

# 1. Branding truth

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“Truth is not always valued and falsehood is not always punished.”<sup>1</sup>

## 1. INTRODUCTION

Branding is the process by which an idea is repeated again and again until it is accepted by the target audience. Mass-marketed branding has a target audience of nearly every man, woman and child who consumes.<sup>2</sup> But brand marketing can be microtargeted to a particular demographic, income group or subculture. For example, Dove soap, which targets women with images of empowerment that are ostensibly against lookism, and Ax soap, which targets men with sexist appeals, are both sold by the same company (Unilever), just to different target demos. The same branding techniques can be used in noncommercial spheres. For example, with propaganda, an idea (often an untrue one) is repeated by the government or reiterated by an official to the electorate, until it is accepted as the truth.

With commercial branding, the message is typically a combination of “this product lives up to expectations” and “please buy this product right now.” For luxury items, the branding is frequently, “this product is a status symbol” and “when you can afford it, treat yourself to this luxury.” There’s also the perennial claim that “this product is cool” and “if you buy this product, you’ll be cool too.” The basic message is to get the public to buy, buy, buy—but buy our widget, not the other guy’s widget.

With political branding (or government propaganda), the messages can be more varied, since the topics that politics touch can be everything from environmental policy to the price of milk (not that those are completely unrelated either); but at the end of the day, the political brander or government propagandist is also hoping that the public will buy, buy, buy. In the political context, however, the audience is urged to buy our idea, not the other guy’s idea.

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<sup>1</sup> David Snyder, media attorney at the Florida Bar Reporters Workshop (2018).

<sup>2</sup> VANCE PACKARD, *THE HIDDEN PERSUADERS* 217 (1957 reprinted 1969) (“Judge Learned Hand expressed himself as being enormously disturbed by the growth of professional publicists in our society. He called publicity ‘a black art’ but agreed it has come to stay.”).

So how does a well-branded but discredited idea stick around for so long? It works the same way an urban legend does. One of the great human conundrums is why false myths stick around so long. Old wives' tales and urban legends persist in part because they are circulated through networks of trust: a parent, a friend, a peer or a co-worker says the mythic claim and it suddenly takes on an air of truth, especially if it is repeated and reinforced. Take this old wives' tale: "cold water boils faster than hot water." Parents tell this to children in many an American kitchen. Line cooks and chefs tell it to busboys and bar backs. The claim also gets repeated on a myriad of cooking shows on television.<sup>3</sup> The only problem is, it isn't true. Hot water boils faster. But hear something from a trusted source, especially from multiple trusted sources, and the end result is it seems "true." It can be mind-blowing when at long last it is revealed that the physics just doesn't add up for the cold-water-boils-quicker myth.<sup>4</sup> Branders and purveyors of lies tap into the same trusted networks that allow myths and old wives' tales to persist.

Facts have the power to cut through even longstanding myths. For centuries, people believed, as Aristotle had postulated, that heavier objects fall faster than lighter objects. But this myth was shattered by a simple experiment when Galileo dropped two cannon balls of different weights from the Leaning Tower of Pisa. And "when Galileo dropped two balls—a heavy one and a light one—and the world witnessed that both hit the ground at the same time[,] [i]t was the beginning of the end of the Aristotelian, prescientific civilization. . ."<sup>5</sup> Truth still has that power to blast through lies and bluster and act as a myth buster.

This chapter will explore how America is going through a period of truth decay, and that a major catalyst for this decay is the extraordinary level of mendacity issuing from the White House. As explained below, lies started from the very first week of the Trump Administration and, if anything, the pace of dishonesties has accelerated. Two and half years in, the rate of lying from President Trump averaged 15–16 lies a day. Finally, this chapter will explain how the Supreme Court deals with lying. Spoiler alert: it's not reassuring.

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<sup>3</sup> 'Chef' Thinks That Cold Water Boils Faster Than Hot Water, HELL'S KITCHEN (May 1, 2018).

<sup>4</sup> Anahad O'Connor, *The Claim: Cold Water Boils More Quickly Than Hot Water*, N.Y. TIMES (Mar. 18, 2008).

<sup>5</sup> ROSSER REEVES, REALITY IN ADVERTISING 151 (1970); see also *id.* at 152 ("scientists began to perform experiments, to see what happened when something was done. It was refreshing, this new philosophy of 'what-when.' Many facts began to appear, suddenly, as fables. Wisdom and experience began to appear, often, as fallacies. Personal opinion began to appear as just that—personal opinion.").

## 2. TRUTH TAKES A BEATING

“How can you know what to believe?” asked the blockbuster book, *The Hidden Persuaders*.<sup>6</sup> One answer to this query is: believe the truth. Unfortunately, political actors, governments (foreign and domestic), advertisers and broadcasters, just to name a few, are all trying to influence what the public thinks is true.<sup>7</sup> And, of course, great philosophers have also spent their lives debating the nature of truth and how to discern it.<sup>8</sup> Sidestepping most of these higher-level philosophical debates about the nature of “truth,”<sup>9</sup> there are things that happened—those things are true; and there are things that have never happened—those things are false. For example, there was a war in the 1930s and 1940s called the Second World War; that happened, that is a truth.<sup>10</sup> The idea that Adolph Hitler survived the Second World War is an event that did not happen and is false.<sup>11</sup> There was a genocide of Jewish people during the Second World War; that happened, that is a truth.<sup>12</sup> Denial that there was a Holocaust during the Second World War is a dangerously false claim and therefore a lie.<sup>13</sup> And, of course, there are many things that are much more debatable, or in a grey zone, like whether the color aqua is really blue or green. When discussing truth in this chapter, this word indicates events that actually happened, either in history or more recently.

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<sup>6</sup> PACKARD, *supra* note 2, at 257.

<sup>7</sup> DARRELL M. WEST, *AIR WARS TELEVISION ADVERTISING AND SOCIAL MEDIA IN ELECTION CAMPAIGNS 1952–2012* 152 (6th Ed. 2016) (“The 1988 presidential campaign was the first to feature ad watches. From time to time, national newspapers printed ‘truth boxes’ in which ad claims were assessed. ... Viewers often remembered the ad but not the media corrections.”).

<sup>8</sup> DEBBIE MILLMAN, *LOOK BOTH WAYS ILLUSTRATED ESSAYS ON THE INTERSECTION OF LIFE AND DESIGN 175–76* (2009) (“The French philosopher Jacques Derrida states that we inhabit ‘a world of signs without fault, without truth, and without origin.’ One of the central tenets of his philosophy is that ‘there is nothing outside the text.’”).

<sup>9</sup> Jennifer Kavanagh & Michael D. Rich, *Truth Decay: An Initial Exploration of the Diminishing Role of Facts and Analysis in American Public Life*, RAND CORP. (2018) (“It is worth noting that although we are calling the phenomenon ‘Truth Decay,’ we are not talking about “truth” in the philosophical sense and therefore do not offer a specific definition of ‘truth’”).

