading political speech regulation to find a “strong likelihood” that rule was unconstitutional); Catherine J. Ross, *Ministry of Truth: Why Law Can’t Stop Prevarications, Bullshit, and Straight-Out Lies in Political Campaigns*, 16 FIRST AMEND. L. REV. 367, 383 n.94 (2017) (listing false political speech laws, including ones struck down in Louisiana and Massachusetts).

43. See *Aharez*, 567 U.S. at 723–26 (Kennedy, J., plurality) (striking down the Stolen Valor Act as unconstitutional because it makes it a crime to falsely claim to have won certain military honors); Lyrrisa Barnett Lidsky, *Where’s the Harm?: Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. REV. 1091, 1091 n.2 (2008) (“The State may only punish deliberate falsehoods when they cause significant harms to individuals.”).

44. *Aharez*, 567 U.S. at 717–18 (plurality opinion).

45. See, e.g., Khiara M. Bridges, *Language on the Move: “Cancel Culture,” “Critical Race Theory,” and the Digital Public Sphere*, 131 YALE L.J. F. 767, 782 (2022) (noting that “many Americans ha[ve] been exposed to staggering amounts of sensational misinformation about the election on Facebook’s platform.” (quoting Gilad Edelman, *Admit It: The Facebook Oversight Board Is Kind of Working*, WIRED (June 4, 2021), <https://www.wired.com/story/facebook-oversight-board-kind-of-working-trump-ban> [perma.cc/3MKZ-EEBG])).

46. See, e.g., *Garcia v. Vera*, 342 S.W.3d 721, 725 (Tex. App. 2011) (stating the elements of common law fraud in Texas).

47. See *id.*; 18 U.S.C.A. § 1343 (federal criminal wire fraud statute).

But falsehoods asserted for the benefit of the speaker, and which cause harm to others, are generally deemed fraud only if aimed at an individual victim. If, on the other hand, the falsehood is disseminated to the public at large, it is rarely called fraud, a label which would take it outside the purview of the First Amendment.<sup>48</sup> Rather, at least in the noncommercial context, it is often deemed protected speech.<sup>49</sup> Under this “paradox of fraud law,”<sup>50</sup> it is unlawful to defraud *someone*, but lawful, and highly profitable, to defraud *everyone*.<sup>51</sup>

It is now often legal to defraud the public in ways that cause widespread harms, even while it is unlawful to defraud individuals on a far smaller scale in analogous ways. Part of how we got here is the recent development of technologies that have facilitated instant largescale communication, and the law’s failure to keep pace.<sup>52</sup> Certainly, the power of speaking to the public has been deeply appreciated for centuries.<sup>53</sup> Public speech is not a new phenomenon. What *is* new are the technologies available in today’s digital world to push messages out to millions with the click of a button, such as social media, internet news, bots, and “sock puppets.”<sup>54</sup>

Thus, there is a growing tension between two competing interests. On one hand are the free speech values that are fundamental to our democratic system of government.<sup>55</sup> Under these values, the Supreme Court has made clear that the First Amendment protects ideas, views, and beliefs, no matter how wrongheaded,

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48. *Alvarez*, 567 U.S. at 717–18 (plurality opinion).

49. *See supra* note 42.

50. Wes Henricksen, *Fossil Fuel Fraud*, 56 CASE W. RESRV. J. INT’L L. 409, 430 (2024).

51. *See, e.g.*, Henricksen, *supra* note 19, at 1070 (“[T]he vast majority of other methods of defrauding the public [other than securities fraud] continue[] to be protected by law, rather than punished by it.”).

52. *See, e.g.*, Gilad Abiri & Johannes Buchheim, *Beyond True and False: Fake News and the Digital Epistemic Divide*, 29 MICH. TECH. L. REV. 59, 61–68 (2022) (discussing the numerous threats posed by the “rise” in digital fake news and misinformation); Richard K. Sherwin, *Anti-Speech Acts and the First Amendment*, 16 HARV. L. & POL’Y REV. 353, 356 (2022) (arguing that, “in the digital age, traditional doctrinal reliance upon ‘more speech’ as an adequate response to deliberate falsehoods in the electoral context disserves core First Amendment values”).

53. In the seventeenth century, Hobbes observed that, among the most critical powers to be entrusted to an absolute ruler—a form of government Hobbes favored—was the power to determine which books may be published and “on what occasions, how farre, and what, men are to be trusted withall, in speaking to Multitudes of people.” THOMAS HOBBS, *LEVIATHAN* 136 (Oxford Univ. Press 1909) (1651).

54. *See, e.g.*, Adam Krzywon, *Summary Judicial Proceedings As a Measure for Electoral Disinformation: Defining the European Standard*, 22 GERMAN L.J. 673, 677 (2021) (“[An] important characteristic of currently observed electoral disinformation is the speed of its dissemination, thanks to the use of the internet and social media—digital amplification mechanisms. False stories can easily enter the public domain and have the appearance of legitimacy, in an unprecedented manner, without any checks on their accuracy. The fabrication and spread of disinformation in the digital age is straightforward and the cost is negligible.”); Sherwin, *supra* note 52, at 366–67 (“This [electoral] crisis has been deepened by a flood of disinformation, digitally amplified and strategically targeted (by bots [automated algorithms] and sock puppets [hidden identities behind fake sites and identities online, both foreign and domestic]) within a digital architecture designed to maximize attention—the coin of the social media realm.”).

55. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 264 (1986) (“Freedom of speech plays a fundamental role in a democracy; as this Court has said, freedom of thought and speech ‘is the matrix, the indispensable condition, of nearly every other form of freedom.’”).

mistaken, or offensive.<sup>56</sup> Under our free speech jurisprudence, people are allowed to express themselves without government interference, so long as the speech does not fit into an unprotected category, such as obscenity, fighting words, incitement, or fraud.<sup>57</sup> On the other hand—the interest pulling in the opposite direction—there is the fast-evolving media and information environment, in which it is possible for a small number of powerful people, who hold the public megaphone, to push messages out instantly to millions, influencing people’s beliefs and actions.<sup>58</sup> The ability to manipulate public opinion and action in this manner has existed for only a relatively short time.<sup>59</sup> Before television and radio, which appeared roughly a century ago, mass instant communication was not possible.<sup>60</sup> Once these technologies became available, many soon grasped the implications for influencing public opinion.<sup>61</sup> But the recent digital revolution, which occurred over that past couple of decades, has radically increased the reach of instant mass communication, thereby expanding opportunities to profit off largescale dissemination of self-serving falsehoods.<sup>62</sup>

Thus, the tension between these two forces—bedrock free speech principles, on one hand, and ever-expanding opportunities to defraud the public, on the other—has never been greater, nor posed so grave a threat.<sup>63</sup> Should the First Amendment continue to give ironclad protections to intentionally false speech disseminated to the public at large that results in harm to individuals and society? Some say yes.<sup>64</sup> Others say no.<sup>65</sup> Perhaps, as I have argued elsewhere, we should not

56. See *Matal v. Tam*, 582 U.S. 218, 246 (2017) (holding that “the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate’” (citing *U.S. v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting))).

57. *U.S. v. Alvarez*, 567 U.S. 709, 717–18 (2012) (plurality opinion).

58. Nareissa L. Smith, *Built for Boyhood?: A Proposal for Reducing the Amount of Gender Bias in the Advertising of Children’s Toys on Television*, 17 *VAND. J. ENT. & TECH. L.* 991, 1017–18 (2015) (discussing the advent of radio in 1910’s and TV a couple decades later, and Congress’s efforts to regulate both kinds of media).

59. *Id.*

60. *Id.*

61. See *supra* notes 8 and 10.

62. See Krzywon, *supra* note 54; Sherwin, *supra* note 54.

63. See Tiffany Hsu, Stuart A. Thompson & Steven Lee Myers, *Elections and Disinformation Are Colliding Like Never Before in 2024*, *N.Y. TIMES* (Jan. 9, 2024), <https://www.nytimes.com/2024/01/09/business/media/election-disinformation-2024.html> [perma.cc/7Q5H-WJTL] (noting how disinformation is already posing numerous threats in several upcoming elections to take place around the world this year).

64. See Shoshana Weissmann, *Online Content Policy: What Legislative Proposals Aiming to Rein in “Big Tech” Need to Grapple with*, 44 *W. NEW ENG. L. REV.* 35, 38 (2022) (noting that “[h]ealth misinformation” is no less First Amendment protected speech than any other lie or incorrect speech”); Mike Masnick, *House Democrats Decide to Hand Facebook the Internet by Unconstitutionally Taking Section 230 Away from Algorithms*, *TECHDIRT* (Oct. 14, 2021), <https://www.techdirt.com/2021/10/14/house-democrats-decide-to-hand-facebook-internet-unconstitutionally-taking-section-230-away-algorithms/> [perma.cc/2KEV-3BNQ] (responding to calls to regulate social media platform algorithms by explaining that “‘the algorithm’ is simply a set of recommendations, and recommendations are opinions and opinions are . . . protected expression under the 1st Amendment”); Gary Myers, *The Mindful First Amendment*, 53 *N.M. L. REV.* 411, 421 (2023) (noting “most speech that might be deemed ‘misinformation’ . . . is protected by the First Amendment”).

65. See, e.g., Corbin, *supra* note 25, at 853–57 (arguing that some harmful government disinformation should be unprotected because it undermines democratic self-governance); Sherwin, *supra* note 54, at 356 (2022) (“Courts that use free speech doctrine to shield those who deliberately or

be framing this as a question of *false* speech at all, but rather as a question of *fraudulent* speech.<sup>66</sup> If one lies to another for a self-serving purpose and, in doing so, causes significant harm to others, should it matter whether the falsehood was told to an individual victim or to millions of victims? Indeed, if such a distinction does matter—between defrauding one and defrauding millions—should we not treat frauds aimed at a *greater* number of people and causing a *greater* amount of harm with correspondingly *greater* scrutiny?

These are some of the questions around this topic courts are now forced to address.<sup>67</sup> Questions like these will likely become even more relevant, and more numerous, in the near future as disinformation continues to wreak havoc in countries around the world.<sup>68</sup> In this Article, I aim to provide scholars, courts, and lawmakers a more complete picture of the context within which to address and find answers to these questions. I do this by shining a light on the price we now pay for allowing leaders in politics, business, and media to spread intentional falsehoods for self-serving purposes, regardless of the resulting harm. I believe this is important because, although some of the myriad harms caused are widely reported, they are often not associated with one another, so people often fail to see the parallels between, for example, stronger and more frequent extreme weather events due to climate change (resulting from a campaign to defraud the public by the fossil fuel industry) and the attempt to wrongfully overturn a presidential election (by carrying out a campaign to defraud the public about the legitimacy of the election). In this way, disinformation produces harms of widely varying kinds, and which are often not viewed as resulting from a common root cause—compare, for example, harms from disinformation aimed at gaining political office, disinformation aimed at selling a dangerous product, and disinformation aimed at pushing an ideological agenda or impeding justice.<sup>69</sup>

But although these harms result from distinct deceptive schemes, they all contribute to the price we pay—individually and collectively—for giving a free pass to those who defraud the public at large. The price we pay is high. But the extent of that cost cannot be appreciated without stepping back and taking a broad view of the landscape of the harms caused. That landscape is what I hope to map out in this Article.

I argue that the price we pay for disinformation must be taken into account when determining to what extent First Amendment protections should continue to cover intentionally false messages diffused to the public that cause widespread

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recklessly disseminate demonstrably false statements in pursuit of fraudulent electoral or commercial gain subvert the very values they purport to uphold.”)

66. Wes Henricksen, IN FRAUD WE TRUST 179–80 (2024).

67. See, e.g., Verified Complaint, *City of New York v. Exxon Mobil Corp.*, No. 451071/2021 (N.Y. Super. Ct., New York County, Apr. 22, 2021), <https://www.nyc.gov/assets/home/downloads/pdf/press-releases/2021/Earth-Day-Lawsuit.pdf> [perma.cc/XX7P-TX2Q] (detailing the lawsuit against fossil fuel companies and industry trade group alleging they intentionally misled the public about the certainty and causes of climate change); Indictment, *U.S. v. Trump*, No. 23-cr-257 (D.D.C. Aug. 1, 2023), [https://www.justice.gov/storage/US\\_v\\_Trump\\_23\\_cr\\_257.pdf](https://www.justice.gov/storage/US_v_Trump_23_cr_257.pdf) [perma.cc/G5S4-TNK6] (detailing the criminal case against Donald Trump for allegedly defrauding the United States by, inter alia, “spread[ing] lies” about the 2020 election by claiming “that there had been outcome-determinative fraud in the election and that he had won”).

68. See Hsu et al., *supra* note 63.

69. Henricksen, *supra* note 19, at 1077–81.

harm. To be clear, the Supreme Court has rejected as “startling and dangerous” any “free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits.”<sup>70</sup> Thus, when determining whether a speech regulation burdens protected speech, the analysis does not, and cannot, merely balance harms against benefits.<sup>71</sup> But given there is already an exception to the First Amendment for speech amounting to fraud, it is worth asking whether frauds perpetrated on the public should also fit within the existing fraud exception.

Where one claims, wrongly, an election was stolen, or that a pandemic is a hoax, or that climate change is a lie, such claims are unequivocally protected if such statements are made in good faith.<sup>72</sup> Honest speech is clearly protected. But deceitful or recklessly false speech, while subject to debate among the justices, appears to hold less constitutional value, particularly if it injures the hearer or others.<sup>73</sup> I argue that, where a speaker knowingly or recklessly spreads self-serving falsehoods that cause significant harm to individuals or society, such intentionally false speech should not enjoy the free speech protections intended to protect people expressing sincere views, opinions, and beliefs.<sup>74</sup> A lie is none of those things, which is precisely why fraud on the individual is already unprotected.<sup>75</sup> Perhaps, if we take full account of the price we pay for allowing (and rewarding) fraud on the public, we might conclude self-serving deceit may best be treated as unprotected fraudulent speech even if it is aimed at the public at large.

