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ESSAYS AND SCHOLARSHIP

Lies and the Law: An Introduction

Exploring how the law regulates or should regulate false and misleading speech

BY GENEVIEVE LAKIER

APRIL 5, 2023**LIES AND THE LAW**

A series of public conversations and publications exploring what the law can and should do about the problem of lies and deception in the contemporary mass public sphere

We live in an era of profound anxiety about the threat that lies, and false speech more generally, pose to American democracy. It's not hard to understand why. Lies saturate the political realm. George Santos lied his way into office. Donald J. Trump lied his way through his **tenure** as president and is gearing up to lie his way back into power. Meanwhile, blatant lies, hyperbolic rhetoric, and misleading claims about important issues of public controversy—**critical race theory** and its use in public elementary schools, the **risk of COVID-19**, the reliability of the 2020 election results—saturate many reaches of the mass and social media and motivate, or at least justify, all manner of both elite and popular political mobilization.¹

The obvious political potency of these kinds of lies raises many questions about what kind of society we live in, and about our political past and future. But it also raises deep questions for and about free speech law—perhaps the most fundamental being whether the First Amendment, as it is currently understood, enables or impedes the collective pursuit of something we might call “truth.” I spent the 2021-2022 academic year at the Knight First Amendment Institute at Columbia University, exploring these questions through a series of roundtable discussions culminating in a major symposium in April 2022 on “Lies, Free Speech, and the Law.”

A fundamental assumption of the modern First Amendment is that (as Justice Holmes put it in his famous dissenting opinion in *Abrams v. United States*) “the best test of truth is the power of the thought to get itself accepted in the competition of the market.” But as contemporary experience makes quite clear, this assumption is not always true—or, at least, may not be true on a time horizon that prevents society from incurring significant costs—especially if we equate the market, as First Amendment law tends to do, with the hurly burly *public* marketplace of ideas.² There are many reasons why an idea might win out over its competitors on the television screen, in the newspaper, or at the water cooler, other than because it accords better with empirical reality. It might reinforce its audience's assumptions about the world and therefore be easier to embrace than more disruptive alternatives. It might be promoted by an institution or person that is widely viewed as trustworthy. It might be repeated so frequently it becomes one of the taken-for-granted background assumptions of our lives. Or it might give its audience permission to do what they really want to do. The love of truth is not the only motivation that leads listeners to embrace or reject ideas. The result is that there is no reason to think that the fact that an idea wins in the public marketplace of ideas means it must be true, or is likelier to be true, than an idea that fails to win adherents.

And yet, First Amendment law makes it quite difficult (although, as I discuss below, not impossible) for the government to exclude from public discourse assertions about the world that are patently false—that do not, in other words, come anywhere close to satisfying the criteria that have traditionally been used to distinguish truth from falsity. This is not necessarily a doctrinal error, and it is not simply a consequence of courts' embrace of the arguably false Holmesian dictate from *Abrams*. It is also, and to a much greater extent, a consequence of judicial fears that, were the government granted the power to punish false speech, the dynamics of political competition and the vulnerability of government officials to the same cognitive biases that affect how you and I receive information would make that power susceptible to abuse, and thereby result in a public sphere even more saturated with untruths than the one we live in today. In the wake of the Trump presidency, these fears appear very well-justified. Certainly, the fact that one of President Trump's favorite means of deflecting attention away from his own lies and failures was by accusing his enemies of indulging in "fake news" suggests how powerful a political weapon false allegations of falsity can be. The result, nevertheless, is a body of law that, notwithstanding its frequent invocation of the importance of safeguarding the search for truth, often leaves "truth" vulnerable to the manipulation of media moguls, party bosses, and charismatic speakers.