<sup>10</sup> *World War II in Europe*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/world-war-ii-in-europe>.

<sup>11</sup> Jefferson Chase & Deutsche Welle, *Hitler’s teeth analysis dispels myths of Nazi leader’s survival*, USA TODAY (May 21, 2018).

<sup>12</sup> *About the Holocaust*, YAD VASHEM THE WORLD HOLOCAUST REMEMBRANCE CENTER, [www.yadvashem.org/holocaust.html](http://www.yadvashem.org/holocaust.html).

<sup>13</sup> *Holocaust Denial*, SOUTHERN POVERTY LAW CENTER, [www.splcenter.org/fighting-hate/extremist-files/ideology/holocaust-denial](http://www.splcenter.org/fighting-hate/extremist-files/ideology/holocaust-denial).

The first thing to realize is that while America is experiencing a period when truth itself is under siege, this could all just be part and parcel of a broader 20-year trend of what researchers at the Rand Corporation have called “truth decay.”<sup>14</sup> They define “truth decay” as:

a set of four related trends: (1) increasing disagreement about facts and analytical interpretations of facts and data, (2) a blurring of the line between opinion and fact, (3) the increasing relative volume, and resulting influence, of opinion and personal experience over fact, (4) declining trust in formerly respected sources of factual information.<sup>15</sup>

The Rand *Truth Decay* report argues that what the United States is currently experiencing is a period when truth is suffering, but that this is not unprecedented. The Rand report notes three other periods in American history which also had indicia of truth decay: the 1880s–90s, 1920s–30s and 1960s–70s.<sup>16</sup> As the authors noted, these periods (the Gilded Age, the Roaring Twenties followed by the Great Depression, and the tumult of the 1960s and 1970s) were marked by economic disruption, which typically made income inequality more severe as a chosen few became wealthy and the have-nots displaced by the new economy struggled to find their footing. During these periods of social and economic uncertainty, lies and demagoguery flourished and truth took a beating.<sup>17</sup>

Just as a product can be branded, “truth” can be branded too.<sup>18</sup> Like all branding, the impact is most effective when a brand is repeated again and again from a source of authority. All presidents get a mantle of authority whether they win in a close election or not. Those who win in a landslide get an even

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<sup>14</sup> Kavanagh & Rich, *supra* note 9 (“We have adopted the term ‘Truth Decay’ to describe changes currently affecting the U.S. political debate and civil discourse about public policy.”).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (“A closer look at U.S. history reveals several periods – three in particular – that share many similarities with today along a number of dimensions: the 1880s-1890s, the 1920s-1930s, and the 1960s-1970s”).

<sup>17</sup> *Id.* (“These changes [in the Gilded Age] did not lead to universal gains ... because] economic inequality grew sharply during this period, and the gap and polarization between the poorer classes and the rich grew significantly wider”); *id.* (“Economic inequality in the 1920s reached unprecedented levels, which fueled resentment of the elites among lower classes that did not fare as well”); *id.* (“Protests at the time [1960s and 1970s] combined anti-establishment and anti-government sentiments with political and economic unrest.”).

<sup>18</sup> PACKARD, *supra* note 2, at 219 (“Bernays explains ... : ‘It would be ideal if all of us could make up our minds independently by evaluating all pertinent facts objectively. That however, is not possible.’”).

bigger mantle. Nixon was the beneficiary of both. In 1968, more people voted against Nixon (combining votes for Humphrey and Wallace 40 million votes) than voted for him (31.7 million votes).<sup>19</sup> In 1972 Nixon won in a landslide of 46 million votes to McGovern's 28 million. As Robert Spero warned then:

That [the president's] myths were reinforced by a landslide made them and the mythology all the more dangerous. Huge winning margins tend to bond mythology to the public mind until long after an election is over. Despite ample evidence to the contrary, the public automatically reasons that if so many people voted for the winner, his principles and programs must be just and true.<sup>20</sup>

Like Nixon in 1968, Trump in 2016 lost the popular vote, but he still was cloaked with authority. President Trump has the bully pulpit, not to mention two far-reaching Twitter handles (@realdonaldtrump with 62 million followers and @potus with 26 million followers).<sup>21</sup> And this is in a media environment where roughly 69 percent of Americans consume social media.<sup>22</sup> Most social media users check in at least a once a day.<sup>23</sup> One notable attribute of this era is the embrace by President Trump of all-out, bold-faced lying. Lying about big things; lying about small things; lying about things that are easily disproved; lying about things that are hard to disprove; lying about science; lying about economics; lying about basic math—the list goes on.

“You are entitled to your own opinions, but not your own facts,” said Senator Daniel Patrick Moynihan.<sup>24</sup> But this Senator's words of wisdom are ignored as mendacity rains down on America's citizenry from on high, from the Trump White House. Candidate Trump previewed what would happen in the Trump presidency.<sup>25</sup> There was good reason for the *Oxford Dictionary* to

<sup>19</sup> Louis Menand, *Lessons From the Election of 1968*, NEW YORKER (Jan. 8, 2018) (“In close elections, such as those of 1960, 1968, and 1976, the vote is essentially the equivalent of flipping a coin. . . . But we interpret the result as though it reflected the national intention, a collective decision by the people to rally behind R., and repudiate D.”).

<sup>20</sup> ROBERT SPERO, *DUPING OF THE AMERICAN VOTER* 125 (1980).

<sup>21</sup> Twitter as of June 20, 2019.

<sup>22</sup> *Social Media Fact Sheet*, PEW (Feb. 5, 2018), [www.pewinternet.org/fact-sheet/social-media/](http://www.pewinternet.org/fact-sheet/social-media/) (“in 2005, just 5% of American adults used at least one of these platforms. By 2011 that share had risen to half of all Americans, and today [in 2018] 69% of the public uses some type of social media.”).

<sup>23</sup> *Id.* (“Roughly three-quarters of Facebook users – and around six-in-ten Instagram users – visit these sites at least once a day.”).

<sup>24</sup> Edwin P. Hollander, *Further Ethical Challenges in the Leader-Follower relationship* in *ETHICS, THE HEART OF LEADERSHIP*, 3RD EDITION 60 (ed. Joanne B. Ciulla 2014).