In Part II, I will give a catalogue of harms caused by allowing fraud on the public. These include, but are certainly not limited to, harms to health and life, to the environment, to personal autonomy, and to democracy. There are other harms traceable to disinformation, such as an increase in gun violence and an increased risk of insurrection. I will address each of these, in turn, below. In Part III, I discuss why the harm caused by disinformation should be taken into account when deciding what, if anything, to do about it. To conclude, I sum up what I see as the overarching problem, and I draw conclusions about what we might do to resolve this dilemma.

70. *U.S. v. Alvarez*, 567 U.S. 709, 717 (2012) (plurality opinion) (quoting *U.S. v. Stevens*, 559 U.S. 460, 470 (2010)).

71. *Id.*

72. *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 574 n.6 (1968) (noting that First Amendment protections for false speech can be lost only where the statements were “knowingly or recklessly false”).

73. *See, e.g., Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (“False statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas . . . .”); *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (noting that false statements “are not protected by the First Amendment in the same manner as truthful statements”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (“Untruthful speech, commercial or otherwise, has never been protected for its own sake.”); *Herbert v. Lando*, 441 U.S. 153, 171 (1979) (“Spreading false information in and of itself carries no First Amendment credentials.”).

74. *See* Wes Henricksen, *Disinformation and the First Amendment*, 96 ST. JOHN’S L. REV. 543, 556–57 (2022) (“Fraud on the public . . . is carried out in the same manner as fraud on the individual, and the harm it causes to individuals, society, and the environment is at least as destructive . . . . [A]ccordingly, fraud on the public . . . should not be protected speech.”).

75. *Alvarez*, 567 U.S. at 717 (plurality opinion).

## II. A PARTIAL LIST OF THE WAYS DISINFORMATION HARMS INDIVIDUALS AND SOCIETY<sup>76</sup>

In 1991, a fourteen-month-old boy named Steven was hospitalized in Milwaukee for lead poisoning.<sup>77</sup> The doctor ran a blood test to determine its seriousness.<sup>78</sup> Blood lead levels are measured in micrograms of lead per deciliter of blood ( $\mu\text{g}/\text{dl}$ ).<sup>79</sup> The Center for Disease Control considers any lead in the body toxic.<sup>80</sup> The only “healthy” amount of lead is none.<sup>81</sup> However, the higher the amount, the worse the effect; anything above 10  $\mu\text{g}/\text{dl}$  causes permanent damage to a child’s brain development.<sup>82</sup> Steven’s blood lead level, at fourteen months old, was 18  $\mu\text{g}/\text{dl}$ .<sup>83</sup> Steven was put on chelation treatment, where drugs are administered intravenously to purge the body of heavy metals.<sup>84</sup> It is, as one expert put it, “a very painful procedure.”<sup>85</sup> Apart from a burning sensation near the injection site, it also causes fever, headache, nausea, and vomiting.<sup>86</sup>

The lead entered Steven’s body at his home in Milwaukee.<sup>87</sup> His parents moved the family to a new rental home, but this did not solve the problem; Steven was thereafter hospitalized several more times, with his lead levels alarmingly high each time doctors measured them.<sup>88</sup> His blood lead level was 40  $\mu\text{g}/\text{dl}$  at twenty-two months, 36  $\mu\text{g}/\text{dl}$  at two years old, and 27  $\mu\text{g}/\text{dl}$  at two years and seven months old.<sup>89</sup> On August 5, 1993, at age three years and two months, Steven was hospitalized for five days after he was diagnosed with a blood lead level of 49  $\mu\text{g}/\text{dl}$ .<sup>90</sup> He continued to suffer elevated blood lead levels until he was six years old.<sup>91</sup>

Steven was far from alone. Between the 1920s and 1990s, lead poisoned millions of children in the United States.<sup>92</sup> This most often happened at home,

76. Portions of this Part II have been adapted, in substantially altered form, from my forthcoming book, *IN FRAUD WE TRUST*, as indicated *supra* in note \*.

77. Plaintiff-Appellant’s Brief, *Thomas v. Mallet*, No. 03-1528, 2003 WL 24112286, at \*21–25 (Wis. Ct. App. Oct. 10, 2003).

78. *Id.*

79. *Id.*

80. Advisory Committee on Childhood Lead Poisoning Prevention, *Interpreting and Managing Blood Lead Levels <10  $\mu\text{g}/\text{dL}$  in Children and Reducing Childhood Exposures to Lead*, U.S. DEPT’*H* HEALTH, CENT. FOR DISEASE CONTROL, Oct. 10, 2007, <https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5608a1.htm> [perma.cc/V5FF-33UT].

81. *Id.*

82. *Id.*

83. Plaintiff-Appellant’s Brief, *supra* note 77.

84. *Id.*; Brief of the Plaintiff-Appellant-Petitioner, *Thomas v. Mallet*, No. 03-1528, 2004 WL 2656842 (Wis. Ct. App. Oct. 20, 2004).

85. Trial – AM Session: Testimony of Carol Thomas and Dr. John Rosen (Expert) for the Plaintiff, *Thomas v. Mallet*, No. 1999CV006411, 2007 WL 6878118 (Wis. Cir. Ct. Oct. 15, 2007).

86. Jacquelyn Cafasso, *What Does Chelation Therapy Treat?*, HEALTHLINE MEDIA (Apr. 10, 2018), <https://www.healthline.com/health/chelation-therapy> [perma.cc/83ZC-KHVQ]; *supra* note 85.

87. Plaintiff-Appellant’s Brief, *supra* note 77; Brief of the Plaintiff-Appellant-Petitioner, *supra* note 84.

88. Plaintiff-Appellant’s Brief, *supra* note 77; Brief of the Plaintiff-Appellant-Petitioner, *supra* note 84; Testimony, *supra* note 85.

89. Plaintiff-Appellant’s Brief, *supra* note 77.

90. *Id.*; Testimony, *supra* note 85.

91. Plaintiff-Appellant’s Brief, *supra* note 77.

92. See Barbara Berney, *Round and Round It Goes: The Epidemiology of Childhood Lead Poisoning, 1950-1990*, 71 MILBANK Q. 3, 3–32 (1993); Herbert L. Needleman, *Childhood Lead Poisoning: The Promise and Abandonment of Primary Prevention*, 88 AM. J. PUB. HEALTH 1871, 1871–76 (1998).

where children are exposed to dust from lead paint.<sup>93</sup> Lead poisoning occurred disproportionately to children in low-income neighborhoods.<sup>94</sup> “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.’”<sup>95</sup>

This public health crisis was—like those created by opioids, tobacco, and other products<sup>96</sup>—caused by an industry that went to great lengths to defraud the public to hide the dangers posed by what it was selling.<sup>97</sup> Like other industries have done, the lead paint industry funded a public relations campaign, an industry advocacy group, academic research by bought-and-paid-for scientists and researchers, magazines, articles, op-eds, ads, and on and on.<sup>98</sup> In fact, the industry knew in the early twentieth century that lead was deadly, and documents have come to light to show that the deceit of the public was done knowingly.<sup>99</sup> Although non-toxic alternatives existed to using lead in white paint, those running the lead paint companies chose profits over safety.<sup>100</sup> In one exchange from 1939, 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.<sup>101</sup>

On at least one occasion, industry executives mocked victims while rejecting the idea of spending funds to address the problem they were causing.<sup>102</sup> In 1955, the Lead Industries Association’s (LIA) director of health and safety, while discussing the costs to the industry of childhood lead poisoning, scoffed at the idea these poisonings might cost the industry hundreds of thousands per year.<sup>103</sup> He acknowledged the health dangers but rejected the idea that it posed 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

93. See Berney, *supra* note 92; Needleman, *supra* note 92.

94. Marissa Hauptman, Michelle L. Rogers, Matthew Scarpaci, Barbara Morin & Patrick M. Vivier, *Neighborhood Disparities and the Burden of Lead Poisoning*, 94 PEDIATRIC RSCH. 826, 826–36 (2023).

95. *Peace v. Northwestern Nat’l Ins. Co.*, 228 Wis. 2d 106, 145 (1999) (citation omitted); See also Martha Mahoney, *Four Million Children at Risk: Lead Paint Poisoning Victims and the Law*, 9 STAN. ENVTL. L.J. 46, 46–47 (1990).

96. See Stephen Goettsche, *Cleaning Up the Opioid Crisis: Emerging Public Nuisance Liability in Opioid Litigation*, 2023 WIS. L. REV. 2105, 2108–09 (2023); Christopher N. Bantlin & Richard A. Daynard, *Room for Two in Tobacco Control: Limits on the Preemptive Scope of the Proposed Legislation Granting FDA Oversight of Tobacco*, 11 J. HEALTH CARE L. & POL’Y 57, 71–72 (2008); Alexia Brunet Marks, *Taming America’s Sugar Rush: A Traffic-Light Label Approach*, 62 ARIZ. L. REV. 683, 697–98 (2020).

97. Richard Ausness, *Conspiracy Theories: Is There a Place for Civil Conspiracy in Products Liability Litigation?*, 74 TENN. L. REV. 383, 387–88 (2007).

98. Carmel Sileo, *Wisconsin Court Revives Public-Nuisance Claim in Lead Paint Case*, TRIAL, Feb. 2005, 80–83; Randy J. Sutton, *Products Liability: Paints, Stains, and Similar Products*, 69 A.L.R. 5th 137 (1999); see also Brief of the Plaintiff-Appellant Petitioner, *supra* note 84.

99. Brief of the Plaintiff-Appellant-Petitioner, *supra* note 84, at \*2–10.

100. *Id.* at \*5–6.

101. *Id.* at \*5.

102. *Id.* at \*10.

103. *Id.*

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<sup>104</sup> 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.<sup>105</sup>

More than forty years after these words were uttered, Steven and his parents sued the seven major leaded paint manufacturers, alleging they “conspired over the years to obscure and conceal lead’s dangers.”<sup>106</sup> 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.<sup>107</sup> The plaintiffs called to testify one of the leading experts on childhood lead poisoning, Dr. John Rosen.<sup>108</sup> He had treated more than 30,000 lead poisoned children. Dr. Rosen testified that, of all cases he had seen, Steven’s “was one of the worst in terms of how long it lasted and what the levels were.”<sup>109</sup> As a result, Steven was afflicted with “a constellation of neuropsychological sequelae, including mild mental retardation, ADHD, and behavior disorder.”<sup>110</sup> Nevertheless, the trial court granted a motion for summary judgment filed by the defendants “because Thomas could not identify the specific manufacturer that produced the particular paint products that allegedly caused him harm.”<sup>111</sup> Steven and his family filed appeals, eventually taking the case to the Wisconsin Supreme Court, but the trial court’s dismissal of the case was upheld.<sup>112</sup> Accordingly, they never recovered a dollar from those who not only knowingly put Steven’s health, and the health of millions of other children, in danger, but whose product in fact caused his injuries.<sup>113</sup>

Steven’s health was damaged by falsehoods disseminated by an industry motivated to suppress public knowledge of the dangers its products pose. Others likewise suffer damage—to their health, wealth, or property—as a result of falsehoods disseminated to the public by businesses, politicians, and others who hold the public megaphone who deceive for their own self-serving purposes—to sell dangerous products, to push a political agenda, to win an election, to increase

104. This is the same Robert Kehoe who served as the resident scientific expert in support of both the tobacco and leaded gas industries before being engaged by the leaded paint industry to help hide its dangers to public health. See Jamie Lincoln Kitman, *The Secret History of Lead*, NATION (Mar. 2, 2000), <https://www.thenation.com/article/archive/secret-history-lead> [perma.cc/887B-VG5J] (leaded gas); DAVID MICHAELS, DOUBT IS THEIR PRODUCT: HOW INDUSTRY’S ASSAULT ON SCIENCE THREATENS YOUR HEALTH (2008).

105. *Supra* note 84, at \*10 (emphasis added); Richard A. Oppel Jr., *Rhode Island Sues Makers of Lead Paint*, N.Y. TIMES (Oct. 14, 1999), <https://www.nytimes.com/1999/10/14/us/rhode-island-sues-makers-of-lead-paint.html> [perma.cc/7U4N-44ZM].

106. Thomas ex rel. Gramling v. Mallett, 685 N.W.2d 791, 793 (Wis. 2004).

107. Thomas, ex rel. Gramling v. Mallett, 795 N.W.2d 62 (Dec. 16, 2010).

108. Trial – PM Session: Closing Statements, Thomas v. Mallet, No. 1999CV006411, 2007 WL 6877564 (Wis. Cir. Ct. Oct. 31, 2007).

109. *Id.*

110. Reply Brief of the Plaintiff-Appellant-Petitioner, Thomas, ex rel. Gramling v. Mallett, 2004 WL 5026978, at \*1.

111. *Thomas*, 795 N.W.2d 62.

112. Thomas ex rel. Gramling v. Mallett, 685 N.W.2d 791, 793 (Wis. 2004); *Thomas*, 795 N.W.2d 62.

113. Closing Statements, *supra* note 108.

viewership or ad revenue, and on and on. There are numerous ways those who speak to the public at large use that privileged access to defraud on a largescale,<sup>114</sup> causing a wide range of harms. In this Part II, I will catalogue some of the harms caused by fraud on the public, including harm to health and life, harm to the environment, harm to personal autonomy, harm to democracy, and increased gun violence.