The strictures the First Amendment imposes on the government's power to punish lies did not always appear as much of a problem for the enlightenment ideals of the First Amendment as they do today. This is because, until relatively recently, other mechanisms of disciplining the undisciplined truth-sorting processes of the public marketplace appeared sufficient (at least to those in power) to ensure that that its participants were not fundamentally deluded about the basic facts of their political reality.³ The press, first and foremost, but also the scientific establishment, the universities, professional organizations—all of these "knowledge institutions"—helped determine whose voice got amplified, what ideas ought to be believed, and what modes of knowledge production were considered legitimate. This gatekeeping was, obviously, not **without cost**. Professional gatekeeping may have kept many valuable ideas out of wide public circulation. But one of its effects was to limit public contestation over what is true and false, and to place sometimes significant pressure on members of the political, economic, and social elite to obey basic norms of truthfulness when they spoke in public, or to their clients and constituents. To put it in other terms, the older system helped create what Michel Foucault called a "regime of truth" in which there was widespread agreement about what facts were true—even if, in retrospect, we might think some of that agreement was wrong.⁴

Over the past few years, however, the ability of these institutions to decide what counts as a true claim has lessened, due to a variety of familiar changes: first the rise of social media, and the democratization it has enabled of the public sphere; second, the decline in elite authority that this democratization and political polarization have accompanied; and third, but closely connected to this, the emergence of a strongly populist, anti-technocratic strain

of democratic politics. The decline in the power and influence of the old institutions of truthfulness that has resulted from these changes, as well as their increasing politicization from within, help explain the recent wave of public anxiety about the political problem of lies. It has also motivated politicians, judges, scholars, and others to argue that the government should play more of a role in delimiting what is true or false than it has done in the past, now that the other institutions of truth-delimitation no longer work as well as they once did. The fruit of these arguments are laws like the one California recently enacted, which intrudes upon the otherwise autonomous practices of medical professional associations to mandate discipline for doctors who spread information about COVID-19 vaccinations and treatments that contradicts the “scientific consensus.”

Laws like the California COVID misinformation law—and similar efforts by state governments and professional organizations to crack down on false speech⁵—suggest that it is high time to re-examine both the constitutional and subconstitutional legal regimes that either directly or indirectly govern the regulation of false speech in the United States, to better understand what lawmakers should and *should not* do in response to the current “crisis of truth.” More specifically, they raise anew two questions that for many years were left on the backburner of First Amendment law and scholarship because they were assumed to be largely solved or uninteresting.

First, *exactly* how broad is the government’s power to punish false and misleading speech under the First Amendment, and how broad *should* it be? It has long been clear that, notwithstanding the fear of abuse that pervades the false speech cases, the First Amendment does not entirely deny the government the ability to restrict false speech. To the contrary: In certain areas of the law, the First Amendment has been interpreted to permit the government quite broad power to punish speech in part because it is untruthful. For example, in libel cases, plaintiffs may not recover for defamatory statements made about them that are true, but they can recover for defamation that they can show to be false, so long as they can also show that the falsehood was made recklessly or negligently. Similarly, the commercial speech cases grant agencies like the Federal Trade Commission significant power to restrict commercial advertising that is false or misleading to consumers—indeed false or misleading commercial speech is understood to be categorically outside the scope of First Amendment protection. In other areas of the law, however, the extent of the government’s power to punish false speech is much less clear. The Court’s last word on the subject—its 2012 plurality opinion in *Alvarez v United States*—establishes that the government *may* restrict false speech when it threatens a “legally cognizable harm” but does not do much to spell out what kinds of harms are legally cognizable. The recent crisis of truth is putting pressure on judges and scholars to figure this out. And even with respect to doctrines that we thought were clearly established—such as the law of libel—the recent crisis of truth is pushing some to **rethink** the existing rules because they believe that the existing rules overvalue the risk of

government abuse when compared to the risk of doing nothing in the face of the “proliferation of falsehoods.”

Second, what else can the government do, consistent with the First Amendment, to ensure that authorities, like doctors, communicate true information to those that trust them, like their patients, and that (politically) attractive but false ideas do not win over difficult but true ones in the public competition of ideas? Given the risk of abuse and the **value** that lies can sometimes have, it seems clear—whatever you think about a law like the one California just enacted—that bans represent at best a very partial solution to the problem of false information. So what other changes might government institutions make to promote truth and to shore up the power of the old gatekeepers or, alternatively, create new ones? Are there things, in other words, the law can do to promote a public discourse in which there is truth and not just opinion?