<sup>25</sup> Samuel Osborne, *Donald Trump wins: All the lies, mistruths and scare stories he told during the US election campaign*, INDEPENDENT (Nov. 9, 2016).

dub “post-truth” the word of the year in 2016, after the Trump campaign took fact-free campaigning to new heights.<sup>26</sup> Though it’s worth noting that President Trump isn’t the only president to be notorious for lying. President Nixon (R) and President Clinton (D) were also noted fabulists. Whether it was Nixon’s claim that “I’m not a crook” (narrator’s voice: he was); or Bill Clinton’s claim, “I did not have sexual relations with that woman, Ms. Lewinsky,” (narrator’s voice: he did),<sup>27</sup> presidents have been known to lie to the American public in significant ways about serious subjects. Or, jumping way back, during the election of 1800, Thomas Jefferson’s side accused John Adams of being a hermaphrodite (narrator’s voice: he wasn’t), while John Adams’ side accused Thomas Jefferson of being a Jacobin (narrator’s voice: he wasn’t).<sup>28</sup>

On the second day in the Trump presidency, Donald Trump claimed erroneously that the crowd at his inauguration was the biggest in history.<sup>29</sup> This was not true. That honor belonged to President Barack Obama’s 2009 inaugural,<sup>30</sup> which makes sense as President Obama was the first African American president and Washington, D.C. is a majority Black city.<sup>31</sup> Even the U.S. Park Service put out pictures comparing President Obama’s huge inaugural crowd to President Trump’s comparatively paltry inaugural crowd.<sup>32</sup> But undaunted, Press Secretary Sean Spicer went to the podium in the White House briefing room and repeated the lie that the crowd at the Trump inauguration was the

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<sup>26</sup> *Oxford Dictionaries Word of the Year 2016 is...*, OXFORD DICTIONARIES (Nov. 17, 2016), <https://www.oxforddictionaries.com/press/news/2016/11/17/WOTY-16>.

<sup>27</sup> MILLMAN, *supra* note 8, at 175–176 (“‘We really can’t know if something is true or not,’ maxim of the deconstructionists, or Bill Clinton’s infamous equivocation, ‘That depends on what the meaning of “is” is.’”).

<sup>28</sup> Kerwin Swint, *Adams vs. Jefferson: The Birth of Negative Campaigning in the U.S.*, MENTAL FLOSS (Sept. 9, 2012), <http://mentalfloss.com/article/12487/adams-vs-jefferson-birth-negative-campaigning-us>; C. James Taylor, *John Adams: Campaigns and Elections*, MILLER CENTER AT UVA (2018), <https://millercenter.org/president/adams/campaigns-and-elections>.

<sup>29</sup> *President Trump Remarks at the Central Intelligence Agency*, C-SPAN (Jan. 21, 2017), [www.c-span.org/video/?422418-1/president-trump-tells-cia-we-rid-isis&start=1025](http://www.c-span.org/video/?422418-1/president-trump-tells-cia-we-rid-isis&start=1025).

<sup>30</sup> Joshua Gillin, *Inaugural crowd sizes ranked*, POLITIFACT (Jan. 20, 2017), <https://www.politifact.com/truth-o-meter/article/2017/jan/20/inaugural-crowd-sizes-ranked/> (Obama’s 2009 crowd was estimated at 1.8 million people).

<sup>31</sup> *Washington D.C. Quick Facts*, U.S. CENSUS (2017), <https://www.census.gov/quickfacts/fact/table/dc/PST045217#PST045217>.

<sup>32</sup> *Side-by-Side Images Show 2009 Inauguration Compared to 2017*, NBC NEWS (Jan. 20, 2017), [https://www.nbcnews.com/card/side-side-images-show-2009-inauguration-compared-2017-n709801;www.nbcnews.com/card/side-side-images-show-2009-inauguration-compared-2017-n709801; see also Jon Swaine, \*Trump inauguration crowd photos were edited after he intervened\*, GUARDIAN \(Sept. 6, 2018\).](https://www.nbcnews.com/card/side-side-images-show-2009-inauguration-compared-2017-n709801;www.nbcnews.com/card/side-side-images-show-2009-inauguration-compared-2017-n709801;see%20also%20Jon%20Swaine,%20Trump%20inauguration%20crowd%20photos%20were%20edited%20after%20he%20intervened)

biggest.<sup>33</sup> Now, perhaps one could argue that Spicer did this for an audience of one, the president himself. But Spicer also broadcast this lie to the world—and it sits on the White House’s webpage to this day.<sup>34</sup> When a journalist asked Presidential Aide Kellyanne Conway about Spicer’s lie, she said Spicer was only providing “alternative facts.”<sup>35</sup> Again, that was just in week one, but the rebranding of the truth by the Trump White House had already begun.

President Trump has surrounded himself with individuals who will echo and amplify his misstatements of facts without correcting them. Sean Spicer was all too willing to spread falsehoods. His replacement, Press Secretary Sarah Huckabee Sanders, perpetually told the press corps the functional equivalent that the “sky is green.” *Politifact* had Huckabee Sanders’ rating as 75 percent “false” and 25 percent “pants on fire.”<sup>36</sup> Editorialist Frank Bruni said of Sarah Huckabee Sanders’ pressers: “For some 20 minutes every afternoon, down is up, paralysis is progress, enmity is harmony, stupid is smart, villain is victim, disgrace is honor, plutocracy is populism. . . .”<sup>37</sup> The war over false narratives that were present in the Trump 2016 campaign continued seamlessly into the Trump presidency. “We have to fight over basic facts these days,” *Washington Post* White House reporter Abby Phillip told the audience at the New Establishment Summit.<sup>38</sup> Ms. Phillip reported that the team of fact checkers at her paper are working overtime to just keep up with President Trump’s statements, and what’s remarkable is that now there is a “segment of the population that is not moved by politicians that deny things that they can see with their own eyes.” The *Washington Post* fact checkers reported that in a single day, September 7, 2018, President Trump “publicly made 125 false or misleading statements—in a period of time that totaled only about 120 minutes. It was a new single-day high.”<sup>39</sup> On June 10, 2019, the *Washington*

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<sup>33</sup> *Statement by Press Secretary Sean Spicer*, WHITE HOUSE (Jan. 21, 2017), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-sean-spicer/> (“This was the largest audience to ever witness an inauguration — period — both in person and around the globe.”).

<sup>34</sup> *Id.*

<sup>35</sup> Reena Flores, *Kellyanne Conway draws fire after “alternative facts” defense*, CBS NEWS (Jan. 22, 2017), [www.cbsnews.com/news/kellyanne-conway-draws-fire-after-alternative-facts-defense/](http://www.cbsnews.com/news/kellyanne-conway-draws-fire-after-alternative-facts-defense/).

<sup>36</sup> *Sarah Huckabee Sanders’s file*, POLITIFACT, [www.politifact.com/personalities/sarah-huckabee-sanders/](http://www.politifact.com/personalities/sarah-huckabee-sanders/).

<sup>37</sup> Frank Bruni, *Sarah Huckabee Sanders Makes the Heart Grow Fonder*, N.Y. TIMES (Nov. 3, 2017).

<sup>38</sup> *Breaking Through “Scandal Fatigue” In the Era of Trump*, VANITY FAIR (Oct. 4, 2017), <https://video.vanityfair.com/watch/the-new-establishment-summit-breaking-through-scandal-fatigue-in-the-era-of-trump>.

<sup>39</sup> Glenn Kessler, Salvador Rizzo & Meg Kelly, *President Trump has made more than 5,000 false or misleading claims*, WASH. POST (Sept. 13, 2018).