### *A. Harm to health and life*

#### *1. Anti-vaccine disinformation*

During the recent COVID-19 pandemic, the spread of disinformation about the virus and its vaccine led, according to some experts, to “countless preventable hospitalizations and deaths.”<sup>115</sup> It is clear these false and misleading claims about the pandemic, disseminated to the public in bad faith, worsened the impact of the pandemic.<sup>116</sup> This is not to say all information labeled “false” or “misleading” was actually false or misleading; indeed, an accusation that a claim or idea is disinformation can be, itself, disinformation.<sup>117</sup> To be sure, there were many questionable claims made by many leaders at the time which may have been made in good faith, and knowledge of precisely how the virus spreads, as well as the effectiveness of social distancing, masks, and the vaccine, evolved as the pandemic progressed.<sup>118</sup> But studies now make it clear that deaths almost certainly increased by thousands in the United States due to leaders focusing more on politicizing the pandemic than on taking reasonable measures to protect the public.<sup>119</sup>

Beginning in early- to mid-2021, when vaccines became widely available, politicians, pundits, podcasters, and others disseminated a staggering amount of

114. See Henricksen, *supra* note 19, at 1077–81 (listing different ways fraud on the public is commonly carried out).

115. Alessandra Perez, *Compassion Fatigue in an Infodemic: A Physician’s Duty to Treat in the Age of Misinformation*, 30 U. MIAMI INT’L & COMP. L. REV. 236, 271 (2023).

116. *Id.* at 248–53, 271–72.

117. For example, following the 2020 election, Trump and others claimed the election was “stolen” through massive fraud, but the allegation itself was an attempt to fraudulently steal the election. See, e.g., Lawrence J. Trautman, *Democracy at Risk: Domestic Terrorism and Attack on the U.S. Capitol*, 45 SEATTLE U. L. REV. 1153, 1218 (2022) (“Trump lied to his followers, telling them that the certification of Joe Biden’s election was a ‘coup’ and that their country was being stolen from them.”).

118. Jasper L. Tran, *Of Vaccine and Hesitancy*, 77 FOOD & DRUG L.J. 176, 215–16 (2022).

119. Sen Pei, Sasikiran Kandula & Jeffrey Shaman, *Differential Effects of Intervention Timing on COVID-19 Spread in the United States*, MEDRXIV (May 20, 2020), <https://www.medrxiv.org/content/10.1101/2020.05.15.20103655v1> [perma.cc/FN8W-NWAN]; Bill Chappell, *U.S. Could Have Saved 36,000 Lives if Social Distancing Started 1 Week Earlier: Study*, NPR (May 21, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/05/21/860077940/u-s-could-have-saved-36-000-lives-if-social-distancing-started-1-week-earlier-st> [perma.cc/47KN-PQWW]; Britta L. Jewell & Nicholas P. Jewell, *The Huge Cost of Waiting to Contain the Pandemic*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/opinion/covid-social-distancing.html> [perma.cc/ATR6-CE9G]; Ben Gittleston, *Study Finds Earlier Coronavirus Restrictions in US Could Have Saved 36,000 Lives. Trump Calls It a ‘Political Hit Job.’*, ABC NEWS (May 21, 2020), <https://abcnews.go.com/Politics/study-finds-earlier-coronavirus-restrictions-us-saved-36k/story?id=70808611> [perma.cc/M3V7-CETL]; Isaac Sebenius & James K. Sebenius, *How Many Needless COVID-19 Deaths Were Caused by Delays in Responding? Most of Them*, STAT (June 19, 2020), <https://www.statnews.com/2020/06/19/faster-response-prevented-most-us-covid-19-deaths/> [perma.cc/LSE3-WLYH]; Science News Staff, *The United States Leads in Coronavirus Cases, but Not Pandemic Response*, SCI. (Apr. 1, 2020), <https://www.sciencemag.org/news/2020/04/united-states-leads-coronavirus-cases-not-pandemic-response> [perma.cc/MD7P-C984].

false and misleading anti-vaccine claims.<sup>120</sup> These claims were not made only by those on the far-right; mainstream Republicans and their allies spread anti-vaccine messages, such as the idea the vaccine was a plot by “liberals,” “progressives,” “globalists,” “Democrats,” Bill Gates, or George Soros.<sup>121</sup>

The result was predictable. A gap between vaccination rates in liberals and conservatives emerged.<sup>122</sup> There had been no gap prior to the disinformation.<sup>123</sup> In swift fashion, however, one side of the political aisle became significantly more anti-vaccine, at least regarding the COVID-19 vaccine, and this diminished vaccine rate likely killed hundreds of thousands.<sup>124</sup> There were over a million deaths from COVID-19 in the United States during 2021.<sup>125</sup> Experts estimate about a third of them could have been prevented if vaccination rates had not been pushed down by falsehoods about the vaccine.<sup>126</sup> This amounts, by one count, to a little over 319,000 preventable deaths in 2021 alone caused primarily by vaccine disinformation.<sup>127</sup>

## 2. Opioids

The opioid epidemic, which has been labeled “the worst public health crisis in American history,”<sup>128</sup> was in fact a uniquely American phenomenon; it occurred almost exclusively within the United States.<sup>129</sup> There are multiple reasons for this. Among them are the direct marketing of the drugs to consumers, something almost no other country allows, and the incentives offered to doctors to prescribe the drugs

120. See Dorit Rubinstein Reiss, *Anti-Vaccine Misinformation and the Law: Challenges and Pitfalls*, 18 IND. HEALTH L. REV. 85, 93–94 (2021) (discussing false and misleading messages disseminated regarding COVID-19, such as “that it is not dangerous or that you do not need to wear a mask,” “that deaths from COVID-19 are fake,” and that it “is just a common cold [t]hat people need to go out to catch”).

121. See, e.g., *id.*; Ana Santos Rutschman, *The Covid-19 Vaccine Race: Intellectual Property, Collaboration(s), Nationalism and Misinformation*, 64 WASH. U. J.L. & POL’Y 167, 200 (2021) (“I would submit that COVID-19 triggered the first vaccine race fully immersed in far-reaching, globalized misinformation and disinformation, particularly in the online environment.”).

122. Jennifer Kates, Jennifer Tolbert & Kendal Orgera, *The Red/Blue Divide in COVID-19 Vaccination Rates*, KFF (Sept. 14, 2021), <https://www.kff.org/policy-watch/the-red-blue-divide-in-covid-19-vaccination-rates/> [perma.cc/9LTG-V9M2].

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*; A. Martínez & Allison Aubrey, *How Vaccine Misinformation Made the COVID-19 Death Toll Worse*, NPR (May 16, 2022), <https://www.npr.org/2022/05/16/1099070400/how-vaccine-misinformation-made-the-covid-19-death-toll-worse> [perma.cc/6CWY-EWPK]; Taylor Allen, *Nearly Half of Pennsylvania’s COVID Deaths Were Preventable, Per Analysis*, AXIOS (May 19, 2022), <https://www.axios.com/local/philadelphia/2022/05/19/pennsylvania-preventable-covid-deaths> [perma.cc/58E9-X6PN].

127. See Kates et al., *supra* note 122; Martínez & Aubrey, *supra* note 126; Allen, *supra* note 126; *Vaccine Preventable Deaths Analysis*, GLOBAL EPIDEMICS, <https://globalepidemics.org/vaccinations> [perma.cc/QLP5-7SRB] (last visited Jan. 31, 2024). On the dangers of anti-vaccine misinformation generally, see Dorit Rubinstein Reiss & John Diamond, *Measles and Misrepresentation in Minnesota: Can There Be Liability for Anti-Vaccine Misinformation That Causes Bodily Harm?*, 56 SAN DIEGO L. REV. 531 (2019).

128. Neil Howe, *America’s Opioid Crisis: A Nation Hooked*, FORBES (Nov. 30, 2017), <https://www.forbes.com/sites/neilhowe/2017/11/30/americas-opioid-crisis-a-nation-hooked/#47f440f56a57> [perma.cc/AU6Z-XCNC].

129. See Roseann B. Termini & Rachel-Malloy Good, *50 Years Post-Controlled Substances Act: The War on Drugs Rages on with Opioids at the Forefront*, 46 OHIO N.U. L. REV. 1, 52 (2020) (noting the opioid crisis “unfortunately is unique to the United States of America”).

in America.<sup>130</sup> Beginning in the 1990s, the opioid industry spent millions to mislead the public about the dangers posed by its painkillers.<sup>131</sup> By 2004, Purdue Pharma's OxyContin was the most abused drug in the United States.<sup>132</sup> For years now, opioid deaths have been rising, and in 2021 the opioid death toll exceeded 100,000.<sup>133</sup> Overdose deaths have now surpassed deaths from car accidents, AIDS, and guns.<sup>134</sup> Americans make up five percent of the global population, but consume eighty percent of the world's opioids.<sup>135</sup> For the most potent and dangerous kinds of opioids, the synthetic variety, the numbers are worse.<sup>136</sup> Americans consume eighty-two percent of the world's oxycodone and more than ninety-nine percent of its hydrocodone.<sup>137</sup> According to prosecutors pursuing claims against opioid makers, opioids were pushed on doctors and consumers using falsehoods, and as a result, tens of thousands have died.<sup>138</sup>

### 3. Sugar

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.<sup>139</sup> 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

130. Owen Amos, *Why Opioids Are Such an American Problem*, BBC (Oct. 25, 2017), <https://www.bbc.com/news/world-us-canada-41701718> [perma.cc/C9YE-3YQU].

131. Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221 (2009).

132. *Id.*

133. *Drug Overdose Deaths in the U.S. Top 100,000 Annually*, Center for Disease Control (Nov. 17, 2021), [https://www.cdc.gov/nchs/pressroom/nchs\\_press\\_releases/2021/20211117.htm](https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2021/20211117.htm) [perma.cc/D8KW-78BG]; *U.S. Overdose Deaths In 2021 Increased Half as Much as in 2020 – But Are Still Up 15%*, Center for Disease Control (May 11, 2022), [https://www.cdc.gov/nchs/pressroom/nchs\\_press\\_releases/2022/202205.htm](https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2022/202205.htm) [perma.cc/KZ8Q-F4JR].

134. Noah Weiland & Margot Sanger-Katz, *Overdose Deaths Continue Rising, with Fentanyl and Meth Key Culprits*, N.Y. TIMES (May 11, 2022), <https://www.nytimes.com/2022/05/11/us/politics/overdose-deaths-fentanyl-meth.html> [perma.cc/WB27-YT5F].

135. Jessica Bruder, *The Worst Drug Crisis in American History*, N.Y. TIMES (July 31, 2018), <https://www.nytimes.com/2018/07/31/books/review/beth-macy-dopesick.html> [perma.cc/SV2B-97BH]; Laxmaiah Manchikanti, Bert Fellows, Hary Ailinani & Vidyasagar Pampati, *Therapeutic Use, Abuse, and Nonmedical Use of Opioids: A Ten-Year Perspective*, 13 PAIN PHYSICIAN 402 (2010).

136. See *supra* note 135; *infra* note 137.

137. Howe, *supra* note 128; Jessica Bruder, *supra* note 135; Manchikanti et al., *supra* note 135; Editorial Staff, *The Big List of Narcotic Drugs*, AM. ADDICTION CTRS. (June 22, 2021), <https://americanaddictioncenters.org/the-big-list-of-narcotic-drugs> [perma.cc/YK9D-VL52]; Int'l Narcotics Control Bd., *Narcotic Drugs: Estimated World Requirements for 2009*, U.N. Doc. E/INCB/2008/2, at 92 (2009).

138. See *Attorney General Herring Sues Purdue Pharma for Lies that Helped Create and Prolong Opioid Crisis*, ATTY GEN. VIRGINIA (June 27, 2018), <https://oag.state.va.us/consumer-protection/index.php/news/288-june-27-2018-attorney-general-herring-sues-purdue-pharma-for-lies-that-helped-create-and-prolong-opioid-crisis> [perma.cc/ZK5L-ZJ8D] (outlining claims of Virginia state prosecutors in claims against Purdue Pharma).

139. Cristin E. Kearns, Laura A. Schmidt, Dorie Apollonio & Stanton A. Glantz, *The Sugar Industry's Influence on Policy*, 360 SCI. 501 (2018); Cristin E. Kearns, Stanton A. Glantz & Laura A. Schmidt, *Sugar Industry Influence on the Scientific Agenda of the National Institute of Dental Research's 1971 National Caries Program: A Historical Analysis of Internal Documents*, 12 PLOS MEDICINE 1 (2015), <https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001798> [perma.cc/5MUL-UDRX].

produced favorable results.<sup>140</sup> The campaign was orchestrated by top executives in the sugar industry, some of whom later joined the tobacco industry.<sup>141</sup> As part of the industry's campaign, sugar executives 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.<sup>142</sup> The conflict of interest was not disclosed.<sup>143</sup>

The campaign worked. Over the past fifty years, consumption of sugar has tripled worldwide.<sup>144</sup> In the United States, sugar consumption in both children and adult diets increased remarkably.<sup>145</sup> Moreover, there have been even sharper increases in the consumption of certain, more harmful sugars like high-fructose corn syrup (HFCS).<sup>146</sup> HFCS, in fact, can now be found in a wide array of processed foods and beverages, like juices, yogurts, cereals, and breads.<sup>147</sup> 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.<sup>148</sup>

This rise in sugar consumption imposed a high cost on society. Recent reports have identified sugar as the single leading non-regulated component contributing to the spike in metabolic syndrome diseases such as diabetes, hypertension, lipid problems, cardiovascular disease, and non-alcoholic fatty liver disease.<sup>149</sup> The other two contributing factors, tobacco and alcohol, are already heavily regulated (although each of these industries also has a track record of defrauding the public).<sup>150</sup> Sugar has been a leading cause in the rise of obesity and a cornucopia of other diseases, which have sharply driven up the cost of health care in the United States.<sup>151</sup>

140. Anahad O'Connor, *Sugar Industry Long Downplayed Potential Harms*, N.Y. TIMES (Nov. 21, 2017), <https://www.nytimes.com/2017/11/21/well/eat/sugar-industry-long-downplayed-potential-harms-of-sugar.html> [perma.cc/7M4F-BPFA] (quoting another source).