These are the questions explored in the provocative, rich, and varied essays and blog posts that were written as part of the Lies and the Law project I was privileged enough to spearhead for the Knight Institute. Scholars from many disciplines contributed to the project. Their reflections differ greatly in style, methodologies, and conclusions. Indeed, although contributors all draw from largely the same body of First Amendment cases, they reach very different conclusions about what constraints the First Amendment imposes when it comes to the regulation of false speech. They therefore demonstrate what has always been true of the First Amendment but may be particularly true today: namely, that despite, or perhaps because of, the importance of invocations of freedom of speech to all kinds of political debates, what it means to guarantee freedom of speech in the United States today remains a deeply contested question. This isn't to say that there are no points of agreement among contributors to the project. Collectively, the essays and blog posts illuminate three important themes.

Not All Lies Are the Same

First, what even a cursory read of the contributions to the series makes crystal clear is that, when considering the scope of the government's power to restrict false or misleading speech, the devil lies in the details. Notwithstanding their many points of disagreement, what all of the contributors share is a recognition of the complexity of the constitutional question, and an assumption that answering it will require courts to look at the context and content of the speech being regulated—that there can be no blanket rule that applies to all falsehoods or all lies. They make clear, in other words, that although it may be politically attractive or rhetorically effective to paint with a broad brush—to say for example that the First Amendment treats *all* lies as high-value speech and therefore almost never permits the government to regulate falsity; or conversely, to analogize very different kinds of false speech to the **false cries of fire in a crowded theater** that courts today **agree** (for good reason!) the government can prohibit without violating the First Amendment—

generalizations of this sort are not actually useful to figuring out when free speech values permit the government to sanction false speech and when they don't.

Contributors disagree about what factors are most important when it comes to distinguishing protected from unprotected falsehoods. Eugene Volokh argues, for example, that what matters most to the constitutional analysis is whether nongovernmental institutions can or—perhaps more importantly—*will* be motivated by their institutional and political incentives to provide “a more helpful resolution of these matters” by using their resources and prestige to counter the lie. The essay reads into First Amendment doctrine, in other words, an implicit recognition of the role that universities, press organizations, and similar institutions have traditionally played, and continue to play, in the regulation of the public sphere. It thus raises as a question, but does not answer, whether First Amendment doctrine should shift in response to the declining power and authority of these groups—as some, including Justice Gorsuch, have suggested it **should**. Either way, it suggests that the question of when the government has the power to restrict lies can only be answered after we take account of the alternatives.

In contrast, Mark Tushnet focuses in his essay on the institutional characteristics of the government institutions empowered to identify and restrict lies, and the kinds of laws that empower them. “Broad bans on the dissemination of lies,” he argues, “should be viewed with great suspicion but ... bans targeted at well-defined, quite specific lies shouldn't be seen as violating free expression principles.” This is particularly true, Tushnet argues, when these bans are implemented by agencies charged with a mission other than *just* to identify lies—agencies, that is, that do not need to keep on finding falsehoods to sanction to justify their existence.

Deborah Pearlstein meanwhile argues that what makes lies legally sanctionable is evidence that they pose a serious threat to core democratic interests—for example, the democratic interest in a functioning government, for example, or a competitive marketplace of ideas, or, Pearlstein argues rather provocatively, the “people's belief in the existence of a system of constitutional governance”—that cannot be redressed by other means. Pearlstein makes a strong and persuasive claim that courts need to do a lot more to figure out how to answer this ultimately empirical question than they have done to date—that First Amendment rules are too often based on speculation and assumptions, not (ironically enough) the kind of empirically tested truth we might expect. But on her view, it is these kinds of empirical questions (what kind of harm does the speech threaten?) that should be dispositive to the constitutional analysis.