*Post* reported: “he has been averaging about 16 fishy claims a day. ...”.<sup>40</sup> The *Washington Post* decided that President Trump merited an entirely new category for repeated lies which they dubbed the “Bottomless Pinocchio.” As the paper explained:

[t]he president keeps going long after the facts are clear, in what appears to be a deliberate effort to replace the truth with his own, far more favorable, version of it. He is not merely making gaffes or misstating things, he is purposely injecting false information into the national conversation. To accurately reflect this phenomenon, The *Washington Post* Fact Checker is introducing a new category —the Bottomless Pinocchio. That dubious distinction will be awarded to politicians who repeat a false claim so many times that they are, in effect, engaging in campaigns of disinformation.<sup>41</sup>

The paper has given the Bottomless Pinocchio to Trump for his false claims about the U.S. trade deficit, his tax cuts, the border wall, the U.S. economy, NATO, drug trafficking and the Mueller Special Counsel investigations, among many others.<sup>42</sup>

There have been so many lies during the Trump presidency that space limits the ability to list them. The *Washington Post* reports that “As of June 7, [2019] his 869th day in office, the president has made 10,796 false or misleading claims. ...”.<sup>43</sup> This tally of lies goes up on a nearly daily basis. But here is a representative sample of some of the biggest whoppers from the mountebank-in-chief. One genre of Trump lies are lies about the state of the economy. This is one of the most puzzling things that he misrepresents, because during the first two years of his presidency, the economy by objective measures was doing reasonably well.<sup>44</sup> But by lying about the economy, he puts other statements about basic facts and mathematics in doubt. Often the president simply does not distinguish between opinion and fact—an indicia

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<sup>40</sup> Glenn Kessler, Salvador Rizzo & Meg Kelly, *President Trump has made 10,796 false or misleading claims over 869 days*, WASH. POST (June 10, 2019); see also Glenn Kessler, *A year of unprecedented deception: Trump averaged 15 false claims a day in 2018*, WASH. POST (Dec. 30, 2018).

<sup>41</sup> Glenn Kessler, *Meet the Bottomless Pinocchio, a new rating for a false claim repeated over and over again*, WASH. POST (Dec. 10, 2018).

<sup>42</sup> Glenn Kessler & Joe Fox, *The false claims that Trump keeps repeating*, WASH. POST (Feb. 19, 2019).

<sup>43</sup> Glenn Kessler, *et al.*, *supra* note 40.

<sup>44</sup> Neil Irwin, *How Good Is the Trump Economy, Really? It depends on whether you look at the level, the direction or the rate of change — three concepts that are often conflated.*, N.Y. TIMES (June 9, 2018) (“The economy looks strongest if you look only at the level of economic activity. . .”).

of truth decay.<sup>45</sup> For instance, “[a]lmost 50 times, Trump has claimed that the economy today is the ‘greatest’ in U.S. history, an absurd statement not backed up by data.”<sup>46</sup> As the *Washington Post*’s chief fact checker, Glenn Kessler, further clarified:

The president can certainly brag about the state of the economy, but he runs into trouble when he repeatedly makes a play for the history books. By just about any important measure, the economy today is not doing as well as it did under Presidents Dwight D. Eisenhower, Lyndon B. Johnson and Bill Clinton — and Ulysses S. Grant.<sup>47</sup>

Relatedly, President Trump lies about the unemployment rate as well: he has falsely claimed that “[u]nemployment is at historic lows.” But the *Washington Post* noted that this is “[f]alse. The unemployment rate, currently 3.9 percent, is low but it is not historic.”<sup>48</sup>

President Trump also lies about his own standing in the world. When he claimed, “We’re respected again as a nation[,]”<sup>49</sup> the fact checkers at the *Washington Post* responded thusly: “False. Polls by Gallup and the Pew Global Attitudes Project show worldwide views of the United States and its president have become more negative since Trump took office.”<sup>50</sup> When addressing the U.N. General Assembly in 2018, other world leaders showed how little they respected him. President Trump bragged to the U.N. that his administration “has accomplished more than almost any administration in the history of our country.” The response from the assembled group of dignitaries was to break into a gale of laughter. “So true,” he said; and when he heard the laughter, he responded, “I didn’t expect that reaction.”<sup>51</sup>

While he has been under investigation, President Trump has lied about the Special Counsel’s Office, the Justice Department and the FBI.<sup>52</sup> One of his classic moves is to call the investigation into Russia and his campaign a “witch

<sup>45</sup> Kavanagh & Rich, *supra* note 9 (“Truth Decay [includes] a blurring of the line between opinion and fact in a way that makes it difficult to distinguish between the two ...”).

<sup>46</sup> Kessler, *et al.*, *supra* note 40.

<sup>47</sup> Glenn Kessler, *Anatomy of a Trump rally: 70 percent of claims are false, misleading or lacking evidence*, WASH. POST (Sept. 12, 2018).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Deirdre Shesgreen & John Fritze, *Trump’s boast at the United Nations prompts laughter from world leaders and ridicule on Twitter*, USA TODAY (Sept. 25, 2018).

<sup>52</sup> Natasha Bertrand, *The President Humiliates His Own Department of Justice*, ATLANTIC (Jan. 13, 2019); John Bowden, *McCabe: Trump’s “relentless attack” on FBI prompted memoir*, HILL (Feb. 18, 2019).

hunt” or a “hoax.”<sup>53</sup> For example, the *New York Times* reports that President Trump has attacked the Russia investigation over 1100 times in two years.<sup>54</sup> These attacks on investigators can do real damage. As the former head of the FBI, James Comey, testified to a House Committee in December of 2018:

**Comey:** [There have been lies from] the President and his supporters about the nature and quality of the Department of Justice and the FBI. It’s shortsighted and anybody who knows those organizations knows it’s not true.

**Nadler:** And what implications might there be under the Justice Department and the rule of law?

**Comey:** Those kind of lies hurt the ability of the FBI to be believed at a doorway or in a courtroom. That makes all of us less safe. These are honest institutions made up of normal flawed human beings, but people committed to doing things the right way. When they’re lied about constantly, it hurts the faith and confidence of the American people in them, and that is bad for all of us. I don’t care what your political stripe is.”<sup>55</sup>

**Nadler:** And how does that impact our national security?

**Comey:** Our national security turns upon the ability of an FBI agent to convince the girlfriend of a jihadi that we will protect her if she cooperates with us. If we’re seen as a political group of one kind or another, an untrustworthy group, that trust is eroded and the agent loses the ability to make that case. If a jury doesn’t believe an FBI agent when he or she says, “I found this” or “I heard this” “in the course of this case, we’re less safe because the case can’t be made.”<sup>56</sup>

... [W]hen people veer from truth-seeking into trying to find any excuse to bad-mouth an organization that’s investigating the President, we’ve lost our way.<sup>57</sup>

While the *Washington Post* has been keeping track of these false and misleading statements from President Trump, the paper’s fact checkers have been very reluctant to call particular statements from him actual “lies.” The *New York Times* had already crossed that Rubicon during the 2016 election. After struggling for months about what to do with candidate Trump’s repeated deceptions, in September of 2016, it stopped pretending and called out a series of lies as lies.<sup>58</sup>

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<sup>53</sup> David Jackson, *As Robert Mueller’s Russia probe accelerates, Trump adds to attacks on special counsel*, USA TODAY (Nov. 29, 2018).