141. *Id.*; Anahad O'Connor, *How the Sugar Industry Shifted Blame to Fat*, N.Y. TIMES (Sept. 12, 2016), <https://www.nytimes.com/2016/09/13/well/eat/how-the-sugar-industry-shifted-blame-to-fat.html> [perma.cc/PZ2C-XCVP].

142. *See supra* note 141.

143. *Id.*

144. Robert H. Lustig, Laura A. Schmidt & Claire D. Brindis, *The Toxic Truth About Sugar*, 482 NATURE 28 (2012).

145. *Id.*

146. *Id.*; Elyse S. Powell, Lindsey P. Smith-Taillie & Barry M. Popkin, *Added Sugars Intake Across the Distribution of US Children and Adult Consumers: 1977–2012*, 116 J. NUTRITION & DIETETICS 1543 (2016).

147. *See supra* note 146.

148. Kay Parker, Michelle Salas & Veronica C. Nwosu, *High Fructose Corn Syrup: Production, Uses and Public Health Concerns*, 5 BIOTECHNOLOGY & MOLECULAR BIOLOGY REV. 71 (2010).

149. *See* Kimber L. Stanhope, *Sugar Consumption, Metabolic Disease and Obesity: The State of the Controversy*, 53 CRITICAL REVIEWS IN CLINICAL LAB'Y SCIS. 52 (2016); Fumiaki Imamura, Laura O'Connor, Zheng Ye, Jaako Mursu, Yasuaki Hayashino, Shilpa N. Bhupathiraju & Nita G. Forouhi, *Consumption of Sugar Sweetened Beverages, Artificially Sweetened Beverages, and Fruit Juice and Incidence of Type 2 Diabetes: Systematic Review, Meta-Analysis, and Estimation of Population Attributable Fraction*, BMJ (July 21, 2015), <https://www.bmj.com/content/351/bmj.h3576> [perma.cc/5ELS-Z98N]; Mary Ann Liebert, *Metabolic Syndrome Risk Factors Drive Significantly Higher Health Care Costs*, SCIENCE DAILY (Sept. 17, 2009), <https://www.sciencedaily.com/releases/2009/09/090917111625.htm> [perma.cc/GZ5B-PFXX].

150. Liebert, *supra* note 149.

151. *See supra* note 149; *see also* Nadia B. Ahmad, *The International Sugar Trade and Sustainable Development: Curtailing the Sugar Rush*, 39 N.C. J. INT'L L. & COM. REG. 675, 675–80 (2014) (providing brief overview of the global sugar trade).

#### 4. Fossil Fuel

In 2015, two teams of investigative journalists independently uncovered internal corporate documents from ExxonMobil, the world's largest oil company,<sup>152</sup> showing that it had funded a massive campaign of climate denial; from about 1990 up through at least 2010, it had known that the message it spread to the public was false.<sup>153</sup> ExxonMobil and others spent millions to pay Harvard-affiliated academics to shill for the industry by publishing papers that supported the corporate campaign of climate change denial and doubt.<sup>154</sup> The disinformation campaign centered on misleading the public about the product's dangers.<sup>155</sup>

The fossil fuel industry's campaign of climate change denial and doubt has harmed, and will harm, millions.<sup>156</sup> 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.<sup>157</sup> These have, and will have, a significant adverse effect on the health and lives of millions. Moreover, according to recent estimates, global warming has, in recent years, killed nine million people per year.<sup>158</sup> Most of these deaths are caused by small particle respiratory infections and related respiratory illnesses.<sup>159</sup> In the past few years, this has amounted to one in every five deaths worldwide.<sup>160</sup> "Without fossil fuel emissions, the average life expectancy of the world's population would increase by

152. Exxon Corporation and Mobil Oil Corporation signed an \$80 billion merger agreement in 1998 to form a new company called ExxonMobil Corporation, the largest company in the world at the time. See Allen R. Myerson & Agis Salpukas, *Exxon and Mobil Announce \$80 Billion Deal to Create World's Largest Company*, N.Y. TIMES (Dec. 2, 1998), <https://www.nytimes.com/1998/12/02/business/big-oil-overview-exxon-mobil-announce-80-billion-deal-create-world-s-largest.html> [perma.cc/UV2W-GSA5]; Lauren Debter, *The World's Largest Oil and Gas Companies 2016: Exxon Is Still King*, FORBES (May 26, 2016), <https://www.forbes.com/sites/laurengensler/2016/05/26/global-2000-worlds-largest-oil-and-gas-companies/?sh=40b393ae28b6> [perma.cc/V6RR-2LFP]. This Article refers to the company post-merger as ExxonMobil, and pre-merger as Exxon.

153. Neela Banerjee, Lisa Song & David Hasemyer, *Exxon's Own Research Confirmed Fossil Fuels' Role in Global Warming Decades Ago*, INSIDE CLIMATE NEWS (Sept. 16, 2015), <https://insideclimateatnews.org/news/16092015/exxons-own-research-confirmed-fossil-fuels-role-in-global-warming> [perma.cc/67KX-6MGH]; Sara Jerving, Katie Jennings, Masako Melissa Hirsch & Susanne Rust, *What Exxon Knew About the Earth's Melting Arctic*, L.A. TIMES (Oct. 9, 2015), <https://graphics.latimes.com/exxon-arctic> [perma.cc/PST2-RHGE]; Susanne Rust, *Report Details How ExxonMobil and Fossil Fuel Firms Sowed Seeds of Doubt on Climate Change*, L.A. TIMES (Oct. 21, 2019), <https://www.latimes.com/environment/story/2019-10-21/oil-companies-exxon-climate-change-denial-report> [perma.cc/J9M3-BHES].

154. Suzanne Goldenberg, *Work of Prominent Climate Change Denier Was Funded by Energy Industry*, GUARDIAN (Feb. 21, 2015), <https://www.theguardian.com/environment/2015/feb/21/climate-change-denier-willie-soon-funded-energy-industry> [perma.cc/5RAD-7QSV].

155. *Id.*

156. See *infra* notes 157, 158, and 161.

157. OVE HOEGH-GULDBERG, DANIELA JACOB & MICHAEL TAYLOR, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C: IMPACTS OF 1.5°C GLOBAL WARMING ON NATURAL AND HUMAN SYSTEMS, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (2018), <https://www.ipcc.ch/sr15/chapter/chapter-3> [perma.cc/TNR6-873Y].

158. Karn Vohra, Alina Vodonos, Joel Schwartz, Elois A. Marais, Melissa P. Sulprizio & Loretta J. Mickley, *Global Mortality from Outdoor Fine Particle Pollution Generated by Fossil Fuel Combustion: Results from GEOS-Chem*, 195 ENV'T RSCH. 110754 (2021), <https://doi.org/10.1016/j.envres.2021.110754> [perma.cc/5732-Z637].

159. *Id.*

160. *Id.*

more than a year, while global economic and health costs would fall by about \$2.9 trillion.”<sup>161</sup>

*National Geographic* recently called climate change “the greatest threat to human health” on the planet.<sup>162</sup> There is certainly room for debate on many aspects of climate change, such as how much warming will occur in the future, how much harm it will cause, and what should be done to address it. But given the direct conflict between what the industry knew and what it told the public, along with the panoply of injuries it caused (and continues to cause) and the trillions of dollars the industry made off its disinformation campaign, it might fairly be called the most profitable fraud in history. It will continue to pose threats to human health and the environment for decades to come.<sup>163</sup>

### 5. *Leaded Gas*

Lead was purposefully added to gasoline and then pumped out of exhaust pipes all over the world for decades.<sup>164</sup> It poisoned the air, land, and sea; everyone alive between 1940 and 1990 suffered at least minor lead poisoning.<sup>165</sup> Those who patented and manufactured leaded gas spent millions to hide its dangers.<sup>166</sup> As a result, they made billions.<sup>167</sup>

Lead was never a necessary ingredient of gasoline.<sup>168</sup> In fact, lead is *bad* for car engines, a fact pointed out by top automotive experts.<sup>169</sup> But while lead is bad for cars and even worse for human, animal, and plant life, it was a goldmine for those who held the patent to manufacture and sell it,<sup>170</sup>—General Motors (GM), DuPont, and Exxon.<sup>171</sup> These companies launched a public relations campaign to convince the public that tetraethyl lead, or TEL, one of the most dangerous forms of lead ever discovered, must be added to gas to make it perform well.<sup>172</sup> They called it a “gift from God.”<sup>173</sup> The companies were lying. Lead did nothing that other

161. Oliver Milman, *Invisible Killer: Fossil Fuels Caused 8.7m Deaths Globally in 2018, Research Finds*, GUARDIAN (Feb. 9, 2021), <https://www.theguardian.com/environment/2021/feb/09/fossil-fuels-pollution-deaths-research> [perma.cc/2QDQ-LUV2].

162. Amy McKeever, *Why Climate Change Is Still the Greatest Threat to Human Health*, NAT'L GEOGRAPHIC (Sept. 9, 2021, 2:50 PM), <https://www.nationalgeographic.com/science/article/why-climate-change-is-still-the-greatest-threat-to-human-health> [perma.cc/2FMZ-TN6M].

163. *Id.*

164. *See, e.g.*, Kitman, *supra* note 104; Paul Brown, *Firms 'Knew of Leaded Petrol Dangers in 20s'*, GUARDIAN (July 12, 2000), <https://www.theguardian.com/environment/2000/jul/13/uknews> [perma.cc/9E2A-5CWZ].

165. *See* Kitman, *supra* note 104; Brown, *supra* note 164.

166. *Id.*

167. *Id.*

168. Kitman, *supra* note 104.

169. *Id.*

170. *Id.*

171. *See supra* note 152; Kitman, *supra* note 104.

172. Kitman, *supra* note 104.

173. U.S. PUB. HEALTH SERV., PUBLIC HEALTH BULLETIN NO. 158, PROCEEDINGS OF A CONFERENCE TO DETERMINE WHETHER OR NOT THERE IS A PUBLIC HEALTH QUESTION IN THE MANUFACTURE, DISTRIBUTION, OR USE OF TETRAETHYL LEAD GASOLINE (1925); *see also* Jerome O. Nriagu, *The Rise and Fall of Leaded Gasoline*, 92 SCI. TOTAL ENV'T 13, 15–16 n.7 (1990). Notably, the claim a harmful product is a “gift from God” has been used repeatedly by sellers of harmful products or services. For instance, Elizabeth Holmes claimed her blood testing product, Theranos’s Edison machine, was a “gift from God.” *See* THE INVENTOR: OUT FOR BLOOD IN SILICON VALLEY (HBO

alternative additives could not do.<sup>174</sup> This was admitted by GM at the time (in private), and later confirmed when, following the ban on leaded gasoline in the 1980s, gas companies phased out leaded gas without delay or issue.<sup>175</sup>

Because TEL was patentable,<sup>176</sup> GM, DuPont and Exxon exploited it by hiding and lying about its dangers.<sup>177</sup> There is evidence these companies knew the dangers of TEL before its use in gasoline, including internal memoranda and correspondence admitting to this knowledge.<sup>178</sup> Yet, the companies denied this knowledge publicly for decades.<sup>179</sup> Thus, as with opioids, sugar, and fossil fuel, the ones who knew the extent of the dangers posed by the product was limited almost exclusively to experts and industry insiders; the former were motivated to tell the public what they knew, and the latter were motivated to keep this knowledge from the public.<sup>180</sup> One of these experts, Yandell Henderson, a staunch opponent of putting lead in gas, made a prediction:

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.<sup>181</sup>

Henderson was correct, not only about how lead poisoning from leaded gas develops,<sup>182</sup> but also about how the public will remain ignorant of it until it affects

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2019). *See also Man Indicted in Peachtree City Ponzi Scheme*, ATLANTA BUS. CHRON. (Sept. 23, 2010, 11:24 AM), <https://www.bizjournals.com/atlanta/stories/2010/09/20/daily35.html> [perma.cc/S6FW-QX45] (noting that the perpetrator of a massive Ponzi scheme that bilked investors out of more than \$15 million “often told potential investors that he believed his success in [foreign exchange] trading was a blessing and gift from God”).

174. Kitman, *supra* note 104.

175. *Id.*

176. John W. Schlicher, *The New Patent Exhaustion Doctrine of Quanta v. LG: What It Means for Patent Owners, Licensees, and Product Customers*, 90 J. PAT. & TRADEMARK OFF. SOC'Y 758, 818 (2008); *see also* C. Boyden Gray & Andrew R. Varcoe, *Octane, Clean Air, and Renewable Fuels: A Modest Step Toward Energy Independence*, 10 TEX. REV. L. & POL. 9, 18–19 (2005).

177. Kitman, *supra* note 104.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*; *see also* Alice Hamilton, Paul Reznikoff & Grace M. Burnham, *Tetra-Ethyl Lead*, 84 JAMA 1481, 1485–86 (1925); William Kovarik, *Ethyl-Leaded Gasoline: How a Classic Occupational Disease Became an International Public Health Disaster*, 11 INT'L J. OCCUPATIONAL & ENV'T HEALTH 384, 384 (2005).