Despite their disagreements, all three of these essays make clear that it makes no sense to talk about falsehoods as such, or even “lies” as such. They make clear, furthermore, that there are many ways to distinguish within these categories and that balancing the costs and benefits of governmental regulation might—likely will—require courts or legislators to

perform something like a constitutional sociology. Indeed, if we combine the insights of the Tushnet, Volokh, and Pearlstein essays, what they suggest is that courts need to pay attention to the institutional context in which both the lies and the regulatory response to the lies operate, the alternative institutions of regulation, and the harms that are likely to result from both government action and *inaction*. Of course, we might fear that neither the courts nor First Amendment doctrine are sufficiently lithe, or realist in temper, to take account of the crosscutting concerns that contributors to the series identify as relevant. But we might hope that they are. At the very least, the essays suggest that regulators (ahem, California!) should be very thoughtful not only about how they define the category of false or misleading speech they aim to regulate, but also how they design the institutional process responsible for enforcing the regulation; that because the devil lies in the details, the details matter a lot.

Current Law May Be Part of the Problem

A second theme running through many of the essays and blogposts is a concern that existing law—including existing First Amendment law—contributes to the crisis of truth by enabling self-interested actors to undermine the disciplinary practices of the traditional knowledge institutions, and by failing in other ways to protect their authority and independence. The point here is not just that current law has done little, or prevents the government from doing much, to counteract the proliferation of lies and falsehoods in public life, but that existing legal doctrines may have actually *made things worse*.

Heidi Kitrosser argues, for example, that strands in existing First Amendment law fail to provide adequate protection to “public knowledge producers”—those many government-funded individuals and groups that work to produce or disseminate knowledge “according to disciplinary norms” of truth and falsity (think here Environmental Protection Agency scientists, Department of Labor economists, and publicly funded journalists)—against politically motivated efforts to subvert their work. Kitrosser points specifically to the government speech cases, which in the name of protecting the autonomy of government speakers grant political appointees significant freedom to discipline their subordinates when they reach conclusions about the world that are politically unpalatable. Other scholars have criticized the government speech cases for frustrating basic norms of political accountability.⁶ Kitrosser argues, persuasively, that they also render public knowledge institutions—those that make up part of the democratic state—subject to politicization and “distortion.” And she warns that the problem may in fact intensify, as a result of courts’ embrace of an expansive theory of the unitary executive—a theory that, Kitrosser argues, may be used to strike down the whistleblower laws that currently provide some protection to government employees against political control, in lieu of the First Amendment.

Wendy Wagner makes a similar argument about the failure of existing law to adequately protect the work of government-run knowledge institutions from politicization but focuses

on a very different body of law: namely, the set of policies and administrative laws that govern the scientific institutions of the bureaucratic state. Wagner points to two areas of administrative law that enable, even encourage, the politicization of these institutions. The first is the set of administrative policies and statutory law that grant political appointees largely unconstrained power to adjust and manipulate the scientific findings of agency experts subservient to them, and also protect them from political accountability by shielding them from the reach of transparency mandates. The second are the procedural mandates written into laws like the Administrative Procedure Act—mandates like the foundational requirement to provide notice and opportunity for comment prior to agency rulemaking—that enable well-funded industry groups (pesticide companies, for example) to focus agency attention on their arguments and factual claims about the harms and benefits of regulation. Wagner argues that there is “growing evidence that the factual bases for at least some agency decisions are [as a result] unreliable and biased towards industry.” (Like Amy Kapczynski in **her** contribution to the series, Wagner also points to the expansive protection current law provides trade secrets as a barrier to the ability of the public to check whether agency decision-making in fact obeys scientific norms of knowledge production.)

RonNell Andersen Jones and Sonja R. West meanwhile focus on the challenge current law poses to the autonomy and effectiveness of private knowledge institutions—specifically, the institutional press. They argue that, in its recent First Amendment cases, the Supreme Court has failed to adequately weight the free speech interests of press speakers because of its underlying skepticism—a skepticism shared in many cases across the partisan divide on the Court—about whether the institutional incentives of the press align with the broader interests of the public, and whether the press in its current form can be presumed to be a “trustworthy” guardian of democratic values (as it was once strongly presumed it to be). The result, they argue, in this essay and in other work, is diminished constitutional protection for the important truth-delimiting functions of the institutional press.⁷

Although all four contributors point to different bodies of law, all four demonstrate how existing legal rules fail to insulate knowledge institutions from political efforts to resist what Hannah Arendt once described as the “despoti[sm]” of truth.⁸ In so doing, they also suggest pathways for reform. For example, Wendy Wagner argues that one solution to the problem of political domination of agency processes is to create firewalls around agency expert analysis. Heidi Kitrosser makes precisely the same suggestion in her piece about government-funded journalism. And Andersen Jones and West’s essay suggests, implicitly, that a Supreme Court that had a more positive view of the press would produce a body of First Amendment law that would enable it to better perform its democratic function.