<sup>54</sup> Larry Buchanan & Karen Yourish, *Trump Has Publicly Attacked the Russia Investigation More Than 1,100 Times*, N.Y. TIMES (Feb. 19, 2019).

<sup>55</sup> James Comey, *Testimony to House Committee on the Judiciary, Joint with the Committee on Government Reform and Oversight* 68 (Dec. 7, 2018).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 69.

<sup>58</sup> Steve LeVine, *New York Times editor on Trump: “We will call out lies,”* QUARTZ (Sept. 20, 2016), <https://qz.com/784533/new-york-times-editor-dean-baquet-on-donald-trump-we-will-call-out-lies/> (“Dean Baquet, the *New York Times*’ exec-

One rare exception to the *Washington Post's* calling a Trump lie a lie came in mid-2018, when President Trump's former lawyer named Michael Cohen pleaded guilty to campaign finance violations in the 2016 presidential election. The backstory of what he was admitting to involved facilitating payments to a porn star with the stage name Stormy Daniels to remain silent during the 2016 election about an affair she allegedly had with Donald Trump years before. Because the payment was to help a federal candidate during a federal election, and because the candidate allegedly directed the payment, it was considered an "in-kind" campaign donation to the Trump campaign. One legal problem about this payment of \$130 000 to Stormy Daniels for her silence was that it was too big. The contribution limit at the time was \$2700. Another violation of campaign finance law was that the payment wasn't reported properly.<sup>59</sup> Once all of this came to light when Cohen pleaded guilty of violating campaign finance laws in open court in August of 2018, the *Washington Post* put out a rare article calling Trump's denials around the Stormy Daniels payments a bold-faced "lie."<sup>60</sup> As Glenn Kessler wrote: "What we know now: Every answer was false. Trump knew about the payment, he knew Cohen made the payment as part of an effort to kill damaging stories, and he knew Cohen was reimbursed."<sup>61</sup> This confession by Cohen also implicates the possible guilt of the president, who many deem to be an unindicted co-conspirator to Cohen's campaign finance crimes.<sup>62</sup>

Incidentally, Michael Cohen's sentencing memorandum filed by the Southern District of New York on December 7, 2018 explained how Cohen first became Trump's attorney. Cohen lived in a condominium in a Trump-branded building. The condo board was going to rename the building or at least drop the Trump name. Cohen intervened to stop the rebranding of the building. Trump was so appreciative of Cohen's help in this matter that he hired Cohen to work for the Trump Organization as an executive vice president and special counsel.<sup>63</sup> Cohen worked for Trump for a dozen years, right up to the year he

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utive editor [said] 'But we have decided to be more direct in calling things out when a candidate actually lies.'").

<sup>59</sup> Ciara Torres-Spelliscy, *Why the U.S. Has the Campaign Finance Laws That Michael Cohen Broke and What Their History Means for Trump*, TIME (Aug. 23, 2018), <http://time.com/5376715/campaign-finance-laws-trump/>.

<sup>60</sup> Glenn Kessler, *Not just misleading. Not merely false. A lie*, WASH. POST (Aug. 22, 2018).

<sup>61</sup> *Id.*

<sup>62</sup> *Cohen Plea Deal Makes Trump 'Unindicted Co-Conspirator,' Watergate Prosecutor Says*, WBUR (Aug. 22, 2018), [www.wbur.org/hereandnow/2018/08/22/cohen-plea-deal-trump-watergate-prosecutor](http://www.wbur.org/hereandnow/2018/08/22/cohen-plea-deal-trump-watergate-prosecutor) (quoting Nick Akerman).

<sup>63</sup> USA v. Cohen, 18 C.R. 602 (Government's sentencing memo) at 3 (Dec. 7, 2018), [www.documentcloud.org/documents/5453404-USDOJ-Cohen-20181207.html#document/p3](http://www.documentcloud.org/documents/5453404-USDOJ-Cohen-20181207.html#document/p3).

pleaded guilty. Without Trump's love of his own brand, Cohen would not have been his lawyer.

As the *Washington Post* continues to fact check President Trump, "Trumpian" is becoming a synonym for lying. For instance, the paper used the new word in a sentence: "Trump's tsunami of untruths helped push the count in The Fact Checker's database past 5,000 on the 601st day of his presidency. That's an average of 8.3 *Trumpian* claims a day. . ."<sup>64</sup> And the average only went up the following year to 15 Trumpian lies per day.<sup>65</sup>

It's not just the *Washington Post* that fact checks Trump. This has become standard practice for all sorts of sources—from the Art Institute of Chicago, which notes that a Renoir painting President Trump claims is the genuine article is a really a fake;<sup>66</sup> to *Golf Magazine*, which questions whether he has won any of the golf tournaments he has claimed to win;<sup>67</sup> to Gold Star families, which have had a service member die who were never contacted by the president, when he claimed he had contacted them all.<sup>68</sup>

In the fall of 2018, the *New York Times* caught President Trump in a particularly juicy lie about himself.<sup>69</sup> For decades, Trump had claimed to journalists and in his autographical books that he was a "self-made" man.<sup>70</sup> He claimed that he had received a single \$1 million loan from his father, which he repaid and then parlayed into a billion-dollar enterprise.<sup>71</sup> The *New York Times* exposé showed that Trump's father Fred had given his son closer to \$60 million and had repeatedly bailed him out when the younger Trump ran a business into the

<sup>64</sup> Kessler, *et al.*, *supra* note 40.

<sup>65</sup> Kessler, *supra* note 41.

<sup>66</sup> Lia Eustachewich, *Trump's 'Renoir' painting is a fake: museum*, N.Y. POST (Oct. 20, 2017).

<sup>67</sup> 'He hit the ball on the screws': Sen. Graham details President Trump's improbable 73, GOLF MAGAZINE (Oct. 11, 2017).

<sup>68</sup> Ken Meyer, *CNN Airst Gut-Wrenching Interview with Gold Star Family Who Never Heard from Trump*, MEDIAITE (Oct. 19, 2017), [www.mediaite.com/tv/cnn-airst-gut-wrenching-interview-with-gold-star-family-who-never-received-call-from-trump/](http://www.mediaite.com/tv/cnn-airst-gut-wrenching-interview-with-gold-star-family-who-never-received-call-from-trump/)

<sup>69</sup> David Barstow, Susanne Craig & Russ Buettner, *Trump Engaged in Suspect Tax Schemes as He Reaped Riches From His Father*, N.Y. TIMES (Oct. 2, 2018) ("What emerges from this body of evidence is a financial biography of the 45th president fundamentally at odds with the story Mr. Trump has sold in his books, his TV shows and his political life.").