182. A.D. Beattie, M.R. Moore & A. Goldberg, *Tetraethyl-Lead Poisoning*, 300 LANCET 12, 12 (1972).

large segments of the public surreptitiously.<sup>183</sup> The leaded gas industry, like others, funded a large-scale public relations campaign, which included paying large amounts to “rented white coat” industry shell scientists, to deceive the public into believing leaded gas was safe.<sup>184</sup>

The lead pumped out of exhaust pipes as a result has permanently stunted neurological development in millions of children, and caused permanent learning disabilities, mental impairment, anxiety disorders, and a significant drop in IQ levels in numerous communities during the second half of the twentieth century.<sup>185</sup> The presence of lead also increased violence and criminality, not only in certain individuals, but in entire communities.<sup>186</sup> These increases were measurable. Violence and criminal activity dropped in the 1980s and 1990s in specific communities at the same time, and in the same proportion, that lead levels went down in those same communities.<sup>187</sup> There were also many thousands of worldwide cases of acute lead poisoning from TEL in gas, ranging from fuel spills to gas pumping accidents.<sup>188</sup> Those responsible profited extraordinarily from this disinformation campaign.<sup>189</sup>

### 6. Tobacco

In 1969, the British American Tobacco company circulated the now-infamous memorandum reviewing the current state of the tobacco industry’s public image and its future.<sup>190</sup> The memo stated, “our consumer I have defined as the mass

183. Kitman, *supra* note 104; COMMITTEE ON MEASURING LEAD IN CRITICAL POPULATIONS & NATIONAL RESEARCH COUNCIL, MEASURING LEAD EXPOSURE IN INFANTS, CHILDREN, AND OTHER SENSITIVE POPULATIONS, 1, 123–27 (Norman G. Grossblatt, 1993), <https://doi.org/10.17226/2232> [perma.cc/G3LZ-EKYJ]; *Odd Gas Kills One, Makes Four Insane*, N.Y. TIMES (Oct. 27, 1924), <https://www.nytimes.com/1924/10/27/archives/odd-gas-kills-one-makes-four-insane-stricken-at-work-in-standards.html> [perma.cc/G5LS-PCZ2].

184. Jerome O. Nriagu, *Clair Patterson and Robert Keboe’s Paradigm of ‘Show Me the Data’ on Environmental Lead Poisoning*, 78 ENV’T RSCH. 71, 76 (1998); Susan Fourtané, *Thomas Midgley Jr.: The Man Who Harmed the World the Most*, INTERESTING ENG’G (Aug. 6, 2018), <https://interestingengineering.com/thomas-midgley-jr-the-man-who-harmed-the-world-the-most> [perma.cc/2VT2-YZJQ]; Hugh Iglarsh, *The Man Who Poisoned Us All*, COUNTER PUNCH (Mar. 25, 2011), <https://www.counterpunch.org/2011/03/25/the-man-who-poisoned-us-all> [perma.cc/U4PQ-LWT6]. Environmental historian J.R. McNeill opined that Midgley “had more impact on the atmosphere than any other single organism in earth history.” J.R. MCNEILL, SOMETHING NEW UNDER THE SUN: AN ENVIRONMENTAL HISTORY OF THE TWENTIETH-CENTURY WORLD 111 (Norton 2000). And author Bill Bryson remarked that Midgley possessed “an instinct for the regrettable that was almost uncanny.” BILL BRYSON, A SHORT HISTORY OF NEARLY EVERYTHING 151 (Doubleday 2003); Kovarik, *supra* note 181; David Heath, *Meet the ‘Rented White Coats’ Who Defend Toxic Chemicals*, VICE NEWS (Feb. 8, 2016), [https://www.vice.com/en\\_us/article/8x3vjb/meet-the-rented-white-coats-who-defend-toxic-chemicals](https://www.vice.com/en_us/article/8x3vjb/meet-the-rented-white-coats-who-defend-toxic-chemicals) [perma.cc/S74C-ZZJD].

185. See *supra* note 184.

186. *Id.*

187. See Kovarik, *supra* note 181, at 394; Yvette Cabrera, *Lead Culprits: Profiting from Poison*, THINKPROGRESS (July 16, 2017), <https://archive.thinkprogress.org/lead-villains-profiting-from-poison-dec14d75bfc0/> [perma.cc/J2SD-JDAP]; William Kovarik, *Ethyl-Leaded Gasoline: How a Classic Occupational Disease Became an International Public Health Disaster*, 11 INT’L J. OCCUPATIONAL & ENV’T HEALTH 384 (2005).

188. See *supra* note 187; Wes Henricksen, *Deceive, Profit, Repeat: Public Deception Schemes to Conceal Product Dangers*, 42 CARDOZO L. REV. 2395, 2419 (2021).

189. See *supra* note 187.

190. Memorandum from Brown & Williamson on the Tobacco Industry and its Future, Smoking and Health Proposal 3–4 (1969) (on file with the University of California San Francisco).

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.”<sup>191</sup> 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.”<sup>192</sup> That is, tobacco manufacturers and sellers determined they need not set out to convince the public that smoking was one hundred percent safe, but simply that there was doubt about its dangers.<sup>193</sup> This shifted the burden to scientists to prove tobacco was *not* safe.<sup>194</sup> This is akin to how many other industries have raised doubt to keep the public in the dark, keep courts from imposing liability, and keep the government from regulating them.<sup>195</sup>

Tens of millions have died from illnesses resulting from firsthand and secondhand tobacco smoke.<sup>196</sup> The first wave of tobacco litigation began in the 1950s,<sup>197</sup> following the publication of several scientific studies warning of the health hazards of smoking.<sup>198</sup> But industry defendants were able to evade liability in court for decades, even as the number of cases against them grew through the 1960s, 1970s, and 1980s.<sup>199</sup> Through the years, the industry’s principal defense went from “nobody knows for certain if smoking causes cancer” to “everyone knows smoking causes cancer, and so the plaintiff assumed the risk.”<sup>200</sup>

191. *Id.*

192. *Id.*

193. Nriagu, *supra* note 184, at 75; Rebecca Adler, Clair Patterson’s Battle Against Lead Pollution (May 26, 2006) (B.S. Thesis, California Institute of Technology), at 92–95.

194. *See supra* note 193.

195. *See supra* Sections II.A.2, II.A.3, II.A.4, and II.A.5.

196. OFF. OF THE SURGEON GEN., U.S. DEPT. OF HEALTH & HUMAN SERVICES, HEALTH CONSEQUENCES OF SMOKING, SURGEON GENERAL FACT SHEET (Jan. 16, 2014) <https://www.hhs.gov/surgeongeneral/reports-and-publications/tobacco/consequences-smoking-factsheet/index.html> [perma.cc/T3B]-8CAM] (noting that more than 20 million Americans have died because of smoking since 1964, including approximately 2.5 million deaths due to exposure to secondhand smoke). As Stanford professor Robert Proctor points out: “It’s still the leading cause of death. It still kills over 400,000 Americans per year. It’s still two jumbo jets crashing every day.” Michael Mechanic, ‘Golden Holocaust’ Is the Book Big Tobacco Doesn’t Want You to Read, MOTHER JONES (May 2012), <https://www.motherjones.com/politics/2012/05/tobacco-book-golden-holocaust-robert-proctor> [perma.cc/9A9R-6YN9]. Worldwide, the number is even more grim. It is estimated one hundred million people were killed by tobacco in the twentieth century, and that as many as one billion are expected to die from tobacco in this century. Ed Cropley, *Smoking Could Kill 1 Billion this Century – WHO*, REUTERS (Aug. 9, 2007), <https://www.reuters.com/article/economy/smoking-could-kill-1-billion-this-century-who-idUSBK252060/> [perma.cc/TUW6-A8TQ].

197. *See* Michael V. Ciresi, Roberta B. Walburn & Tara D. Sutton, *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477, 482 (1999) (tracing the beginnings of tobacco litigation back to the 1950s).

198. *See* Ernest L. Wynder, Evarts A. Graham & Adele B. Croninger, *Experimental Production of Carcinoma with Cigarette Tar*, 13 CANCER RSCH. 855 (1953); Richard Doll & A. Bradford Hill, *A Study of Aetiology of Carcinoma of the Lung*, 2 BRITISH J. CANCER 1271 (1952); Ciresi et al., *supra* note 197, at 482.

199. Christine Hatfield, *The Privilege Doctrines—Are They Just Another Discovery Tool Utilized by the Tobacco Industry to Conceal Damaging Information?*, 16 PACE L. REV. 525, 561–62 (1996). “The tobacco industry has enjoyed a record of success in civil litigation unique to almost any industry, never paying one cent in settlements or awards for any injuries claimed by cigarette smokers in their civil lawsuits.” *Id.* at 558.

200. Ciresi et al., *supra* note 197, at 485; *see also* Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 871 (1992).

In the 1990s, after it finally came to light the tobacco industry deliberately concealed the health dangers and addictiveness of tobacco, while purposefully designing cigarettes to be addictive, states brought several lawsuits against the industry.<sup>201</sup> In 1994, Mississippi Attorney General Mike Moore filed the first of what would become several ultimately successful lawsuits against tobacco manufacturers.<sup>202</sup> 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 to a particular individual.<sup>203</sup> 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.<sup>204</sup>

Forty other states filed similar lawsuits within three years.<sup>205</sup> 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.”<sup>206</sup> 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.<sup>207</sup> 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, and entered into a “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.<sup>208</sup> This was the largest civil settlement in U.S. history.<sup>209</sup> Although tobacco companies were ultimately convicted of criminal violations for their deceptive practices, and 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

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201. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 757–58 (2003).

202. Debra Cassens Weiss, *Lawyer Who Targeted Tobacco Companies Encourages State Suits Against Drug Makers for Opioid Crisis*, ABA J. (July 25, 2017, 7:00 AM), [https://www.abajournal.com/news/article/lawyer\\_who\\_targeted\\_tobacco\\_companies\\_encourages\\_state\\_suits\\_against\\_drug\\_makers](https://www.abajournal.com/news/article/lawyer_who_targeted_tobacco_companies_encourages_state_suits_against_drug_makers) [perma.cc/7FYE=QEF3].

203. Gifford, *supra* note 201.

204. Gifford, *supra* note 201, at 759; Paul L. Keenan, *Death by 1000 Lawsuits: The Public Litigation in Response to the Opioid Crisis Will Mirror the Global Tobacco Settlement of the 1990s*, 52 NEW ENG. L. REV. 69, 77–78 (2017); NPR Staff, *15 Years Later, Where Did All the Cigarette Money Go?*, NPR (Oct. 13, 2013), <https://www.npr.org/2013/10/13/233449505/15-years-later-where-did-all-the-cigarette-money-go> [perma.cc/MTW2-AMPQ].

205. Frank Sloan & Lindsey Chepke, *Litigation, Settlement, and the Public Welfare: Lessons from the Master Settlement Agreement*, 17 WIDENER L. REV. 159, 164–67 (2011); Keenan, *supra* note 204, at 78.

206. Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331, 338 (2001).

207. *The Tobacco Settlement: Practical Implications and the Future of the Tort Law*, 67 MISS. L.J. 847, 852–53 (1998).

208. Sloan & Chepke, *supra* note 205, at 168–69; Gifford, *supra* note 201, at 762; Keenan, *supra* note 204, at 78.

209. *3rd Circuit Snuffs Out Anti-Smoking Group’s Suit Against Insurers: Am. Legacy Found. v. Nat’l Union Fire Ins. Co.*, 21 No. 7 WESTLAW J. INS. COVERAGE 8 (2010).

products to children,<sup>210</sup> it is nevertheless a sobering fact that, before the industry paid one penny in damages or settlement, tobacco had killed over 100 million people.<sup>211</sup> Tobacco continues to kill more than eight million people each year.<sup>212</sup>

### B. 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.<sup>213</sup> Many 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.<sup>214</sup> The public, however, remains largely ignorant of these dangers, and “exposure to these chemicals is widespread.”<sup>215</sup> Pesticide companies, which possess vast amounts of data on this subject, do not respond by warning the public or making their products safe, nor do they stop manufacturing or selling them. Instead, the industry seemingly does all in its power to keep the public in the dark and keep regulators off its back.<sup>216</sup> But the pesticide industry is not unique.

Numerous industrial waste by-products contaminate our drinking water.<sup>217</sup> 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.<sup>218</sup> Slash-and-burn agriculture on an industrial scale causes deforestation, erosion,

210. See United States’ Final Proposed Findings of Fact at ES-1, *United States v. Philip Morris Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006) (No. 99-CV-02496) (“As set forth in these Final Proposed Findings of Fact, substantial evidence establishes that Defendants 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 RICO.”), *aff’d in part, vacated in part*, 566 F.3d 1095 (D.C. Cir. 2009), *order clarified*, 778 F. Supp. 2d 8 (D.D.C. 2011).

211. See Prabhat Jha & Richard Peto, *Global Effects of Smoking, of Quitting, and of Taxing Tobacco*, 370 N. ENG. J. MED. 60, 60–68 (2014); Richard A. Daynard, Clive Bates & Neil Francey, *Tobacco Litigation Worldwide*, 320 BMJ 111, 111 (2020); OFF. ON SMOKING AND HEALTH, U.S. DEP’T OF HEALTH AND HUM. SER., *THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL* (2014), <https://www.ncbi.nlm.nih.gov/books/NBK179276/> [perma.cc/9UFF-Y5UV].

212. *Tobacco*, WORLD HEALTH ORG. (July 31, 2023), <https://www.who.int/news-room/fact-sheets/detail/tobacco> [perma.cc/SF3D-AC7R].