These solutions are attractive. Implementing them may be difficult however, for reasons that other contributors to the series make clear: namely, that the laws that Kitrosser, Wagner, Andersen Jones, West, and others discuss not only govern the political realm but are a product of it.

There's No Escaping Politics

A third important theme sounded by many of the contributors to this project is that the current crisis of truth is not only a product of law or technological change, but also a product of politics. What this means, they argue, is that legal change (or technocratic reform) can never provide a complete solution to the problem.

In his essay for the series, Sam Lebovic argues that the epistemic crisis of the present moment is best understood as the “expression of [the power of a] conservative political formation in American public life,” albeit one that has been able to be so powerful because of underlying problems in the information environment produced by the collapse of the economic model of journalism. It is not a consequence of the fact—or even the political potency—of lies themselves. Lies, Lebovic points out, are nothing new in American political life. Indeed, many of the most politically powerful lies in American history (lies about the United States’ conduct in the Vietnam War, for example, or the lies Ronald Reagan and cohorts told about selling arms to Iran) occurred well before the rise of social media. Instead, what makes the current moment distinctive, and distinctively troubling, Lebovic argues, is the freedom that the loss of newspapers, and the transformation of many newspapers into opinion rags, gives to political players, most of them on the right, to use outrage and deception—and sometimes intentional lies—to advance their political goals. This diagnosis of the problem leads Lebovic to suggest as a partial solution the development of what he calls, borrowing from Walter Lippman, “political observatories”—perhaps attached to student newspapers—that could “keep an eye on the ongoing, daily work of politics, provide easily digestible summaries of what is happening,” and expose politicians’ lies.

John Witt makes a similar argument but reaches a different conclusion about what to do. Like Lebovic, Witt points to history—in this case, the World War I-era crisis of propaganda and misinformation—to argue that what is new about the current moment is not the weaponization of lies but changes in the information environment. But Witt foregrounds the decline in the power and influence of unions, as well as administrative agencies, rather than the press, to explain the crisis of the current moment. Unions, he suggests, borrowing from the work of Roger Baldwin, one of the founders of the ACLU, provide an “endogenous institutional foundation for public opinion formation.” They “make[] the interests of workers central to the way information is produced and received in public life.” To put it in Foucauldian terms, they provide an alternative “regime of truth” to that promoted by political elites. The result, on Witt’s telling—and Baldwin’s as well—is a richer and more empirically grounded public sphere.

These essays provide a bracing and useful counterpoint to many of the other, more doctrinally focused, contributions to the series by reminding us that there are limits to what can be achieved by legal reform, at least if we understand that to refer to a technocratic

practice of legal change. Indeed, Lebovic explicitly argues that “the key domains for reform and activism lie elsewhere [than in law].” What are needed, he argues, are changes “in the political economy, in social relations, in political institutions, and so forth.” This is undoubtedly true. The structural problems sketched out that contributors to the series identify as having led to the current moment are obviously deeper and broader than can be fixed by merely technocratic reforms—be those reforms, changes to how algorithms present information, or how the law regulates it.

But the essays, read somewhat against their grain, also suggest how important a role law can and does play in structuring politics; and the role that that politics play in law. After all, the crisis of journalism, the decline in industrial democracy, and the undermining of the administrative state were both intensified and to some degree caused by changes in the legal frameworks that governed them (the erosion of New Deal limits on media ownership and control, for example, the steady erosion of the protections provided unions by federal labor law, and the increasing deference courts give to managerial authority that Norton and Wagner discuss in their contributions). Conversely, we might understand the changes in the Supreme Court’s view of the press to reflect deep political shifts on the Court.