<sup>70</sup> CLOTAIRE RAPAILLE, *THE CULTURE CODE: AN INGENIOUS WAY TO UNDERSTAND WHY PEOPLE AROUND THE WORLD LIVE AND BUY AS THEY DO* 121–22 (2007) ("There is very little 'old money' in America.").

<sup>71</sup> Becca Stanek, *Trump's infamous \$1 million loan from his father was apparently just the first of many*, WEEK (Sept. 23, 2016), <https://theweek.com/speedreads/809172/massive-climate-study-shows-pretty-much-everything-trump-saying-about-climate-change-wrong>.

red. In a particularly odd bailout, Fred Trump apparently rescued one of his son's casinos, called the Trump Castle, from ruin by buying \$3.35 million in casino chips and then never cashing them back in at the casino.<sup>72</sup> As the authors said:

The president has long sold himself as a self-made billionaire, but a *Times* investigation found that he received at least \$413 million in today's dollars from his father's real estate empire, much of it through tax dodges in the 1990s.<sup>73</sup>

When asked about the myth of President Trump being a "self-made" man, Susanne Craig (one of the authors of the *New York Times* investigation) said flatly, "it's a lie."<sup>74</sup> And notably, it's a lie that he has told most of his adult life, including during his run for president. Ms. Craig told Terry Gross of *NPR*:

It's interesting ... the lie repeated over and over and passed down into history becomes fact. And I think that we've reset that. I think it's going to take time for this to move into the bloodstream of America. ... [W]e've taken ... a good first step in resetting exactly the origins of Donald Trump's wealth.<sup>75</sup>

Branding the truth is par for the course for big businesses, many of which spend huge budgets on public relations trying to craft public opinion, so that there are positive views of a particular product, corporation or industry.<sup>76</sup> But when the P.R. tricks are deployed by the Oval Office, what just looked like a little spin from a corporate source looks far more like pernicious propaganda. And it's malignant because it is potentially corrosive to the democratic process

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<sup>72</sup> *New York Times publishes investigation. TRANSCRIPT: 10/2/2018, The Rachel Maddow Show*, MSNBC (Oct. 3, 2018), [www.msnbc.com/transcripts/rachel-maddow-show/2018-10-03](http://www.msnbc.com/transcripts/rachel-maddow-show/2018-10-03) ("Howard Snyder, walked into Trump's casino in Atlantic City. He went up to the cage where all the cashiers work on the casino floor and he handed them a check for \$3.35 million. The cashiers verified that the check was good, and the casino promptly handed over to Howard Snyder a big pile of poker chips. Here you go. Each worth \$5,000, \$3.3 million worth of poker chips. Howard Snyder took those poker chips, put them in a bag and left.")

<sup>73</sup> Barstow, *et al.*, *supra* note 69.

<sup>74</sup> "I Started With A Million Dollar Loan." *Taking Apart Trump's Taxes*, 1A at minutes 6–7 (Oct. 25, 2018), [www.npr.org/2018/10/25/660642593/i-started-with-a-million-dollar-loan-taking-apart-trumps-taxes](http://www.npr.org/2018/10/25/660642593/i-started-with-a-million-dollar-loan-taking-apart-trumps-taxes) (quoting Suzanne Craig).

<sup>75</sup> NPR, "Times' Journalists Puncture Myth of Trump as Self-Made Billionaire," *FRESH AIR* (Oct. 18, 2018), [www.npr.org/2018/10/18/658442355/times-journalists-puncture-myth-of-trump-as-self-made-billionaire](http://www.npr.org/2018/10/18/658442355/times-journalists-puncture-myth-of-trump-as-self-made-billionaire) (quoting Suzanne Craig).

<sup>76</sup> V.O. KEY, JR., *POLITICS, PARTIES, & PRESSURE GROUPS* 93 (1964 5th ed.) ("a widespread attitude among business leaders [was] ... the public be damned. In some formulations they advocated almost a doctrine of divine right.")

itself.<sup>77</sup> As former Federal Bureau of Investigation (FBI) Agent Clint Watts, who worked on cybersecurity, told a magazine recently: “You’re seeing some withdrawal from information sources altogether because people don’t know what to believe. I worry about that. They’ve suffered information annihilation, and they’re tired. This is what happens in Russia. It leads to political apathy.”<sup>78</sup>

### 3. THE SUPREME COURT WON’T SAVE US FROM LIARS

What President Trump counts on when he is rebranding the truth to include myth, lies and conspiracy theories is that “the public is enormously gullible at times.”<sup>79</sup> Perhaps because of this gullibility, journalist Walter Lippmann argued that freedom of speech should not cover mendacity. As Lippmann wrote in *The Public Philosophy*:

If there is a dividing line between liberty and license, it is where freedom of speech is no longer respected as a procedure of the truth and becomes the unrestricted right to exploit the ignorance, and to incite the passions, of the people. Then freedom is such a hullabaloo of sophistry, propaganda, special pleading, lobbying, and salesmanship that it is difficult to remember why freedom of speech is worth the pain and trouble of defending it. ... It is sophistry to pretend that in a free country a man has some sort inalienable right to deceive his fellow men. There is no more right to deceive than there is a right to swindle, to cheat, or to pick pockets.<sup>80</sup>

But the current Supreme Court (headed by Chief Justice Roberts) has adamantly disagreed with Lippmann’s framing of this issue. Much to the chagrin of many a litigant seeking truth, the Supreme Court has protected the right to lie in many circumstances, including in elections. As was previewed in the introduction to this book, facts matter surprisingly little in elections—in part because many voters are voting for emotional, instinctual reasons.<sup>81</sup>

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<sup>77</sup> Kavanagh & Rich, *supra* note 9 (“Facts and data have become more important in most other fields, with political and civil discourse being striking exceptions”).

<sup>78</sup> Denise Clifton, *Russia’s Campaign to Help Trump Win Was Just the Start And the next attack on US elections, warns former FBI agent Clint Watts, could come from within*, MOTHER JONES (May 23, 2018).

<sup>79</sup> PACKARD, *supra* note 2, at 216 (quoting *The Public Relations Journal*).

<sup>80</sup> SPERO, *supra* note 20, at 1 (quoting Walter Lippmann’s *The Public Philosophy*).

<sup>81</sup> DREW WESTEN, *THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION IX* (2007) (“the vision of mind that has captured the imagination of philosophers, cognitive scientists, economists, and political scientists since the eighteenth century—a dispassionate mind that makes decision by weighing the evidence and reasoning to the most valid conclusions—bears no relation to how the mind and brain actually work.”).