213. John Charles Kluge, *Farming by the Foot: How Site-Specific Agriculture Can Reduce Nonpoint Source Water Pollution*, 23 COLUM. J. ENV’T. L. 89, 92–95 (1998); *Pesticides and Cancer*, PESTICIDE ACTION NETWORK, <https://www.panna.org/resources/pesticides-and-cancer/> [perma.cc/P9MK-65AW] (last visited Jan. 31, 2024).

214. *Pesticides and Cancer*, *supra* note 213.

215. *Id.*

216. See Valerie Watnick, *Who’s Minding the Schools: Toward Least Toxic Methods of Pest Control in Our Nation’s Schools*, 8 FORDHAM ENV’T. L.J. 73, 74 n.3 (1996) (“Some have postulated that the public still has only limited information about the dangers of pesticides because the chemical companies have launched an aggressive campaign to keep the public uninformed and to dismiss fear of chemicals as hysteria.”).

217. Jasmine Spearing-Bowen & Karl Schneide, *Industrial Waste Pollutes America’s Drinking Water*, CTR. FOR PUB. INTEGRITY (Aug. 17, 2017), <https://publicintegrity.org/environment/industrial-waste-pollutes-americas-drinking-water/>.

218. *Fact Sheet: Nitrogen Dioxide & Sulfur Dioxide*, S.C. DEP’T HEALTH & ENV’T CONTROL, <https://des.sc.gov/sites/des/files/Library/CR-008071.pdf> [perma.cc/4NDA-ZLM6] (last visited Sept. 2, 2023).

animal and plant extinction, and air pollution.<sup>219</sup> Drainage and runoff from mining operations poison groundwater with arsenic, sulfuric acid, and mercury.<sup>220</sup> Aerosol cans spray chlorofluorocarbons, or CFCs, into the air, opening a hole in the ozone layer of the atmosphere.<sup>221</sup> 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.<sup>222</sup>

But one environmental cause overshadows all others, at present, which is 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.<sup>223</sup> The fossil fuel industry holds the dubious distinction of being today's public environmental enemy number one.<sup>224</sup> The industry followed a two-step strategy for defrauding the public. Step one, according to 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."<sup>225</sup> 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.'"<sup>226</sup>

Fossil fuel companies hired public relations firms, like Edelman, Singer, Story, and Pac/West, and established a powerful corporate lobbying group, the American Petroleum Institute, to craft and disseminate the message of climate change doubt, frequently demonizing climate science and scientists.<sup>227</sup> One paid-for editorial,

219. Monisha Jaishankar, Tenzin Tseten, Naresh Anbalagan, Blessy B. Mathew & Krishnamurthy N. Beeregowda, *Toxicity, Mechanism and Health Effects of Some Heavy Metals*, 7 INTERDISCIPLINARY TOXICOLOGY 60, 60–72 (2014).

220. *Abandoned Mine Drainage*, ENV'T PROT. AGENCY, <https://www.epa.gov/nps/abandoned-mine-drainage> [perma.cc/U535-5EWK].

221. *Id.*

222. *Chlorofluorocarbons and Ozone Depletion*, AM. CHEMISTRY SOC'Y (Apr. 18, 2017), <https://www.acs.org/education/whatischemistry/landmarks/cfcs-ozone.html> [perma.cc/GS6Z-HBW5].

223. John H. Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT'L L. 163, 165 (2009).

224. Labeling these harms "environmental" is something of a misnomer; the harms that worry most people, as opposed to harms that worry primarily environmental activists, are those that affect human health, life, property, and other rights. See Jennifer M. Mohamed, *Silent Spring + 55: The Human Right to A Clean Environment*, 42 ENVIRONS ENV'T. L. & POL'Y J. 35, 35, 41 (2018) ("The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world.") (quoting U.N. Conference on the Human Environment, *Report of the U.N. Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1, (June 5–16, 1972), at 6).

225. Amy Westervelt, *How Fossil Fuel Industry Got Media to Think Climate Change Was Debatable*, WASH. POST (Jan. 10, 2019), <https://www.washingtonpost.com/outlook/2019/01/10/how-fossil-fuel-industry-got-media-think-climate-change-was-debatable/> [perma.cc/J5ZZ-2ZXP].

226. *Id.*

227. Tiffany Hsu, *A.P.R. Giant Is Caught Between Climate Pledges and Fossil Fuel Clients*, N.Y. TIMES (Dec. 10, 2021), <https://www.nytimes.com/2021/12/10/business/media/a-p-r-giant-is-caught-between-climate-pledges-and-fossil-fuel-clients.html> [perma.cc/YL32-TB25]; Valerie Volcovici, *U.S. House Democrats Probe PR Firms' Work for Oil, Gas Companies*, REUTERS (Sept. 15, 2022), <https://www.reuters.com/business/environment/oil-industrys-ad-firms-shun-us-hearing-climate-disinformation-2022-09-14>. See also Christine Arena, *Testimony Before the U.S. House Committee on Natural Resources, Examining the Role of PR Firms in Preventing Action on Climate Change* (Sept. 14, 2022), available at: <http://docs.house.gov/meetings/II/II15/20220914/115094/HHRG-117-II15-Wstate-ArenaC-20220914.pdf> [perma.cc/ZAV4-BTJC]; Jeffrey Pierre & Scott Newman, *How Decades of Disinformation About Fossil Fuels Halted U.S. Climate Policy*, NPR (Oct. 27, 2021), <https://www>

published in the *New York Times* in 1992, was titled “Apocalypse No.”<sup>228</sup> It said the American people were being “inundated by the media with dire predictions of global warming catastrophes.”<sup>229</sup> “Unfortunately,” the piece went on, “the media hype proclaiming that the sky was falling did not properly portray the consensus of the scientific community.”<sup>230</sup> 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.<sup>231</sup> The companies also hired scientists like Wei-Hock Soon, Fred Singer, and Patrick Michaels to produce research papers, editorials, television commentary, and presentations to spread climate change doubt under the banner of science.<sup>232</sup> These academics were paid millions.<sup>233</sup> For decades, they cited industry talking points to support the idea scientists were divided on the issue, that there was a legitimate “debate.”<sup>234</sup> Recent reports show the “debate” was, and had been all along, a manufactured myth.<sup>235</sup> A U.S. 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

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.npr.org/2021/10/27/1047583610/once-again-the-u-s-has-failed-to-take-sweeping-climate-action-he-re-why [perma.cc/VL2Y-JBYU].

228. Geoffrey Supran & Naomi Oreskes, *The Forgotten Oil Ads that Told Us Climate Change Was Nothing*, *GUARDIAN* (Nov. 18, 2021), <https://www.theguardian.com/environment/2021/nov/18/the-forgotten-oil-ads-that-told-us-climate-change-was-nothing> [perma.cc/7JSM-GJZN].

229. *Id.*

230. *Id.*

231. Connor Gibson, *How Exxon Used the New York Times to Make You Question Climate Science*, *GREENPEACE* (Aug. 28, 2017), <https://www.greenpeace.org/usa/exxon-used-new-york-times-make-question-climate-science/> [perma.cc/E5R6-BH6K]; Supran & Oreskes, *supra* note 228; Geoffrey Supran & Naomi Oreskes, *What Exxon Mobil Didn’t Say About Climate Change*, *N.Y. TIMES* (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/opinion/exxon-climate-change.html> [perma.cc/4V3Q-U9G2]; Geoffrey Supran & Naomi Oreskes, *Assessing ExxonMobil’s Climate Change Communications (1977-2014)*, 12 *ENVIRON. RES. LETT.* 1, 13 (Aug. 23, 2017); *see also* Jane McMullen, *The Audacious PR Plot that Seeded Doubt About Climate Change*, *BBC* (July 23, 2022), <https://www.bbc.com/news/science-environment-62225696> [perma.cc/QK94-4E8X].

232. KATHY MULVEY, SETH SHULMAN, DAVE ANDERSON, NANCY COLE, JAYNE PIEPENBURG & JEAN SIDERIS, *Climate Deception Dossier #1: Dr. Wei-Hock Soon’s Smithsonian Contracts*, in *THE CLIMATE DECEPTION DOSSIERS* 6 (2015), <https://www.ucsusa.org/sites/default/files/attach/2015/07/The-Climate-Deception-Dossiers.pdf> [perma.cc/3CPL-4G4B]; NAOMI ORESKES & ERIK M. CONWAY, *MERCHANTS OF DOUBT* (2010); UNION OF CONCERNED SCIENTISTS, *SMOKE, MIRRORS & HOT AIR: HOW EXXONMOBIL USES BIG TOBACCO’S TACTICS TO MANUFACTURE UNCERTAINTY ON CLIMATE SCIENCE* 31–37 (2007), [https://www.ucsusa.org/sites/default/files/2019-09/exxon\\_report.pdf](https://www.ucsusa.org/sites/default/files/2019-09/exxon_report.pdf) [perma.cc/7Q43-5DS7]; *see also* Justin Gillis & John Schwartz, *Deeper Ties to Corporate Cash for Doubtful Climate Researcher*, *N.Y. TIMES* (Feb. 21, 2015), <https://www.nytimes.com/2015/02/22/us/ties-to-corporate-cash-for-climate-change-researcher-Wei-Hock-Soon.html> [perma.cc/4LEF-W3TE] (Wei-Hock Soon); Leo Hickman, *Climate Sceptics – Who Gets Paid What?*, *GUARDIAN* (Feb. 15, 2012), <https://www.theguardian.com/environment/2012/feb/15/climate-sceptics-pai-heartland-institute> [perma.cc/NCX2-NSTV] (Fred Singer); *Patrick Michaels (Deceased)*, *DESMOG*, <https://www.desmog.com/patrick-michaels/> [perma.cc/KJ5Y-ZUBE] (last visited Jan. 31, 2024).

233. *See supra* note 232.

234. *Id.*

235. Rasmus E. Benestad, Dana Nuccitelli, Stephan Lewandowsky, Katharine Hayhoe, Hans Olav Hygen, Rob van Dorland & John Cook, *Learning from Mistakes in Climate Research*, 126 *THEORETICAL & APPLIED CLIMATOL.* 699, 699–703 (2016), <https://doi.org/10.1007/s00704-015-1597-5> [perma.cc/2KM8-J3BB].

science and obstruct climate action.”<sup>236</sup> 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.<sup>237</sup> In return, Republicans, with the help of a handful of Democrats, rewarded the industry with billions in subsidies, tax breaks, and other preferential treatment.<sup>238</sup>

The fossil fuel industry’s scheme to defraud the public allowed it to rake in trillions of dollars; 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.<sup>239</sup> The harms caused by the falsehoods peddled by the industry are numerous. They include “rising atmospheric and ocean temperatures, ocean acidification, melting polar ice caps and glaciers, more extreme and volatile weather, sea level rise, and marine heatwaves with concomitant harmful algal blooms.”<sup>240</sup> Moreover, as mentioned above, climate change and its related environmental effects are now estimated to kill nine million people per year, mostly from small particle respiratory infections and illnesses.<sup>241</sup>

### C. Harm to Personal Autonomy

The act of defrauding another, regardless of what scale on which the fraud is carried out, surreptitiously manipulates the targets’ desires, beliefs, emotions, and behaviors.<sup>242</sup> It is, in other words, a kind of assault on the mind of those deceived.<sup>243</sup> As noted by Professor Helen Norton, the key features of 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.”<sup>244</sup>

236. Emily Holden, *Democrats’ Climate Plan Takes Aim at the Fossil Fuel Industry’s Political Power*, THE GUARDIAN (Aug. 24, 2020), <https://www.theguardian.com/us-news/2020/aug/24/defrauds-climate-plan-fossil-fuel-industry> [perma.cc/RE4E-Z5ML].

237. JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* (2016).

238. *Id.* One fossil fuel industry lobbyist revealed a list of U.S. Senators who were “crucial” to ExxonMobil’s lobbying efforts to spread climate change doubt and avoid regulation of fossil fuels. Sarah K. Burris, *ExxonMobil Lobbyist ‘Deeply Embarrassed’ After He Accidentally Reveals 11 Senators He Says He Relies on to Push Big Oil’s Agenda*, RAW STORY (June 30, 2021), <https://www.rawstory.com/exxonmobil-controls-11-senators/> [perma.cc/VVS3-2BQH].

239. Nerijus Adomaitis & Terje Solsvik, *Oil and Gas Industry Earned \$4 Trillion Last Year, Says IEA Chief*, REUTERS (Feb. 14, 2023), <https://www.reuters.com/business/energy/oil-gas-industry-earned-4-trillion-last-year-says-iea-chief-2023-02-14/> [perma.cc/K598-TWG2]. The six largest oil and gas companies reported an excess of \$55 billion in combined profits in 2019 alone. These six companies have generated \$2.4 trillion in profits since 1990. *Padding Big Oil’s Profits: Companies Bank Trillions, Taxpayers Get the Bill*, TAXPAYERS FOR COMMON SENSE (Feb. 12, 2020), <https://www.taxpayer.net/energy-natural-resources/padding-big-oils-profits/> [perma.cc/2T7U-JKZD]. Those companies are ExxonMobil, Royal Dutch Shell, BP, Chevron, Total S.A., and ConocoPhillips. *Id.*

240. Michael C. Blumm, *A Dozen Landmark Nuisance Cases and Their Environmental Significance*, 62 ARIZ. L. REV. 403, 438 n.195 (2020).

241. Vohra et al., *supra* note 158.

242. Daniel Susser, Beate Roessler & Helen Nissenbaum, *Online Manipulation: Hidden Influences in a Digital World*, 4 GEO. L. TECH. REV. 1, 26 (2019).