What these essays make clear, therefore, is that the legal changes needed to create a healthier information environment will, themselves, require political change—that it is not simply a question of crafting the proper legal rule, but of changing the distribution of power and influence in both the public and private sectors. As such, they suggest how broad the ambitions of legal reform might be. They suggest that we should think of the goal of legal change to be not merely punishing liars, or protecting the existing knowledge institutions from subversion, but instead creating a different information economy, in which a new regime of truth can stabilize.

Reading these essays might make you despondent because they suggest there to be no easy fix to our current epistemic crisis. But they should also make you excited about the breadth of opportunity there is to rethink the institutions, both legal and political, that have brought us to this point. The many rich contributions to this series push us to think about the problem of disinformation and misinformation, likes and propaganda, in new ways. It was a privilege to spearhead this project. I have learned many truths.

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- 1 The raucous school board meetings in which parents accuse public and high school boards of teaching children critical race theory, of grooming, and of pedophilia provide only one example of how lies and misinformation generate, or justify, political mobilization. See Margaret Talbot, *The Increasingly Wild World of School-Board Meetings*, NEW YORKER (Oct. 8, 2021), <https://www.newyorker.com/news/daily-comment/the-increasingly-wild-world-of-school-board-meetings> [<https://perma.cc/5SHF-XYYG>].
- 2 There are other markets for information—the academic market, for example, or the market for scientific publication—that operate according to a very different logic than general public discourse. In these markets, ideas do not win or lose in the market based on the processes described above, or at least not entirely. Another criterion of success is how well they satisfy the standards of knowledge production imposed by the scientific method or the scholarly doctrine. See ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 28-29 (2012) (“Fools and savants are equally entitled to address the public. What we characterize as expert knowledge, by contrast, is not to be determined by the indiscriminate engagement of all. Technical beliefs do not become reliable merely because they are widely shared.”). These more selective markets of information have traditionally played an important role in ensuring the fact-based nature of public discourse. But when First Amendment scholars and courts talk about the “marketplace of ideas,” it is generally not these markets that they refer to.
- 3 Of course, even before the emergence of the current wave of anxiety about lies in public life, there were those who questioned the basic truthfulness of public discourse and believed that the democratic public was being misled about basic facts about the world. Richard Hofstadter famously chronicled the far-right groups who aired these concerns in the mid-20th century. RICHARD HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS* (1965). In his contribution to the series, [John Witt](#) discusses similar concerns by groups on the political left in the early 20th century. However, these voices and concerns remained largely on the margins of public discourse and reflected for the most part the anxiety that there was too much gatekeeping of public speech, not the anxiety that there was not enough. No president made it the signature concern of his post-election period to tackle the disinformation problem, as [Barack Obama](#) has. *Solving Our Challenges Together*, OBAMA, <https://www.obama.org/democracy-challenges-2022/> [<https://perma.cc/48C4-AS2Y>] (last visited Mar. 29, 2023). Today, anxiety about truth has made it into the mainstream.
- 4 Michel Foucault, *Truth and Power*, in *ESSENTIAL WORKS OF FOUCAULT* 131 (Paul Rabinow ed., 2000).
- 5 For other efforts to target doctors who spread COVID-related misinformation, see Claudia Haupt, *Pseudo-Professional Advice*, 103 B.U. L. REV. (forthcoming 2023).
- 6 See for example Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1 (2009).
- 7 See, e.g., RonNell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. ONLINE 567 (2017).
- 8 HANNAH ARENDT, *Truth and Politics*, in *BETWEEN PAST AND FUTURE* (1968) (“Seen from the viewpoint of politics, truth has a despotic character . . . Facts are beyond agreement and consent, and all talk about them—all exchanges of opinion based on correct information—will contribute nothing to their establishment. Unwelcome opinion can be argued with, rejected, or compromised upon, but unwelcome facts possess an infuriating stubbornness that nothing can move except plain lies. The trouble is that factual truth, like all other truth, peremptorily claims to be acknowledged and precludes debate, and debate constitutes the very essence of political life.”).

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