So, isn't lying illegal? Lying is illegal in certain confined circumstances. When an individual is under oath, it is illegal to lie. It is also illegal to lie to federal law enforcement, like the FBI, or to lie in documents that are being filed with the federal government under 18 U.S.C. 1001. Lying about private persons, if the lie is outrageous enough to damage their reputation, can be slander. If the lie about the private person is in writing, that is potentially libel.<sup>82</sup> But when the target of the lie is a public figure, a whole different line of legal precedent applies.<sup>83</sup> Good luck trying to prove that a particular published article about a public figure was committed with the requisite malice to be libelous under controlling U.S. Supreme Court First Amendment doctrine.<sup>84</sup>

Under the law of libel, an injured private citizen can sue for money damages in tort against a person who has spread injurious lies about him or her. *Gertz v. Robert Welch, Inc.* explains, in part, why America has libel laws:

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. ... [T]he individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being.'<sup>85</sup>

The law of libel provides public figures with fewer protections against personally damaging lies. *Gertz* noted the difference between the rights of private and public figures:

The communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. ... He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private

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<sup>82</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) ("libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.").

<sup>83</sup> *Id.* at 279 ("A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.' Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.").

<sup>84</sup> *Id.* at 279–80 ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

<sup>85</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.<sup>86</sup>

For public figures, recovering for libel is nearly impossible unless they can meet the high hurdle of proving actual malice on the part of the person spreading slanderous lies under *New York Times v. Sullivan*. Yet the law of libel can leave some reputations forever in tatters. As Justice Stewart noted, “[t]he destruction that defamatory falsehood can bring is ... often beyond the capacity of the law to redeem.”<sup>87</sup>

Indeed, the Supreme Court gives Americans wide latitude to lie even when the topic is something serious, like military service. The Supreme Court, in a 2012 case called *U.S. v. Alvarez*, allowed a man to pretend he was a decorated veteran. As Justice Kennedy wrote for the Supreme Court in his *Alvarez* opinion:

Lying was his habit. Xavier Alvarez ... lied when he said that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico. But when he lied in announcing he held the Congressional Medal of Honor, respondent ventured onto new ground; for that lie violates a federal criminal statute, the Stolen Valor Act of 2005.<sup>88</sup>

The Stolen Valor Act was meant to protect the integrity of the award of military honors.<sup>89</sup> Because someone who is perceived to be a war hero may be lauded with praise, jobs and money, the law is intended to allow only individuals who have actually earned those military honors to claim those plaudits. Thus, the Stolen Valor Act makes lying about getting military honors a crime—or it at least it did until the Supreme Court stepped in.

The Supreme Court considered the Stolen Valor Act to be a content-based restriction on free speech. This type of law is nearly universally held by the federal courts to violate the First Amendment.<sup>90</sup> As the Court explained in *Alvarez*:

The Government contends the criminal prohibition is a proper means to further its purpose in creating and awarding the Medal [of Honor]. When content-based speech

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<sup>86</sup> *Id.* at 345.

<sup>87</sup> *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

<sup>88</sup> *U.S. v. Alvarez*, 567 U.S. 709, 713 (2012).

<sup>89</sup> 18 U.S.C. §704.

<sup>90</sup> *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995):

Discrimination against speech because of its message is presumed to be unconstitutional. ... When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.

regulation is in question, however, exacting scrutiny is required. Statutes suppressing or restricting speech must be judged by the sometimes inconvenient principles of the First Amendment.<sup>91</sup>

Content-based restrictions typically fall on hostile ears at the Supreme Court, as they did in *Alvarez*. As the Court wrote:

as a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.’ As a result, the Constitution ‘demands that content-based restrictions on speech be presumed invalid.’<sup>92</sup>

The rare exceptions of content-based laws that have been upheld typically involve public safety. As the Supreme Court explained:

content-based restrictions on speech have been permitted, as a general matter, only when confined to the few “‘historic and traditional categories [of expression] long familiar to the bar’”. Among these categories are advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called ‘fighting words’; child pornography; fraud; true threats; and speech presenting some grave and imminent threat the government has the power to prevent, although a restriction under the last category is most difficult to sustain.<sup>93</sup>

These categories in *Alvarez* track the “low value speech” categories from *Chaplinsky*.<sup>94</sup> Embracing a classic slippery slope argument, the Supreme Court posited in *Alvarez* that if Congress were allowed to criminalize lying about the receipt of the Congressional Medal of Honor, “there could be an endless list of subjects the National Government or the State could single out.”<sup>95</sup>

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Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

<sup>91</sup> U.S. v. *Alvarez*, 567 U.S. 709, 715 (2012).

<sup>92</sup> *Id.* at 715–17 (quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002)).

<sup>93</sup> *Id.* at 717.

<sup>94</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (“These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words -- those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”).

<sup>95</sup> *United States v. Alvarez*, 567 U.S. 709, 723 (2012).

Sounding much like Walter Lippmann (above), the lawyers for the government defending the Stolen Valor Act argued that lies should not enjoy First Amendment protections. But the Justices rebuffed this argument: “The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection.”<sup>96</sup> The Supreme Court found the Stolen Valor statute to be different than others it had previously reviewed, noting: “Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.”<sup>97</sup> And the Court explained: “Even when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment.”<sup>98</sup> The Supreme Court has long held onto the myth that in a market place of ideas, good ideas and true ideas will win out over bad ideas and lies. Referencing George Orwell, the Supreme Court stated: “Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth.”<sup>99</sup> According to the Supreme Court in *Alvarez*, “The only solution to speech that is false is speech that is true[,]”<sup>100</sup> rather than laws against lying.

One of the areas that the Supreme Court acknowledged in *Alvarez* could still be policed for truthfulness was perjury in the courts. But this criminalization of perjury was distinguished from the Stolen Valor Act by the Court as it concluded: “It is not simply because perjured statements are false that they lack First Amendment protection. Perjured testimony ‘is at war with justice’ because it can cause a court to render a ‘judgment not resting on truth.’”<sup>101</sup> *Alvarez* does fit into a long tradition of protecting unpopular speech. As the Supreme Court once explained in the seminal First Amendment case, *New York Times v. Sullivan*: “we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . .”<sup>102</sup>

As the Court in *Alvarez* assumed in a free society, inevitably there will be deceptions: “This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.”<sup>103</sup> In the end, the Supreme Court ruled that the Stolen

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<sup>96</sup> *Id.* at 719

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 723.

<sup>100</sup> *Id.* at 727.

<sup>101</sup> *Id.* at 720 (internal citations omitted).

<sup>102</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>103</sup> *United States v. Alvarez*, 567 U.S. 709, 718 (2012).

Valor Act violated the First Amendment, thereby siding with the liar Alvarez. As the Court said, it “rejects the notion that false speech should be in a general category that is presumptively unprotected [by the First Amendment].”<sup>104</sup> This result in *Alvarez* is not far off from where the Court ended up in *New York Times v. Sullivan*, which held that “erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need ... to survive ...’”<sup>105</sup>

The Supreme Court has also been tolerant of lying in political campaigns. In 2014, in *Susan B. Anthony List v. Driehaus*, the Supreme Court unanimously allowed a case to go forward which challenged the constitutionality of an Ohio law which made certain false statements illegal in a political campaign. Violation of the Ohio false statement statute was a first-degree misdemeanor. A second conviction under the false statement statute was a fourth-degree felony that carried a mandatory penalty of disfranchisement.