243. *Id.*

244. Helen Norton, *Manipulation and the First Amendment*, 30 WM. & MARY BILL RTS. J. 221, 224–25 (2021) (italics in original).

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—whose thoughts and actions have been manipulated by others for those others' own purposes—the harms are as real as any outwardly obvious injury. Whenever we are deceived by those seeking to profit off our gullibility, we are exploited by those who stand to profit off our vulnerabilities.<sup>245</sup> We are taken advantage of, robbed of our dignity of independent thought.<sup>246</sup> Lies, by their nature, assault the autonomy of the one lied to.<sup>247</sup> 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; that is, in the case of fraud, where the lie is made for the purpose of self-gain or profit of the liar, the harm to those duped is greater because the purpose for which they were deceived is of an even less defensible kind.

This basic principle is obvious in the case of personal fraud, where one defrauds a particular individual. But in the case of fraud on the public, it is either missed or ignored. But whereas personal fraud is an assault on the mind of one, fraud on the public is an assault on the minds of millions. Thus, fraud on the public, if anything, causes far greater harm to personal autonomy because the number of personal autonomies assaulted is greater. Moreover, lies spread to profit off our gullibility destroys 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.”<sup>248</sup> 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.<sup>249</sup> This makes it easy for leaders to defraud because, to do so, they need only mix profitable falsehoods in with partisan rhetoric. The invisible harms they cause to great numbers of people, however, must be counted among the more obvious injuries, such as those to health, life, and the environment.

#### *D. Harm to Democracy*

Lies by those running for office or serving in government inflict “democratic harm.”<sup>250</sup> Such lies, according to Professor Norton, “deny the public the information necessary to hold the government accountable for its misconduct,

245. *Id.* at 225.

246. *Id.*

247. *See, e.g.*, Christine M. Korsgaard, *What's Wrong With Lying?*, in *PHILOSOPHICAL INQUIRY: CLASSIC AND CONTEMPORARY READINGS* 577, 577–85 (Jonathan E. Adler & Catherine Z. Elgin eds., 2007); *see also* CASS R. SUNSTEIN, *LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION* 31 (2021); Paul Faulkner, *What Is Wrong with Lying?*, 75 *PHIL. & PHENOMENOLOGICAL RSCH.* 535 (2007); SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* (2014); CHRISTINE M. KORSGAARD, *The Right to Lie: Kant on Dealing with Evil*, in *CREATING THE KINGDOM OF ENDS* 133, 133–58 (1996).

248. *See* RonNell Andersen Jones, *Defamation, Disinformation, and the Press Function*, 3 *J. FREE SPEECH L.* 103, 117–18 (2023) (noting that disinformation in the media has caused “public confidence in the media [to] hit[] record lows and the media is increasingly distrusted as overly partisan”).

249. *See id.* at 118 (“At least some research points to asymmetric political polarization within the media ecosystem that produces a ‘propaganda feedback loop’ far less governed by the reality-check dynamic of professional journalistic norms.”).

250. Helen Norton, *Government Falsehoods, Democratic Harm, and the Constitution*, 82 *OHIO ST. L.J. ONLINE* 1, 3 (2021).

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."<sup>251</sup> Professor Caroline Mala Corbin calls these kinds of political falsehoods "government propaganda."<sup>252</sup> She asserts:

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.<sup>253</sup>

Corbin then enumerates the ways that government propaganda (i.e., fraud on the public by those in or seeking office) undermines democratic processes and institutions: "it shields elected officials from accountability by obscuring their misdeeds," and it "destabilizes truth itself, which 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."<sup>254</sup> "Indeed," as Corbin points out, "this destabilization of truth, along with repetition, cognitive shortcuts, echo chambers, and motivated reasoning, helps explain why government propaganda succeeds."<sup>255</sup> 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."<sup>256</sup>

Democratic self-government depends on a well-informed public able to understand what public officials are doing, what they stand for, and who will best represent them. This informs voters who to vote for. Purposeful manipulation of the electorate disrupts, if not destroys, this self-government process by robbing the electorate of the necessary knowledge to participate effectively in the democratic process.<sup>257</sup>

Indeed, there are numerous examples available to choose from to show how proliferation of disinformation helps destroy democratic self-governance and leads, instead, to tyranny.<sup>258</sup> Tyrannical leaders depend on falsehoods and fabrications to glorify the leader and the party; to invent foreign and domestic threats; to falsely

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251. *Id.*

252. Corbin, *supra* note 25, at 857.

253. *Id.*

254. *Id.* at 853–54.

255. *Id.* at 854.

256. *Id.*

257. *See, e.g.*, Michael C. Bender, Lisa Lerer & Michael Gold, *Trump Signals an Election Year Full of Falsehoods on Jan. 6 and Democracy*, N.Y. TIMES (Jan. 6, 2024), <https://www.nytimes.com/2024/01/06/us/politics/jan-6-trump-biden.html> [perma.cc/76LY-LJ6D] (discussing how Trump, who attempted to overturn a legitimate election, spread the false claim that it was President Biden who tried to thwart a legitimate democratic election).

258. Sharon James, *Tyranny Follows Where Truth Fades*, DESIRING GOD (June 11, 2022), <https://www.desiringgod.org/articles/tyranny-follows-where-truth-fades> [perma.cc/VK3J-CVUL].

accuse opponents of treason, corruption, and stupidity; and to normalize the regime and its policies.<sup>259</sup>

Adolf Hitler, who seized power inside a democratic government system 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.<sup>260</sup> In *Mein Kampf*, Hitler wrote about a principle he claimed always holds true:

[T]hat 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.<sup>261</sup>

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.”<sup>262</sup> This, according to him, makes “the masses of people” manipulable through the use of “propaganda.”<sup>263</sup> In manipulating the public through propaganda, Hitler asserted that “the Press” is “a ‘Great Power’ within the State.”<sup>264</sup>

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 the Holocaust, one of history’s greatest crimes against humanity. The 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.<sup>265</sup> Namely, they, and much of the rest of the public, were lied to over and over, and never shown the true nature of what was transpiring.<sup>266</sup> Historian Timothy Snyder asserted that, with regard to the Holocaust, “Disinformation was the key to the entire operation.”<sup>267</sup> In his book *On Tyranny*, Snyder put forth a maxim for cutting through disinformation as a way of avoiding

259. See Megan L. Gill, *North Korea: The Role of Propaganda in the Sustainability of the Kim Regime* 78–79 (Nov. 1, 2012) (M.A. thesis, Georgetown University) <https://repository.library.georgetown.edu/handle/10822/557700> [perma.cc/2V4Q-2384], at 67, 78–79 (discussing how North Korea’s Kim dynasty has used propaganda to glorify the leader and manufacture foreign enemies).

260. ADOLF HITLER, *MEIN KAMPF* (James Murphy trans., Hurst and Blackett 1942) (1939).

261. HITLER, *supra* note 260, at 196; see also *Big Lie*, Section in *Dictionary of Populism*, EUROPEAN CTR. FOR POPULISM STUD., <https://www.populismstudies.org/Vocabulary/big-lie> [perma.cc/HE9N-4WHZ] (last visited Oct. 25, 2023).

262. HITLER, *supra* note 260, at 158 (capitalization corrected).

263. *Id.*

264. HITLER, *supra* note 260, at 202.

265. See, e.g., Tracey Martin, *Propaganda: How Germany Convinced the Masses*, 13 *HIST. THE MAKING* 91 (2020), <https://scholarworks.lib.csusb.edu/history-in-the-making/vol13/iss1/8> [perma.cc/FC8Y-V8MP] (deceiving the German public); JTA, *How the Nazis Deceived Dutch Jews Before Sending Them to the Death Camps*, HAARETZ (July 10, 2017), <https://www.haaretz.com/world-news/europe/2017-07-10/ty-article/how-the-nazis-deceived-dutch-jews-before-sending-them-to-the-death-camps/0000017f-e56d-d62c-a1ff-fd7fd3f20000> [perma.cc/BS43-LX65] (deceiving Jewish people the Nazis aimed to massacre).

266. See *supra* note 265.

267. TIMOTHY SNYDER, *BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN* 201 (2012).

tyrannical movements. “Believe in truth,” Snyder wrote.<sup>268</sup> “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 blinding lights.”<sup>269</sup> The Nazi regime, as tyrants before and after, built its political power on a foundation of lies disseminated to the public at large.<sup>270</sup>

Tyrants today follow the same playbook. The leader of North Korea, like his father and grandfather before him, bombards his people with false and misleading propaganda through state-sponsored news reports, textbooks, and public announcements rife with provably false claims calculated to boost loyalty and eliminate dissent.<sup>271</sup> 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.<sup>272</sup> Thus, the erosion of democratic institutions and the rise of tyranny are additional threats we open ourselves up to by allowing those with power to defraud the public.

### *E. Gun Violence*

Guns, like climate change, is a topic that is not inherently political in nature, but which was turned into a hot-button partisan issue through an industry disinformation campaign.<sup>273</sup> In both cases, the industry stood to profit by spreading doubt about the damage wrought by the industry’s products.<sup>274</sup> In both cases, the

268. TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 65 (2017).

269. *Id.*

270. The ways Hitler and the Nazi Party used fraud on the public to carry out their horrific policies have been thoroughly studied and portrayed in movies, books, and the media. Similar policies and outcomes in the Soviet Union, under Lenin (1917–1924) and Stalin (1924–1952), have been generally less widely-known and acknowledged. There are, of course, important differences between the Nazi and Soviet atrocities (e.g., the Nazi concentration and death camps, on one hand, compared to the Soviet Gulags and prisoner camps, on the other). Both, however, required massive fraud on the public to operate.

271. *See generally* BRIAN REYNOLDS MYERS, THE CLEANEST RACE: HOW NORTH KOREANS SEE THEMSELVES AND WHY IT MATTERS (2011).

272. Allison Denton, *Fake News: The Legality of the Russian 2016 Facebook Influence Campaign*, 37 B.U. INT’L L.J. 183, 185–86 (2019) (Russia); Larry Catá Backer, Flora Sapio & James Korman, *Popular Participation in the Constitution of the Illiberal State—an Empirical Study of Popular Engagement and Constitutional Reform in Cuba and the Contours of Cuban Socialist Democracy 2.0*, 34 EMORY INT’L L. REV. 183, 198 (2020) (Cuba); Ya-Wen Lei & Daniel Xiaodan Zhou, *Contesting Legality in Authoritarian Contexts: Food Safety, Rule of Law and China’s Networked Public Sphere*, 49 LAW & SOC’Y REV. 557 (2015) (China).

273. Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 106 (1995).

274. *See id.* at 103–05 (explaining that the gun industry, including its industry advocacy group the National Rifle Association, lobbied to lower gun industry regulation to further the industry’s bottom line); Karen C. Sokol, *Seeking (Some) Climate Justice in State Tort Law*, 95 WASH. L. REV. 1383, 1412–15 (2020) (explaining that the fossil fuel industry spread disinformation to raise doubt about the certainty and causes of climate change to further the industry’s bottom line).

industry aimed its megaphone at the political right.<sup>275</sup> In both cases, the industry accomplished its objective.<sup>276</sup>

The Second 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.”<sup>277</sup> For over 200 years, the amendment was understood to mean what it says: it is a right to possess guns in connection with militia service.<sup>278</sup> 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.”<sup>279</sup> In the past couple decades, the mainstream political right has twisted the amendment’s words, through tortured interpretation and at the insistence of the gun lobby, to provide a guarantee that every individual has a fundamental right to own unlimited firearms, including military-grade assault rifles.<sup>280</sup> This resulted in the Supreme Court’s ruling 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.”<sup>281</sup> This flew in the face of what historians agreed was the purpose and intent of the amendment,<sup>282</sup> but the *Heller* ruling now stands, protecting the individual right created in that case.

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

275. See Gabriella Kamran, Note, *The Things We Bear: On Guns, Abortion, and Substantive Due Process*, 23 GEO. J. GENDER & L. 479, 503 (2022) (touching on some ties between the gun industry and the political right); Chloe N. Kempf, Note, *Why Did So Many Do So Little? Movement Building and Climate Change Litigation in the Time of Juliana v. United States*, 99 TEX. L. REV. 1005, 1019 n.105 (2021) (noting that the fossil fuel industry’s climate doubt campaign targeted the political right).

276. The political divide on the issues of gun control and climate change demonstrates the effectiveness of the campaigns of doubt spread by the firearm and fossil fuel industries, respectively.

277. U.S. CONST. amend. II.

278. Eileen Kaufman, *The Second Amendment: An Analysis of District of Columbia v. Heller*, 25 TOURO L. REV. 703, 704–05, 705 n.11 (2009).

279. Hammer Museum, *Erwin Chemerinsky on Recent Supreme Court Rulings*, YOUTUBE (Jan. 23, 2023), <https://www.youtube.com/watch?v=-j7ZVgfdhsU> [perma.cc/JBH6-S7C2]; see also Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 LAW & CONTEMP. PROBS. 11, 11 (2017) (noting that *Heller* reversed “almost seventy years of settled precedent that linked the meaning of the ‘right of the people to keep and bear arms’ with the preservation of a ‘well-regulated militia,’” which harkens back to the first Supreme Court case to make a holding on the amendment passed in 1791).

280. Chelsey Johnson, *The Automatic Answer: How Common-Sense Gun Control Legislation and Suing the Gun Industry Can Prevent Mass Shootings*, 45 T. MARSHALL L. REV. 39, 43–44 (2020).