The false statement at issue in the case involved a claim by a political non-profit called the Susan B. Anthony List that candidate Steven Driehaus had voted “to fund abortions with tax dollars” by voting for the Affordable Care Act (ACA). This is patently false, as the ACA specifically restricts the use of federal funds for abortion. Nonetheless—truth be damned—the high court remanded the case so that it could continue.<sup>106</sup> A district court went on to rule in *Susan B. Anthony List v. Ohio Elec. Comm’n* that the Ohio prohibition on lying in political campaigns was unconstitutional because it left the government in the position of deciding what was true or false.<sup>107</sup> On appeal to the Sixth Circuit, citing the *Alvarez* case discussed above, the appellate court agreed the law against lying in Ohio elections should be permanently enjoined.<sup>108</sup> And the

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<sup>104</sup> *Id.* at 722.

<sup>105</sup> *New York Times Co.*, 376 U.S. at 271–72.

<sup>106</sup> *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345 (2014) (“And, there is every reason to think that similar speech in the future will result in similar proceedings, notwithstanding SBA’s belief in the truth of its allegations.”); see also Richard L. Hasen, *A Constitutional Right To Lie In Campaigns and Elections?*, 74 *MON. L. REV.* 53 (2013).

<sup>107</sup> *Susan B. Anthony List v. Ohio Elections Comm’n*, 45 F.Supp.3d 765, 781 (S.D. Ohio 2014).

<sup>108</sup> *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 469 (6th Cir. 2016) (“Because the laws are content-based restrictions that burden core protected political speech and are not narrowly tailored to achieve the state’s interest in promoting fair elections, we affirm.”).

Sixth Circuit noted that other false-statement laws have also been invalidated by courts around the nation:

Other courts [that have] evaluate[d] similar laws post-*Alvarez* have reached the same conclusion. See *281 Care Comm. v. Arneson*, 766 F.3d 774, 785 (8th Cir. 2014) (“[N]o amount of narrow tailoring succeeds because [Minnesota’s political false-statements law] is not necessary, is simultaneously overbroad and underinclusive, and is not the least restrictive means of achieving any stated goal.”), *cert. denied*, — U.S. —, 135 S.Ct. 1550, 191 L.Ed.2d 637 (2015); *Commonwealth v. Lucas*, 472 Mass. 387, 34 N.E.3d 1242, 1257 (2015) (striking down Massachusetts’ law, which was similar to Ohio’s); see also *Rickert v. State Pub. Disclosure Comm’n*, 161 Wash.2d 843, 168 P.3d 826, 829–31 (2007) (striking down Washington’s political false-statements law, which required proof of actual malice, but not defamatory nature) ...<sup>109</sup>

Who knows whether the Supreme Court’s (and other federal courts’) tolerance for lying in politics contributed to the cynicism of many voters who feel politics is a dirty business.<sup>110</sup>

#### 4. CONCLUSION

It is clear that the Supreme Court won’t act as the platonic guardians of truth. Rather, vouchsafing truth is left to the American people. Political scientist Kathleen Hall Jamieson still holds high hopes for American democracy, as she aspires for the nation:

The size of the United States, the heterogeneity of its population, and the complexity of its role in the international community mean that the kind of deliberative discourse envisioned by Aristotle is beyond our reach. Any whisper of Aristotle or Athens invites the charge of polis envy. But that does not mean we can’t aspire to an Athenian ideal characterized by argument and engagement. Just as there are tendencies in candidate speeches, ads and debates that we ought to deplore, there are certain characteristics we ought to consider indispensable to effective democratic discourse. At the core of this model is a belief that democratic deliberation must be practiced if use of it is to become habitual.<sup>111</sup>

Returning to where this chapter started, the problem right now is that the nation is experiencing truth decay. In a democracy, the lack of agreed upon

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<sup>109</sup> *Id.* at 476.

<sup>110</sup> Denis Muller, *When truth is the first casualty of politics and journalism*, CONVERSATION (Oct. 18, 2016), <http://theconversation.com/when-truth-is-the-first-casualty-of-politics-and-journalism-66490>.

<sup>111</sup> KATHLEEN HALL JAMIESON, *EVERYTHING YOU THINK YOU KNOW ABOUT POLITICS ... AND WHY YOU’RE WRONG* 55 (2000).

truth means that an argument can never be won between partisans. Neither side can be convinced because the argument wasn't about facts in the first place. But recall that truth has taken a beating before and then subsequently returned to central place in policy making and in discourse after the Gilded Age, the Roaring 20s and the 1960s–70s. What restored truth to its rightful place after these three periods? According to Rand's *Truth Decay* report:

In each previous case, a revival of fact-based and investigative journalism helped reduce the blurring of the line between opinion and fact and championed the primacy of facts over disinformation and opinion. In more than one case, changes in government policy to increase accountability and transparency helped restore trust in government as an information provider, again raising the profile of and emphasis on objective facts.<sup>112</sup>

Americans can restore truth to its rightful place through similar means this time, too. Though Americans need to realize that misinformation could come from abroad given modern communications technology. And unfortunately, truth must contend with lies that are circulated en masse in rapid succession. As Jonathan Swift wrote in 1710, "falsehood flies, and the truth comes limping after it."<sup>113</sup> This was particularly the case in the 2016 American election, when the Russian government unleashed a social media disruption campaign rife with fabrications and falsehoods that were distributed through a network of trust: social media. How does a medium that was used to distribute funny pet videos become a weapon? As reported to the Senate Intelligence Committee:

Most of the time, social media are not used for politics: they are a place where friends and families connect and reconnect, or where individuals find and share entertainment, popular culture, as well as humorous cat videos. The ubiquity and prominence of social media for everyday life underscores their importance in today's society, and users place high amounts of trust in these platforms.<sup>114</sup>

These potentially benign platforms were weaponized in the 2016 election by the Russian Internet Research Agency, which functioned:

like a digital marketing agency: develop a brand (both visual and voice), build presences on all channels across the entire social ecosystem, and grow an audience with paid ads as well as partnerships, influencers, and link-sharing. They created media

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<sup>112</sup> Kavanagh & Rich, *supra* note 9.

<sup>113</sup> Jonathan Swift, *The Examiner* (1710).

<sup>114</sup> Philip N. Howard, *et al.*, *The IRA, Social Media and Political Polarization in the United States, 2012–2018* 39 (2018).

mirages: interlinked information ecosystems designed to immerse and surround targeted audiences.<sup>115</sup>

For more on what the Russians did in the 2016 election, see the chapters “Branding treason” and “Branding racism.”

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<sup>115</sup> Renee DiResta, *et al.*, *The Tactics & Tropes of the Internet Research Agency* 41 (2018).