281. Cornell, *supra* note 279.

282. Numerous historians have noted that the Second Amendment’s text, along with other contemporary sources, make clear that the amendment’s rights were tied to militia-related arms only. See, e.g., SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (Oxford University Press, 2006); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 158 (2000); see also Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 246–47 (2008) (“[M]any historians believe that the Second Amendment does not, in fact, create a right to use guns for nonmilitary purposes.”).

purposes.”<sup>283</sup> 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.”<sup>284</sup>

The gun lobby accomplishes this by manipulating public opinion to its own advantage using false and misleading claims. Any time a mass shooting becomes national news—which cannot happen with each mass shooting, given that these events occur, depending on the definition of mass shooting, roughly a dozen times a year to nearly two per day<sup>285</sup>—the gun lobby and its allies push their agenda through “the distortion of complex, painful events to fit an opportune political narrative.”<sup>286</sup> 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.<sup>287</sup> False and misleading statements flood the news and social media feeds, and the end aim is always accomplished.<sup>288</sup>

The result of this fraud on the public is thousands of unnecessary gun deaths per year. America’s gun death epidemic makes it an outlier, a fact President Biden called a “national embarrassment.”<sup>289</sup> In 2020, more than 45,000 Americans were killed by a gun.<sup>290</sup> In 2021, that number topped 48,000.<sup>291</sup> In America, and only in

283. Warren Burger, *2nd Amendment Has Been Distorted*, ASSOCIATED PRESS, Dec. 11, 1991, at 13, <https://www.newspapers.com/clip/102574603/record-searchlight/> [perma.cc/X92C-YE97].

284. *PBS News Hour* (PBS television broadcast Dec. 16, 1991), [https://youtu.be/Eya\\_k4P-iEo](https://youtu.be/Eya_k4P-iEo) [perma.cc/55DS-T3AS] (interview with Warren Burger); see also Joan Biskupic, *Guns: A Second (Amendment) Look*, WASH. POST (May 10, 1995), <https://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/courtguns051095.htm> [perma.cc/FD3E-2B3V]; Michael Waldman, *How the NRA Rewrote the Second Amendment*, BRENNAN CTR. FOR JUST. (May 20, 2014), <https://www.brennancenter.org/our-work/research-reports/how-nra-rewrote-second-amendment> [perma.cc/3LXF-4ES3]; Warren E. Burger, *Second Amendment Does Not Guarantee the Right to Own a Gun*, in GUN CONTROL 99–102 (Charles P. Cozic ed., 1992), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/second-amendment-does-not-guarantee-right-own-gun-gun-control-p-99> [perma.cc/W8QX-QJNA].

285. *Mass Shootings in the United States, An Everytown for Gun Safety Support Fund Analysis*, EVERYTOWN FOR GUN SAFETY (Mar. 2023), <https://everytownresearch.org/mass-shootings-in-america/> [perma.cc/QD2K-GDPZ].

286. Charles Homans & Ken Bensinger, *A Small Town’s Tragedy, Distorted by Trump’s Megaphone*, N.Y. TIMES (May 30, 2023), <https://www.nytimes.com/2023/05/29/us/politics/north-dakota-teen-death-right-wing-trump.html> [perma.cc/5LU4-FLM6].

287. *Myth vs. Fact: Debunking the Gun Lobby’s Favorite Talking Points*, CTR. FOR AM. PROGRESS (Oct. 5, 2017), <https://www.americanprogress.org/article/myth-vs-fact-debunking-gun-lobbys-favorite-talking-points/> [perma.cc/CYC8-NAG8]; Tim Mak, *A Secret Tape Made After Columbine Shows the NRA’s Evolution on School Shootings*, NPR (Nov. 9, 2021), <https://www.npr.org/2021/11/09/1049054141/a-secret-tape-made-after-columbine-shows-the-nras-evolution-on-school-shootings> [perma.cc/4P99-8XB4].

288. *Myth vs. Fact*, *supra* note 287.

289. Jennifer Kim & Christa Nicols, *America’s Gun Violence Epidemic: A Colossal, but Correctable, System Failure*, 77 N.Y.U. ANN. SURV. AM. L. 199, 199 (2022).

290. John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR. (Apr. 26, 2023), <https://www.pewresearch.org/fact-tank/2022/02/03/what-the-data-says-about-gun-deaths-in-the-u-s/> [perma.cc/WY44-NPDF].

291. *Id.*

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.<sup>292</sup> 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.

### III. THE HARM DISINFORMATION CAUSES SHOULD BE GIVEN MORE CONSIDERATION THAN IT HAS RECEIVED TO DATE WHEN DETERMINING WHAT, IF ANYTHING, TO DO ABOUT IT

The injuries catalogued in Part II are only a sampling of handpicked examples of harms suffered by individuals and society as a result of fraud on the public. The list is not exhaustive. But even this partial list contains a sweeping assortment of damages caused by disinformation that, I argue, merits closer examination. The question, from a policy perspective, is what, if anything can be done about these harms?

The list includes, by way of a brief summary, the following: well over 100 million dead from tobacco, with the number growing by the millions every year; lead poisoning of millions from leaded paint; lead poisoning of billions from leaded gas; global warming and sea level rise, more frequent and powerful extreme weather events such as wildfires, hurricanes, droughts, and flooding; the opioid epidemic, which has been called “the worst public health crisis in American history”; epidemics of obesity, diabetes, hypertension, cardiovascular disease, and other ailments caused by the sugar industry’s disinformation campaign, sharply increasing the cost of healthcare in the United States; hundreds of thousands of unnecessary deaths from COVID-19 and other preventable diseases for which vaccines are available but which are rejected based on false and misleading anti-vax claims; environmental destruction and climate disruption on a global scale; the robbing of millions of individuals’ personal autonomy and the mass bad faith manipulation of people’s beliefs and actions; the destruction of democratic norms and a corruption of democratic institutions; a grave threat to the American democratic system as a whole; and thousands of unnecessary gun deaths annually.<sup>293</sup>

Once again, I group all of these together under a single umbrella: fraud on the public. I argue that the current laws covering actionable fraud focus almost entirely on deceptions targeted at individuals (personal fraud) while ignoring most deceptions targeted at the public at large (fraud on the public). The law does this for two primary reasons. First, it is written in such a way so as to focus on personal fraud.<sup>294</sup> That is, the elements of common law fraud, and by extension other fraud-based claims, make it virtually certain that there must be a one-on-one relationship in most instances if the actionable fraud label is to apply.<sup>295</sup> The actionable fraud elements include a requirement that the defendant intend to specifically defraud the plaintiff in particular; and that the plaintiff rely specifically on the misrepresentation

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292. Matt McGough, Krutika Amin, Nirmita Panchal & Cynthia Cox, *Child and Teen Firearm Mortality in the U.S. and Peer Countries*, KFF (July 18, 2023), <https://www.kff.org/global-health-policy/issue-brief/child-and-teen-firearm-mortality-in-the-u-s-and-peer-countries> [perma.cc/W87D-RPMZ].

293. See *supra* Section II.

294. See *Nelson v. McCall Motors, Inc.*, 630 S.W.3d 141, 146–47 (Tex. App. 2020) (Texas common law fraud elements).

295. *Id.*

made by the defendant.<sup>296</sup> Further, the plaintiff's damages must be actually and proximately caused by that reliance.<sup>297</sup> These requirements made sense historically, as most fraudulent schemes in past centuries indeed took place one-on-one. That no longer holds, however, in today's digital world of mass instant communication. Today, most falsehoods spread for self-serving purposes are not communicated one-on-one, but rather disseminated to the public at large.

But the way fraud law is written is only half of the problem. The other half is how that law is applied. After all, fraud law has, indeed, been applied to certain kinds of fraud on the public. One of the principal examples is securities fraud, which is most often carried out not one-on-one but by spreading falsehoods to the public with the intent that someone, rather than a targeted individual, will rely on them.<sup>298</sup> Moreover, on some occasions courts have applied the fraud elements to schemes to defraud the public by the tobacco and asbestos industries. A federal court in New York, for instance, held that in some tobacco cases, the state's common law fraud action could be used by smokers injured by smoking to recover damages against tobacco companies, even if the tobacco makers' false representations were not directed specifically at the injured victim. The court there 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 give rise to a claim of fraud so long as the plaintiff was part of the class of persons intended to receive the misrepresentations.<sup>299</sup>

Like New York, courts in Georgia have also held that common law fraud may cover 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.<sup>300</sup>

Apart from these outlier cases, however, there has never been any acceptance of a broad principle that fraud on the public should actually be treated as actionable fraud. Indeed, in both quoted excerpts above, the respective court clarified there

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296. *Id.*

297. *Id.*

298. James Weinstein, *Climate Change Disinformation, Citizen Competence, and the First Amendment*, 89 U. COLO. L. REV. 341, 375 n.119 (2018); Wes Henricksen, *Intended Injury: Transferred Intent and Reliance in Climate Change Fraud*, 72 ARK. L. REV. 713, 730–32 (2020).

299. *In re Simon II Litig.*, 211 F.R.D. 86, 140 (E.D.N.Y. 2002) (order confirmed Oct. 15, 2002), amended & superseded by 2002 WL 35078407, vacated, 407 F.3d 125 (2005) (citing *Cooper v. Weissblatt*, 277 N.Y.S. 709, 714 (App. Term 1935); *Kuelling v. Roderick Lean Mfg. Co.*, 75 N.E. 1098, 1100–01 (N.Y. 1905)).

300. *Starling v. Seaboard Coast Line R.R. Co.*, 533 F. Supp. 183, 193 (S.D. Ga. 1982) (citing *Ga.-Carolina Brick & Tile Co. v. Brown*, 266 S.E.2d 531, 534–35 (Ga. Ct. App. 1980); *Hines v. Wilson*, 139 S.E. 802, 803 (Ga. 1927)).

must be reliance, and all other required one-on-one fraud elements, to impose liability.

This has led some to question whether such a reluctance to hold accountable those who defraud the public remains tenable in today's falsehood-filled digital world.<sup>301</sup> The cure, however, might prove worse than the disease. But to determine whether it is, we must first assess how bad the disease is—which I argue is worse than most recognize—and how well the cure works as a remedy. Some potential cures include, for instance, a reinterpretation of the fraud exception to the First Amendment that recognizes the fraud on the public fits within the exception, thereby making it regulable, or creating a new exception for fraud on the public altogether.<sup>302</sup> If this preliminary step is taken—whether it utilizes an existing exception or a new one—states might pass legislation specifically prohibiting either narrow categories of fraud on the public, or fraud on the public in general.<sup>303</sup> There are counterarguments to these proposals. And it remains to be seen whether such steps might create more difficulties than the problem they purport to solve, or whether the appropriateness of a cure is determined without first fully apprising the how bad the disease is. We must, I argue, take the myriad harms now being caused by fraud on the public into account when making the consequential decision of what, if anything, to do about it.

#### CONCLUSION

One founding principle of our democratic system, encapsulated in the First Amendment, is the idea that freedom of individual expression must be protected so those in power cannot dictate their own version of truth and impose it on the people.<sup>304</sup> The idea was that the search for truth must be open and vigorous. It should not be monopolized by a monarch or any other state leader. It is best left to the people.<sup>305</sup> We seem to have lost sight of this. Many who oppose the regulation of disinformation object to it by claiming it will allow the powerful to dictate “truth.” But that is precisely what is happening today; that is how the powerful use disinformation. It is a tool those who speak to the masses use to create self-serving “truths,” such as by calling climate change a “hoax” or by claiming an election was “stolen,” and they impose this truth on the masses by way of the media. Thus, the current legal framework ensures that those who are able and willing to lie for their own self-serving purposes will not be punished for doing so, but quite the opposite; they are allowed, encouraged, and richly rewarded for spreading their self-serving falsehoods. This flies in the face of the First Amendment's free speech principles of ensuring self-government and an open and vigorous search for truth.<sup>306</sup>

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301. *See supra* note 65.

302. Henricksen, *supra* note 66, at 180–85.

303. *Id.* at 200–01.

304. William M. Brooks, *Democracy on the Edge: Use the First Amendment to Stop False Speech by Government Officials*, 53 U. MEM. L. REV. 255, 279–80 (2022).

305. Sarah Kramer, Note, *Not Your Mouthpiece: Abortion, Ideology, and Compelled Speech in Physician-Patient Relationships*, 21 U. PA. J.L. & SOC. CHANGE 1, 19 (2018) (“The First Amendment vests the people, not the state, with the right to determine truth and falsity for themselves . . . .” quoting Paula E. Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 223 (1994)).

306. ERWIN CHERMERINSKY, *THE FIRST AMENDMENT* 5–10 (Wolters Kluwer 2d ed. 2021).

The Supreme Court has noted that “[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas.”<sup>307</sup> If that is true of falsehoods in general, it must also be true—if not, especially true—of falsehoods knowingly or recklessly broadcast to millions of people for self-serving reasons, with the intent that people believe the falsehoods to be true. Much of the disinformation we see today is precisely this kind. It is low-value speech causing enormous harm to individuals and society.

There will likely be no one-size-fits-all solution for the disinformation dilemma we face. A false claim that an election was stolen will likely require a different approach than a false claim that climate change is a hoax. But to meaningfully address either kind of falsehood, we must first understand just how much harm disinformation is doing so we can come up with more appropriate solutions. The digital revolution has worsened the problem.<sup>308</sup> With AI and other technologies rapidly advancing, this problem will almost certainly worsen in coming decades. Thus, it is urgent we take action to prohibit, or at least rein in, some of the most harmful kinds of disinformation. So much is at stake. The longer we let those with access to the public megaphone to use that platform to spread self-serving falsehoods, the greater the risk will be to our health, welfare, environment, and democracy.

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307. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

308. *See supra* notes 52 and 54.